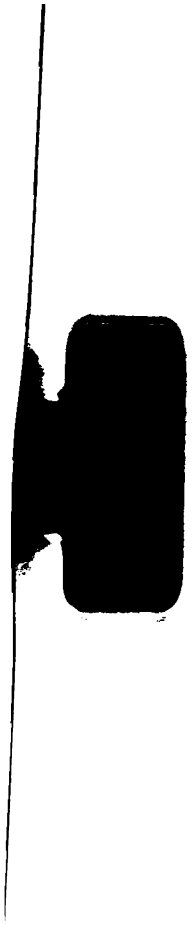

May 8

OHIO

CIRCUIT COURT REPORTS.

NEW SERIES. VOLUME X.

CASES ADJUDGED

IN

THE CIRCUIT COURTS OF OHIO.

VINTON R. SHEPARD, EDITOR.

CINCINNATI:
THE OHIO LAW REPORTER COMPANY.
1908.

JUDGES OF THE CIRCUIT COURTS OF OHIO

FROM FEBRUARY 9, 1907, TO FEBRUARY 98, 190.

HON. ULYSSES L. MARVIN, *Chief Justice*, Cleveland.
HON. LOUIS H. WINCH, *Secretary*, Cleveland.

FIRST CIRCUIT.

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

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

SECOND CIRCUIT.

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

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

THIRD CIRCUIT.

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

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

FOURTH CIRCUIT.

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

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

FIFTH CIRCUIT.

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

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

SIXTH CIRCUIT.

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

ROBERT S. PARKER.....Bowling Green.
GEORGE R. HAYNES.....Toledo.
SAMUEL A. WILDMAN .....Norwalk

SEVENTH CIRCUIT.

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

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

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FREDERICK A. HENRY ....Cleveland

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OHIO

CIRCUIT COURT REPORTS.

NEW SERIES—VOLUME X.

CAUSES ARGUED AND DETERMINED IN THE CIRCUIT COURTS OF OHIO.

RECOVERY FOR CARE AND SUPPORT FURNISHED TO A DECEDENT.

Circuit Court of Wood County.

FRANK P. CLARK, ADMINISTRATOR OF THE ESTATE OF CATHARINE GRANT, DECEASED, v. ABNER BOLTZ ET AL.

Decided, April 29, 1906.

Contract—For Care and Support During Remainder of Life—Property to be Conveyed in Consideration—Failure to Make the Conveyance—Action for Quantum Meruit—Not for Enforcement of Contract—Evidence as to the Contract—Limiting Recovery to the Value of the Property—Charge of Court—Special Requests—Pleading—Surplusage—Parties—Misjoinder.

B and wife brought an action against the administrator of G for personal judgment on account of care and support furnished to G for a number of years. The petition set forth an agreement whereunder such care and support were to be furnished to G during the remainder of her life in consideration of a certain house and lot being conveyed to them, of which G died the owner, and intestate. *Held:*

1. The action was for a *quantum meruit*, and the references in the petition to the agreement or contract were surplusage.
2. The defendant, having successfully interposed an objection to the introduction of testimony as to the value of the house and lot, will not thereafter be heard to complain that the recovery may be for a much larger sum than the value of the house and lot.
3. An allegation of demand and default is not necessary in such a case; the presentation of the account to the administrator and its rejection by him was sufficient.
4. The claim that the proof has established that the cause of action, if any existed, was in favor of the wife, and not in favor of both husband and wife, does not on review furnish a basis for the contention that there has been a misjoinder of parties, where leave to answer as to the alleged misjoinder was not sought at the trial below; nor would the joining of the husband, by gift, assignment or otherwise, in the right of action existing in the wife, be necessarily a matter of any prejudice to the defendant administrator.
5. Where the record does not affirmatively show that requests for instructions to the jury before argument were submitted in writing, the correctness of the instructions will not be inquired into by a reviewing court.

PARKER, J.; HAYNES, J., concurs.

The action below was by Abner Boltz and his wife against Frank P. Clark, administrator of the estate of Catharine Grant, deceased. In the petition it is set forth with considerable particularity that the plaintiffs, being husband and wife, entered into a contract—with one Catherine Grant to the effect that the plaintiffs should board and lodge her, and she on her part was to provide a house for all of them; in this house she was to have a special room of her own; the remainder of the house was to be the habitation of the plaintiffs, and at her death this house was to be the property of the plaintiffs as compensation to them for her support. The petition does not so aver, but the evidence discloses that the contract was oral.

The petition does not state distinctly that Catherine Grant failed or refused to perform her part of the contract, but it does disclose that she died intestate the owner of this property, so that it went to her heirs.

The plaintiffs set forth that the value of what was furnished in the way of services, purchases, support, etc., was nine hun-

dred and thirty-one dollars and ninety cents, covering a period of nearly six years, from January, 1898, until October 10, 1903; and for the same period they credited five dollars per month for the use of the premises as rental, making three hundred and forty-five dollars; and they ask for a judgment for the balance, of five hundred and eighty-six dollars and ninety cents, and interest.

A general demurrer to this petition was filed. It is stated that the point made upon the demurrer was that the petition disclosed that if there was a cause of action at all, it was one for specific performance, that it was not quite sufficient in its averments for that purpose, and there was no prayer for specific performance, but a prayer for personal judgment; that while the petition disclosed imperfectly a clause of action of that character, the action was in effect an action at law. The demurrer was overruled.

It seems to us that there is a good deal in this petition that might have been safely omitted from it. That, of course, would be no reason for sustaining the demurrer to it; but it is because of this large amount of matter disclosing the contract and giving to the petition the appearance of a claim for the specific enforcement of a contract, that counsel for plaintiff in error seem to have been led to the view and conclusion that it was an action of that character, or should have been so framed distinctively.

It appears to us, however, that it is an action for a *quantum meruit*, and not for the specific enforcement of this contract, and that as an action for *quantum meruit* all reference to this contract might have been omitted. Some years ago the firm of which I was a member had a claim of this nature which we undertook to enforce, in the case of *Marx* v. *Loo*, and in that case in the petition we made no reference whatever to a contract, although there was a contract of this character; we simply sued on a *quantum meruit*, and the petition was very brief indeed, and that petition passed muster both in the lower courts and in the Supreme Court. In the course of the investigation we undertook to prove the contract, and the

court of common pleas would not allow us to do so. The action of the court of common pleas in the premises was affirmed by the circuit court, but both courts were reversed by the Supreme Court—that court holding that we had the right to prove the contract not to obtain specific performance thereof, because the contract being oral, and being in respect to land, could not be enforced on account of the statute of frauds, but that we had a right to prove the contract as a part of our showing that the services were not performed gratuitously; the court holding that since the contract could not be enforced, and since the services were not performed gratuitously, we had a right to sue and recover on a *quantum meruit*. The final hearing in the case, including the petition and all matters pertaining to it, will be found in final record No. 49 of this court, and the mandate of the Supreme Court will be found at page 309 of that record. We came back and retried the case along those lines, though we failed to recover for lack of evidence to satisfy the jury, and failed to have the matter reviewed again by the circuit court on account of some irregularity in preparing our bill of exceptions, and so the matter ended; but that particular point was considered and passed upon by the Supreme Court. So we think that the plaintiffs in this case had a right to sue upon a *quantum meruit*, and that the petition is sufficient along that line, and that all of this matter about the contract set forth in the petition, may be regarded as surplusage.

In *Berry* v. *Collins*, 9 C. C. R., 656, an action for services as a housekeeper, while this particular point does not appear to have been involved, it is referred to by Judge King in his opinion at page 660. There was in the case testimony that the defendant promised that he would give the plaintiff a farm as compensation for her services, and Judge King in the opinion, says:

"In this connection the court refused to allow the plaintiff to show the value of any farm, or of the farm which seemed to have been indicated by the declarations of Mr. Berry in stating that he would give her a farm. Nothing was done by the court in that respect certainly, which could be prejudicial

to the defendant. Circumstances could be easily imagined where that class of testimony would be entirely competent; but it is perhaps not necessary to pass upon that. I might suggest, however, that if there was testimony that went to the jury that could be said to tend to prove that he had engaged this woman under a promise to give her a farm for her services, such an arrangement or contract would be within the statute of frauds, and she could not enforce it, and she might sue, as she did in this case, to recover the value of those services, and the value of the farm would be competent evidence to be given to the jury for the purpose of showing exactly what he intended to pay her. That far it would be competent to show that her services were worth as much as that farm. A verdict would not be disturbed based upon that kind of testimony."

It will be observed that Judge King's opinion goes a little further than the holding of the Supreme Court, in the case of *Marx* v. *Loo*. It is intimated that the value of the farm might be the measure of damages. That question was involved in *Marx* v. *Loo,* but all we asked in that case was leave to show that the services were not gratuitously performed.

It is urged in this case that the amount recoverable for the services, if this contract were established by the evidence, would be the value of this house and lot—whereas the recovery here may be for a great deal more, that the house and lot may not be worth over a hundred dollars, while recovery was of many times that amount. There may be something in that; we are not prepared to say; we have not been called upon to examine into the question closely, but we think that in the view of the condition of this record the plaintiff in error is not in a position to take advantage of the absence of evidence as to the value of the house and lot, and we shall assume that the house and lot was worth as much as the amount of the recovery, for the reason that the plaintiffs below undertook to prove the value of the house and lot and this was objected to by the defendant below, and because of that objection the plaintiffs were not permitted to make this proof; and having stood in the way of making this proof, this court will not now assume, in order to find

ground for reversal of this judgment, that the house and lot were not as valuable as the amount of this recovery. What plaintiff so offered to prove is found on page 97 of the record.

It is said that there is no allegation or proof of a demand of performance and a default. If this were an action for specific performance of the contract, perhaps something of that kind would be necessary; but nothing was necessary in this case other than what was done—the presentation of the account to the administrator and its rejection by him.

It is said that the evidence discloses that this cause of action, if there was a cause of action, was in favor of the wife and not in favor of the husband; that it was not joint, and that therefore there was a misjoinder; and that this results from the fact that the deceased lady promised in her lifetime from time to time to convey this property, or declared it was her purpose to convey it, to the wife. Looking into the record we find her declared purpose stated both ways. She seems to have said on occasions that she meant it for "them," referring to the husband and wife, and it appears that the support furnished to her and the services, were furnished and performed by both husband and wife. But aside from that we think that question can not be raised now by the plaintiff in error. There was no demurrer upon the ground of misjoinder though perhaps nothing can be claimed from that because it is not disclosed by the petition that it was a cause of action in favor of one and not the other or of both. But passing that, there was no answer that the cause of action was not in favor of both, but that if it existed it was in favor of one; in other words, the plaintiff in error did not seek to take advantage of this misjoinder, if there was one, by either demurrer or answer, and the statute, Section 5063, provides as follows:

"When any of the grounds of demurrer to the petition do not appear on its face, the objection may be taken by answer; and if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objections that the court has no jurisdiction of the

subject of the action, and the petition does not state facts sufficient to constitute a cause of action."

That certainly is very plain. Had the plaintiff in error been desirous of taking advantage of claimed misjoinder, an answer should have been filed. That was not done but it is urged by the plaintiff in error that the fact of the misjoinder developed upon the trial of the case. That is no reason for not complying with the statute. If that fact then developed and plaintiff in error had not been advised of it before, he might then have taken leave to answer. The court would have undoubtedly given him leave to make that answer. We know of no authority for permitting one to pass the question without raising the issue by pleading, and then undertaking to raise it upon the evidence and show that the verdict should be set aside and judgment reversed because it is disclosed by the evidence that the cause of action was not in favor of all of the plaintiffs joined in the petition. If it were true that the cause of action was in favor of but one of the plaintiffs, if that plaintiff agreed to share the cause of action with another by an assignment, either as matter of gift or otherwise, or, not pursuing the method by formal assignment, had agreed to join another as plaintiff so as to give him a share of the recovery, it is not apparent that that would be a matter of prejudice to the defendant in the case, though the defendant might have objected to such misjoinder had he cared to do so.

There were certain requests to charge on behalf of the defendant below which were not given. We think the court was justified in refusing to give these requests, because the propositions of law contained in them are not correct; but aside from that we would not reverse the judgment in this case even if we found that those instructions were correct, for the reason that it is not disclosed by the record affirmatively, as it must be to justify a reversal upon that ground, that the requests were submitted in writing. The record says: "Before any argument of counsel the defendant requested the court to charge the jury as follows, to-wit:" and then follow these charges.

The case of *The Toledo, Fremont & Norwalk Company* v. *Gilbert*, 2 C. C.—N. S., 432, presented this same question. The opinion is by Judge Hull, and on page 436 he says:

"This record before us does not show that these instructions that were requested of the court were written instructions; it simply shows that the defendant submitted to the court certain requests which they asked to be given to the jury before argument, and shows that the court gave some instructions. It does not show that the court read those that were given, and if there should be any inference at all it might be inferred that those were committed to writing or printed, by someone, but by whom it does not appear. And as to those that were refused, the record shows nothing, and for aught that appears in the record, the requests, as is often the case after argument, may have been oral requests of counsel, and not made in writing. To constitute error in the action of the court in this respect, the record must show affirmatively that the requests for instructions were written requests, which the statute clearly contemplates the court shall have opportunity to examine and deliberate upon, if it desires, before they are given to the jury or refused."

That has been our construction of the statute as applied by us in a large number of cases, though that is the only reported case I am able to lay my hands on at this time. The paragraph of Section 5190, Revised Statutes, applicable, reads:

"When the evidence is concluded, either party may present written instructions to the court on matters of law, and request the same to be given to the jury, which instructions shall be given or refused by the court before the argument to the jury is commenced."

We think a right of recovery on a *quantum meruit* of the amount that the jury returned in their verdict was clearly established by the evidence, that the verdict was right, and that the judgment ought to stand, and it will be affirmed.

S. P. Harrison and *Poe & Poe*, for plaintiffs in error.

W. H. McMillen, for defendant in error.

SIDEWALK ASSESSMENTS.

Circuit Court of Cuyahoga County.

FANNIE MEEK v. THE VILLAGE OF COLLINWOOD ET AL.

Decided, November 12, 1906.

Corporations, Municipal and Village—Procedure for Construction of Sidewalk—And Assessment of Cost Upon Abutting Property—Change of Material—Notice—Sections 1536-210-211a-232 *and* 235.

1. When council provides for the construction of a sidewalk, and serves notice on an abutting owner that in case of his failure within a specified time to construct a walk of certain material and a certain width, it will be laid by the municipality or village and the expense assessed back upon the property, all procedure has been had which is necessary for the construction of the walk and the levying of a proper assessment therefor upon the property.
2. But where the notice served on the property owner calls for a walk constructed of sand-stone, no greater obligation is imposed on the property owner than if he had entered into a contract for a sand-stone walk, and the laying of a cement walk by the municipality without further procedure imposes no obligation on him for the cost thereof.

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

Heard on appeal.

This is a suit brought by Fannie Meek against the village of Collinwood and its treasurer to restrain the collection of an assessment made upon the property owned by the plaintiff. It comes here on appeal from the judgment of the court of common pleas.

The facts are that Fannie Meek owned, or did own, a lot in the village of Collinwood, abutting on Kirby avenue; that the village or the council of the village passed a resolution to construct a sidewalk on Kirby avenue, from Adams avenue to Elm street in the village of Collinwood. The specifications appear here in the general statement of facts, and provide that a sidewalk shall be constructed on that street to be of sand-stone, sawed on both sides, and to be five feet in width and two and one-half inches thick, laid to the proper grade and six inches from the lot line.

That resolution was passed on the 23d day of March, 1903, and thereafter a notice was served upon each of the property owners who resided in the village or the county, and published to the non-residents. This plaintiff was a resident of the village of Collinwood and received this notice, or the notice which was directed to be served and was delivered to the proper officer of the village, notifying the plaintiff of the passage of the resolution, and the notice containing the following:

"Mayor's Office, Collinwood, O.
June 10, 1903.

"*To Fanny Meek*:

"You are hereby notified that according to the provisions of a resolution passed by the council on the 11th day of May, 1903, you are required to construct a sidewalk in front of your premises on the southerly side of Kirby avenue, between Adams street and Elm street, known as No. —— on said street. Said sidewalk to conform to the following specifications: to be of sand-stone sawed on both sides, to be 5 feet wide, 2½ inches in thickness and laid 6 inches from the lot line, and to be constructed in accordance with the general ordinances of the village pertaining to sidewalks.

"If said sidewalk is not constructed within thirty days from receipt of this notice, the council will have the same done at your expense, and the costs will be made a lien upon your property and collected with penalty and interest as provided by law."

And then follows the endorsement by the clerk.

The notice, as already said, contained a copy of the resolution that upon the failure of the property owners to construct the sidewalk, the village would proceed to construct the sidewalk and assess the expense thereof upon the property owners; that is, the proper amount of such assessment upon each property owner.

The plaintiff did not construct the sidewalk. The village did construct a sidewalk at this point in front of the premises of the plaintiff, nearly a year after the passage of the resolution. At the time this sidewalk was constructed, this plaintiff was absent from the village and knew nothing of its being done, until after the work was completed.

As a matter of fact, the sidewalk which the village constructed was constructed of cement and not of sand-stone. And the agreed statement of facts contain these words: "A cement sidewalk is of a different material than sand-stone; it is a mixture of cement, sand and gravel." And then it tells what sand-stone is. And the cost of said cement sidewalk is substantially the same as the cost of the sand-stone.

The plaintiff failed to pay the assessment which was certified as a lien upon her property to the county treasurer of Cuyahoga county, who, if not enjoined, will proceed to collect the amount of that assessment.

It is said, first, the village could not lawfully construct a sidewalk and have it assessed upon the property owner under the proceedings that were had in this case. And attention is called to Section 1536-210 of the statutes, which is Section 50 of the municipal code, which provides that—

"The council of any municipal corporation may assess upon the abutting, adjacent and contiguous or other specially benefited lots or lands in the corporation, any part of the entire cost of and expense connected with the improvement of any street, alley, dock, wharf, pier, public road, or place by grading, draining, curbing, paving," etc., and any part of the cost and labor by a percentage of the tax value of the property assessed, in proportion to the benefits which may result from the improvement, or by the foot frontage of the property."

And by Section 1536-211*a*:

"Whenever it is deemed necessary by any city or village to make any public improvement to be paid for in whole or in part by special assessments council shall declare by resolution (three-fourths of the whole number elected thereto concurring, except as otherwise provided herein), the necessity of such improvement.

"At the time of the passage of said resolution council shall have on file in the office of the board of public service in cities, and of the clerk in villages, plans, specifications, estimates and profiles of the proposed improvement, showing the proposed grade of the street and improvement after completion, with reference to the property abutting thereon, which plans, specifications, estimates and profiles shall be open to the inspection of all persons interested."

And then it states that council shall also determine in said resolution the method of the assessment, the mode of payment thereof, etc.

It will be observed that the proceedings here were not in conformity with these sections of the statute. But there is a further provision in the statute with reference to sidewalks. Beginning with Section 1536-232, which is Section 70 of the municipal code, as published in Ellis' work:

"The council of cities and villages may provide by ordinance for the construction and repair of all necessary sidewalks, or parts thereof, within the limits of the corporation," etc.

And then it provides—

"When the council of cities or villages declares by resolution that certain specified sidewalks shall be constructed, the clerk of council shall cause a written notice of the passage of such resolution to be served upon the owner or agent of the owner of each parcel of land abutting on such sidewalk, who may be a resident of such city or village," etc.

And in Section 1536-235, it is provided that—

"If such sidewalks are not constructed within fifteen days * * * from the service of the notice, * * * the department of public service in cities and council in villages may have the same done at the expense of the owner," etc.

And I call attention especially to the last provision of Section 1536-235, which is Section 73 of the code—

"No other or further proceedings shall be necessary by council proceedings," etc.

It is said that notwithstanding that provision it was still necessary before the council of the village or the board of public service in the city may assess upon the property owner the cost of constructing the sidewalk, that there shall have been an ordinance passed, and that there shall have been the plans and specifications on file, as provided in Section 1536-210.

The Legislature has distinctly said that no other or further proceedings than those contained in the sections last read, which

provide for exactly what was done in this case, would be necessary.

And so we hold that the proceedings of the council in providing for the construction of the sidewalk and the serving of the notice and the like, was all that was necessary to authorize the construction of the sidewalk, if it constructed the sidewalk which it said it would construct, and to have the cost of such construction assessed upon the property.

So that there remains the question only whether having provided for a sidewalk of sand-stone it should be constructed, and that upon failure of the owners to construct such sidewalk the village should proceed to do the work and assess the cost upon the property owner. In short, did the village do what it said it would do? Did it say to this woman unless within fifteen days from the service of this notice you construct a sand-stone sidewalk, six feet wide—giving the dimensions of the sidewalk—we will construct such sidewalk at your expense, and you will have to pay for it. Is there a greater obligation upon her than if she had entered into a contract? The village had the authority to construct a sidewalk of cement if it wanted it. It could have passed a resolution and notified her; and if such sidewalk was constructed by the village, provided she did not construct it, and they put in something else which was just as good and did not cost as much and want her to pay for that, I can't see where she is under obligation other than she would be under obligation to do if she had entered into a contract. If she entered into a contract with the village, the village had the right to do just as provided in this resolution and require her to pay for it. The village said, if you do not care to do it, you let us do it and you pay for it. By her silence she said, you proceed; and, instead of putting in the sidewalk they told her they would put in they put in something else that was just as good. I suppose it could hardly be claimed by any one that if an arrangement had been made, that in a house that was being built there should be a particular finish, a particular wood used in the parlor, that it should be finished in a particular way, and a wholly different kind of woodwork was put in, that though just as good, that the owner would be required to pay.

We think this woman was not bound to pay for this sidewalk. The injunction prayed for in the petition is allowed.

Miller & Linder, for plaintiff.

C. L. Stocker and *E. H. Tracy,* for defendant.

VERIFICATION OF PLEADINGS.

Circuit Court of Cuyahoga County

THE BULLOCH-BERESFORD MANUFACTURING CO. v. H. E. HEDGES.*

Decided, June 26, 1905.

Pleadings—Verification of—When Made by an Agent or Attorney of a Corporation—Officers Who May Verify Pleadings Without Restriction—Sections 5102 and 5109.

The provisions of Section 5109, Revised Statutes, regarding verification of pleadings by agents and attorneys, apply to the pleadings of corporations as well as those of natural persons.

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

Error to the court of common pleas.

The question presented by the petition in error in this case is whether a petition in an action instituted by a corporation having its place of business within the county should be stricken from the files because it was not verified by an officer of the corporation. The verification complained of was by the corporation's attorney, no reason being given why it was not verified by an officer, and no statement being made that the facts were within the personal knowledge of the attorney.

This question requires a construction of Sections 5102 and 5109, Revised Statutes of Ohio; the former section, so far as applicable, reads as follows:

"Every pleading of fact must be verified by the affidavit of the party, his agent or attorney; when a corporation is a party, the verification may be made by an officer thereof, its agent or attorney."

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*Affirmed by the Supreme Court, March 19, 1907; reported, 76 Ohio State, —

Section 5109 provides: "The affidavit verifying a pleading can be made by the agent or attorney only when;" then follows four specified cases when it can be done, within none of which the verification in this case is brought.

It is said that Section 5109 does not apply to the pleading of a corporation. The common pleas court held otherwise. We apprehend that it was right.

Were it not for Section 5109, under a fair construction of Section 5102, read without reference to any other law, we take it that every pleading, whether of a natural or artificial person, might be verified by an agent or attorney, without restriction or qualification.

The same may be said of Section 5109. Read by itself it applies to all pleadings, whether of natural or artificial persons. It is a manifest limitation upon the privilege of having pleadings verified by agents or attorneys, granted under Section 5102.

It would seem, then, that by combining the two sections there would not result any exemption of corporations from the operation of Section 5109, though we are aware that the conclusion reached by the Common Pleas Court of Cuyahoga County is not in harmony with the conclusion reached by the Common Pleas Court of Franklin County, 7 N. P., 127, and the Common Pleas Court of Lucas County, 2 N. P., 260.

The two cases last cited proceed upon the proposition that officers, agents and attorneys of corporations are all of them its agents. True, but it does not follow that all its agents and attorneys are *officers,* and we believe that the only agents of a corporation who may verify its pleadings without restriction are such as are *strictly officers,* having charge and control of its affairs, whom the law must presume to have sufficient knowledge of its affairs to warrant them in verifying statements of fact on its behalf, as though made for themselves.

The judgment is affirmed.

George S. Groot, for plaintiff in error.

W. J. Patterson, for defendant in error.

ALOTMENT OF COST OF IMPROVING JOINT COUNTY DITCH.

Circuit Court of Huron County.

COMMISSIONERS OF CRAWFORD COUNTY v. COMMISSIONERS OF HURON COUNTY ET AL; SMITH ET AL v. COMMISSIONERS OF HURON COUNTY, AND FERGUSON ET AL v. COMMISSIONERS OF HURON COUNTY.

Decided, April, 1907.

Ditches—Improvement of a Joint County Ditch—Jurisdiction of the Common Pleas—In an Action to Apportion the Costs of such an Improvement—Right of Contribution from an Upper County—Not Lost by the Ditch Becoming a Public Water-course by Operation of Section 4510*—Time Within which Viewers are to Report—Parties —Who Should be Joined in an Action for Contribution.*

1. Where it was decided, during proceedings by and before the boards of commissioners of three counties convened for the purpose of improving a joint county ditch, that the lower county should do certain work upon the ditch in that county, reserving all rights as to compensation from the other counties, the court of common pleas has jurisdiction, by virtue of Section 4488*a*, of an action against the other counties for an apportionment of the cost of the improvement; and voluntary submission to the jurisdiction of such court, by tender of issues in pleadings without questioning jurisdiction therein and by assenting to the journal entries, is equivalent to an agreement by a majority of the boards of commissioners of the several counties under which the alternative procedure may be had in the court of common pleas under Section 4510-10 to compel contribution for the expense of constructing or improving an outlet for waters from other counties.
2. Where the county commissioners, by virtue of Section 4510-1, clean and enlarge that part of a joint county ditch lying within their county so that better drainage is provided for an upper county, contribution may be had from such upper county to meet the cost of improvement.
3. Where a county ditch has once been established by law, and has been used for a period of over seven years, it does not by operation of Section 4510 become a public water-course in the sense that the right to improve it as an established county ditch no longer exists.
4. Under Section 4510-10, viewers are given thirty days from the

time of their appointment to act and report, and are not limited to thirty days from the filing of the petition.

5. Provision is only made by statute for proceedings between the boards of county commissioners of the different counties interested in a suit for contribution for a ditch improvement, and the owners of lands affected by the improvement can not join in the action and become parties thereto.

Error to Huron Common Pleas Court.

C. H. Henkel and J. R. McKnight, for plaintiffs in error cited—

As to jurisdiction of commissioners of one county to construct a ditch in another county: Schamp v. Kennedy, 16 C. C., 604; Carlin v. Hosler, 58 Ohio St., 694; Lucas County v. Fulton County, 2 N. P., 47 (affirmed, Fulton County v. Lucas County, 12 C. C., 563); Zimmerman v. Canfield, 42 Ohio St., 463; Buckley v. Lorain County, 1 C. C., 251, where the land of a party was not benefited by the improvement; Redfern v. Hancock County, 18 C. C., 233; Blue v. Wentz, 54 Ohio St., 247; Pleasant Hill v. Commissioners, 71 Ohio St., 13; Greene County v. Harbine, 74 Ohio St., 318.

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

Three cases numbered on the docket, 413, 414 and 415, involve proceedings relative to a joint county ditch, so-called, with regard to which there is some dispute concerning its precise character, and as to what proceedings should have been taken. The first of the cases so numbered is that of the board of county commissioners of Crawford county against the board of county commissioners of Huron county; the second of them, that of Charles R. Smith and others against the board of county commissioners of Huron county, and the third, that of Daniel Ferguson and others against the board of county commissioners of Huron county and others.

These are all based upon claimed errors of the court of common pleas in a proceeding instituted under favor of Section 4488*a*, Revised Statutes.

It appears that some time in the year 1905, petitions were filed in the three counties, Huron, Crawford and Richland, for the widening, deepening and straightening of a so-called joint

ditch, known as the Noggle Joint county ditch, and certain ditches draining into the same, known as Spring run and Marsh run.

One of the three counties named (Huron) is the lower county and the one into which the waters of the other two counties would naturally drain, or into which waters might be conducted by proper drainage.

The commissioners of the three counties held certain meetings and had certain proceedings, but we are favored with no record of any of them until the date of March 6, 1906, when a meeting was held at the office of the board of county commissioners of Huron county for the purpose of further considering the petition of one J. W. Dawson and others, which was the foundation of the proceedings. An examination of the record of this meeting is vital to the proper determination of the controversy here involved.

I may say that the claims of Richland county, as represented by the board of commissioners of that county, are practically eliminated from the contention here; no petition in error has been filed by the board of commissioners of that county and the real controversy here is between the board of commissioners of Huron county and the board of commissioners of Crawford county except in so far as certain residents of the two counties of Richland and Crawford have sought to become parties in the proceedings to contest before the court the claims of Huron county under the statute to which I have referred.

Before entering upon any critical examination of the recorded proceedings, it may be well to mention, in a general way, the terms of Section 4488, Revised Statutes, immediately preceding Section 4488*a*, Revised Statutes, which provides for the bringing of a proceeding in the court of common pleas. Section 4488, Revised Statutes, provides that when a ditch or improvement is proposed, which will require a location in more than one county, application shall be made to the commissioners of each of said counties, and the surveyor or engineer shall make a report for each county. Application for damages shall be made, and appeals from the finding of the commissioners, in joint session, locating and establishing such ditch, and from the assess-

ment of damages or compensation, shall be taken to the probate court of the county in which the greatest length of such ditch or improvement is located; and a majority of the commissioners of each county, when in joint session, shall be competent to locate and establish such ditch or improvement; but no commissioner shall serve in any case in which he is personally interested, and any two of the commissioners may form a quorum for the transaction of business for their respective counties.

There are certain other provisions in the section which it is not necessary to read.

Now, Section 4488*a*, Revised Statutes, provides:

"If the commissioners in joint session find in favor of the proposed improvement, and are unable afterwards to agree as to the proportion of the costs of location and constructing the improvement, which shall be assessed in each of the counties, respectively, the board of commissioners of either county may petition the court of common pleas of their county for the appointment of three disinterested freeholders, not residents of either of said counties, who shall within thirty days thereafter, after being duly sworn and upon actual view of said improvement, estimate and report to said court the amount which should be charged to the land in each county interested in said improvement, respectively."

Now, examining the proceedings of March 6, 1906, we find it recited that, among other persons present, were two commissioners of Crawford county, Samuel Easterday and J. H. Petri, with all the members of the Richland and Huron county boards.

The meeting was called to order by the chairman of the joint board. It is recorded that the minutes of the meeting of February 23 were read and on motion, duly approved, but we are not informed as to just what had taken place at the meeting of February 23.

I now read from the record of the proceedings of March 6:

"After a further explanation of their reports by the engineers of the several counties respectively, it was moved by Felton and seconded by Miller, that 'Noggle Joint county ditch,' 'Spring run' and 'Marsh run' be cleaned out, deepened and widened as prayed for in the petition.

"Mr. Easterday moved to amend the motion by providing for the elimination of that part of 'Noggle Joint county ditch'

which lies in Crawford county from the proposed improvement. The amendment being accepted by Mr. Miller, the following vote was had on the amendment: Crawford county—Easterday, aye, Petri, aye; Huron county—Noble, aye, Miller, aye, Felton, aye; Richland county—Finney, aye, Baker, aye, Patterson, aye. The amendment was carried by a unanimous vote.

"Then it was moved by Mr. Finney to further amend the motion by providing that that part of 'Spring run' lying in Richland county be eliminated from the proposed improvement. That amendment was accepted and the motion was carried."

It was moved by Felton and seconded by Miller that the motion be amended by providing that of the cost of said proposed improvements exclusive of that part of "Noggle Joint county ditch" in Crawford county, and that part of "Spring run" in Richland county, there shall be paid by Crawford county, $1,300; Richland county, $750, and by Huron county, the balance of the cost thereof.

A vote was taken on this motion and it was declared lost. All these are proposed amendments to original motions. Then it was moved by Finney and seconded by Patterson to amend the motion by providing that Huron county pay all the cost of said proposed improvement.

The vote on this amendment was unanimously no, all the commisioners from the three counties present voting against the proposition to amend the original motion by throwing the entire charge upon Huron county. It was then moved by Finney and seconded by Baker that the motion as amended be laid on the table and the vote was unanimously in favor of so doing.

It was then moved by Finney and seconded by Baker—

"That it is the sense of this joint board that that part of 'Noggle Joint county ditch' lying in Huron county be improved, reserving to Huron county any existing right of recovery for benefits to, or damage caused by Richland and Crawford counties or landowners therein."

Up to this time there is no hint that this was not a joint county ditch which was sought to be improved. No question is raised in this meeting, and we are not advised that any was raised in any prior one, as to the legality of a proceeding for

the improvement of an existing joint ditch, parts of which were in all of the three counties named.

The motion which I have just read was carried by a unanimous vote. It was then moved by Finney and seconded by Petri that the reports of the engineers of the several counties be accepted, and this motion was carried by a unanimous vote.

It was moved by Easterday, one of the Crawford county commissioners, and seconded by Patterson, that the joint board adjourn subject to call of its president and this motion was carried by a unanimous vote, and the meeting adjourned.

It will be noted that while there was no question raised as to the legality of the proceedings, under Section 4488, Revised Statutes, applicable to a joint ditch, still there had been no agreement as to the proportion of the expense which should be borne by the one county or the other. There was no agreement among the commissioners, for instance, that Crawford county should bear a proportion of the expenses stated, and that Huron county or Richland county should bear another. We are left with the express reservation that Huron county preserves all its rights as to compensation from the other counties, whatever those rights may be.

On March 8, 1906, the board of county commissioners of Huron county commenced its action in the Court of Common Pleas of Huron County, Ohio, under Section 4488*a*, Revised Statutes, alleging a failure to agree as to the proportion of the expenses that should be borne by the different counties, and asking for the action of the court, under said section.

We find that summons was issued upon this petition and properly served on the board of commissioners of Crawford county and also that the board of commissioners of Crawford county filed an answer. There can be no question, in our judgment, as to the jurisdiction of the court of common pleas of the board of commissioners of Crawford county, authorized to represent the county in the manner provided by this statute, and by the general statute as to county commissioners, making that body capable of suing and being sued.

I have before me the answer of the board of commissioners of Crawford county. There are certain admissions in this answer

which may be important in view of some of the contentions of counsel.

It is expressly admitted that on October 10, 1905, a petition praying for the cleaning out, deepening and widening of a joint county ditch, known as "Noggle Joint county ditch No. 370," was filed with the proper officers in the said counties.

It is expressly admitted that on November 9, 1905, said boards of county commissioners met in joint session at the place of beginning of said proposed improvement.

It is expressly admitted that said boards of county commissioners met in adjourned joint session at the court house at Norwalk, Ohio, on February 23, 1906, and also that the plaintiff, the Huron county board, and the parties defendant, the Crawford county board and Richland county board, were unable to agree as to the proportion of the costs of location and construction of said improvement which should be assessed in each of said counties respectively, and that they have ever since been unable to agree.

This substantially admits about all the matters which the statute provides shall constitute conditions precedent to the invoking of the jurisdiction of the court of common pleas under Section 4488*a*, Revised Statutes. However there are certain denials and averments which should be taken into consideration in connection with the admissions which I have recited.

The answer alleges that no benefit would accrue to Crawford county by reason of the proposed drainage; it alleges that the lands in Crawford county do not need drainage; that they naturally drain the waters into "said" swamp (which does not seem to have been before mentioned in the answer), and that the same are carried off through said ditch, referring evidently to the "Noggle ditch" concerning which we have this whole controversy, and if so, that that ditch is the natural outlet and drainage of these lands.

Then we find this allegation in the answer:

"And this answering defendant says that the said surface waters from off the lands in Crawford county have been running through depressions in which said ditch is constructed since time immemorial to the same extent that they now do; that said

ditch would be the natural drain and outlet for said water, and that all the land in Crawford county claimed to be affected by this improvement is as naturally and sufficiently drained thereby and as well and thoroughly as though this proposed improvement had been made, or will be when said improvement has been constructed.

"This defendant, for further answer, says that the proposed improvement will not require a location in more than one county, viz., Huron county, Ohio."

Then it urges that no part of the costs or expense should be placed against Crawford county; that there are no lands in said county which can be assessed for the location and construction of the same, for the reason that they are not benefited thereby; and also that, if a portion of the expense for the location and construction of this proposed improvement should be placed against Crawford county, the same would be unjust, unfair and inequitable.

It is urged by counsel for defendant below, plaintiff in error here, the board of commissioners of Crawford county, that this ditch had been in existence for many years and had not been obstructed or interrupted, and that it had become a natural water-course under the terms of Section 4500, Revised Statutes, which provides when a ditch shall become a public water-course. The language is:

"When a ditch has been established and constructed for the public health, convenience, or welfare, either by private agreement between two or more individuals, whose real property has been affected thereby, or by a board of township trustees, or by a board of county commissioners, and such ditch has been used for the purpose of drainage of private lands or public highways for seven years or more, without obstruction or interruption, the same shall be, and hereby is declared to be, a public water-course, notwithstanding errors, defects, or irregularities in the location, establishment, or construction of the same, and such public water-course shall, in all respects, be considered and treated as a natural water-course, and the public shall have and possess in and to such public water-course, the same rights and privileges which pertain and relate to natural water-courses."

We do not understand, however, when a ditch has been once established by law and has been used for seven years, that all

right is lost to the proper authorities to widen or deepen or straighten it; that it has become a natural water-course in any such sense as to take away the right to improve it as an established ditch.

It is urged by counsel for plaintiff in error that as the work is required by the joint voice of the boards of commissioners of three counties to be done entirely in Huron county, therefore no such proceeding as we have here is permissible, and that an action should be brought under another section of the Revised Statutes providing for the construction or improvement of an outlet in one county to waters drained therein from another.

Section 4510-1, Revised Statutes, provides:

"In all cases where the commissioners of any county in this state shall cause to be constructed or enlarged, or cleaned, or repaired, any ditch, drain or water-course, the water from which flows into an adjoining county or into or finds an outlet in any ditch, drain or water-course constructed or being constructed in an adjoining county, and in all cases where the commissioners of any county in this state shall cause to be constructed, enlarged, cleaned out or repaired, any ditch, drain or water-course, which is or may be an outlet for any ditch, drain or water-course, of lands of an upper county"—and I emphasize the term "water-course" in view of the argument which has been made under Section 4500, Revised Statutes, that under certain circumstances, a ditch becomes a public water-course and subject to treatment as such—"or which, by reason of any proposed improvement thereof, will provide better drainage or a more sufficient outlet for any ditch, drain or water-course, or lands of an upper county, and in all cases where the commissioners of any county in this state find it necessary to construct, or enlarge, or widen, or deepen, or clean out, any ditch, drain or water-course of a lower county in order to secure a sufficient and proper outlet for a proposed ditch, drain or water-course of an upper county, the commissioners of such upper county shall pay the commissioners of such lower county such sum as may be agreed upon by the commissioners of both counties, for the use and benefit of such outlet, which sum the commissioners of said upper county shall apportion to the lands in their county, for whose benefit said ditch was, or is constructed," etc.

There are several sections immediately following this, culminating in Section 4510-10, in which we think that we find

authority to the commissioners of any one of these counties for an alternative procedure.

It will be noted that in the section which I have just read, the right is given to the lower county to compel contribution by the upper counties for work done solely in the lower county, in the cleaning out or widening or improving a ditch which drains the lands or water-course, or ditch of an upper county.

Section 4510-10, provides:

"All proceedings for the construction, cleaning out, repairing or enlarging either of said ditches, in either the upper or lower counties, whether or not the same have been originally constructed as joint ditches or whether or not the ditch to be constructed might be a joint ditch, may be commenced and conducted in the manner prescribed by this act and the law prescribed for single county ditches."

I should perhaps pause to say that the procedure in what is here called "this act," is a procedure instituted in the probate court where the parties have not agreed upon the proper proportion of the expenses.

Section 4510-10 continues:

"But in addition to the manner of procedure prescribed in this act for the construction, enlarging, cleaning out or repairing of any ditch, which furnishes or may furnish drainage for more than one county, proceedings shall be commenced and conducted in the manner prescribed by law for the construction of joint ditches, whenever a majority of each board of commissioners of such counties shall agree."

This, we think, gives the alternative remedy under which the board of commissioners of Huron county might proceed in the court of common pleas instead of the probate court, provided the boards of county commissioners have agreed to treat the case as one where such procedure may be adopted. Have they done so in this case? Perhaps not by any formal resolution to that effect; but, by filing their answer in the court of common pleas, by their agreement to what should be the finding of the court, on July 5, 1906, by their assenting to the journal entry and by their taking no exceptions to the action of the court on that occasion,

it seems to us that they have acted as effectually as if they had placed a formal motion adopting this procedure upon their records. The entire procedure on March 6 was entirely in harmony with the action which was taken in the court of common pleas. No objection was made in the court of common pleas to the jurisdiction of the court unless we are to treat the exceptions filed to the report of the viewers on December 8, 1906, as such an objection to the jurisdiction of the court.

Now, the court of common pleas, having that sort of jurisdiction which we think it might properly assume, from the apparent consent of all parties, and from the fact that summons had been issued and served and answers filed, proceeded upon July 5 to appoint certain viewers, non-residents of either of the three counties named, to take action provided by law in the apportioning of the expenses.

Section 4488*a*, Revised Statutes, provides for the appointment of three disinterested freeholders, not residents of either of said counties, who shall within thirty days thereafter, after being duly sworn and upon actual view of said improvement, estimate and report to said court the amount which should be charged to the land in each county interested in said improvement respectively.

It seems that by some inadvertence, perhaps, the persons appointed by the court in July failed to qualify or to make any examination as required by law or to file any report thereon; and the attention of the court being called to these facts, at a later date, during the same term, on August 6, the court reappointed the same persons as viewers. More than the period of thirty days having elapsed from the time of the filing of the petition, and indeed from the time of their first appointment, it is contended that the court had no jurisdiction to appoint viewers after this lapse of time, and that the thirty-day period specified by the statute is intended to begin with the day of the filing of the petition in the court of common pleas.

This was not the view entertained by the court of common pleas, nor is it ours. We think, as is ably suggested by Judge Richards in the court below, that many matters might intervene to prevent the court of common pleas from taking immediate

action by appointment of viewers upon the filing of the petition. We think that it is the design of the statute to allow viewers thirty days from the time of their appointment and qualification to do the work entrusted to them, and that the time is none too long.

If the contention of counsel for plaintiff in error is right, the first appointment by the court as well as the second was, as suggested, invalid for want of jurisdiction, because more than thirty days had elapsed from the time of the filing of the petition in the court of common pleas.

Now, on August 6, the court appointed these viewers and they made their report at a later date, and on December 28 the court heard certain exceptions that were filed by the commissioners of Crawford county. The court, prior to this time, had overruled motions made by the two groups of residents of Crawford and Richland counties to be made parties to the proceeding, and when it was discovered that the viewers had not qualified or acted under the order made in July, the court set aside its entire order made as of that date, and the motion of these men to become parties seems to have been renewed and was again overruled, to which ruling of the court they took exceptions and they are prosecuting their claims here in two cases numbered as I have already stated, in which they appear as individual plaintiffs in error.

The board of commissioners of Richland county attacked the report of the viewers upon the ground that the apportionment of the expenes to Richland county was unjust, and the court of common pleas, considering those exceptions, so far sustained them as to cut down the apportionment against Richland county. No objection, however, was made to the amount of expense assessed against Crawford county, but the board of commissioners of that county, in their exceptions, contended that no charge at all could legally be made against Crawford county by reason of the allegations in their answer and the facts which they claimed to exist. They based their contention almost entirely, if not entirely, upon these jurisdictional claims. They based their contention almost entirely, if not entirely, upon these jurisdictional claims. They claimed that the court of com-

mon pleas had no power to appoint viewers after the lapse of thirty days from the time of filing the petition; they claimed that after the court had once appointed viewers, the court had no jurisdiction to reappoint the same viewers or to appoint any others; and they also contended that the proceeding was not one in which the court of common pleas could act at all; that if the plaintiff had any rights, they were to be worked out in the probate court under Section 4510-10, a part of which I have read.

Perhaps I should qualify the foregoing statement: It is not quite clear that this last contention was made in the court of common pleas. It has been made in this court; and it is being urged now with force and earnestness that the only rights belonging to Huron county to improve a ditch in Huron county and assess any part of the expense upon other counties drained thereby, must be enforced by proceedings under Section 4510-10, and in the probate court, and not in the court of common pleas at all.

I have already attempted to explain our views as to the contention of the plaintiff in error upon that subject, by inviting attention to what seems to be an alternative procedure offered by Section 4510-10.

We are of the view, however, that even without this alternative the proceedings are properly brought in the court of common pleas because of the apparently conceded fact, that this was a joint ditch; and although no part of the work of widening, deepening or straightening was to be done in the other counties, still it was the improving of an apparently already established joint ditch in which the counties were jointly interested and by which they were presumably benefited.

We think that even if this ditch existed in part in Crawford and Richland counties, as well as in Huron county, and lay along the valley of any depression or water-course; and if it had existed for so long a time that it had become what, in Section 4500, Revised Statutes, is termed a public water-course, it would make no difference with the right to proceed under Section 4488*a*, Revised Statutes.

We are quite clear in the view that the court of common pleas, having once obtained jurisdiction by the filing of the petition

by the board of commissioners of Huron county, the issuance and service of summons, the filing of the answers of the defendants below and the order of the court, as made, which seems to have been assented to by the prosecuting attorneys of the different counties acting as attorneys for the parties, the action then taken by the court, to which there was no exception, so far as appears by the certified journal entries before me, could not be subsequently attacked upon exceptions to the report of the viewers. No attack was at any time made directly to the jurisdiction of the court; it was the action of the viewers, or the report of the viewers, that was attacked.

The statute provides for exceptions to reports of viewers and counsel filed such exceptions, and those exceptions were heard and disposed of on December 28, 1906.

It is said by counsel in argument that no replies had been filed to the answers, or to the answer of the defendant, the board of commissioners of Crawford county. It is true that no reply had been filed to the answer up to December 28, 1906, and it is a matter of some doubt as to whether any reply was necessary.

The material matters urged in the answer of the board of commissioners of Crawford county was, that there was no necessity for a joint ditch; that the lands of Crawford county were not going to be benefited, etc. All this was a matter for the commissioners to consider in their meeting, their joint meeting of March 6, 1906, or February 23, or at some time prior to the determination to go on with the proposed improvement in one county or more.

There was, by the authorizing of the work to be done, a substantial concession of benefit to the different counties joining in this action.

Upon December 28, 1906, the court of common pleas permitted a reply to be filed *instanter* and a reply was filed in which the various pleas made by the commissioners of Crawford county were denied, except in so far as the allegations were admissions of matters previously stated by the plaintiff board below.

The statutes are somewhat meager as to provisions for forms of procedure. Nothing is said about any pleadings except the petition. It is possible that the procedure of the civil code

might be followed so far as it can be made applicable, and it seems to have been followed in this case, but whether or not that was essential is a matter which it is not necessary for us at this time to determine.

We think that the court of common pleas committed no error in confirming the report of the viewers in the absence of any evidence showing that their apportionment of expenses to Crawford county was unjust.

Presumably, had there been evidence of unfairness in this regard, Crawford county would have been fairly dealt with. The court of common pleas found no difficulty in determining that too large an amount had been assessed against Richland county and promptly cut it down.

Now, as to the attempted interposition of the resident landowners in Richland and Crawford counties, it is perhaps sufficient to say that no section can be found in the statutes in which resident landowners can be made parties. The law makes provision only for proceedings between and among the boards of commissioners of different counties interested and the board of commissioners of Crawford county presumably represents the interests of the landowners of that county. It is not necessary that they should come into court to litigate their claims; nor is it necessary for us to determine at the present time just what procedure should be adopted by the board of commissioners or other officials of Crawford county to place in its treasury the means of providing for the expenses charged against Crawford county in the apportionment of the costs of this improvement.

It is said by the prosecuting attorney of Crawford county that difficulties will arise; that it will be unjust to draw money from the general fund because that would be placing the expenses upon many people in the county who ought not to bear any portion of it, who have no land that would be benefited by the drainage into this ditch, and it is claimed that there is no method under the law of assessing the expense upon the resident landowners whose land will be benefited.

We are not inclined to agree with counsel as to this; but however it may be, it is sufficient for us to decide the case in so far as it is presented to us.

We think that under the spirit of the various sections which have been cited to us, and those which we have examined and some of which I have read in part and commented upon, the judgment of the court of common pleas should be affirmed.

C. H. Henkel and *J. R. McKnight*, for plaintiffs in error.

L. W. Wickham, for commissioners of Huron county.

C. H. Huston, for commissioners of Richland county.

VALIDITY OF ASSESSMENT UNDER SPECIAL ACT.

Circuit Court of Hamilton County.

THE CINCINNATI BUILDING & DEPOSIT COMPANY v. THE CITY OF CINCINNATI.

Decided, May 11, 1907.

Street—Delay in Completing Improvement of—Property Owner Estopped from Resisting Assessment, when—Validity of Assessment Levied Under a Special Act—Constitutionality of Section 2272.

1. Delay in completing a street improvement does not relieve abutting property owners from assessment, and a mortgagee who has become the owner by foreclosure is estopped from denying that the property is not benefited to the extent of the assessment or that it is not valuable enough to stand the assessment, where the mortgagor joined in the petition for the improvement.
2. In so far as concerns the validity of an assessment for a street improvement which has been duly petitioned for and promoted by the abutting owners, Section 2272 is constitutional.

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

We think the injunction prayed for in this case should not be allowed.

The ordinance for the improvement of Elberon avenue and the assessment for the cost of same against abutting property was duly passed by council of the city of Cincinnati and all necessary legislation in reference thereto was taken by it and the board of administration of the city.

While the completion of the work was delayed from time to time by the board of administration and the board of city af-

fairs of the city of Cincinnati, yet there never was an abandonment of the improvement, as council never rescinded its action in passing the ordinance.

As the owner of the property, George F. Meyers, with other property owners on Elberon avenue, petitioned the city for the improvement of said avenue, said Meyers having theretofore mortgaged the same to the plaintiff, the Cincinnati Building & Deposit Company, who subsequently became the owner of the property by foreclosure. That the property owner is bound by said petition, and is estopped from denying that the property in question is not benefited to the extent of the assessment, or that it is not valuable enough to stand the assessment as levied, see *Hendrickson* v. *Toledo,* 3 C. C.—N. S., 355; *Lewis* v. *Symmes,* 61 O. S., 471.

That George F. Meyers, while the owner, and after the property was mortgaged, had the right to sign such petition for the improvement, and thereby estop himself and his mortgagee from claiming lack of benefits, or lack of value of the property to stand the assessment, see *Kemker* v. *St. Bernard,* 60 O. S., 253-4.

We can not hold so far as this case is concerned that Section 2272 is unconstitutional, so as to relieve the plaintiff of the assessment. Such acts as Section 2272, at and previous to the passage of the ordinance in question, had been held constitutional, and as the property owners by their petition promoted the improvement that was subsequently carried out, we think the assessment should be sustained.

Dempsey & Nieberding, for plaintiff.

George H. Kattenhorn, for the city.

AS TO WHETHER THE MAIN ISSUE WAS SUBMITTED TO THE JURY.

[Circuit Court of Lucas County.]

THE DETWILER REAL ESTATE & INVESTMENT COMPANY v. EDWARD V. E. RAUSCH.

Decided, October, 1906.

Commissions—For Sale of Real Estate—Agency—Issue as to, for the Jury—Charge of Court—Motion for a New Trial—Bill of Exceptions.

Where a motion for a new trial includes the ground that the verdict was contrary to law, it includes error of the court in the charge to the jury, and a bill of exceptions prepared within forty days from the overruling of the motion is prepared in time.

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

Heard on error.

In this case the action in the court below was brought by Edward V. E. Rausch against the Detwiler Real Estate & Investment Company to recover commissions for selling real estate. The defendant filed an answer in which, after admitting that it was a corporation, and that its principal office was in the city of Toledo, Ohio, denied each and every other allegation contained in the plaintiff's petition. The case went to trial to a jury, and there was a finding in favor of the plaintiff for the full amount he claimed and judgment was entered upon the verdict.

The plaintiff in error claims that the main issue, *i. e.*, as to whether it was liable at all upon this claim, was not submitted by the court to the jury.

It appears that there were two companies having their offices and places of business in the same room, or the same building in this city, one the plaintiff in error, the Detwiler Real Estate & Investment Company, the other the I. H. Detwiler Company; that the real estate and investment company is what is called a holding company, a company which holds the title to cer-

tain real estate, and that it owns considerable real estate in the city; that the I. H. Detwiler Company is a real estate brokerage company. I may say that besides these two companies there are quite a number of corporations that also have their offices in the same building and room. It does not appear that the stockholders of these two companies are identical. It appears that one George K. Detwiler is the president of the I. H. Detwiler Company, the brokerage company, and that he is the vice-president of the Detwiler Real Estate & Investment Company. That the plaintiff, Rausch, went to George K. Detwiler at this place of business and said to him—taking the statement of Mr. Rausch—that he had a prospective buyer for Superior street property, and asked him about the Superior street hotel property, the price of it, and if it was for sale. Detwiler said that it was for sale, that everything he had was for sale. Rausch told Detwiler that he had a buyer that he had been showing some property, and he thought he could interest him in that property and maybe could make a deal for it, and asked him the dimensions of the property, etc. Now that it is the way the negotiations opened up, which resulted in Mr. Rausch finding a purchaser for this property. It appears that in the talk with Mr. Detwiler there was no inquiry made and nothing said pointedly as to who held the legal title to this property, or as to who Mr. Detwiler was representing in the transaction, whether himself, the I. H. Detwiler Company, or the real estate and investment company, or some other person or company; but Mr. Rausch appears to have supposed that he was dealing with George K. Detwiler personally. Mr. Detwiler says, however, that he was, as a matter of fact, in the transaction representing the I. H. Detwiler Company, the real estate brokerage company; that all of the real estate owned by the real estate and investment company had been put into the hands of the I. H. Detwiler Company for sale, and that he as vice-president of the Detwiler Real Estate & Investment Company had no authority to sell property of that company, and had no authority to select agents for that company and authorize them to sell its property.

Now, the property was sold, as I have said, and it appears that in the course of negotiations a Mr. Chalmers, who was an officer of and interested in the I. H. Detwiler Company, took an active part in the transaction which would have some tendency to show that it was really the I. H. Detwiler Company that was moving in the business. When the deed came to be made for the property, it was signed by George K. Detwiler, as vice-president of the I. H. Detwiler Real Estate & Investment Company, and it appears that he, in the absence of the president, was authorized to sign deeds. Of course, it was necessary to have a deed from the owner of the legal title to the purchaser. This deed was signed by him as vice-president, and also by the secretary of the company, in pursuance of the authority contained in the by-laws of the company.

So it appears that the controversy was as to whether this was a transaction between the I. H. Detwiler Company, represented by George K. Detwiler and Mr. Rausch, or the Detwiler Real Estate & Investment Company, represented by George K. Detwiler and Mr. Rausch, and there was evidence tending to support both claims. If George K. Detwiler was in fact representing the I. H. Detwiler Company, and the Detwiler Real Estate & Investment Company had done nothing in the premises whereby it was estopped from making the defense, there would be no liability upon the part of that company to Mr. Rausch for his commission. And it appears that if it was the I. H. Detwiler Company that was being represented, there would be one rule according to the customs in the city of computing the amount that would be due Mr. Rausch as commission; and if he was representing the owner, the Detwiler Real Estate & Investment Company, he would be entitled to a commission under another rule; that in the first case he would be entitled to share in the commission; in the second case he would be entitled to all the commission customarily made upon sales of real estate.

Now it seems to us that during the trial of the case something must have occurred to give it a direction or aspect which caused the court to see very distinctly that there was a question as to the amount of commission Mr. Rausch might be entitled to in

the one case or in the other, but caused him to lose sight of the fact that there was another question involved, *i. e.*, whether the defendant in this case was liable at all for any commission. If it was not a transaction for the plaintiff in error, if George K. Detwiler was not representing the plaintiff in error, then there would be no commission due from it. When the court came to charge the jury he said to them:

"It is therefore evident that the only controversy between the parties to this action is as to the amount of compensation that should be awarded the plaintiff. It is conceded that the usual and customary commission for procuring purchasers of real estate in this city is 5 per cent. on the first $1,000, and 2½ per cent. on the balance of the purchase price. The burden is upon the plaintiff to prove by a preponderance of the evidence the fair and reasonable value of the services rendered in procuring a purchaser for said real estate. If you find from a preponderance of the evidence that there was no agreement as to the amount of compensation to be allowed the plaintiff for procuring a purchaser for said real estate, then the plaintiff is entitled to recover the reasonable value of the services rendered by him in that behalf. If you find that there was no agreement as to the amount of compensation to be paid the plaintiff, then for the purpose of determining the fair and reasonable value of the services by him performed in procuring a purchaser for said real estate, you may take into consideration the amount of compensation usually and customarily paid in this city for such services, though that amount is not to be taken as conclusive. If, however, you find that there was an agreement as to the amount of compensation to be paid the plaintiff, that agreement is controlling."

Further along the court instructs the jury:

"Having determined the compensation to which the plaintiff is entitled, you will then compute thereon and add thereto interest at the rate of 6 per cent. per annum from the 16th day of February, 1906, to the first day of this term of court, to wit, April 2, 1906, and return the same with your verdict."

And then he hands to them a verdict which is prepared, which reads: "We find that there is due to the plaintiff from the defendant, the sum of $———", submitting to them the single question as to the amount due to the plaintiff, saying to them

in substance that the plaintiff is entitled to recover some amount—what amount you are to determine under the evidence.

We think that the charge was erroneous; that the main issue in the case was not submitted to the jury at all.

It is said by counsel for defendant in error that this question is not properly presented to this court, because the motion for a new trial does not specifically state as a ground that the court erred in the charge, and the bill of exceptions was not prepared and filed within forty days of the time that this error in the charge was committed, that the time was not protracted and carried forward, as it might have been by filing a motion for a new trial on that ground, giving the court another opportunity to rule upon it, and thereby making the time for the bill of exceptions forty days from the time of the ruling upon the motion. It has been held that though it is not necessary that an objection and exception to the charge to the jury by the trial court be included in a motion for a new trial, when it is in fact included in such motion, the time in which the bill of exceptions may be filed begins to run from the overruling of the motion, instead of from the time of the committing of the error in the charge; whereas the time will begin to run at the time of such error in case it is stated as a ground for a new trial in the motion therefor. The decisions bearing upon that will be found in the case of *Weaver* v. *Railroad Company,* 55 Ohio State, 491, and in *R. R. Co.* v. *Wright,* 54 Ohio St., 181.

The motion for a new trial in this case contains the following grounds: (1) That the verdict given by the jury was contrary to the weight of the evidence; (2) That the verdict given by the jury was contrary to law; (3) That the court erred in overruling defendant's motion to take the case from the jury and direct a verdict for defendant, and in excluding testimony by defendant and admitting testimony objected to by defendant.

In *Weaver* v. *Railway Company, supra,* Judge Bradbury, in discussing the statutes on the subject of new trials, bills of exceptions, etc., says:

"The sixth division of Section 5305, prescribing that a new trial may be had on the ground 'that the verdict, report or

decision is not sustained by sufficient evidence or is contrary to law.' * * * is broad and comprehensive. It would seem to include any error of law committed by the trial court in the course of the trial prejudicial to the losing party."

We conclude that according to the views of the Supreme Court expressed by Judge Bradbury this motion for a new trial containing the ground that the verdict was contrary to law includes the error of the court in its charge to the jury; and that, therefore, the bill of exceptions prepared within forty days from the overruling of that motion was prepared in due time.

On account of the errors in the charge above indicated the judgment of the court of common pleas will be reversed.

F. E. Calkins and *L. W. Story,* for plaintiff in error.

H. D. Merrick and *J. C. Jones,* for defendant in error.

YEA AND NAY VOTES IN COUNCIL ON STREET IMPROVEMENTS.

Circuit Court of Lucas County.

WILLIAM V. MCMAKEN v. BIRCHARD A. HAYES ET AL.

Decided, March 9, 1907.

Municipal Corporations—Sufficiency of Record—As to Yea and Nay Vote in Council—Benefits—To Abutting Property from Street Improvement—Determination of, is in Council Rather than the Courts —Assessable Frontage where Three Lots form a Flat-iron Shaped Plat.

1. Where the record discloses that at the meeting of the city council, at which there were proceedings with reference to a street improvement and the assessment therefor, certain members of council were present just prior to the taking of the vote, and does not disclose that any of the members left the room before voting, and it is definitely stated that the particular resolution and ordinance was passed by a certain number of votes being "yeas," and the number of "yeas" is the same as the number of members previously recorded as present, there is a substantial record of compliance with the statutory provisions requiring the vote of the council for street improvements to be by "yeas"

and "nays," although the court does not approve of the form of the record.

2. Whether or not abutting property has been benefited by a street improvement is not to be determined alone by the market value of the property after the improvement has been made, as compared with its value before; but the real question is whether there will be any potential benefits, and the determination thereof is within the discretion of council rather than of the courts.

3. Where three lots held by different owners form a flat-iron or wedge-shaped plot, bounded on three sides by public streets, the assessments for improving the adjoining streets should be levied on each lot separately, although all three form a single parcel and are used at the time for a common purpose; and such assessments should be based on the shorter frontage of each lot.

B. A. Hayes, for defendants, cited and commented upon the following authorities: Toledo v. Sheill, 53 Ohio St., 447; Walsh v. Baron, 61 Ohio St., 15; Walsh v. Sims, 65 Ohio St., 211; Dayton v. Bauman, 66 Ohio St., 379; Campbell v. Cincinnati, 49 Ohio St., 463; Thatcher v. Toledo, 19 C. C., 311; Streckert v. East Saginaw, 22 Mich., 104; Blair v. Cary, 2 C. C.—N. S., 25; Board of Education v. Best, 52 Ohio St., 138.

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

This is an action brought by the treasurer to collect certain assessments for paving Fulton and Floyd streets in this city, and is defended by Birchard A. Hayes, as executor, et al upon the grounds:

(1). That the assessments and all proceedings upon which they are based are entirely invalid by reason of the alleged fact that statutory requirements as to the taking of a vote by "yeas and nays" in the passage of certain resolutions and ordinances were not complied with.

(2). That assuming the validity of the proceedings for the construction of the pavements and the assessments for the costs thereof, the basis of the assessments was wrong in that too much frontage was charged against the lots assessed.

(3). That property derived no benefit whatever from the paving of Fulton street, so that any assessment for such paving was improper.

The most important question, but the one which was not perhaps so much dwelt upon either in oral argument or in briefs, is this: Whether the ordinance and the resolutions upon which the assessment was based were properly passed.

The proceedings of the counsel show in each instance at the beginning of the session, just what councilmen were present. It is not stated that a call of the roll was made, but is alleged in each instance that a certain number of the councilmen, and the requisite number for the passage of such resolution or ordinance, voted "yea," the names of the persons so voting not being specifically given in the statement of the vote. I have had the stenographer transcribe from his notes the evidence upon this subject as to each of these meetings, as shown by the journal of the board of councilmen, and from the transcript handed me I take by way of illustration one of the meetings and the record thereof.

From page 455, Vol. Q of the journal, it appears that a resolution to improve Floyd street from Ashland avenue to Fulton street by paving, etc., was adopted, seventeen persons voting "yea," or, as stated in the words of the record, "yeas, seventeen." It appears that there were present at the session, with regard to which I have just read, which was on May 12, 1890, councilmen, whose names are given, to the number of seventeen; one of the total membership of the council was absent. The names of these councilmen are given as present at the convening of the meeting. The record does not show whether any of the members who were present at that time left the room prior to the vote. It does not disclose that any other member of the council came in from the time of the convening of the council until the time the vote was taken.

I will not take time to read from the transcript of the various meetings. It is enough to say as to all of them that the record discloses the names of the persons who were present at the opening of the sessions, and what persons came in, or what persons departed during the session; and, although the names of the persons voting "yea" at the time of the claimed adoption of each resolution or ordinance are not given, still the number voting "yea" in each instance coincides with the number stated

in the earlier part of the record to have been present. It is insisted that this is not sufficient; that the statute requires the call of the roll and the anouncement by each member of his vote. That the statute so requires is unquestionably true. The roll should be called and each member should anonunce his vote. As has been stated in the opinion in a case in our Supreme Court Reports, and has also been very forcefully asserted in a decision from another state cited to us, the object of the law is to place each member of the council upon his individual responsibility, and also to inform the public how the member votes. It is the influence upon the mind of each member, caused by the knowledge that the public will be informed as to how he votes, that is the inducement to the requirement that he shall make public announcement of his vote upon the passage of each resolution or ordinance of the character such as we have here; that is, an ordinance of a permanent or general nature, or upon suspensions of rules so as to permit the ordinance to be read three times and passed at one meeting.

There is a case very close to the case at bar cited by counsel for defendants: *Steckert* v. *East Saginaw,* 22 Mich., 104. I will not stop to read it. There is much of the language in the opinion of Judge Cooley which perhaps might fully sustain the contention of counsel for defendants, and if it were the only case bearing upon this question which we have been able to find, we should perhaps be very greatly influenced by it; but there are other adjudications which we have had occasion to examine, and I will make reference to some of them in order that we may, if possible, ascertain the general current of authority upon the question of the sufficiency or insufficiency of such a record.

The case of *Barr* v. *Village of Auburn,* 89 Ill., 361, holds that where the journal of a board of trustees, six in number, of a village incorporated under Revised Statutes, 1874, Chapter 24, showed that only one member, naming him, was absent from the meeting of the board at which a certain resolution was passed, and contained this entry—"On motion of" (one of the members) "the following ordinance" (the one in question) "was unanimously adopted"—the showing of the journal was sufficient upon the question of the proper passage of the ordinance

under Section 41 of said act, which provided that the "yeas and nays" shall be taken upon the passage of all ordinances; that the same shall be entered upon the journal of the board, and that the concurrence of a majority of all the members elected in the city council shall be necessary to the passage of any such ordinance.

The statute there is not essentially different from our own in the section relied upon by counsel for defendants.

The case of *Preston* v. *Cedar Rapids,* 95 Iowa, 71, holds that where the only provision regulating the voting on the passage of an ordinance by the council of a city under a charter is a rule, adopted by the city, that "All votes taken on the adoption of ordinances shall be taken by the 'yeas and nays,' " it is sufficient for the record to show that all the aldermen voted for the ordinance.

In the case of *Downing* v. *Miltonvale,* 36 Kan., 740, with reference to a statute which provided that "All ordinances of the city shall be read and considered by sections at a public meeting of the council, and the vote on their final passage shall be taken by 'yeas and nays,' which shall be entered on the journal by the clerk," it was held that where the journal shows the full vote adopting the ordinance as a whole on its final passage, it will be presumed that it was read and adopted by sections. See also *Brophy* v. *Hyatt*, 10 Colo., 223.

It might be interesting to read more in detail from these various cases, but we have concluded, although we do not approve of the practice which has been adopted, or, at least, was followed at one time in this city, in the recording of such votes as this, that there has not been such a departure from the law as, under the circumstances of this case, would justify a holding that the entire proceedings with reference to these assessments are invalid.

We think that, where the record discloses the fact as to each session of council which is under investigation that certain named members were present, and it does not appear that those members or any of them departed from the session during the intervening time between its opening and the taking of the vote, or where it is indicated just which ones did depart, and where

the record discloses, as here, not simply that the particular resolution or the particular ordinance was carried by a certain number of votes, but where it is definitely stated upon each occasion that there were so many "yeas," indicating that there must have been a taking of the vote by "yeas and nays" as to each individual member, so as to enable the chairman or other person counting the vote to determine just how many voted for the resolution or ordinance, it is to be presumed that the persons whose names are given and whose number would equal the number said to have voted "yea" are the same persons who did so vote. Our judgment then is, that these proceedings are not invalid for the reason suggested by counsel for defendants.

Much difficulty has been elimated from our consideration of the case by the concessions of counsel for the plaintiff as to the invalidity of some of the assessments, with regard to which I need not go into detail—counsel have agreed as to those; but we are left with the inquiry whether too much frontage has been assessed as to certain of these lots, and also whether any benefit accrued to some of them by the construction of the Fulton street pavement.

Taking this latter matter first, it is urged by counsel for defendants that from the time that the Fulton street pavement was constructed the property has remained in the possession and ownership of the defendants, and that the pavement has become out of repair and substantially useless, perhaps, so that the market value of the property is not enhanced by it. The question is not, however, whether the market value is at present greater by reason of the pavement than it was before the pavement was constructed, nor whether the pavement is of present use to any of this property. The question is whether at the time the pavement was constructed it was substantially beneficial to the properties, and we are not sufficiently apprised that the judgment of the council was at fault in this respect to justify a holding that the properties were not at that time benefited. For aught that appears, although no sales have been made of those lots or either of them, it might have been done. The market value may have been enhanced, or the pavement may have been useful in some other respects. The assessments seem to be

pretty heavy upon these lots, and it is entirely possible that the properties are burdened far beyond the amount of any benefits received from the pavements, but this is so largely a matter of discretion with the council, a matter of judgment for them to exercise, that we do not feel justified in interfering with it.

It is also urged, as to the Fulton street pavement, that the improvements upon two of these lots, the three lots involved here being Nos. 14, 15 and 16, consist of a residence fronting on Ashland avenue, and it is claimed that with that building there is no very convenient or practicable way of improving the parts of the lots that abut on Fulton street, so as to make access to Fulton street therefrom particularly desirable or essential to the use of the properties. The three lots and their surroundings may be described succinctly as follows: They lie within an angle formed by the intersection of Fulton street and Ashland avenue, north of said intersection, and almost exactly at this intersection Floyd street crosses, so as to cut off or pass along the southerly end of one of the three lots. The combined property is in a sort of wedge or flatiron shape, lot 14 being the northerly lot of the three, 15 the middle one and 16 the southerly one, lots 14 and 15 extending from Ashland avenue to Fulton street, and lot 16 abutting on Ashland avenue and Fulton and Floyd streets, having a frontage on Floyd street of 32.1 feet. On Fulton street all the lots have longer lines than on Ashland avenue.

Referring again, before leaving the matter, to the contention that has been made that the property as it is improved by a structure on lots 14 and 15 derives no great benefit from the paving of Fulton street, we think that it may justly be said that it is not altogether the present use that is made of the property, but its potential use that fixes the market value of property, and that such use is to be taken into account by the persons assessing the benefits. To what extent the property as a whole may be enhanced in value, if at all, by reason of the Fulton street pavement we are unable to say, but that it may have been potentially benefited by the pavement, we think, is altogether probable, or, at least, not improbable. With the present residence on lots 14 and 15, it may not be desirable to build

shops or business buildings of any kind on the parts of lots 14 and 15 abutting on Fulton street, but possibly either at the present time or some future time it might be practicable to do so to the advantage of the properties. We dismiss, then, this question as to whether or not the properties have been benefited by the Fulton street pavement with the conclusion that we can find no just ground for interfering in this respect with the jurisdiction and action of the municipal authorities.

Another contention made by counsel for the defendants is, that the city's estimate of the frontage assessed is wrong. It appears that lots 14 and 15 have each a frontage, if we call it such, on Fulton street, of fifty-six feet, and on Ashland avenue of fifty feet. The lots strike Ashland avenue at right angles so that the frontage is shorter on that avenue than on Fulton street. The same thing is true as to lot 16, which has a frontage on Ashland avenue of ninety-nine feet and on Fulton street of 129.34 feet. It is conceded, I believe, by counsel for plaintiff, that as to 14 and 15 the Ashland avenue frontage should be taken, and that the assessment, which has been upon the basis of fifty-six feet, is too great. We think that counsel are entirely right in this concession, and that it is one that should be made. It is the conclusion at which we should have arrived as to these two lots, had the concession not been made.

As to lot 16, it is claimed now by counsel for plaintiff that the frontage on Ashland avenue of ninety-nine feet should be taken instead of 32.1 feet on Floyd street. In the case of *Toledo* v. *Sheill*, 53 Ohio St., 447, it was held, with reference to a corner lot, that the frontage to be assessed should presumptively be that on the shorter line. We have here, as to lot 16, not simply a lot abutting on two streets, but we have one abutting on three. We have no doubt that the principle of the decision applies, and our judgment is, that the frontage contended for by counsel for defendants is the correct one; that is, 32.1 feet. It is urged by counsel for plaintiff that these three lots are substantially one property. There is but one improvement upon them, and lot 16 is little more than a lawn or dooryard, it is said, appurtenant to the residence property on lots 14 and 15. It is said that a walk leading from the entrance to the house on

lots 14 and 15, angles across a part of lot 16, so that the three lots should be taken together as one residence property, and logically be assessed upon the Ashland avenue length of front. We think, however, that this contention of counsel for plaintiff can not be sustained. It happens at the present time that no especial use is apparently made of lot 16 other than that stated, but, as in the other case, we are to consider not simply the present, but the future, uses that may be made of the property The principle is just as applicable in favor of the defendants as it is against them. And it is to be remembered, as shown by the evidence, that the titles to the properties were, at the time of the assessments, in different people, lots 14 and 15 being owned by Mrs. Birchard Hayes, and lot 16 by the late Rutherford B. Hayes.

Our conclusion of the whole matter is, that the assessment should stand with the modifications which I have indicated: that lots 14 and 15 should be assessed each upon the basis of fifty feet front and lot 16 upon the basis of 32.1 feet. I believe that this disposes of all the questions that were presented. The decree of the court will be accordingly entered.

O. W. Nelson, for plaintiff.

B. A. Hayes, for defendants.

ACTION ON BOND OF BUILDING ASSOCIATION ATTORNEY.

Circuit Court of Hamilton County.

EDWARD DIENST ET AL v. THE FISCHMANN LOAN & BUILDING CO.

Decided, June 22, 1907.

Bond—Of Building Association Attorney—Action on, for Negligence in Examining Title—Jurisdiction Where One Obligor can not be Served—Subrogation—Estoppel—Laches.

A building association through the negligence of its attorney loaned $1,000 to one holding a defective title to the property upon which he gave a mortgage to secure the loan. The mortgagor died. The proceeds of the loan could not be traced to his creditors, but were probably used by the widow in satisfaction of her allowance of

$1,500 for the first year's support of herself and minor children. The attorney moved out of the jurisdiction and in the present suit on his bond service could not be obtained upon him. *Held:*

1. In an action on a bond which is in the nature of a joint obligation, the fact that one of the obligors could not be served with summons because not within the jurisdiction of the court does not prevent the taking of judgment against obligors who are within the jurisdiction.
2. The building association was without remedy on its mortgage by way of subrogation against the general creditors of the mortgagor or the first year's allowance to the widow.
3. The attorney having knowledge of the mistake which he had made, notice to him or his bondsmen of the loss the building association had sustained was not necessary, and laches or estoppel can not be pleaded in their behalf.

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

Upon an examination of the testimony in this case, and the finding of facts and conclusions of law of the trial court, we are of opinion that the record establishes the negligence of Edward Dienst in not reporting to the Fischmann Loan & Building Co. the true state of the title of the property on which it made its loan on Blue Rock street. As an attorney at law he held himself out as capable of examining titles to real estate in this county, and the omission on his part to report the correct status of the property under the administration of the probate court is an omission for which he can not be excused. This being so, can his bondemen be relieved from payment of the loss to the building association?

1st. Because the court had no jurisdiction to enter judgment against the bondemen for the reason that the principal, Dienst, was not served with a summons.

2d. Because the building association should have resorted to all of its remedies on its mortgage by way of subrogation against the general creditors of John J. Holbrook, and the $1,500 set-off by the appraisers for the widow's allowance.

3d. Because the building association is estopped by reason of laches.

As to the first contention, it is clear that the bond, being a joint obligation, suit could be maintained and judgment rendered against such obligors as were found within the jurisdiction of

the court where suit was brought, notwithstanding that some other joint obligor was without the jurisdiction, and could not be served with summons.

As to the question of subrogation, no part of the $1,000 loaned by the building association was traced to any one or more of the general creditors; this loan, together with all income from the estate of John J. Holbrook, was intermingled by Catherine Holbrook in one general account. The amount set off by the appraisers, $1,500, the widow's year's allowance, could not be obtained under the doctrine of subrogation. The evidence shows that the testator, John J. Holbrook, gave Catherine Holbrook by will all his real and personal property, and in doing this she received every asset of every kind belonging to the estate, and there can be no doubt but that this sum was used by her for her support and that of her minor children.

We do not think the building association is guilty of laches. Notice to Dienst or his bondemen of the loss to the building association was not necessary. Dienst himself knew of the mistake he had made in the examination of the title, and so stated when he later examined another lot for a second loan. It was his negligence that caused the loss, and it was his duty and that of his bondsmen in the first instance to protect themselves, if possible, by perhaps paying off the mortgage to the association, and then pursuing their remedy by way of subrogation, if such a remedy existed.

Judgment affirmed.

G. C. Wilson, Boyce & Boyd and *M. C. Slutes*, for plaintiff in error.

E. A. Hafner and *Robertson & Buchwalter*, contra.

ERROR IN DISMISSING ACTION WITHOUT PREJUDICE.

Circuit Court of Lucas County.

KLINK v. TOLEDO RAILWAYS & LIGHT CO.

Decided, June 8, 1907.

Dismissal—Court Without Power to Dismiss Without Prejudice, When —Error to Strike Material Averments from Pleading—Redundant Matter—Negligence—Where Passenger was Swept from Running Board by Car on Parallel Track.

1. Where a petition still states a cause of action against the defendant after the striking out of the redundant and improper matter, the court has no power to dismiss the action without prejudice in the absence of any pleading traversing the averments left in the petition.
2. It is prejudicial error for a court in an action for damages, growing out of the negligence of a street railway company in operating cars over tracks so close together as to endanger the safety of passengers standing on the running board, to strike from the petition language that is material and a proper averment of the cause of action.
3. But it is not prejudicial error to strike from a petition matter that sufficiently appears in another part of the petition.

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

Error to Lucas Common Pleas Court.

This is a proceeding in error, brought to reverse the judgment of the court of common pleas. It is a personal injury case. The plaintiff filed successive petitions, the last one being designated the "fourth amended petition," from which, on motion of the defendant, the court struck several passages, as redundant or improper pleading. Thereupon, as shown by the journal entry, plaintiff not desiring to avail himself of leave given to amend, or file additional pleadings, the action was dismissed by the court, without prejudice.

The petition alleges error both in the striking of these matters from the petition and the dismissal of the action. So far as the record discloses, the plaintiff below—who is plaintiff in error here—was objecting as strenuously to the dismissal of the case as he was to the prior ruling of the court on the motion to strike out. The journal entry shows an exception to both matters, and

it is to be noted that the dismissal without prejudice is by the court, and not under the provisions of the statute available to a party who, under certain circumstances, may before final submission of the action himself dismiss without prejudice.

We have carefully examined this fourth amended petition and our conclusion is, that after the striking out of the several matters the pleading still stated a cause of action against the defendant. This being so, it follows as a corollary that the court had no power to dismiss the action in the absence of any pleading by the defendant traversing the averments left in the petition. Some notion seems to have been entertained by counsel that, in order to maintain his position in court, it would be necessary for the plaintiff to make some amendment of the petition omitting the objectionable clauses or passages, and that, if the court granted him leave to amend, and he failed to avail himself of such leave, the court might then dismiss the action just as the court might do it after sustaining a demurrer to a pleading. The section of the code under which the court acted in striking this matter from the pleadings is Revised Statutes, 5087, which provides:

"If redundant, irrelevant, or scurrilous matter be inserted in a pleading, it may be stricken out on the motion of the party prejudiced thereby; and obscene words may be stricken from a pleading on the motion or a party, or by the court of its own motion."

It is not like a requirement by a court that a party shall make his pleading definite and certain; but the order is self-operating, and in the case at bar it will be noted that the motion which was filed was, not that the plaintiff be required to amend the fourth amended petition by omitting therefrom or striking out the passages assumed to be redundant or otherwise objectionable, but the motion was, as to each passage, that the court strike such passage from the amended petition, and in the journal entry it is said that—

"The portions of said fourth amended petition in each of said paragraphs in said motion set forth are hereby stricken from said fourth amended petition."

Our judgment is, that no amendment or further pleading was necessary to preserve the plaintiff's standing in court.

We think, then, that the court erred in the dismissal of the action after the striking of matters from the pleading which did not so rob it of its vitality as a pleading as to make it inefficient to obtain judgment upon it upon default.

The plaintiff in error claims also that the court erred in the striking of these several allegations from the petition. The court had previously stricken certain matters from the third amended petition, after which action the fourth amended petition was filed. The court overruled the motion of defendant as to some of its claims, but as to others, granted it; and we think as to some of the passages stricken from the fourth amended petition, the court erred.

The plaintiff's claim is based upon an asserted negligence of the defendant company in permitting the proximity of two of its tracks in the city upon which cars were permitted to pass one another so closely as to endanger the lives of persons or passengers standing upon the so-called running board extending along the sides of the car, used for the purpose of getting upon and off the car. The plaintiff alleges that he had stepped upon the running board of one of these cars, on the left hand side of the car, and, before he had time to reach a seat, another car approached rapidly from the opposite direction, and he was pushed off and severely injured. He alleges various kinds of negligence on the part of the company and makes certain allegations calculated to relieve himself from the imputation of contributory negligence. One of the passages stricken out by the court reads as follows:

"Plaintiff says that he did not know or observe that the defendant had a double track in said Front street upon which to run its cars." * * *

And again:

"There being no rail nor other guard upon said left-hand side of said car to prevent plaintiff from so boarding said car or warn him there was any danger in so doing."

As to the language of both these passages, we think that the court's action was not prejudicial; indeed, we are inclined to think that, as to a part of it, it was redundant, being otherwise expressed in another part of the pleading.

The court also struck out this language:

"And so it was, that plaintiff was compelled to walk along said running board, while said car was in motion, to reach a seat inside."

This sufficiently appears in another part of the pleading and we think that the action of the court in striking it out was not prejudicial.

I now come to the language stricken out by the court which does seem to us material and matter of proper averment and as to which we think that the action of the court in striking it from the pleading was prejudicial error. I will read the language for the guidance of the court below in such subsequent proceedings as may be had:

"Plaintiff further alleges that the said double track that defendant laid and operated in Front street, at and along the locality where plaintiff was struck and injured, was wrongfully, carelessly and negligently constructed and maintained by defendant, as it well knew, but plaintiff did not know, with such narrow space between the two tracks that there was danger of a passenger standing on the running board of one car being struck by another car operated in the opposite direction.

"Plaintiff further says that on the day he was injured, and for a long time prior thereto, the defendant was negligently operating cars along its line of double track in said Front street (including the one so boarded by plaintiff), of such great and unusual widths as to endanger the safety of its passengers who might be standing upon the running board of its cars, all of which was well known to defendant but not known to plaintiff when he boarded said car.

"Plaintiff further says the defendant wrongfully, carelessly and negligently failed to have said running board on the left side of the car which plaintiff so boarded turned up or folded against the side of the car, as was customary under the circumstances, so as not to invite and receive passengers on said side." * * *

We find no other errors in the record; but for those errors to which I have invited attention, the judgment of the court of common pleas is reversed, and the cause remanded with direction to reinstate the case upon the docket for such other proceedings as may be proper.

O. S. Brumbach and *T. F. Connell,* for plaintiff in error.

Smith & Baker, for defendant in error.

PAYMENT UNDER A BUILDING CONTRACT FROM WHICH THERE WERE DEVIATIONS.

[Circuit Court of Hamilton County.]

THE MOORES LIME CO., v. THE NATIONAL CHEMICAL CO., ET AL.

Decided, June 15, 1907.

Building Contract—Modification of, by Mutual Agreement—Owners to Pay what the Work was Reasonably Worth—Extent to which the Contract Controls and to which the Contractors are Entitled to their Quantum Meruit—Pleading—Evidence—Failure of Proof under Section 5296 Relating to Variance.

The changes from the building contract, involved in this case, made by consent of the parties thereto, were not of such a nature as to abrogate the contract and permit a recovery of what the entire work was reasonably worth; on the contrary, it is a case where the estimate should not be excluded, but payment should be made under the contract as far as it can be traced, and for anything beyond it the contractors are entitled to their *quantum meruit.*

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

The plaintiff in its petition avers that the defendants, the National Chemical Co. and the firm of Houstler & Fox "entered into various written and verbal contracts and agreements with each other by which the defendants, Houstler & Fox, agreed to do and cause to be done certain work and labor and to furnish certain materials in and about the erection of certain buildings for the use and occupancy of the defendant, the National Chemical Co., in their business and the said National Chemical Co. agreed to pay said Houstler & Fox therefor at prices stipulated in said contracts and agreements"; that said Houstler & Fox have done everything on their part to be done under said contracts and agreements; that a large sum is due thereon to said Houstler & Fox; that it holds two orders in the sum of $1,557.45 drawn by the said Houstler & Fox upon the said National Chemical Co., which the chemical company refuses to pay; and prays for an accounting between the said chemical company and said Houstler & Fox, and that said chemical company be ordered to pay the plaintiff the amount of said orders out of any balance found due to Houstler & Fox.

The defendants, Houstler & Fox, by answer admit the allegations of the petition.

The defendant chemical company admits that it entered into contracts with Houstler & Fox to do certain work and to furnish certain materials in and about the erection of certain buildings, and agreed to pay said Houstler & Fox therefor certain stipulated prices, but denies that Houstler & Fox have done everything on their part to be performed under said *contract*, or that there remains due to said Houstler & Fox a large sum of money or any sum of money, and joins in the prayer of the plaintiff for an accounting.

The cause was referred to Morison R. Waite for the trial of both the issues of law and fact arising therein, and said referee was ordered to report his findings and decision to the court of common pleas.

Trial was had before the referee, the evidence reported in full, and his conclusions of fact and law stated separately, showing a balance due from the National Chemical Co. to Houstler & Fox of $1,438.60, with interest from July 16, 1903, which amount the plaintiff is entitled to recover on its orders aforesaid.

This report was confirmed by the court of common pleas and judgment rendered for the plaintiff. The cause comes into this court on appeal by the chemical company and is submitted upon the report of the referee, including the evidence heard by him. The chief contention arises upon the following finding made by the referee:

"After the making of said contract of October 14, 1902, for the work of the refining house, and before commencing said work and afterwards, the said contract was by mutual agreement of the parties thereto materially modified with respect to the execution of the concrete work on said refining house, and it was agreed by the parties that the said Chemical Co. should pay for the work on said building what it was reasonably worth. Said work was reasonably worth $8 per yard for the first and second stories and $9 per yard for the third story measured in the wall. Said concrete work in said refining house measured in the wall in the first and second stories amounted to 453 yards and in the third story 346 yards."

It is manifest, from the present state of the pleadings, admitting that the work was to be done at a stipulated price, that

the claim is unproved in its general scope and meaning by evidence of an agreement to pay what the work was reasonably worth, which should be deemed a failure of proof within the meaning of Section 5296, Revised Statutes.

The contract of October 14, 1902, provided that Houstler & Fox should receive $5 per cubic yard for the concrete work and the specifications which were made a part of the contract provided that the concrete should be one part cement, three parts sand and four parts broken stone or clean gravel; all materials to be furnished by the contractor. The material modificaiton of the contract consisted in changing the mixture to one part of cement and six parts of sand and gravel. The proof shows that the change was made by direction of the chemical company; that it made a better wall, and cost the contractors more money than a mixture of one to seven of sand and gravel and still more than a mixture of one to seven of sand and broken stone. It is contended, however, by the chemical company that the specifications gave it the option of either broken stone or gravel, but we think not, as this provision was made for the benefit of the contractors and that the choice of material could be exercised by them alone.

The other modifications of the contract, such as mixing the materials in a machine instead of by hand on a board platform, are of minor importance, and the question is whether the change of mixture was such a deviation from the contract as would abrogate it and permit a recovery of what the entire work was reasonably worth. We think not, as the general plan of the building as well as the character of the work to be performed remained the same, the only change being in the material used and the manner of mixing it, which resulted in the use of more cement and required more labor, for which the contractors should be allowed what they were reasonably worth.

The rule is stated in *Robson* v. *Godfrey & Thomas,* 1 Holt's, 236, as follows:

"Where work is done upon a special contract, and for estimated prices, and there is a deviation from the original plan by the consent of the parties, the estimate is not excluded, but is to be the rule of payment, as far as the special contract can be traced;

and for any excess beyond it, the party is entitled to his *quantum meruit.*"

The testimony in this case shows that a mixture of a cubic yard of material composed of one part cement, three parts sand and four parts broken stone would lay twenty-five cubic feet in the wall, and that the same amount of material composed of one part cement and six parts sand and gravel would measure in the wall only sixteen and two-thirds feet and would require nine-fourteenths of a cubic foot of cement more than the mixture of one to seven of sand and stone, which was worth $2.30 per barrel—about forty-three cents.

The account may be stated as follows:

755 mixtures of 1 to 7 of sand and gravel equals	699	cu. yds.
755 mixtures of 1 to 6 " " " " "	466	" "
Deficiency occasioned by change of mixture.....	233	" "

699 cubic yards as per contract at $15.....	$3,495.00
Extra cement for 755 mixtures at 43 cents.....	324.65
233 cubic yards each reasonably worth $8.33, equals...	1,941.00
	$5,760.65

This amount is $77.35 less than that found by the referee, and his finding should be modified to that extent.

The findings of the referee as to the other disputed items will not be disturbed. As heretofore indicated, the plaintiff is not entitled, under the pleadings as they now stand, to recover more than the stipulated price of $5 per cubic yard, but the pleadings may be amended to conform to the facts and this opinion, when a judgment may be entered confirming the report of the referee as herein modified.

Charles M. Leslie, for plaintiff.

Frank F. Dinsmore, contra.

PRESUMPTION AS TO CANCELLATION OF WILL.

Circuit Court of Ashtabula County.

F. CLEMENT CROSBY ET AL v. JOHN C. CROSBY ET AL.

Decided, January Term, 1907.

Wills—Contest of—Obliteration of Signature of Testator—As to Whether It was Done with the Intention of Cancelling the Will—Presumption that the Testator Acted Animo Revocandi, When.

Where a will after its execution remains in the possession of the testator until his death, at which time it is found among his papers with his name erased, the presumption is that the testator erased his name, and that he did so with the intention of revoking the will.

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

Error to Ashtabula Common Pleas Court.

The action below was the contest of a will. The principal ground of contest was that the testator intentionally revoked the will before his death by cancelling and obliterating the same.

The will was in the testator's possession after its execution, and after his death it was found among his papers with the name entirely erased, and there was some evidence tending to show that the testator erased his name, but for what purpose is not entirely clear. On the part of the proponents of the will it is claimed it was done only for the purpose of making his name more definite, and that it was done before the execution of the will; while by the contestants it was claimed that it was done after the execution of the will, and with the intention of revoking it.

The first name of the testator was originally signed by him with his initial; this was entirely erased and his name signed in full about an inch below the original signature, with indication that something had been written between the original signature and the subsequent one which had also been obliterated.

The evidence is very conflicting upon the question as to how the erasure of the original name came to be made, whether it was done for the purpose of simply correcting the signature and be-

fore execution, or whether it was done with the intention of revoking the will.

The jury found it was done with the intention of revoking it and we feel the jury was fully justified in so finding and the trial court in confirming the verdict.

The important question in the case, however, is upon the charge of the court. The court charged the jury that if they should find that the will remained in the possession of the testator from the time of its execution until his death, then it would be presumed that the testator himself erased his name, and that he did so with the intention of revoking the will. Was this correct?

While, so far as we are aware, there is no case in Ohio directly bearing upon this question, yet many decisions in other states support the charge of the court, and we think the charge was correct.

In the case of *Smock* v. *Smock,* 11 New Jersey Equity Reports, 156, it was held:

"1. A writing sought to be established and proved as the last will of decedent, was executed by him as his will in due form of law in 1846. After testator's death in ——, it was found, on the day of his funeral, by his widow and two of his sons, in a private desk of decedent. It was wrapped up in a newspaper. The name of testator and the seal were cut off with a sharp instrument, leaving only the letter B—the first letter of testator's name—partly remaining. *Held*: That the testator is presumed to have done the act, and that the law further presumes he did it *animo revocandi.*"

In the opinion of the chancellor it is said:

"The will was in the custody of the testator during his life, and upon his death it was found among his depositories, canceled, with his name and seal cut off. Under such circumstances, the testator himself is presumed to have done the act, and the law further presumes that he did it *animo revocandi* (1 Williams on Ex., 78). In a late case, decided in the prerogative court (afterwards taken up on appeal to the Delegates, where the decision below was affirmed), a will was found in the repositories of the deceased, and it appeared that some one had carefully cut out, apparently with the scissors, the whole of the instrument from its marginal frame; the attestation clause was also cut through, but no other part of the writing; and it was held that

the court was bound to construe the act as one done by the testatrix for the purpose of canceling, revoking, or destroying the validity of the instrument, and consequently that it was thereby revoked (*Moore* v. *Moore*, 1 Phillim, 375; 1 Williams on Ex., 74). The same principle will be found established by the following cases: *Freeman* v. *Gibbons*, 2 Hagg. Eccl. Rep., 328; *Bumgarten* v. *Pratt*, *Ib.*, 329; *Richards* v. *Mumford*, 2 Phillim Rep., 23; *Loxley* v. *Jackson*, 3 Phillim Rep., 126; *Wilson* v. *Wilson*, 3 Phillim Rep., 552; *Davies* v. *Davies*, 2 Add. Eccl. Rep., 223; *Colvin* v. *Frazer et al*, 2 Hagg. Eccl. Rep., 266; *Holland* v. *Ferris*, 2 Bradford's Rep., 334; *Bulkley* v. *Redmond*, *Ib.*, 282; 6 Wend., 180."

In the matter of the probate of the will of Engelina S. White, deceased, 25 New Jersey Equity Reports, 501, it is held:

"The tearing out of the seal affixed to a will, and of part of the testator's signature, and the obliteration of the rest of his name and of the names of the witnesses, are a cancellation of the will.

"From the finding of a will in testator's box thus canceled, the presumption arises that the cancellation was his act, done *animo cancellandi*, and that, by that act, he intended to render the will null and void."

In the opinion it is said:

"The will bears clear evidence of the intention to revoke it. The tearing out of the seal and of part of the signature of the testatrix, and the obliteration of the names signed to the will, are a cancellation of the will (*Avery* v. *Pixley*, 4 Mass., 460; *Hobbs* v. *Knight*, 1 Curties, 768; *Goods of James*, 7 Jur., N. S., 52; *Price* v. *Powell*, 3 H. & N., 341; *Smock* v. *Smock*, 3 Stockt., 156). And from the fact that the will was found in the possession of the testatrix, in her repository, thus canceled, the presumption arises that the cancellation was her act, done *animo cancellandi*, and that, by that act, she intended to render the will null and void. *Smock* v. *Smock*, *supra;* 4 Kent's Comm., 532; *Davies* v. *Davies*, 1 Lee, 444; *Lambell* v. *Lambell*, 3 Hagg., 568; *Baptist Church* v. *Robbarts*, 2 Barr, 110."

Judgment of court of common pleas affirmed.

Pickard, Hoyt, Munsel & Hall, for plaintiffs in error.

Calvin, Hogue, Goddard & Starkey, for defendants in error.

THE LICENSING OF AMUSEMENTS.

Circuit Court of Hamilton County.

VILLAGE OF SILVERTON v. CHARLES H. DAVIS.

Decided, June 8, 1907.

Ordinance—Requiring the Taking out of a License for Certain Amusements—Rendered Invalid by Conferring Discretion on the Mayor—Evidence Necessary to Convict of Violation of—What the Affidavit Must Charge—Bills of Exceptions—Criminal Law—97 O. L., 504 (30)—*Municipal Corporations.*

1. Where a bill of exceptions in a prosecution before a mayor was duly signed and regularly filed in the common pleas, it is not open to objection in the circuit court on the ground that it was not filed by the mayor or noted on his docket.
2. Under an ordinance which provides that "no person shall be engaged in any business hereafter mentioned (including the keeping of public ball rooms or ball grounds) until he shall have obtained a license therefor," it is necessary in order to charge an offense that the affidavit allege the accused unlawfully failed to secure a license to conduct the business, and not that he unlawfully engaged in the business.
3. Where such an ordinance delegates to the mayor the power to grant or refuse a license at his discretion, it confers upon him more than a ministerial or administrative duty, and is invalid to the extent that it is not general and does not apply to every person.
4. In order to warrant a conviction for violation of an ordinance providing for the licensing of ball grounds, etc., there must be evidence that the accused was engaged in the business as keeper proprietor or manager, and this requirement is not met where the evidence goes no further than to indicate that the accused maintained a ball ground and pavilion on his private grounds, but not for profit and with which the public had nothing to do.

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

The defendant in error was tried before the mayor of the village of Silverton in September, 1906, upon an affidavit and warrant, charging that the defendant in error as the owner and keeper of ball grounds in the village of Silverton, did unlawfully engage in the business of using said ball grounds, by

having ball playing on said grounds in said village, without first taking out a license therefor as required by law. And also in August, 1906, said defendant in error was tried before the mayor of the village of Silverton upon an affidavit and warrant charging that he did unlawfully as the owner and keeper of a public ball room or dancing pavilion located in said village engage in the business of using such public ball room or dance pavilion for public dancing without first taking out a license therefor as required by the laws of said village made and provided.

The defendant in error was found guilty by the court in both cases. A motion for a new trial in each case was overruled by the court and the defendant sentenced in each case to pay a certain fine and costs. Bills of exceptions were signed by the mayor, containing all of the evidence offered on the trials, and the judgments of the mayor were reversed in the court of common pleas. In this court it is now sought to reverse the judgments rendered by the court of common pleas.

At the outset plaintiff in error makes objection to the hearing of these causes in this court on the ground that the bills of exception can not be considered by the court, for the reason that they were not filed by the mayor, but were filed by the defendant in error, and the filing of the bills was not noted upon the mayor's docket. We do not think this objection is well taken, as the bill was duly signed and filed in the court of common pleas. *Bodosi* v. *The State,* 13 C. C., 275.

Defendant in error moved the trial court to quash the affidavits and warrants, which motions were overruled. He also demurred to the same, which demurrers were overruled, and said causes proceeded to trial.

We are of the opinion that the trial court erred in not granting the motions and in not sustaining the demurrers. Section 1 of the ordinance passed by the village of Silverton, providing for licenses is as follows: "That no person shall be engaged in any business hereafter mentioned until he or she shall have obtained a license therefor." Section 6 provides that keepers of public ball rooms shall pay a license fee of $75 per annum; and

Section 8 provides for a license for keepers of ball grounds within the village.

While it will be seen from this ordinance that the offenses for which the defendant in error would be liable were the failure or neglect to pay the license fee if he kept a public ball room, or if he was the keeper of ball grounds, these offenses are not charged in the two affidavits; they simply charge that he unlawfully engaged in the business, instead of charging that he unlawfully failed to secure a license to conduct the business. *O'Rourke* v. *The State,* 6 C. C., 612.

Defendant in error also urges that Sections 6 and 8, relating to the issuance of licenses for public ball rooms and ball grounds, delegates to the mayor the power of granting or refusing a license at his discretion. In this respect the ordinance does delegate discretionary power to the mayor, and not a mere ministerial duty; and while ministerial or administrative duties may be delegated to the mayor legislative duties can not be. It gives to the mayor the power of discrimination between applicants for licenses; it therefore is not general and does not apply to every person, and this would render the ordinance in this respect invalid. Upon an examination of the evidence in these cases, we are of the opinion that upon this ground alone the defendant in error should have been dismissed.

The law providing for the regulation by municipal corporations of "public ball rooms" and "ball grounds" is found in the 97th Ohio Laws, page 504, Section 30. This act gives to municipal corporations the power to regulate such matters by granting a license for them. The latter part of Section 30, provides that in the trial of any action brought under the power of licensing, the fact that any party to such action represented himself as engaged in any business or occupation for the transaction of which a license may be required; or as the keeper, proprietor or manager of the thing for which a license may be exacted; or that such party exhibited a sign indicating such business or calling, or such proprietorship or management, shall be conclusive evidence of the liability of such party to pay the license thereof. This, therefore, is indicative of the kind of

evidence that should be adduced to control an action to find one guilty of not taking out a license for the conduct of a "public ball room" or "ball grounds."

The section relates to one engaged in the "business" or "occupation," or one who "keeps," or is "proprietor" of, or "manager" of a certain "thing or business." The evidence nowhere shows that the defendant in error represented himself in the business or occupation of keeping a public ball room or ball grounds, or as the keeper, proprietor or manager of a public ball room or ball grounds. No sign was exhibited by him indicating such business or calling, or such proprietorship or management, but, on the contrary, while games of ball were played upon the grounds in question by permission, and while there was a covered pavilion, open on all sides, upon the grounds where people might seek shelter in case of necessity, or even dance if they so chose, yet there is nothing in the testimony to show that these ball grounds were for public exhibitions, were used for the purpose of profit, or that the pavilion itself was used in any way from the business standpoint of one engaged in running it for gain. On the contrary, the evidence shows that the grounds were marked "private grounds," and the most that can be said about them would be that they were permitted by the owner to be used for picnic grounds. It was simply a place on private grounds where people were allowed to assemble for the purpose of recreation; no admission fee was charged; the ball grounds and the pavilion could not in any sense be construed to impose upon the owner the duty of taking out licenses for their use, as the statute evidently means that such use must be one for business or occupation, which necessarily implies the use of a public ball room and ball grounds for profit. We must recognize the distinction in all matters of amusements, which are public in their nature, to which all the public are invited, for which admission fees are charged, and gain or profit is made, as theaters, race-courses, and other kinds of amusements mentioned in the section under consideration, from those private amusements in which individuals engage and with which the great mass of the people as the public have nothing to do.

In conclusion, therefore, we are of the opinion that the defendant in error in no wise offended against the law and the ordinance in question, and the judgment of the court of common pleas will be affirmed.

Frank H. Reppert and *A. E. Painter,* for the village.

Charles M. Leslie and *Frank F. Dinsmore*, contra.

NEGLIGENCE IN DRIVING ALONG A STREET RAILWAY TRACK.

Circuit Court of Hamilton County.

THE CINCINNATI TRACTION CO. v. LOUIS KROGER.

Decided, June 15, 1907.

Negligence—And Presumption of Contributory Negligence—Where a Wagon was Struck by a Street Car—Charge of Court—Doctrine of the Last Chance—High Rate of Speed not Negligence Per Se.

1. While it is not negligence *per se* to drive along a street railway track in the direction traveled by the cars, a presumption of negligence is raised by the admission of the driver that he traveled for three hundred feet at a slow trot without looking behind for an approaching car, and that his only reason for being in that position rather than on the side of the street was that the wagon ran more easily on the tracks.
2. It is error to charge a jury with reference to the doctrine of the last chance where there is no allegation in the petition which would warrant an application to the rule of "last chance."
3. Whether a motorman who ran his car at an unusually rapid rate of speed on a dark and stormy night was guilty of negligence as a matter of law depends upon the circumstances of the case.

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

Although it is not in itself negligence to drive a wagon along a street railway track in the direction traveled by the cars, it becomes such if the evidence shows that it was needless, and that the driver failed to keep a proper look-out when he knew a car was about due.

The driver in this case, who was an employe of the plaintiff, testified that he had driven about 300 feet at a slow trot without

looking back; that there was no reason why he could not have driven on the left track, or on the left side of the road, "only it run much easier on the tracks than it did at the sides"; nor any reason why he could not have looked oftener for an approaching car.

This raised a presumption of contributory negligence which was not removed by plaintiff's testimony. The testimony of the defendant tended to prove that the wagon was in the left track, and suddenly turned into the right track a moment before being struck by the car, which makes the statement, which was undisputed by the plaintiff's testimony, a disputed fact. No motion was made at the conclusion of plaintiff's evidence, hence this court can not now say as matter of law that the plaintiff's driver was guilty of contributory negligence.

There is no allegation in the petition of such negligence of the defendants as warrants the application of the rule of "last chance"; hence the court erred in charging the jury upon this doctrine both in the general charge and in special instruction Number 3. *Drown* v. *The Northern Traction Co.*, 76 O. S., —.

The court erred also in charging the jury without qualification that " the burden of proving contributory negligence on the part of the plaintiff's driver is upon the defendant."

In answer to a question by the foreman of the jury after their retirement the court charged as follows:

"A motorman who runs his car at an unusually fast rate of speed on a dark and rainy night under the circumstances of *every particular case* is guilty of negligence; and if such negligence directly or proximately causes injuries, the traction company is liable."

This was too broad and should have been confined to the circumstances of this particular case; nor is it sound as a general proposition of law, for the rain and slippery track on a down grade or other circumstances beyond the control of the motorman may have caused the unusual speed.

The trial judge might well have set the verdict aside because not sustained by sufficient evidence, but this is not so manifest as to require this court to reverse the judgment.

For the errors above stated the judgment will be reversed and the cause remanded for a new trial.

Geo. P. Stimson, for plaintiff in error.

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

JURISDICTION IN A CRIMINAL CASE AFTER TERM.

Circuit Court of Lucas County.

MAX LISBERGER v. STATE OF OHIO.

Decided, November 7, 1906.

Criminal Law—Conviction for Homicide—Motion for New Trial on the Ground of Newly Discovered Evidence—Filed After Term—Jurisdiction to Entertain—Remedy of the Accused.

A trial court is without jurisdiction to hear a motion for a new trial in a criminal prosecution at a term of court subsequent to that at which the verdict was returned.

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

Error to Lucas Common Pleas Court.

Lisberger was convicted of the crime of murder in the second degree and sentenced to life imprisonment. At the term at which he was convicted he filed a motion for a new trial, setting up, among other grounds for a new trial, newly discovered evidence, and in support of that ground affidavits were filed. That motion came on for hearing and was heard at that term of court, and was overruled. And at a subsequent term—I think at the next term of court, although I am not certain of that—another motion for a new trial was filed, and the chief ground of that motion was newly discovered evidence; and in support of that motion a number of affidavits were filed. Upon the overruling of the first motion and the entering of judgment a bill of exceptions was taken; and upon the overruling of the second motion another bill of exceptions was taken, which is called in the record a supplemental bill of exceptions. After the overruling of the first motion a petition in error was filed in this court. After that the second motion for a new trial was filed, and upon

its being overruled, as I have said, a supplemental bill of exceptions was taken, and then a supplemental petition in error was filed in this court.

It is said to us that the trial judge overruled this second motion for a new trial upon the ground that he had lost jurisdiction over the matter; that the second motion for a new trial was not filed within the time provided by law. Section 7350, Revised Statutes, sets forth the causes or grounds upon which a motion for a new trial may be granted, and among them the fifth paragraph is, "Newly discovered evidence, material for the defendant, which he could not, with reasonable diligence, have discovered and produced at the trial."

Section 7351, Revised Statutes, provides that:

"The application for a new trial shall be by motion, upon written grounds, which shall be filed at the term the verdict is rendered, and, except for the cause of newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial within three days after the verdict was rendered unless unavoidably prevented."

The first motion for a new trial was filed in due time. The second motion was not filed within three days, nor was it filed within the term. It was filed at a subsequent term.

We have looked into the record very carefully, and we are impressed by these affidavits, indeed, we are convinced thereby, that this man did not have a fair trial; that he was unfairly treated by the witnesses for the state; that on account of some prejudice against him and some feeling for the deceased, these witnesses combined together to convict this man and send him to the penitentiary; and it seems to us that the verdict of murder in the second degree could hardly have been justified, if the statements set forth in these affidavits are true; and they stand here in the record uncontradicted. The man should not have been convicted of a higher crime or offense than manslaughter, and perhaps he acted in self-defense, so that he should not have been convicted at all. It seems to us that he is the victim of a wicked conspiracy, and if it was within the power of the court to grant him relief we should be swift to do it.

But we find no authority for acting upon a motion for a new trial filed after the term in a criminal case; we know of none. We think that is the policy of the law that the matter shall be concluded by the action in the case taken at the term; and it may be readily perceived that if it were otherwise, there would be no certainty about results in criminal cases, and the state would often be taken at great disadvantage. If a motion might be filed after the term, there is no reason why it might not be filed at any time, no matter how remote from the time of the trial; even after the state's witnesses had disappeared or been scattered, or perhaps died; so that the state might be unable to show the true state of the case on a new trial. We have no doubt but that the statute is founded upon the theory that that should not be permitted; but that if it should turn out that a person is wrongly convicted he should not be without a remedy; and we believe the remedy is with the board or tribunal or officials that may either pardon, or in some way, modify the result.

We think that this is a case that should be presented to the pardon board or the board of managers, who may not only pardon, but reduce or commute the sentence. There the state may be able, by counter affidavits, to put a different face upon the matter. The state here, relying upon the statute, seems to have thought it idle and useless to file counter affidavits. I speak of the matter as it appears here in the record, with these affidavits standing uncontradicted. It may be that when the matter shall be presented to the proper tribunal, these affidavits will be contradicted, and that a different face could be put upon the matter.

We see no error in the action of the court of common pleas in overruling the motion for a new trial. Sufficient showing was not made upon the first motion, which was filed in due time, to require the court to grant a new trial, and we think the court properly held upon the second motion. We find no errors in the record requiring a reversal. Therefore the judgment will be affirmed.

Frank Mulholland and *C. E. Holland,* for plaintiff in error.

L. W. Wachenheimer, Prosecuting Attorney, and *Ralph Emery,* Assistant Prosecuting Attorney, for defendant in error.

PROMISE BY TESTATOR OF REIMBURSEMENT FOR SERVICES.

Circuit Court of Hamilton County.

ANNA C. GOGREVE v. ELIZABETH DAY.

Decided, June 22, 1907.

Wills—Devise for Life with Power to Sell—Promise of Reimbursement for Faithful Services—Constitutes a Binding Contract Against Estate of Promisor—Action to Quiet Title—Presentation of Claim to Executor.

1. The devise of real estate in this case was for life only, with power to sell for the benefit of the estate.
2. Where long and faithful service by the plaintiff was acknowledged by the decedent, who exacted a promise that these services should be continued to his wife after his death, with the direction that the wife make suitable provision for the services rendered and to be rendered, a binding contract is made and a debt created against the estate for services performed after as well as before the death of the decedent.
3. A conveyance under such circumstances by the widow to the plaintiff of property forming no more than an adequate consideration for the services rendered, is a conveyance for the benefit of the estate, and plaintiff is entitled to a decree quieting her title to said property, notwithstanding she had never presented her claim to the executor who had knowledge of its existence.

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

This action was commenced to quiet title to certain real estate conveyed to plaintiff by Christina Behrens, widow of Frederick Behrens, who died testate. His last will and testament contained the following provisions, after giving all of the personal property to his wife:

"Item 3d. I give, devise and bequeath to my beloved wife, Christina Behrens, all the real estate of which I may die seized and possessed of, or to which I may be entitled at the time of my death, she to have, hold and enjoy the same for and during her natural life; and I hereby authorize and empower my said wife to sell any and all of my real estate, with the exception of the house and lot known as number twenty-one (21) Woodward

street. Cincinnati, Hamilton county, Ohio, and to convey the same by a good and sufficient deed in fee simple and the purchaser shall not be required to look to the application of the purchase money."

Items fifth and sixth give certain charitable bequests to be paid in money after his wife's death.

"Item 7th. All the rest and residue and remainder of my estate I give, devise and bequeath to my heirs at law, according to the laws of descent and distribution of the state of Ohio."

Held: The wife took a life estate only in the real estate, with power to sell the same for the benefit of the estate. *Jones* v. *Lloyd*, 33 O. S., 572; *Baxter* v. *Bowyer et al*, 19 O. S., 490; *Huston et al* v. *Craighead et al*, 23 O. S., 208.

The plaintiff, though not adopted, lived with the testator and his wife as their child, performing during the best period of her life, from the age of eighteen till about forty-eight years, not only every sort of menial service, but her filial duty toward them.

The testator, a short time before his death, recognized and acknowledged his indebtedness to her for such service, and exacted a promise from her to perform a like service for his wife after his death, and directed his wife to make a suitable provision for the plaintiff on account of services rendered and to be rendered. This constituted a binding contract between them, and upon performance by the plaintiff of the services required, created a debt against the estate for services performed after the death of the testator, as well as those before.

That the services performed during a period of nearly thirty years were an adequate consideration for the real estate conveyed is fully supported by the testimony, hence the power of sale was duly executed for the benefit of the estate. The fact that no claim was presented by the plaintiff to the executor is of little moment, as the object of the law in requiring the presentation of claims against an estate is to apprise the executor or administrator of their existence, amount and character, which in this case were already known. *Kyle's Admr.* v. *Kyle*, 15 O. S., 15, at 20 and 21.

The plaintiff is therefore entitled to the relief prayed for, and a like decree to that entered in the court of common pleas may be entered in this court.

Burch & Johnson, for plaintiff.

Chas. J. Fitzgerald, Henry Baer and *Powell & Smiley,* contra

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CERTIFICATES THAT MONEY IS IN THE TREASURY AND UNAPPROPRIATED.

Circuit Court of Hamilton County.

THE VILLAGE OF CARTHAGE v. HENRY DIEKMEIER.

Decided, May 11, 1907.

Municipal Corporations—Villages—Certificates of Auditor or Clerk under the Burns Law—Sufficiently Definite, when.

When from the nature of the work to be done in connection with a proposed improvement it is impossible to estimate except approximately the expense likely to be incurred, a certificate by a clerk or auditor, that there is in the treasury of the corporation and unappropriated "money sufficient to pay" for the improvement as proposed, is an adequate compliance with the requirement of Section 2702 that a certificate must issue to render valid contracts, agreements or other obligations involving the expenditure of municipal or village funds.

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

The original action was based upon a contract for making certain street improvements in the village of Carthage. The chief contention arises upon the alleged failure of the village clerk to certify a sufficient amount of money in the treasury to pay for the work in full. The jury, by a special verdict, found that the following certificate was attached to the resolution of council awarding the contract to the defendant in error:

"I hereby certify that there is money in the village treasury in the fund from which the above fund is proposed to be drawn for payment of the village portion of the improvement, and not appropriated for any other purpose, sufficient to pay for the same. L. HALL,

"$2,030. *Village Clerk.*"

This certificate suggests three different constructions as to the amount certified in the treasury, either the fixed sum of $2,030, or the multiple of the estimated number of yards and the bid per yard, or an indefinite sum required to complete the work according to the plans and specifications at the rate bid. The first construction is not tenable, because the figures and dollar mark $2,030 on the margin are no more related to the written words nor more significant than if indorsed on the back of the certificate. The second construction is more reasonable, but can not be adopted because the plans and specifications contain the provision that "the quantities named on the estimate are approximate and will not govern the final estimate." The third and last construction, that the sum is indefinite, accords with the very language of the certificate that there is in the treasury "money sufficient to pay for the same," and complies substantially with Section 2702, Revised Statutes, as amended (86 O. L., 391) and in force at the time this contract was made. Under this section a definite sum should be certified when ascertainable, but when from the nature of the work to be performed it is impossible to estimate except approximately the quantity thereof, the certificate may be for such sum as may be required to complete the improvement according to the plans and specifications at the rate bid; and the village clerk having in this case so certified, the contractor is entitled to recover the amount of the final estimate under the original contract less the payments already made.

There being no certificate attached to the supplementary contract he is not entitled to recover for any work performed thereunder, and with this modification the judgment will be affirmed.

Samuel W. Bell and *Frank F. Dinsmore*, for plaintiff in error.

Jerome D. Creed and *Archer & Osler*, contra.

RIGHTS OF RAILWAY EMPLOYE USING TRACK AS A CONVENIENT PATHWAY.

Circuit Court of Lucas County.

DANIEL A. BYRKET v. LAKE SHORE & MICHIGAN SOUTHERN RAILWAY.*

Decided, October 30, 1906.

Master and Servant—Negligence—Railways—Right of Company to Use Either Track for the Running of Trains in Either Direction—Duty of Pedestrian and of Engineer as to Keeping a Lookout—Presumption of Negligence on Part of the Pedestrian—Technical Construction of Rules of Company.

1. Where an employe of a railway company, while off duty but in compliance with an order to report at a certain place as soon as possible, walks along the tracks of the company as a matter of convenience and for the purpose of saving time, he is not within the course of his employment while on said tracks, and the engineer of an approaching train is not bound to keep a lookout for him.
2. If such employe, while using the tracks of the company as a convenient pathway, failed to discover an approaching train and was struck by it and injured at a point where by a proper exercise of his faculties he might have had warning of its approach, a presumption arises that he did not exercise due care, and the burden is upon him to remove the presumption; and in the absence of any reasonable inference from the evidence which might relieve him from the presumption, or any claim that the engineer or others controlling the train had actual knowledge of his danger, it becomes the duty of the court to direct a verdict for the defendant company.
3. A railroad company owes no duty to an employe or other person, who is using its tracks merely as a convenient path of travel, to give notice by bell or whistle of an approaching train, or to run at any particular rate of speed.

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

Error to Lucas Common Pleas Court.

* Affirmed by the Supreme Court without report, January 8, 1907 (75 Ohio State).

In this case, which below was an action brought by Byrket for injuries claimed by him to have been sustained by reason of negligence of the defendant company, the plaintiff in error complains of the action of the court below in several respects. The one especially argued is the court's charge to the jury, at the close of the evidence in the case, to find in behalf of the defendant. Several of the other alleged errors are so closely connected with this that they may be treated as incidental to it, and our judgment is, that if the court was right in instructing the jury to find for the defendant, the other alleged errors were not prejudicial to the plaintiff even if the court was in any one of its rulings in those respects in error.

The plaintiff, Byrket, had been for several years in the employ of the defendant company, sometimes acting as brakeman, sometimes in the capacity of conductor upon some of its trains, and I think at one time was known as a pony conductor or the conductor of a pony engine. At the time of the unfortunate occurrence which has been made the basis of this action, in which the plaintiff received severe injuries, he had been telegraphed to while at Jonesville, Michigan, to come to Air Line Junction in Ohio, as soon as possible, and it was while proceeding to Air Line Junction that he received the injury for which he seeks damages. He had arrived at the Union Station in Toledo and then proceeded to walk along one of the tracks of the defendant company from the Union Station to Air Line Junction, and it is indicated by the evidence that he designed at some place along this line to take an electric car, but he concluded that he could arrive at Air Line Junction, his destination, more speedily and readily by proceeding along the track, and his claim is, that in doing this he was complying with the requirements of the defendant company; that he was in the discharge of his duty as an employe and that he had been instructed by the officials of the company that at all times when in discharge of the duties pertaining to his employment, he must keep upon the right of way. Our judgment is, that any such instruction was not to be construed by him so technically and that the general instruction that he was to proceed to Air Line Junction and arrive there as soon as possible, was to be construed according to its

reasonable spirit and that he had a right to proceed by any ordinary means of safe transportation to the place of destination where he was required to report.

The principal question that is involved here requires some consideration of the nature of his duties while upon the defendant's right of way and track and of the correlative duties of the defendant company toward him while he was at the same place. He insists that his situation was much that of a person who would be at the time doing some work for the company and that it was the duty of the engineer upon an approaching train to keep a lookout for him while he was upon the company's track; and he attempts to fortify this claim by proof that it was a common custom for the employes of the company to use the track in that locality as a sort of a passage way from the Union depot to Air Line Junction while going to or from their work.

The plaintiff claims that at the time of this occurrence he was walking upon a track known as the "east-bound track" and that the engine which struck him was coming from the east, moving eastward, and the evidence shows those two facts. The defendant company had a right to move its trains upon whichever of these tracks it saw fit and in whatsoever direction it saw fit; it had the right, no matter what the tracks were called and no matter for what purpose it ordinarily used either one, to move its trains either east or west upon the so-called "east-bound" or the so-called "west-bound" track, although the circumstance that the engine was moving westwardly and upon what was usually treated as an "east-bound" track might be one circumstance bearing upon the care due from the plaintiff and also might, under some circumstances, upon the asserted negligence of the defendant.

It is apparent from an examination of the numerous authorities in cases similar to the one at bar, that every case must stand almost upon its own footing, and it is not likely that we shall find cases that are upon all fours with one another, although counsel in argument asserts oftentimes that one case is precisely like another in all its features. Much stress is laid by counsel for plaintiff in error upon the case of *L. S. & M. S. Ry.*

v. *Ford,* 18 C. C., 239, which was decided by this court at the January term, 1899. The case has some features similar to those in the case at bar, but it has others dissimilar to the ones under consideration by us here. In the Ford case the conditions were such that the engineer of a train having knowledge of the fact that persons were accustomed to walk upon the track, was unable to distinguish persons upon the track until almost upon them; whereas in the case at bar there was no difficulty on the part of either the engineer or the man upon the track in discovering objects at remote distances. It is claimed, indeed, on behalf of the plaintiff in error, as one of the grounds upon which this judgment should be reversed, that he could see all the way from the point of injury to Air Line Junction, which was quite a distance away, and that he was thereby apprised that no train was coming from that direction on the "east-bound" track, so that he had a right to conclude that it was safe for him to walk upon that track.

The conclusion must logically be drawn that if it was easy for him to see all the way to Air Line Junction, it was equally easy for him to see in the opposite direction, if he had looked in the opposite direction at the time when the train that struck him was sufficiently near to manifest its approach. In his testimony there is an indication that he did look back about once every hundred feet, but in one part of his testimony he says that probably he went one hundred and fifty feet from the time he last looked back before the engine struck him. Of course any statement of this kind is to be received and construed reasonably by the court. A man does not measure by paces the exact distance that he travels between the several times of using his faculties of observation, and it is probably impossible for the man to say how long a time had elapsed and how much distance he had traveled between one time of looking and another. But, however all this may be, it is manifest that if he had looked a sufficient time before he was struck to see the trains approach, there would have been no difficulty in seeing the danger and escaping the injury. There is nothing to indicate that he could not have leaped from the track if he had seen the train bearing down upon him. While it is claimed by the plaintiff that it

would have been unsafe for him to walk upon either side of the track, or between the two tracks, by reason of certain circumstances which were given in evidence, there is no claim that in the immediate emergency of the train's approach, if it had been observed, he could not have escaped to a place of safety by leaping upon the other track or by leaping to one side, even into a ditch if necessary.

The court did not, apparently, arrest the case from the jury or charge the jury for the defendant upon the ground of any holding by the court that, as a matter of law he was guilty of negligence directly contributing to or causing his own injury. The court puts it upon the other ground: That the defendant company owed no duty to a man situated as he was and acting as he was, of giving him notice by bell or signal of the approach of the train. A large part of the argument of counsel for plaintiff, orally and in his brief, is based upon the theory that it was the duty of the company to keep the bell ringing upon the locomotive at all points in the progress of the engine and trains from the Union Station to Air Line Junction. Is this law? Was it the duty of the company to apprise persons walking upon its tracks of the approach of the train by giving signals by either bell or whistle?

In connection with the holding by this court in 1900, in *L. S. & M. S. Ry.* v. *Ford, supra*, my attention has been called by one of my associates to an unreported case of this court in the year 1903, or about that year. The case is that of *Ham* v. *Railway*, which was decided first in the Court of Common Pleas of Fulton County, and the case there was arrested from the jury and the jury instructed to bring in a verdict for the defendant company. This court reversed the case, which is said by one of the judges —Judge Haynes—to have been very similar in its aspects to the case at bar. The case was carried to the Supreme Court, on error, and the Supreme Court reversed the circuit court and affirmed the ruling of the common pleas in its holding that the defendant company was not liable to such a duty as is sought to be imposed upon it here towards persons in a somewhat similar position to that which the plaintiff in error occupied at the time of his injury. The decision of the Supreme Court,

which is also unreported, was rendered in June, 1903. In the following October—what is said to be the January term, 1903, on October 13—the Supreme Court rendered a decision in the case of *Erie Ry.* v. *McCormick,* 69 Ohio St., 45, which case we deem very analogous to the case at bar. It was a case of a man employed as a track man, or track walker, for the defendant company, who was injured while engaged in walking upon its tracks; but whether in the direct discharge of his duty or not, does not appear clearly from the statement of facts reported. In the course of his traveling along the track, while in the discharge of his duty or going to or from his work, he had occasion to cross a bridge which was within the lines where he was required to work when he did work, as a track walker, exercising, I suppose, some duty of inspection of the track—that is, to see that everything was in order and free from obstructions or defects. In crossing this bridge on the occasion in question, he was struck by an engine and killed. Now it is not claimed on behalf of the plaintiff in error here, Byrket, that his duty to the defendant company had any relation whatever to its track or required him to be walking upon the track, except in so far as he asserts a claim that he was necessarily upon the company's track in the carrying out of the injunction to stay upon the company's track when he was in the company's employment on duty and also when he was going to a place to which he had been directed to go as soon as possible. As I have already said, we think he had the right to construe that instruction reasonably and go by reasonably safe methods, and that it was not designed in the order that he should travel all the way from Jonesville or from the Union Station to Air Line Junction on the company's tracks, even if he could get to that place somewhat more speedily than by traveling some other route or in some other way.

It would seem that the case presented by the representative of McCormick was perhaps a stronger case, so far as this question is concerned, than the case at bar. McCormick's duties ordinarily related to the track, and if he was upon the company's track at the time of the colliding of the train with him and his death, in the direct discharge of his duties, then his case was stronger than that of Byrket, who was, at the best, but simply

traveling along the track as a pathway to the place of his destination.

It is the judgment of this court, under all the circumstances of this case, that he does not stand in precisely the same position with reference to the transaction that Ford did in *L. S. & M. S. Ry.* v. *Ford, supra.* There are some circumstances here which would seem to have made it easier for Byrket to have apprised himself of the danger than in the case just mentioned, and we think that a strong presumption of negligence arose; in other words, that the proper exercise of his faculties of hearing and vision would have notified him before his danger. The presumption arises when he does not discover that danger, that he did not exercise these faculties, and the burden is upon him to remove this presumption when it so arises. It is true that sometimes it is an inference which is to be drawn by the jury that he did discover the fact. But, on the other hand, there are numerous cases that where no reasonable inference can be drawn that would relieve him from the presumption, it becomes the duty of the court to say so to the jury.

In the McCormick case the court seems to assume that the plaintiff was in some fault in remaining upon the bridge, and then the court, so holding, goes farther and holds that the company was not negligent—that it was not held to the exercise of that sort of care toward him that it would have been compelled to exercise under other circumstances.

In the third paragraph of the syllabus, on page 45, it is said by the court:

"In an action against a railroad company by one who, by his own fault is upon its track and in a place of danger, to recover for a personal injury caused by the failure of its employes operating one of its trains to exercise due care after knowledge of his peril, it is necessary to show actual knowledge imputable to the company. *C., H. & D. Ry.* v. *Kassen,* 49 Ohio St., 230, distinguished."

This leads me to call attention to the language of the petition which has been filed in this case, in which it is not clearly asserted that the engineer of the defendant company did in fact discover Byrket upon the track, and thereafter was guilty of

negligence in not avoiding an injury to him. In one part of the petition it is said that:

"The action of said conductor and engineer *in so operating said train* was either willful or so grossly negligent as to be willful in its nature."

The pleader is speaking of the speed with which the train was run; that it was run at a high and excessive rate of speed and in violation of a certain ordinance of the city of Toledo, which provided that within the city limits the speed should not exceed six miles per hour. This question was also raised in the McCormick case: "That the speed of the train exceeded that limited by the ordinance of the city of Akron." With regard to the claim of excessive speed and also the claim that the speed was unlawful as being prohibited by ordinance, Judge Shauck, speaking for the court, says, page 52:

"The petition and all the evidence having shown that McCormick was an employe of the company, engaged as a track walker, there should have been no allegation in the petition as to the omission of signals for the neighboring road crossing or of the violation of the ordinance regulating the speed of trains, because, by the fact of his relation to the company, it was made to appear that he was not within the classes of persons for whom such signals are required to be given, or for whose protection the speed of trains is regulated. The omission of a duty does not constitute the foundation of an action unless it results in injury to one for whose protection the duty is imposed. This would seem to be elementary, and it is sustained by the decided cases."

And he then cites two cases of *B. & O.* v. *Depew,* 40 Ohio St., 121, and *Cleveland, A. & C. Ry.* v. *Workman,* 66 Ohio St., 509.

Again, in this petition, it is alleged:

"That the engineer in charge of the engine drawing said train did carelessly, wrongfully and negligently fail to keep a proper lookout for persons who might be rightfully upon said track. That plaintiff was in plain view of said engineer for such distance as said engineer did see plaintiff, or, by the exercise of ordinary care, could have seen him."

In other words, we are presented with an alternative by this pleader; there is no averment that the engineer did see Byrket.

and if there had been such an allegation, there was perhaps no evidence that would have justified a finding that he did see him. But it is enough to say that the petition does not charge it. It is alleged:

"That said engineer carelessly, wrongfully and negligently failed to give plaintiff any warning of the approach of said train but ran the same in such a manner as to strike plaintiff and throw him upon said track, and to allow said train to pass over him, inflicting injuries as hereinafter set forth."

Now, going back to *Erie Ry.* v. *McCormick, supra,* and resuming the consideration of the language of Judge Shauck, we find, on pages 52 and 53, he says:

"Passing to a consideration of the ground upon which counsel for the administratrix now insist that the recovery might have been sustained, the general inquiry is, whether it is in accordance with the law which defines liability for the wanton and willful infliction of injury. The concrete rule upon the subject is, that if one is upon the track of a railway company by his own fault and in peril of which he is unconscious, or from which he can not escape, and these facts and conditions are actually known by the engineer, it is his duty to exercise all reasonable care to avoid the infliction of injury. It does not impose the duty to exercise care to discover that one so upon the track is in a place of danger, but it does impose a duty to be exercised upon actual discovery. No matter if the rule did originate in consideration of humanity, it is an established rule of the law which does not unreasonably interfere with the rapid movements of trains nor is it ordinarily difficult of application, if earnest and impartial efforts are made to apply it according to its terms and obvious import. With respect to the ground of liability now considered, the court instructed the jury that the company would be liable if the engineer ought, by the exercise of ordinary care, to have seen the deceased in his perilous position and could, by the exercise of ordinary care, have stopped or checked the speed of the train so as to avoid the collision. Notwithstanding the manifest conflict between the instruction given and the rule, it is said that the instruction is authorized by *C., H. & D. Ry.* v. *Kassen,* 49 Ohio St., 230."

Now in the brief of counsel for plaintiff in error, before me, some consideration is given to *C., H. & D. Ry.* v. *Kassen, supra,* and emphasis is put upon the language of the court in that

case holding the company to a knowledge which ought to have been had by the persons in control of the train which caused the injury; but a careful consideration of the reasoning of Judge Shauck in the case of *Erie Ry.* v. *McCormick, supra,* clearly evidences that a proper construction of *C., H. & D. Ry.* v. *Kassen, supra,* will not bear the interpretation which is sought to be put upon it by the counsel for plaintiff in error here. Kassen had fallen from the rear platform of one of defendant's trains. The company was running two trains, in the same direction, about two hours apart. This injury disabled him from leaving his position of danger upon the track, and while in that dangerous position he was run down and killed by the following train. That Kassen had fallen from the train and was in place of danger, were facts actually known to the employes of the defendant company operating the forward train. There was ample opportunity to rescue him either by stopping the train from which he had fallen or by using the telegraph to communicate information of his situation to those in charge of the following train. The actual knowledge of the employes of the company in charge of the forward train was the company's knowledge and that knowledge ought to have been communicated to the engineer of the following train, so that it may be said that it was a knowledge which he ought to have had; but that is not saying that it was the negligence of the engineer in charge of the train; it was the negligence of the company itself in not communicating to him the information which he ought to have had so that he might thereby have saved his train from killing or injuring Kassen. Judge Shauck goes further and says:

"The phrase 'ought to have been aware' manifestly applies to those in charge of the following train, and implies the duty of the company to communicate to them its actual knowledge of Kassen's danger. This is entirely clear, not only from the peculiar facts of the case, but from the language of the opinion."

I will not stop to read more. It is clear enough from what I have already read that the construction which is placed upon *C., H. & D. Ry.* v. *Kassen, supra,* in the brief of plaintiff in error is not the construction which should be properly drawn

from it. We think that the circumstances of *Erie Ry.* v. *McCormick, supra,* are so similar to those in the case at bar that, if this case had been permitted to go to the jury, no verdict in behalf of the plaintiff in error, or judgment thereon, would have been permitted to stand by the Supreme Court, if the case ever reached that court of last resort, because of the principles which are in *Erie Ry.* v. *McCormick, supra,* so clearly enunciated. And it is against the previous rulings of this court, which it is not necessary to further consider; it is enough to say that the last enunciation of the Supreme Court to which our attention has been called, or which we have found in our examination of the questions, leads along the line of the holding at which we have arrived in this case, that the judgment of the court below must be affirmed.

C. A. Thatcher, for plaintiff in error.

Potter & Potter, for defendant in error.

MIXED CAUSES OF ACTION.

Circuit Court of Allen County.

F. P. RUSHER LUMBER CO. v. G. W. TROXEL ET AL.*

Decided, November Term, 1905.

Actions—Nature of, Determined by Pleadings—Mixed Causes of Action Not Appealable—Notwithstanding Only Equitable Issues are Tried.

Since the nature of an action as to its being legal or equitable is determined by the pleadings, it follows that a petition to foreclose a mechanic's lien, determine priorities, and for personal judgment, sets forth both a legal and an equitable cause of action, and without change of pleadings is not appealable, notwthstanding the parties reached an agreement as to the facts determinable by a jury, and the equitable issues only were submitted to the court.

VOLLRATH, J.; NORRIS, J., concurs.

This cause comes into this court on appeal from the Court of Common Pleas of Allen County and is for hearing at this time on a motion to dismiss the appeal.

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* Affirmed by the Supreme Court, without report, June 18, 1907.

The plaintiff is a corporation and filed its petition setting forth, as its first cause of action, an account for material and supplies furnished by it to the defendants, G. W. Troxel and Allie L. Troxel, in the sum of $330.58, with interest from November 30, 1904; a copy of the account is attached to the petition. As a second cause of action the plaintiff alleges that the items charged in said account were so furnished by the plaintiff to said defendants and at their request, in and about the building and construction of a certain house, etc., and then follow the averments necessary to perfect a lien for the amount of said account upon the building and premises for which the same were furnished. Proper averments were made with reference to the filing and verification of said account and then, after a reference to possible claims upon the same property by some of the defendants named in the petition, the plaintiff prays judgment against said G. W. Troxel and Allie L. Troxel for the sum of $330.58, with interest from November 3, 1904, and that it may be decreed to have a lien in and upon the said house and the building and the real estate described, for the amount of said claim and from a specified date, and that said lien may be foreclosed and said property sold as upon execution; that priorities may be ascertained and the proceeds distributed, etc.

It will be noted that there are two causes of action, one of a legal and the other of an equitable nature. It is claimed by the defendant, the Lima Home & Savings Association, as well as other defendants herein, that under the issues thus presented by the petition of the plaintiff no right of appeal exists and that the petition therefore should be dismissed. All the defendants met the issue tendered by the first cause of action by a general denial.

The plaintiff contends, as against said motion, that all matters of fact were amicably agreed upon between the parties in the court below and that the only thing that was in reality submitted to the judgment of the court was the question of priorities, matters affecting solely the liens and their order of succession, and that because of this fact the case was tried in the court below entirely within the equitable jurisdiction of the common pleas court, and that it ought therefore to be appealable, and this the more so since no jury was even asked or required.

A correct solution of the question presented will require an examination of the law governing appeals. The right of appeal in actions of this kind is given in Revised Statutes, Section 5226, which provides in part as follows:

"In addition to these cases and matters specially provided for, 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," etc.

Revised Statutes, Section 5130, provides:

"Issues of law must be tried by the court, unless referred as hereinafter provided; and issues of fact arising in actions for the recovery of money only, of 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."

It is held in the case of *Ladd* v. *James*, 10 Ohio St., 437, that—

"The issues shown by the pleadings in an action will show whether, after a judgment, there be a right to a second trial, under the act passed April 12, 1858 (55 O. L., 81; 4 Curwen, 3087; repealed, Section 7437, Revised Statutes). If there be an issue of fact joined between the parties, which either party has the right to demand shall be tried by a jury, then either party may demand a second trial. If there be a joinder of several causes of action and an issue of fact as to either of them, which either party has a right to have tried by a jury, a second trial may be demanded, and there can not be an appeal, though one or more of the causes of action would be such as would authorize an appeal.

"Where an action is brought upon a note and on a mortgage given to secure its payment, and a judgment is asked upon the note and for the sale of the mortgaged property, any issue of fact which affects the judgment upon the note is an issue which either party has a right to demand that it shall be tried by a jury; and in such a case there may be a second trial, but not an appeal. If there be no such issue of fact or the judgment asked is simply for a finding of the amount due upon the note and a sale of the property mortgaged, either party would have the right to appeal and not a right to a second trial."

The same principle is recognized by the circuit court of the first circuit in the case of *The Lockland Lumber Co.* v. *Marsh*,

16 C. C., 432. The latter case involved a petition asking for personal judgment and foreclosure of a mechanic's lien as in the case at bar. See also *Keller* v. *Wenzel,* 23 Ohio St., 579; *Bugh* v. *Sturgeon*, 41 Ohio St., 402; *Mitchell* v. *Drake,* 7 C. C., 308.

These authorities seem conclusive of the proposition that where a petition asks for a personal judgment and also for a decree of foreclosure to enforce such judgment, and these issues are met by a general denial, no appeal can be taken by the plaintiff presenting such a petition.

It is claimed, however, in the action at bar, that all issues of fact which might otherwise require the attention of a jury had been amicably disposed of before trial and that the only thing left to be done in the lower court was a finding with reference to priorities. This view seems to be based in part at least upon the case of *Grapes* v. *Barbour,* 58 Ohio St., 669, where it is held:

"If in an action for the foreclosure of a mortgage and for a personal judgment for the money claimed to be due upon the demand which it secures, the journal entry in the court of common pleas shows that before the action is tried, the plaintiff, by leave of court, withdraws the prayer for a personal judgment, and the court proceeds to find the amount due and to decree a foreclosure, the mortgagor may appeal to the circuit court."

In the case just cited, however, there was a substantial amendment of the pleading. The prayer for a personal judgment was withdrawn and this withdrawal was evidenced by a journal entry. This left nothing for the jury to pass upon and nothing remained but a request for a decree of foreclosure, a finding of the amount due, of sale and distribution. These were all matters within the peculiar province of the chancery powers of the court. The issues requiring a jury trial had been eliminated by the withdrawal of the prayer for a personal judgment. This is quite different from a mere oral agreement or understanding of counsel, or like arrangement with the court on the trial day with the pleadings still in their original shape. The pleadings determine the nature of the action. This is held in the case of *Raymond* v. *Railway,* 57 Ohio St., 271, where, in the third section of the syllabus, the court say:

"Whether a case is one in equity or of law, does not depend upon the understanding of counsel, or of the trial court, nor

upon the form of the judgment rendered, but upon the nature of the action as shown by the pleadings."

In view of the foregoing authorities and the nature of the pleadings before us we are impelled to the conclusion that since the petition in this case asks for a personal judgment as well as a decree of foreclosure, it presents an issue of fact upon which either party had the right to a trial by jury, and this being the case, the action is not appealable and the motion to dismiss the appeal must be sustained.

It is the judgment of this court, therefore, that the several motions to dismiss the appeal of the plaintiff herein be, and the same are, hereby sustained and the appeal is accordingly dismissed at the costs of the plaintiff. Judgment for costs, execution awarded and cause remanded to the court of common pleas for execution.

DAMAGES TO FARM LANDS FROM CHANGE OF GRADE OF RAILWAY.

Circuit Court of Hamilton County.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY CO. v. DELANO CORDRY ET AL.

Decided, June 22, 1907.

Appropriation—Railways—Change of Grade of—Impaired Access Over Private Right of Way—Evidence as to Damages—Verdict—Remittitur.

In an appropriation proceeding, preparatory to a change of grade of a railway through farm lands, the assessment of damages to the residue of the tract must be based on present conditions, and not have reference to conditions existing prior to the original location of the railway many years before.

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

The damage to the residue of 400 acres after the appropriation of the 40-100 acre tract must be based upon the effect such appropriation will have upon present conditions, and not those existing before the railroad was originally located and constructed

many years prior. The testimony shows that the several owners would sustain substantial damage by reason of impaired access over the private right of way appurtenant to their lands.

The exception to the failure of the court to charge the jury that a roadway to defendant's premises twelve feet wide is substantially as good for the purposes for which it was created as the present road, without regard to the change of grade or other obstruction, is not well taken, and besides the record does not disclose that the court was requested to so charge.

We think the damages awarded are excessive. One of the defendants, Walter F. Fitch, himself testified that the land would be worth ten dollars an acre less by reason of the improvement, which would amount to $4,000, although the jury allowed $4,750.

The testimony as to the costs of reconstructing the private right of way ranged from thirty-five cents to one dollar per yard for 4,200 cubic yards.

Whether our conclusions be drawn from the evidence of the value of the land before and after the change of grade of the railroad, or from the evidence of the cost of conforming the private right of way to such change of grade, the result is the same, and we think that $3,200 would be a fair and reasonable compensation for injury to the residue of 400 acres.

Unless a remittitur of $1,550 is consented to by the defendants in error the judgment will be reversed.

Harmon, Colston, Goldsmith & Hoadley and Stanley Shaffer, for plaintiff in error.

Alfred B. Benedict and Stanley Struble, contra.

CONSENTS FOR THE CONSTRUCTION OF A STREET RAILWAY.

Circuit Court of Cuyahoga County.

EDWARD S. ISOM v. THE LOW FARE RAILWAY COMPANY.

Decided, July 12, 1907.

Municipal Corporations—Consents of Abutting Owners—To the Construction of a Street Railway—Requirement as to, does not Create a Favored Class—Construction of the Exception in Section 1536-189—Life of Consents Inure to Whom—Duplication of Grant over Same Street—Consents of Original Company—Good Faith of Property Owner Seeking an Injunction—Constitutionality of Sections 1536-188-9.

1. Sections 1536-188 and 1536-189, requiring the written consents of the owners of more than one-half of the frontage of lots and lands abutting on a street along which it is proposed to construct a street railway, do not create a favored class upon whom a privilege is bestowed to the exclusion of others having equal rights, and is not an arbitrary classification of individuals, but is a valid and constitutional exercise of legislative power.
2. Where street railway tracks occupy a street unlawfully by reason of the fact that the term for which the grant was made has expired, the exception found in Section 1536-189, making in unnecessary to procure consents from abutting owners under certain conditions, is not operative, and consents are required before new tracks can be laid in place of the old.
3. Consents to the building of an extension of a street railway inure to the company obtaining them and its assigns only, and can not be used by a third party who is a stranger to the franchise.
4. Where consents have been once acted on by a city council in the granting of a valid street railway franchise, their vitality is expended and they can not be again used as the basis of a second grant to another company.
5. A grant to construct tracks in a street can not be duplicated over the same right of way, even with the consent of the company to which the right was first given, unless the consent is that of the stockholders given in the way provided by statute.
6. The failure to carry into the syllabus of *Traction Co.* v. *Parrish* the declaration of Judge Burket that the good faith of one who brings an action to protect a legal right is of no importance, does not make it an *obiter*, inasmuch as that was one of the questions made in

Reprinted on account of errors.

the case, and what was said in the body of the opinion became the established law of the state.

Per Curiam.

WILSON, J. (of the Second Circuit); DONAHUE, J. (of the Fifth Circuit) and WILDMAN, J. (of the Sixth Circuit).

This cause comes into this court upon appeal and is submitted to the court on a motion of the plaintiff, and a countermotion of the defendant, for judgment on the pleadings and admitted facts.

It is unnecessary to state in detail the averments of the pleadings. This suit is brought by an abutting property owner to enjoin the construction and operation by the defendant of a double-track electric street railway on Central avenue, and the sole and only reason now urged by this plaintiff why such injunction should be allowed is, that there was not produced by the council before the passage of the ordinance granting to defendant a right to construct, maintain and operate such railroad on Central avenue, the written consent of the owners of more than one-half of the feet front of the lots and lands abutting on that portion of said street along which it is proposed to construct such railway, as required by Sections 1536-188, 1536-189 and Section 3439 of the Revised Statutes of Ohio.

The defendant, for answer to this claim of plaintqff, says:

First. That these statutes in so far as they require the consent of owners of abutting property to the construction of a street railroad are unconstitutional and void.

It is urged in support of this contention that the occupation of the street by a street railway is a proper and legitimate use thereof and one of the uses and purposes comprehended in the original grant or dedication of the same, and not different from the use by other vehicles for transportation of passengers or by pedestrians.

We think there is some difference, and that difference is very plainly stated in the case of *Street Railway* v. *Cumminsville*, 14 Ohio State, 523, at page 545, in this language:

"So far as the carrying of passengers by this mode is concerned, it differs in nothing from the exercise of the common

right of carrying them by coaches or omnibuses; and everything needing a grant, or the further authority of law, is the right to place and maintain in the highway, the necessary conveniences for this new description of carriages."

It is further held in the same case that if the easement of the abutting property owner of ingress and egress should be materially injured by the building and operation of the street railroad, then he must be fully compensated for such injury.

Again, it is held by the Supreme Court in the case of *Traction Company* v. *Parrish,* 67 Ohio State, 181, 191, that:

"So long as his easement of ingress and egress is not materially injured, he is without remedy, * * * that the city authorities have the power, under the Constitution, to construct and operate a street railroad on and along the street without his consent and against his will, unless restrained by a statute, provided they caused no material interference with his easement of ingress and egress."

This would seem to be the only difference between this use of the street and any other, and because the Supreme Court has thus limited the property rights of abutting lot and land owners in the streets, and having further declared in the case of *Traction Company* v. *Parrish,* above cited, that the consents provided for in the sections under consideration are not property rights, adhering to the lot, but a mere personal right in the owner of the lot, subject to bargain and sale, the defendant insists that the statute, conferring such a right, creates a favored class upon whom a privilege is bestowed, to the exclusion of others having equal rights and that the same is a violation of the trust reposed in the Legislature of the state, in respect to public ways.

It must be conceded at the threshold of this investigation that every classification of the individuals must be based upon some substantial, fundamental reason therefor. It is not required that every act of the Legislature should operate at one and the same time on every member of society, but it is required that it must affect all who are within the reason for its enactment. The contention of the defendant herein is that the Supreme Court having decided that the abutting lot owner has no special rights or interest in the street on which his property

abuts in excess of the rights of the general public, other than the right of ingress and egress, for which he must be compensated if the same is materially interfered with, the creation of such class and conferring upon it such a privilege as is conferred by these statutes were and are a mere arbitrary classification, and grants special privileges upon such favored class without any fundamental reason therefor.

This would seem to be a strong position, were it not that upon investigation of the reported cases in Ohio it appears that the constitutionality of this legislation is no longer an open question in this state.

In the case of *Roberts* v. *Easton et al,* 19 Ohio State, 78, it was held that such consent is a prerequisite to the power of the council to grant such permission.

In the case of *Railway Company* v. *Neare,* 54 Ohio State, 153, it was held that under the provisions of Sections 3437 to 3443, Revised Statutes, inclusive, the consents of the owners of more than one-half of the feet front of the lots and lands abutting on each street to be occupied by such extension are requisite.

In the case of *Traction Company* v. *Parrish, supra,* the nature of the consents and the purposes of this legislation are fully discussed. In that case the Supreme Court says:

"Such personal rights were bestowed by the General Assembly on owners of abutting lots, as a check upon the power of municipal authorities to authorize street railroads to be constructed and operated against the wishes of the owners of lots on such street."

In the opinion of *Traction Company* v. *Parrish,* on page 194, we find the following quotation from *Probasco* v. *Raine,* 50 Ohio State, 378:

"If a statute is constitutional, it is valid and can not be set aside by a court as being against public policy or natural right. There can be no public policy or right in conflict with a constitutional statute."

In that case it was sought to have the consents that had been procured by purchase held invalid, as against public policy, and the circuit court so held, but the Supreme Court reversed

that holding, and in effect held that this legislation was neither unconstitutional nor against public policy. To the same effect is the doctrine announced by Judge Day in the case of *Roberts* v. *Easton, supra.*

There are other cases in which the Supreme Court considered this legislation, but the cases above cited are sufficient to show that the Supreme Court is committed to the doctrine of the constitutionality thereof, and it will not do to say that the Supreme Court has so fully considered the provisions of these sections and required the performance of the same, and expended so much time in ascertaining the purposes of this legislation and defining the rights therein granted, without regard to the constitutionality of the law. In view of the many declarations of that court, sustaining these statutes and requiring full compliance therewith, the rule of judicial subordination would require a court of inferior jurisdiction to hold the same constitutional, and thus pass the question on to the Supreme Court as the only tribunal that has a right to review and reverse its declarations of the law; and therefore on this contention the defendant must fail.

The next contention of the defendant is, that in this particular case no consents are required for the extension of its lines, even though the statute be constitutional, because ever since the year 1868 this portion of the street has been devoted to street railway purposes; that the Cleveland Electric Railway Company owned and operated a line of street railway over and along this street, the franchise therefor having expired in 1905, but notwithstanding the expiration of such franchise said railway company did continue to maintain and operate its line of railway over and upon this street until the 23d day of April, 1907, at which time, in obedience to the judgment of the Supreme Court of the United States, declaring that the term of its franchise had expired at the time first mentioned, it discontinued the operation of such railway, and within a few days thereafter removed its tracks and fixtures, but not until after the passage of the ordinance herein authorizing defendant to construct and operate its line; that in 1904, in anticipa-

tion of the expiration of the term of the grant to the Cleveland Electric Railway Company, the said council attempted, by ordinance, to grant a renewal of that franchise to the Forest City Company, which ordinance was declared invalid by the Supreme Court of Ohio; that in September, 1906, the city council of the city of Cleveland authorized the Forest City Railway Company, by ordinance, to extend its line by constructing, maintaining and operating a double-track electric railway over and along the portion of this street now sought to be occupied by this defendant; and that at that time there were procured and produced to the city council the requisite consents of more than one-half of the lot and land owners abutting on said portion of said street; that by reason of these facts, all of which are admitted, this street has become and was a street devoted to street railway purposes, and in the nature of things no further consents would be required.

Section 1536-189 provides, among other things, that:

"No change or extension of any existing route shall be granted over any street or streets now unoccupied by street railway tracks, unless the consent of a majority of the owners of property abutting on such street or streets shall have been first obtained as now required by law."

The ordinance under which this defendant claims the right to construct, maintain and operate this street railway, provides that:

"If at the time the grantee herein shall attempt to execute the rights conferred by this ordinance in said Central and Quincy avenues S. E., there shall have been constructed any street railway tracks, the grant for which has not expired, the right hereby is limited to a right to use jointly with the owner thereof such tracks," etc.

The agreed statement of facts shows that said Central avenue was not then occupied by any such tracks, but that as a matter of fact the grant to the Cleveland Electric Company had then expired, and the tracks were then wrongfully and unlawfully in said streets, and were removed within a few days thereafter. Even if these tracks of the Cleveland Electric Railway Company

can be considered as tracks occupying said street, which, by the terms of Section 1536-189, Revised Statutes, would make unnecessary the procuring of consents, yet by another paragraph of the same section it is provided that:

"Nothing herein contained shall authorize the extension of existing street railway routes or any portion thereof over and along existing tracks or portions thereof for a longer period than the terms for which the original franchises for such roads or routes existing at the time of the passage of this act were granted."

So that the term of the franchise of the Cleveland Electric Railway Company having expired, the rights of this defendant company to operate jointly with it over its tracks must necessarily expire with that company's grant. If that were not true, then the city council could in this manner renew a franchise over a street occupied by a street railway company to a company other than the one in the original grant, or its assigns. The Supreme Court of this state has recently held in reference to this particular street that this can not be done. It is sufficient to say that if it can not be done directly, it can not be done indirectly. It is therefore clear from the agreed statement of facts that this street was not then occupied with tracks of any railway company then having the right to operate it for any term whatever, and this grant does not come within the exceptions contained in said section.

It is insisted, however, that the character of this street as a street devoted to street railway purposes has been established, and having once been established and the consents having been procured and produced authorizing the same, that there is no longer any purpose in again requiring such consents to be procured and produced.

The Supreme Court in the case of *Railway Company* v. *Neare et al,* 54 Ohio State, 153, declares it to be the law that:

"In the extension of a street railway over streets unoccupied by any road under the provisions of Sections 3437 to 3443, R. S., inclusive, the consents of the owners of more than one-half of the feet front of the lots or lands abutting on each street to be occupied by such extensions are requisite."

The admitted facts in the case at bar do not distinguish it from the above case, and therefore the consents were necessary to a valid grant.

It is also insisted that there was filed in September, 1906, with the clerk, and produced to the council of said city, the requisite number of consents, and that said council thereupon granted a valid franchise to the Forest City Street Railway Company to construct, maintain and operate a double-track electric street railway over and upon this portion of Central avenue; that said Forest City Street Railway Company has the right under said ordinance to construct and maintain the same, and that this company is only proceeding to do that which another company has the absolute right to do, and for that reason construction by this defendant can not injure or affect the plaintiff in any particular, and that a court of equity ought not to interfere for any whimsical reason the plaintiff may have, that would induce him to prefer that these tracks should be constructed by the Forest City Railway Company instead of this defendant.

It is further claimed that by the limitations of Section 4 of the ordinance under which this defendant claims the right to construct these tracks, that no more than two tracks shall be constructed, and that the Forest City Street Railway Company knew of the limitation in Section 4 of this ordinance, and assented and consented to the same, and that by no possibility can this street be burdened by four tracks, instead of two, even though this defendant should construct the tracks, instead of waiting until the Forest City Street Railway Company should do so.

It is denied by the plaintiff that the Forest City Street Railway Company assented or consented to the limitation in Section 4 of this ordinance under consideration, but for the purpose of plaintiff's motion, if that averment of the answer would amount to a defense, the motion should be overruled.

Notwithstanding it is conceded that the Forest City Street Railway Company has the right to construct these tracks, it does not necessarily follow that it will do so. It may forfeit such right, or abandon the same. If that company never as-

serts its right against the plaintiff and other non-consenting abutters, that failure must operate for their benefit, and not for the benefit of a stranger to its franchise. True, that company may assign its franchise and the assignee thereof may assert the right to construct such road, but it is not permissible for a third party to claim the rights of the Forest City Street Railway Company against non-consenting abutters. No matter how remote the chance may be that the Forest City Street Railway Company, or its assigns, will not assert its right in this street, yet this plaintiff is entitled to that chance.

If it be conceded for the purpose of this motion that the Forest City Street Railway Company in some way has assented or consented to the limitations in Section 4 of this ordinance, and by reason thereof it would be forever estopped from constructing any line of railway over and along this street other than that proposed to be constructed by this defendant, it would still be immaterial, as that company or its assignee would be the only one that can make any claim under its franchise. If this road were constructed, we think the limitation of Section 4 of this ordinance is such as would prevent the ordinance from being declared invalid for want of consents, because no consents are required to authorize the city council to grant the right to a street railway company to extend its lines over and upon the tracks of another, for and during the term for which such company has a right to maintain and operate its road, but, in so far as it authorizes the extension in streets unoccupied by a street railroad, consents would be required without which that portion at least of the ordinance authorizing the construction of new tracks would be invalid. Therefore, upon this contention, the defendant must fail.

It is insisted, however, by the defendant herein, that the necessary consents were in fact produced to the council before the passage of this ordinance under which it claims the right to construct, maintain and operate its road over and upon this portion of this street.

It does not appear from the admitted facts in this case that enough consents were produced to the council, if all were

available. These consents were of various kinds; some of them were general in their nature, some of them specified particularly the Forest City Street Railway Company, some specified the Forest City Railway Company and the Cleveland Electric Company and some specified the Cleveland Electric Company only. It is admitted that the rejection of any one class of these limited consents would reduce the entire amount below the requisite majority.

It is also admitted that all of the consents procured and produced to the council by the Forest City Railway Company at the time of the passage of the ordinance granting it a franchise to construct, maintain and operate a double track electric railway over and upon its street, were part of the consents produced to this council at the time the ordinance under which the defendant claims was passed, and it is admitted that if these consents could not be considered by the council, there were not sufficient others to confer jurisdiction.

It is claimed, first, that consents can not be limited to any company, but that they operate in favor of the company to which the grant is made.

The Supreme Court of Ohio, in the case of *State, ex rel,* v. *Bell,* 34 Ohio State, 194, held that these consents, by whomsoever obtained, inure to the benefit of the lowest bidder.

In the opinion, at page 197, the reasoning of the court is as follows:

"Equally certain it is that the consents mentioned in Section 412 need not, in terms, be given to the person who is the lowest bidder; for the contract can be awarded to him alone, and the consents, it matters not by whom obtained or to whom given, are in substance assent to the construction and operation of the railway in the designated streets, and hence must inure to the benefit of the lowest bidder."

In the case of the construction of a new road the franchise must be granted to the lowest bidder. The city council has no discretion in that respect and the consentors when they sign the consents must be held to know that under the law, neither they nor the city council can designate to whom the franchise shall

be granted. The statutes of our state require that it be granted to that person or corporation that offers to carry passengers for the lowest rate of fare. So that any attempt to limit such consents or to designate the beneficiary of the same, must prove abortive. That reasoning does not apply with equal force to the extension of an established route. The proposition in the latter case is as to whether or not a known company having either an established line or a right to construct such line shall have the further right to extend its road. No one is called upon to bid. No one can bid for this franchise, because one of the terms of its grant is that no additional fares whatever shall be charged for carrying passengers over this proposed extension. The only possible profit would be from the accumulation of business. It is an entirely different question whether an abutter can in this case limit his consent to a specific company or individual, from the question presented, when the construction of a new road is contemplated. Aside from this, it is admitted that the same consents that were produced to the council at the time it passed the ordinance granting to the Forest City Railway Company its franchise, in September, 1906, were produced when this ordinance was passed, and that if these consents which clothed the city council of Cleveland with jurisdiction to pass the ordinance granting the franchise to the Forest City Railway Company can not be counted, then this ordinance was passed without a sufficient number of consents being presented.

We are clearly of the opinion that these consents had expended all their vitality in clothing the city council with jurisdiction to pass the ordinance granting the franchise to the Forest City Railway Company. They had served their purpose, fulfilled their mission, and could be of no further use or effect. True, if the ordinance passed by reason of these consents were an invalid ordinance, they still could be used for the purpose of granting a valid ordinance; but it is conceded here, for the purposes of this case, that the franchise of the Forest City Railway Company is a valid franchise, and, therefore, the purpose of these consents had been accomplished, except, however, that the consentors must be held to abide the effect of that grant for

the term thereof, provided such term did not exceed the statutory limitation. This would include the right of renewal with the same company or its assigns, and the right to grant the joint use of this company's tracks to other companies for the purpose of the extension of their lines. Aside from this, they could serve no other purpose, and the council had no right to consider the same or to count the same in ascertaining whether or not a majority of consents had been produced.

The holding of the Supreme Court, in the case of *Roberts* v. *Easton, supra,* is clearly to this effect. On page 88, the court say: "The original assent [consent] therefore merged in the completed action of the city authorities."

Having arrived at this conclusion, it is idle further to discuss the limited consents. If these consents of the Forest City Railway Company are to be excluded this franchise was granted without the requisite number of consents and did not confer on the defendant any right or authority to construct tracks along and over this street.

Upon another proposition not made in the pleadings or argued by counsel, we are of the opinion that it might be urged with much force that the municipality was without authority of law to grant the franchise of the defendant company in its present form, either with or without the statutory consents. It undertakes to grant to the Low Fare Company, not alone the right to use the tracks of the Forest City Company, but to pre-empt the right of way, and construct its own tracks to the exclusion of the tracks of the Forest City Company.

When the Forest City Company obtained its grant, it secured the right to construct its own tracks in the street, and, having done so, the right to make traffic contracts with other street railway and interurban companies for the use of its tracks.

In the case of *Ingersoll* v. *Nassau Electric R. R. Co.,* 157 N. Y., 453, Chief Justice Parker quotes approvingly from *Roddy* v. *Brooklyn City & Newton R. R. Co.,* 32 App. Div., 311, and following:

"The right or privilege to contract for its use with other railroads and thereby derive a profit was as much a part of its

franchise as was the right to lay its tracks or operate its cars. This was a source of use which made its property and franchise valuable, and the corporation could no more be deprived of this right than the right of operating in any other respect as authorized by law."

Judge Parker also says, in the opinion in that case:

"Salability is an essential element of property, and the destruction or diminution thereof is a taking of property that can not be done except through the exercise of the right of eminent domain or of the police power."

It is a right, therefore, secured to the Forest City Company, both by statute and by contract, which neither the city nor the abutting lot owners can take away or impair. Yet counsel for the defendant concede that this is the effect of the grant to the Low Fare Company when they argue that new consents are not necessary, because no additional burden is placed upon the street. The tracks of the Forest City Company are legislated out of the street.

A grant to construct tracks in a street can not be duplicated over the same right of way without impairing vested rights.

An ordinance which assumes to make such a grant would seem to that extent to be void, as violating the obligation of contracts.

It is said that the Forest City Company is consenting to this usurpation. Unless the answer means that the stockholders are consenting in the statutory way, it is no defense. The company can not consent against their interests.

It can not, under the statutes, sell or lease its franchise without the consent of two-thirds of its stockholders, and even then it must make terms with the dissenting stockholders. Much less can it stand by and see another company appropriate one of its most valuable rights without compensation; claiming, at the same time, the privilege of using the consents which support its franchise, to legalize the appropriation.

A street railway franchise, carved out of the sovereignty of the state, is not a thing to be played with, in the courts or out of them. Under the statute law, the municipality can not release the company by consent from any of its obligations or

liabilities imposed, by the term of its grant, during the life of its franchise. *A fortiori,* it can not be released from any of the obligations and liabilities imposed upon the city by the contract.

It is said that the city reserved the right to revoke the franchise of the Forest City Company. Upon what terms, and for what reason, revocation may be had, is not stated; but in any event, it must be exercised with respect to the inviolability of private property.

The next contention of the defendant is that this plaintiff does not bring this action in good faith, but sues for the benefit of another.

It will be noted that this action is brought by the plaintiff in his own behalf only, and not in behalf of all others similarly situated. It is, in fact, identical with the case of *Traction Co.* v. *Parrish.* The answer in that case contained practically the same defense, word for word, with this one, and the Supreme Court held that it did not amount to a defense. The opening paragraph of the opinion, delivered by Judge Burket, page 189, is as follows:

"The contention in the pleadings and finding of facts as to whether Mr. Parrish brought and prosecuted the action in good faith, is of no importance, because if he had a legal right which he sought to protect by an action in a court of justice, the motive which induced him to bring the action can not be inquired into."

It is true that this announcement of the law does not find its way into the syllabus of that case, yet it is not *obiter,* as that was one of the questions made in the case and necessary to be disposed of to reach a decision thereof. That case being identical with the one at bar, it is unnecessary for this court further to discuss this defense.

It is urged that it will result in great hardship to the public to permit one individual to obstruct the construction and operation of this street railway, but that can not be true, for if a majority consent, the minority must submit. That principle obtains everywhere in our form of government. If a hardship result to the public, the fault is with the legislation controlling this subject. A court is not permitted to legislate, but

only to declare and enforce the law as it finds it, and any departure from this rule would be fraught with far more serious danger to the welfare of the people than mere temporary annoyance. If this be the law the ear of the court can not be open to arguments of expediency. These must be directed to the law-making power of the state.

Upon the pleadings and the admitted facts the motion of the plaintiff for judgment will be sustained, and the defendant will be enjoined from constructing tracks in and upon that part of Central avenue described in the petition. The defendant will not be enjoined from jointly operating any tracks that may be constructed therein by the Forest City Railway Company, or its assigns, and the decree may be drawn accordingly.

Motion for new trial will be overruled; exceptions noted.

Squire, Sanders & Dempsey, John G. White and *T. H. Hogsett*, for plaintiff.

Garfield, Howe & Westenhaver and *W. H. Boyd*, for defendant.

Newton D. Baker, City Solicitor, for City of Cleveland.

IMPROVING PARTS OF STREETS WITH SEWERS.

[Circuit Court of Hamilton County.]

BYRON ERKENBRECHER v. CITY OF CINCINNATI.

Decided, June 15, 1907.

Municipal Corporations—Assessments for Sewers—Improvement of Separate Portions of Streets—Sections 2378 and 2379.

It is competent for a municipality to improve with a sewer the unsewered portion of a street, or some part of the unsewered portion of a street, and assess the cost thereof upon the property abutting on the part of the street so improved.

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

This action is brought to enjoin the collection of an assessment for the construction of a sewer in the unsewered portion of St. James avenue, between Curtis street and Windsor street, the cost

of the same having been assessed upon the property abutting upon the improvement by the front foot.

It is claimed that the cost of said improvement should have been assessed upon all the property abutting upon St. James avenue, and not upon the property abutting upon the improvement, because portions of said street had been sewered prior hereto.

Section 2378, Revised Statutes, provides for the construction of sewers in a part or parts of a street; and Section 2379 provides for assessing the cost and expense of the same upon the lands abutting upon the improvement by the feet front.

The improvement of separated portions of a street is fully recognized in the statute, and such improvement if made in sections and assessed per front foot upon said sections is upheld in *Wilder* v. *Cincinnati*, 26 O. S., 284.

The improvement was not of the whole of St. James avenue but only of parts of it; and if some time prior certain portions of the street had been improved with sewers, whether by the city or private individuals, surely the city would have the right to afterwards improve the separated portions and assess the abutting property for the cost of the same as though they were contiguous.

The assessment is therefore valid and the petition will be dismissed.

William A. Geoghegan, for City of Cincinnati.

L. F. Hanger, for the property owners.

IRREGULARITIES AS TO BILLS OF EXCEPTIONS.

Circuit Court of Lucas County.

THE PULLMAN COMPANY v. WILLIAM WASHINGTON.

Decided, March 22, 1907.

Bills of Exceptions—Legislation with Reference to—Premature Delivery of, to Trial Judge—Does not Deprive the Reviewing Court of Jurisdiction, When—Exhibits—Failure to Properly Mark for Identification—Interrogatories Answered by the Words "Don't Know"—Verdict Based on Speculative Evidence—Negligence—Defective Apparatus.

1. While counsel should be granted the full ten days allowed by statute for examination of a bill of exceptions and the making of objections thereto, a miscalculation by the clerk of court as to the time to which counsel were entitled for examination of the bill, and the premature delivery of it by the clerk to the trial judge for his signature, is not such an irregularity as will deprive a reviewing court of jurisdiction, where it appears that the bill was filed in time by the plaintiff in error and no substantial injury will result from disregarding the irregularity.
2. Failure properly to mark for identification certain depositions which were used at the trial below, or to attach them to the bill of exceptions, does not prevent their being treated as a part of the bill of exceptions, when it is reasonably certain that they are the same depositions which were used in the court below, and that it was intended they should be made a part of the bill of exceptions but, owing to an inadvertence, were not attached but filed with the original papers in the appellate court.
3. Where interrogatories are submitted to a jury relating to matters of an evidential nature rather than to ultimate facts, no prejudicial error can be based on the receiving of a verdict in which some of the answers to the interrogatories are neither affirmative nor negative, but simply the words "Don't know."
4. A verdict for damages in a substantial amount for an injury alleged to be due to defective apparatus can not be based on evidence that is vague, speculative and theoretical; and where a verdict is based solely on such evidence, the judgment thereon should be reversed and a new trial granted.

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

This is a proceeding in error to reverse the judgment rendered in the court below in favor of the plaintiff below, William Washington, for the sum of five thousand dollars. The petition is based upon a claim for personal injuries sustained by Washington in the burning of a Pullman car of which he was porter. The petition charges various matters of claimed negligence; but upon the final trial of the case they were, in the judgment of the trial court, reduced to but one claim, of defect in the heating apparatus of the car.

The questions which meet us at the outset of our inquiry are, as to the validity of the bill of exceptions, and as to whether or not certain depositions offered upon the trial below are to be treated as a part of the bill. A motion was made to strike the bill of exceptions from the files, upon the ground that after its filing in the court of common pleas within the time required by statute it was prematurely delivered by the clerk to the trial judge for his examination and signature. The clerk in this case, and in another which we have had occasion to examine, seems to have miscalculated the time allowed by law for the filing of objections to the bill of exceptions by adverse counsel, and upon the tenth day of such period, a day which belongs to the adverse counsel for the purpose of examination and filing such objections, the bills were handed to the trial judge.

Our judgment, from an examination of the various statutes, without referring to them more specifically, is that counsel should have the full ten days for examination of the bill and making objections to it, and until the expiration of that period the bill should not be handed to the trial judge. It does not follow, however, that this irregularity of the clerk is such an irregularity in a jurisdictional matter as will destroy the bill of exceptions. In the legislation in the state with reference to bills of exceptions, and the adjudications of courts thereon, much difficulty, oftentimes of a seemingly technical character, has been placed in the way of perfecting proceedings in error, by which the review of decisions of lower courts has been sought to be obtained in the court of last resort, or in the intermediate appellate courts. At almost every session of the Legislature

some changes have been made as to the time of filing bills of exceptions, or various steps of procedure to get them upon the record or to bring them to the consideration of the appellate court; but we are glad to discover in a very recent case decided by the Supreme Court, the case of *Davies* v. *The New Castle & Lowell Railway Co.*, 71 O. S., 325, that some of these matters which have heretofore been deemed jurisdictional are not now so considered by the Supreme Court, and that greater liberality is obtaining in the methods of perfecting bills of exceptions. I read from the syllabus on page 325:

"1. Under the provisions of Section 5301, Revised Statutes, as passed October 22, 1902, it is incumbent upon the party taking a bill of exceptions to file the same in the cause with the clerk of the court within forty days after the overruling of the motion for a new trial, or the decision of the court excepted to, where a motion for a new trial is not filed, and having done this he has performed all the duties imposed upon him by the statute."

I will not stop to read the second paragraph or the third, which bear more closely upon other claimed irregularities in the case which were considered by the Supreme Court. I read from page 332 of the opinion of Judge Price:

"What could have been shown to defeat the bill? It is not contended that the document, filed with the clerk as a bill of exceptions on the fifteenth of August, lost its identity in any way, or that it was tampered with by anyone during the interim of seven days." [It appears that the time of receipt of the bill by the judge was some seven days after the time when it was said to have been delivered to him by the clerk.]

"The temporary absence of the trial judge might account for the bill coming into his hands on the seventeenth of September. Whatever it was that caused this lapse of time, it was not the fault of the party filing the bill. He has done his part toward its perfection, and the remaining steps are to be taken by the clerk and trial judge or judges. While the statute commands the clerk to transmit the bill to the trial judge within a certain number of days, and as to the officer the duty is mandatory, yet his neglect to do so within the period prescribed would not lose the bill, provided it reached the trial judge in time to enable him to allow, sign and return it within the time prescribed for

that duty, and it is so allowed, signed and returned. What would be the result if the trial judge should neglect to sign and return the bill within the time fixed by statute, is another and different question not raised in this record and we express no opinion concerning it."

The important point to this reasoning and language of the judge is that he is treating the filing of the bill with the clerk as the only duty imposed upon the party, the remaining duties being those of the clerk in transmitting the bill to the judge and of the judge in considering and signing and returning it; and Judge Price seems to indicate by the language of the opinion that the bill would not be rendered invalid by the failure of the clerk to perform a ministerial duty, and that it possibly can not be defeated even by the neglect of the judge to sign it within the statutory time, although this is left as an undisposed of question. On page 334 of the opinion Judge Price says:

"All the objections made to the bill in the circuit court, as well as those presented to us by counsel for plaintiff in error, are purely technical, and under our present law are not valid. Under our former statutes, several things were required of the excepting party in order to obtain a review of his case. Some of these were held in former decisions to be mandatory and jurisdictional, and if not complied with the bill could not be considered.

"We hope that the day is now passed. The former practice furnished a yawning sepulcher wherein were swallowed up the honest efforts of litigants to have their controversies reviewed by a higher court. These lost rights made earnest protest to the General Assembly, until it finally acted, and has adopted a more simple method of relief, and has attempted to utterly cast out some of the difficulties which formerly hedged the way to a reviewing court. The legislative intent is plain in the present statutes, and we are not now required to follow as precedents all decisions of the court made under the former legislation."

We think that the spirit of this reasoning justifies the holding of the bill good so far as this one question is concerned, although the clerk did hand or send the bill to the trial judge a day prior to the time when it should have been so transmitted.

If probable prejudice to the defendant in error, had been shown as a result of the clerk's irregularity, it might be such a matter as would justify a rejection of the bill. But nothing of that kind is indicated in this case. Indeed, it clearly appears that even after the bill passed into the hands of the trial judge, counsel for defendant in error had ample opportunity to examine it, and unquestionably, if the attention of the trial judge had been called to the fact that it was in his hands prematurely, or without that, if his attention had been called to matters which demanded correction in the bill, he would have given his attention to them, and would not have signed the bill without proper correction. But nothing of this kind is claimed. It is not intimated to us in arguments of counsel or otherwise that there was any objection to the bill as such, that is to say, that it demanded correction in any way, unless perhaps in one instance, in the omission to attach certain depositions, to which I will refer later, and as to those counsel for defendant in error is now insisting that they should not be attached rather than that the bill should be corrected by attaching them.

Should these depositions be treated as a part of the bill? This is another important and possibly vital question involved in the present case. I should say that the depositions had been placed on file at some time prior to the trial of the case, and remained on file so far as appears on the twenty-sixth day of January, 1907, when the petition in error was filed in this court. The clerk then, seemingly taking it for granted that depositions were to be treated as original papers in the case, so indicated by lettering them and filed them with the original papers and pleadings. On the fifth day of February the bill of exceptions was filed in the court of common pleas. The depositions should properly have been still on file in that court, but in this instance as in the other it was the inadvertence of an officer of the court rather than of a party that caused the depositions to be filed in the circuit court. I do not mean that it was the inadvertence of the clerk that the depositions were not attached to the bill of exceptions, because it was no part of the duty of the

clerk to attach the depositions to the bill. That was the duty of counsel preparing the bill of exceptions, or such agent as counsel might instruct to prepare the bill.

It does not seem, however, to have been deemed absolutely essential, even before the somewhat wide departure from former practice indicated by Judge Price in the case which I have cited, that the exhibits should be in all cases attached to the bill of exceptions. In a case tried by this court before I was a member of it, *Huron Dock Co.* v. *Swart, Admx.*, in the Erie Circuit Court, some exhibits were treated as a part of a bill when sufficiently identified by it, although they were not attached to it. The case was carried to the Supreme Court, and the court went a little beyond the decision of the court of common pleas and held as a part of the bill still another exhibit which had not been attached to the bill in the court below. The citation is *Swart, Admx.*, v. *The Huron Dock Co. et al*, 69 O. S., 574. The court decides as follows:

"Judgment affirmed on authority of *Busby* v. *Finn*, 1 Ohio St., 409, the map and blue print being filed with the bill of exceptions and so described as to leave no doubt of their identity, and the same are therefore held to be a part of the bill of exceptions."

To our minds there is not a particle of question from the intrinsic evidence of the depositions themselves and also the way in which they were mentioned in the bill and referred to as a part of it, that they were intended to be a part of the bill, that they were introduced in evidence and used upon the trial, and that it is a mere inadvertence that they have not become attached to the bill. It is urged that they are neither attached nor marked as the bill says they are marked, but it is so common a practice to refer to exhibits during the progress of a trial as marked by letter or number, when they have not already been so marked before the statements are made, that we conclude that the marks which were mentioned during the trial had not been placed upon the depositions, but that those marks were intended to be placed there before the making of a record.

As I have said, the intrinsic evidence afforded by an examina-

tion of the depositions themselves in connection with the statements in the bill of exceptions as to what occurred upon the trial, and what was shown, is sufficient to justify the conclusion that they were the same depositions that were used upon the trial, if indeed anything to the contrary were claimed by counsel. It is not asserted to us that they are not the same depositions. It is claimed by counsel for plaintiff in error that they are the depositions that were offered, and while we can not amend a bill of exceptions, or take oral testimony to supplement one or supply an omission in it, still we think we are justified under all the circumstances in concluding that these are the depositions that were intended by the bill of exceptions and that they are as clearly identified as were the exhibits in the Swart case. I am speaking now from information received from my associates who were members of the court at that time, and I am not depending upon any recollection or knowledge of my own, although the facts in the Swart case finally decided in 69 O. S., page 574, are fully set forth in the reported opinion of the circuit court (2 C. C.—N. S., 457).

This brings us to a consideration of the record as disclosed by the bill of exceptions. There are two or three claimed errors. So far as the charge is concerned and the special instructions given by the trial judge to the jury, we find no exceptions in the bill. Some earnest protest is made against the receiving of the verdict, or rather the answers of the jury to some interrogatories by the statement that they did not know. The words "Don't know" are given as an answer to some of the interrogatories, and it is claimed that it was error to receive these findings—that the jury should have been required to answer either in the affirmative or negative, or other definite and positive form, the interrogatories put. We think, however, that the matters to which these questions were addressed were of an evidential nature rather than involving ultimate facts, and that it was proper enough for the jury to answer as they did. At any rate, no claim of prejudicial error can be based upon answers of this kind, where the interrogatories are not such as are contemplated by the statute as to ultimate facts necessarily involved in the conclusions to be embodied in the general verdict.

The important matter presented by this entire record and one which has demanded and has received at our hands several days of earnest consideration and discussion, is the question whether the verdict for five thousand dollars obtained by the plaintiff in the court below is justified by the evidence. It would not be profitable to attempt any extended review of the evidence disclosed in this bulky package before me. The trial probably took a considerable time and the testimony and other evidence made a very voluminous record; but our judgment, from an examination of it all from cover to cover, is that the verdict is not justified by the evidence. There is a conflict of evidence, to be sure, and one which clearly entitled the plaintiff below to have the case go to the jury for its determination; but the matter is still left in the hands of a reviewing court to determine whether the verdict is or is not manifestly against the weight of the evidence. The claims of the plaintiff, as I have said, were finally reduced by the consideration of the trial judge substantially to one, that there was a defect in a so-called drip valve, which was a part of the apparatus for the heating of the car, and that by reason of that defect there had been an escape of water unnoticed, but nevertheless a substantial and considerable escape of water, from the coils which were found within the heater; that upon a fire being kindled in the heater, the result of the coils being empty of water, was such that more heat was disseminated through the iron of the heater and communicated to the combustible materials in the car; that a conflagration was thereby caused, and that the injuries received by Mr. Washington, the plaintiff, in his escaping from the car or being burned while in the car were the proximate result of this first defect to which I have referred.

The evidence offered in support of the theory that the heater was defective in some way is perhaps cogent. There is the evidence in the depositions to which I have referred, and the testimony of the witness Demay, that there was a defective condition in this heating apparatus which had existed for some time prior to the injury. It does not seem to have been indicated to anyone's mind at that time that the defect was of a character that would cause anything but discomfort to passen-

gers. It was not such a defect perhaps as would lead to the idea that there would be danger to the car itself by its destruction from fire, but merely one which lessened the heating capacity of the apparatus.

We are not prepared to say, however, that a defect of this character was not such as to justify a claim that the attention of the company should have been called to it so as to endeavor to remedy the defect, to save the comfort of passengers, and that in so doing they might have discovered the specific defect, the cause of the failure to heat the car sufficiently, and might thereby have been led to a reasonable apprehension that there might be danger to the car itself. But this view is somewhat vague and uncertain. The whole evidence of the plaintiff, when we get beyond the mere fact that there was some defect in the heating apparatus itself at some time prior to the burning of the car, is equally vague, speculative and theoretical. There is more or less theorizing on the other side, but our view is that there is some testimony, which, unless it be capriciously and arbitrarily rejected, is of sufficient significance to justify the finding that immediately after the conflagration and immediately before there was such quantity of water in what is known as the expansion drum attached to this heater as to prove conclusively that the coils themselves must also have contained water. It is very forcibly argued by counsel for defendant in error that the defect to which Mr. Demay had called attention, if it be a defect, which is denied by some of the experts called on the other side, consisted of a three-sixteenth inch aperture in the drip valve instead of one-eighth of an inch, or two-sixteenths, which would result in a loss of water through this drip valve to a considerably larger extent than would be indicated at first blush to a non-technical mind; in other words, that the proportion of loss is as nine to four, the area of the circle increasing with the square of the diameter. And it might be added to reinforce this suggestion, a matter which has occurred to me, and which I think is susceptible of scientific demonstration, that the smaller the aperture the greater the friction, so that with a larger diameter not only would there be a larger capacity for escape but also a chance for a more rapid flow.

But however this may be, we are not inclined to think that the other evidence, somewhat connected with this, as to the amount of water that was drawn from the heating pipes of the car immediately after the fire, is at all satisfactory or conclusive in the way suggested by counsel for defendant in error. It seems that two plugs were opened, or two holes were opened to enable the draining of those pipes after the fire, and the amount of water that was so drawn off is to be determined only from the estimates or guesses of the witnesses as to the time which it took for the water to escape, something that is as unreliable almost as any kind of evidence, unless it be the evidence of witnesses as to conversations.

Immediately after the fire, and immediately before, according to the testimony of witnesses, an examination was made of the expansion drum attached to the heater, and it is said to have been found about half full of water. I have already stated that if that be true, it is inconsistent with the theory of the defendant in error that the coils were empty at the time of the fire. There is other evidence, practically undisputed, that the zinc bounding or defining the enclosure in which the furnace part of the heater was placed was either burned or melted away in patches at some places, and there is some evidence, theoretical to be sure, that before this could be accomplished, the coils themselves, if they were empty of water, would have been melted. We do not deem this evidence very conclusive one way or the other, but we do feel that there should not be an arbitrary and capricious rejection of the testimony of witnesses which stands unimpeached and consistent with itself, that there was water in the expansion drum in such quantity as to evidence that the coils themselves were supplied with it. We think this evidence should have been considered by the jury, and taking the evidence in its entirety, and without further comment upon it—and very much more might be said—we think that the verdict is not justified by the evidence. For this reason and for no other the judgment of the court below will be reversed and the case remanded for a new trial.

Potter & Potter, for plaintiff in error.

C. A. Thatcher, for defendant in error.

LIABILITY FOR BAD CONDITION OF COUNTRY ROADS.

Circuit Court of Williams County.

ELLA SMITH v. COMMISSIONERS OF WILLIAMS COUNTY.*

Decided, January 21, 1905.

Roads—Negligence of County in Failing to Keep in Good Condition—Actions against County Commissioners—Improved Roads and Ordinary Country Roads Distinguished—Section 845.

The duty of keeping ordinary country roads in repair is not imposed on county commissioners by Section 845, Revised Statutes; and a directed verdict for the defendants is not erroneous in an action for damages for negligence brought by one injured by his vehicle sliding into a deep rut or hole in the road.

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

Error to Williams Common Pleas Court.

This action was brought against the board of commissioners of Williams county under Section 845, Revised Statutes, to recover damages for personal injuries the plaintiff claims she sustained on account of one of the county roads of the county being out of repair and dangerous at the time of her injuries. She alleges in her petition that she had been in the town of Bryan on the day of her injury; started home in the evening with a livery rig and driver, and at a certain point in this road, or a certain portion of the road I should say, where she was driving, it was out of repair and had been for many months, in that there were dangerous holes in it, washouts, pits and deep gullies, and that the commissioners had carelessly and negligently permitted that condition of affairs to exist, and as she was driving along in the buggy, her driver undertook to pass another conveyance going the same direction, and the accident occurred, the wagon in some way sliding into one of these holes, and she was injured, for which she asks damages.

The plaintiff offered testimony, quite a large amount, which tends to show that the allegations in her petition are true as to the facts in the case; but at the conclusion of the testimony in favor of plaintiff, a motion was made to direct a verdict in favor

* Affirmed without report, February 27, 1906 (73 Ohio State).

of defendants, upon the ground that the county was not liable in this case, and that it was not one that fell within Section 845, Revised Statutes, making the commissioners liable in their official capacity for negligence. This motion was argued and sustained by the court of common pleas, and a verdict directed in favor of the commissioners, which is in favor of the county. Suit was brought against them in their official capacity, and the question here is, and practically the only question, whether under the facts in this case and under the law there was any liability on the part of the county.

The case was argued fully, and full and comprehensive briefs were filed by counsel in the case. A large number of statutes were cited and reviewed by counsel in oral argument and in briefs filed. Prior to the amendment of Section 845, Revised Statutes, as has been held by the Supreme Court, and as is well known, there was no liability on the board of commissioners for injuries such as this. The county was a mere territorial division for governmental purposes, erected largely for the convenience of the state, and unlike the case with municipal corporations there was no liability imposed upon the community or upon the county for injuries resulting from defective roads. There were officers such as county commissioners, trustees and supervisors who, under certain conditions, were given the power to improve roads, or levy taxes, but a person using the roads, so far as defects were concerned, did it at his own risk, without any right to bring an action for damages on account of defects in the road; but this Section 845, Revised Statutes, introduced a new element, by providing that county commissioners may sue and be sued, and shall be capable of pleading and being impleaded in any court of judicature, and of bringing, maintaining and defending all suits, either in law or in equity, involving any injury to any public state or county road, bridge or ditch, drain or water-course established by such board, in their county, and for the prevention of injury to the same, any such board of county commissioners shall be liable in their official capacity for any damages received by reason of the negligence or carelessness of said commissioners, in keeping any such road or bridge in proper repair. It is this last thing that I

have read that imposes the liability upon the county in this case.

No case exactly like this has been before the Supreme Court under this statute. Cases involving actions on account of defective bridges, defective on account of not being kept in repair, or in their construction, have been before the Supreme Court. There are two leading cases of this kind, *Alexander* v. *Brady,* 61 Ohio St., 174, and *Commissioners Hardin County* v. *Coffman,* 60 Ohio St., 527. It has been held in those cases that there was a liability on the part of the county as represented by the county commissioners for negligence in not caring for the county bridges; but whether the county is liable in such a case as this has not been decided by the Supreme Court. That this was a county road seems to be admitted, but it is urged that no duty is imposed upon the county commissioners by any statute, of making such repairs as seem to have been necessary here under the circumstances of this case, while in the case of bridges, by express statutory provision, the duty is imposed upon the county commissioners to keep them and their approaches in repair.

This statute makes the county liable for the negligence of the commissioners. There can be no negligence unless some duty has been imposed upon them in reference to a case of this kind. The commissioners have power to levy taxes for road and bridge purposes, and it is their duty in some cases to repair roads; as for instance where, by freshet or inundation, the road has been partially or wholly swept away so as to render it impassable, there it is the duty of the commissioners to repair the road. That is not claimed to be the case here, but it is claimed that this condition existed in the road for several months as alleged in the petition.

Now we have examined, so far as we know, all of the statutes bearing upon this question, and we have been unable to find any statute expressly imposing this duty upon the county commissioners in a case of this kind. I will not undertake to review all of the statutes bearing on roads and bridges, as they are numerous and it would be impossible to review them in this opinion, but it will be observed that this statute only makes the county liable for the negligence of the commissioners. It does not, as in some of the bridge statutes, make the county

liable for damages in case of failure to repair and keep in r pair bridges as expressed in some of the bridge statutes. Ne ligence is the failure to use ordinary care. It is the failure perform a duty imposed upon one either by statute or by co mon law, and the language used here, in using the word "ne ligence," is different from that used in the bridge statutes, a in order to make the county commissioners liable for defects county roads under this statute, it must be shown that they w negligent in some respects.

It is provided in some of the statutes relating to impro roads and in other cases that the commissioners shall keep th in repair, but there is no such provision as to an ordinary cou road. On the contrary, express provisions are made in s statutes, as to township trustees keeping roads in repair, conditions as to supervisors keeping roads in repair in t district, and provisions as to the fund from which they draw to keep the roads in their district in repair. In this c ty there are some one hundred and forty supervisors.

Judge Williams, in delivering the opinion of *Commissio Hardin County* v. *Coffman, supra,* discusses the question reference to roads, and he says in the course of that discus that the county is liable for defects in the highway, and them on the same level with bridges, and in discussing question he discusses it as though there was a general liabilit the county in failing to keep the county and state roads i pair.

As I have said, the statute as to bridges has expressly vided that the commissioners keep them in repair, and t fore what is said by Judge Williams can not be regarded a cisive of this question, or as the decision of the court. So f we are able to find, there is no such express duty imposed the county commissioners in reference to such a road as this under these circumstances it is provided by some of the sta where repairs are to be made, a petition is to filed invokin action of the county commissioners to give them jurisdicti the matter. Nothing of that kind has come in this case, o evidence offered to show it. It not appearing herein that has been a violation of any statute on the part of the c

commissioners, in our opinion it has not been shown that they have been guilty of any negligence. This statute should receive a reasonably strict construction, for to impose upon the county the liability for a defect in any road would impose a tremendous liability regardless of the fact as to whether or not the board of county commissioners are actually negligent or not. If that is the law, it would require the county commissioners to devote a good deal of their time to patrolling the roads of the county to see that they were in proper repair.

Whether the doctrine of constructive notices would prevail or not, we are uncertain; that is, to hold the county liable on the ground that it had been out of repair for some time. There is no claim in this case that there was any actual notice to the commissioners of the condition of this road. The question is an important one, and one that should be settled by the Supreme Court. In the light that we now have and that we were able to gain, we are of the opinion that the action of the court of common pleas was correct and, therefore, the judgment of that court will be affirmed. There is no other claim of error in the record that need be especially discussed. The judgment will be affirmed.

L. E. Griffin and *C. L. Newcomer*, for plaintiff in error.

Edward Gaudern and *C. E. Bowersox*, for defendants in error.

ERROR FROM COURT OF INSOLVENCY TO THE COMMON PLEAS.

[Circuit Court of Hamilton County.]

CITY v. LOHMAN ET AL.

Decided, June 22, 1907.

***Eminent Domain—Purpose of the Legislature to Expedite Appropriation Proceedings—Error Proceedings—Duty of Common Pleas to Retain Cause—Sections* 6438, 6453 *and* 1536-114.**

Where error is prosecuted from the court of insolvency to the court of common pleas in an appropriation proceeding, and the judgment is reversed, it is the duty of the common pleas to retain the case and proceed to try the matter at issue as provided in Section 6438.

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

This was in effect an action in the insolvency court for tl appropriation of private property.

Error was prosecuted to the judgment of the insolvency cou to the court of common pleas, in which court the judgment the insolvency court was reversed, and the cause remanded the insolvency court for a new trial.

We are of the opinion that the court erred in remanding t case to the insolvency court for a new trial. It should ha retained the cause and proceeded to try the matter at issue is provided in Section 6438, Revised Statutes.

Section 1536-114 provides that municipal corporations a other parties may prosecute error to the judgments of prob and insolvency courts as in other civil actions, which we th means as in other civil actions for appropriation of priv property.

Section 6453, Revised Statutes, says the provision of t chapter shall not apply to municipal authorities, but it goes to point out in what respect it shall not apply, which is as to payment of judgment.

It is apparent that the intention of the Legislature wa: expedite the determination of appropriation proceedings, in o that the corporation may get the possession of the property the benefit of the public and further that the citizen may l his money for which his property is taken and which rigl especially guarded by the Constitution of the state and of United States.

Judgment reversed to this extent.

City Solicitors, for plaintiff in error.

Renner & Renner, contra.

CONTROL OF CHURCH PROPERTY.

Circuit Court of Fulton County.

SILAS MUNSEL ET AL v. D. S. BOYD ET AL.

Decided, May 11, 1907.

Injunction—Upon Petition of Church Trustees—Complaining of Interference with Control of Church Property by Others Claiming to Act as Trustees—Jurisdiction in Equity—Parties—Misjoinder—Quo Warranto—Exclusion of Church Members without Notice—Office of Trustee of a Church not Coupled with an Interest—Tenure of—Dismissal of a Pastor.

1. There is jurisdiction in a court of equity to determine the rights of the parties to an action for injunction, where the plaintiffs claim to be legally elected trustees of an incorporated church, and ask that the defendants, who also claim to be trustees and one of them to be the pastor of the church, be restrained from interfering with their control of the church property or their use of it for purposes of worship.
2. The fact that the plaintiffs sue as trustees and also as members of said church and in behalf of other members thereof, does not present a case of misjoinder, notwithstanding they are perhaps asserting rights in two capacities.
3. The office of trustee of a church is not one coupled with such an interest that the church body in its corporate capacity may not, at a meeting of its members duly called and held, terminate the tenure of such office.
4. The fact that members of a church have become dissatisfied with the pastor, and disapprove of the control into which the church has fallen and cease to attend its services, does not afford ground, without some rule or law of the church therefor, for their dismissal or expulsion without notice or an opportunity to appear and defend; and a vote of expulsion under such circumstances does not terminate membership.

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

The case of Silas Munsel and others, claiming to be trustees of the First Baptist Church of Swanton, Ohio, against D. S. Boyd and others, is an unfortunate controversy which has grown up among persons claiming certain rights and interests in the as-

sociation mentioned in the caption of the petition, the First Baptist Church of Swanton, Ohio.

The case of the plaintiffs is presented by a petition addressed to the equitable jurisdiction of the court and asking for an injunction to restrain the defendants from doing certain acts and interfering with the plaintiffs in the exercise of claimed rights and duties and the control of the church property belonging to said association.

The case was heard in the court below and appealed to this court. It was first submitted to us upon demurrer to the petition, setting out several grounds under the statute, indeed nearly all the grounds specified in the section for demurrer: a lack of jurisdiction; incapacity in the plaintiffs to sue; defect of parties plaintiff; defect of parties defendant; that the petition does not state facts sufficient to constitute a cause of action; that there is a misjoinder of parties plaintiff and a misjoinder of parties defendant. The plaintiffs allege that they sue as trustees and also as members of the church society named and in behalf of a large number, to-wit, twenty other members of said church.

We have had some trouble over the question of misjoinder, but have concluded that there is no misjoinder of either parties plaintiff or parties defendant. It is true that the plaintiffs are asserting rights in perhaps two capacities. They allege that they are both trustees and members, and that they are asking relief in behalf of other members, but after all the result sought is one, and it is a result which might with propriety be sought by the plaintiffs acting in either capacity, as trustees of the corporation or as members thereof, provided that they have the right to sue at all in a court of chancery.

The case of *Bartholomew* v. *Lutheran Congregation,* 35 Ohio St., 567, is one in which the trustees, or alleged trustees of a church, sued as such and the defendants were sued as persons claiming to be trustees and alleged to be usurping the powers and duties of such. No especial question seems to have arisen in that case as to whether suit was brought in the proper right or not, that is, as to whether they should have sued in their representative capacity or whether in their capacity as members of an association, but the relief sought and granted was such as

might perhaps have been, at least in part, granted them as members of the association, if they had sued as such.

The suit here seeks not only to enjoin the defendants from exercising control as claimed trustees over the property of the church, but also from interfering with the plaintiffs in the exercise of such control. To that extent it is, perhaps, a controversy as to a right of trustees to control property entrusted to the trustees as such. But the petition further asks for an injunction to restrain the defendants from interfering with the plaintiffs in worshiping in said church or otherwise entering into it as members. I am not attempting to recite the precise phraseology of the petition or its prayor, but am giving merely the substance.

Without tarrying long upon the matters presented by the demurrer it suffices to say that it is our conclusion that the demurrer should not be sustained.

I should, before leaving the subject however, pay brief attention to the claim made by counsel for defendants that the court has no jurisdiction in equity to determine the rights of these parties at all. The contention is that the allegations of the petition, if conceded to be true, make a case for quo warranto rather than for equitable relief by injunction, and that so far as possession of the property is concerned, the plaintiffs might have an adequate remedy at law by ejectment or something of that kind. Our judgment, however, is that a court of equity has jurisdiction, although the validity of the election of persons as trustees or the question of authority of one of the defendants to act as pastor may be incidentally considered to some extent in the consideration of the case.

The object of the suit, at least the proper object of the suit, is not exactly to determine the rights of claimants to office, but rather to restrain persons from interference with the control and possession of property; or with the use of the property to the extent to which trustees or members of a religious association may use the property of such association. The defendants, as the petition declares, claimed to be trustees and are in possession and control of the property and keep the plaintiffs out. The plaintiffs claim that they are the legal trustees. They

assert that one D. S. Boyd claims to be pastor of the church, and in substance that he is not; that although formerly pastor of the church he was deposed by the plaintiffs and that he is no longer entitled to exercise the duties or powers or functions of that office.

There are cases, of course, in which the rights of claimants to act as officials of one kind or another are to be determined only by proceedings in the nature of quo warranto, but the 35th Ohio St. case, already cited, *Bartholomew* v. *Lutheran Congregation,* is sufficient authority, we think, for entertaining jurisdiction upon the averments of this petition, and as a court of equity.

The answer admits an averment found in the petition that this church is an independent organization subject to no control from the outside by any other church or organization. It seems to have been, although an incorporated body, a sort of law unto itself, excepting so far as it is governed by the teachings of the Scriptures and general customs, perhaps, of the Baptist church or Baptist churches and customs which may have grown up in its own body.

The evidence which has been introduced upon the hearing, for the case has been heard by us upon evidence, pending our examination of the questions and conclusions thereon arising on the demurrer, discloses that said D. S. Boyd became the pastor of this church society some time in the year 1891 and that he has continued to act as such, claiming to be still pastor up to the rendition of the decree by the court of common pleas in the present suit.

On the 18th day of May, 1905, the plaintiffs and others, claiming to be members of the association, held a meeting at which they elected a new board of trustees consisting of five members. It may be said in passing that while no regulations appear to have been drafted or adopted by this society, the number of trustees has been usually, if not always during its history, five. There may have been vacancies at one time or another, but we are satisfied from the evidence that by common consent or otherwise the number of five has been adopted as a proper number for the board of trustees. At this meeting of the 18th of May,

1905, the persons acting and electing that board of trustees had no power so to act, unless they were in fact members of this corporate body, and upon the question as to whether they were or were not members on that day centers a large part of the present controversy. We will not attempt to review the evidence in detail. It is manifest that not many years after the induction of Mr. Boyd into the pastorate dissatisfaction arose among members of the organization, and that suggestions were made that he be retired or that he be asked to resign from the pastorate. At one time, as is claimed, he tendered a resignation which was not accepted. He does not seem to have tendered a resignation at any time which was accepted, and he was never formally deposed, unless by the action of the meeting of the members held but a short time before the beginning of the suit in the court of common pleas; and the deposition at that time was by the plaintiffs and those associated with them claiming to be members of the corporate body. This claim was disputed by Mr. Boyd and his friends and associates in the church, upon the ground that, although many of these claimed members had been such at one time, they had been dropped from the roll of the church, and by reason of one cause and another had been expelled or dismissed from the church, so that they had no longer any power to act as members. It appears, according to this claim, that although at the coming of Mr. Boyd to the church in 1891 the church had something more than one hundred members this number had been reduced year by year until at about the beginning of 1896 there remained but a corporal's guard, consisting for the most part of Mr. Boyd, his sons and those who were either akin to him or related by marriage. It appears also that the persons claiming to act as trustees of the church at that time, and who have been brought into court as defendants, and who concede that they are acting and claiming as such trustees, are either of his own kin—his own sons or immediate relatives by blood—or that they are related to him by marriage.

Many of the expulsions to which I have referred, or attempted expulsions of members of the church, were had without any previous notice to the persons so sought to be expelled, so as to enable them to resist or defend against the attempted expulsion

if they saw fit. At one time nineteen members were so dismissed from the church or dropped from the rolls and at another twenty, without any apparent notice to them of the intention of the corporate body to dismiss them from membership. We think this could not be done, and we find no authority either in the book called the "star book" which has been offered in evidence or in the New Testament passages quoted and cited by Mr. Boyd in his testimony, or by any customs of the church which will justify the severing of the relations of the members in this way. It is true that most of them had ceased to attend upon his ministrations; they were dissatisfied with him; they did not approve of the management and control into which the church had fallen, and so remained away. We do not, however, deem that this was a relinquishment of their rights as members, and our judgment is that except as to such members as had previous notice of an intention to pass upon their membership by investigation and dismissal if necessary, or as to such as were present when their cases were investigated, and had knowledge at the time of such expulsion, the membership was not terminated, and that the persons so attempted to be expelled remained members of the association up to the present time.

We think also that more than a quorum of legal members gathered at the meeting of May 18, 1905, and that proper notice of that meeting had been given to all persons concerned. It appears to us that Mr. Boyd and the faction supporting him knew of this contemplated meeting; that they might have attended it if they had seen fit. There is no claim in this petition that Mr. Boyd and his sons and others associated with him are not members of the association; and it is not claimed on the other hand that there was any interference with their being present at the meeting referred to. It is agreed that five members of the church constitute a quorum to transact business at any meeting properly called. We think then that this meeting of May 18th was a legal meeting, and that it had authority to do any proper acts or transact any proper business which might come before it connected with the affairs of the church organization.

Now, it is insisted that although the board attempted to elect five trustees at this meeting of May 18, 1905, that there were

still three trustees who had been elected for three year terms and that those terms would not expire until a date subsequent to May 18, 1905. This seems to be true. And it is insisted that because of this fact the members at the meeting of May 18, 1905, had no power to elect a board of five members. It has occurred to us that this question might be disposed of upon either of two grounds. While by custom the board of trustees of this church consisted of five members there is no regulation and no statute that prevented them from at any time increasing that number, so that it would not necessarily follow that even if there were three legal trustees already holding office on May 18, 1905, the members of the church at a valid meeting could not add to that number five more so as to make eight trustees instead of five. We are inclined, however, to place our decision upon another ground, and that is that the trusteeship is not an office coupled with such an interest that the church as a whole, the church as a body in its corporate capacity and power, at a meeting of its members duly called and held, may not terminate the tenure of any trustee. We think that they had such power under all the circumstances of this case, considering the situation that had arisen, the attempts made by Mr. Boyd and those associated with him to control all the affairs of the church, to keep its functions, its powers, its property in their own hands and to expel from membership and exclude from power the plaintiffs and all others associated with them, who had theretofore been members of the association and as we think were so still. We believe these facts justified the election of a full board, and we are satisfied that it was the intention, although not expressed upon the record of these proceedings, to elect a board of five which should constitute the whole board of the church, and that so many as were necessary should take the places of the three members who had been previously elected and were still in office.

Our judgment then is that, not only are the persons claiming here as plaintiffs, members of the association, and that a large number of others who have been treated as expelled members still retain their membership in the association, but also that the plaintiffs constitute the board of trustees of the association, and that they are entitled to such control and management and direc-

tion of the affairs of the chuch as legitimately belong to any legal board of such body.

If this is true, they are clearly entitled to at least a part of the relief which is sought here. We are not inclined to believe from the facts disclosed to us that there is any present intention on the part of the defendants to incumber or dispose of the church property, and we doubt very much their ability to place any troublesome cloud upon its title under the present circumstances. The property is already mortgaged, as appears, to the extent of $500, which might stand somewhat in the way of their disposition of it; but in addition to that, with this decree of the court at which we are arriving, and under the manifest conditions which have been disclosed, it is hardly likely that any persons would be induced to attempt to make an investment in this church property, receiving title from Mr. Boyd and his adherents.

Nor are we inclined to think that there is any disposition on the part of the defendants to prevent the plaintiffs from entering the church during the hours of open session for religious worship, or otherwise to take part in the public meetings to the extent that members of a congregation not members of a church would be permitted to take part.

We do not think then that the plaintiffs need all the relief for which they ask. We do think, however, that they are entitled to an injunction restraining the defendants from interfering with them, the plaintiffs, in the control of the church property. We think that they are entitled to an injunction restraining the defendants from attempting to exercise control over it, except in so far as the defendants as individual members may take part in the meetings or other affairs of the association.

There is another matter to which the petition invites the attention of the court, and that is the status of Mr. D. S. Boyd in the church. The petition alleges and the answer admits that he is one of the trustees. The answer is verified by Mr. D. S. Boyd with others, but it appears upon the trial that he ceased to be a trustee at some time—whether before or after the beginning of the suit I do not know. He insists however that he is still pastor of the church. It becomes essential to inquire as to whether he is justified in this claim.

After the meeting of May 18, 1905, to which I have referred, to-wit, on January 24, 1906, the recommendation was made by the board of trustees, as appears by the record of the society, that the pastorate be declared vacant and that the Rev. D. S. Boyd, the so-called pastor, be informed that his relationship as such cease with the date last mentioned.

On the same day the society met in the evening at 7:30 o'clock and we find this record of the proceedings, so far as relate to the question which we are now considering:

"Brother Vaughan then attempted to read a recommendation of the trustees of the church, but Mr. Boyd and a few others made such disturbance that he waited for silence. On motion of Brother M. G. Will, seconded by Sister E. J. Crissey, it was voted to adjourn to Sister E. J. Crissey's home. A few minutes later the First Regular Baptist Church of Swanton, Ohio, met pursuant to its adjournment as above stated in the home of Sister E. J. Crissey. Brother J. C. Vaughan was appointed chairman. As the clerk had left, the minutes of the last business meeting was waived. The board of trustees submitted the following report and on motion of Brother David Kelsey and seconded by Brother M. G. Will, the church unanimously voted to adopt the report and instructed the clerk to send a copy of the recommendation to Mr. D. S. Boyd. On motion it was voted that Brother J. C. Vaughan, David Kelsey, Silas Munsel, Sister C. A. Fairchild and Charlotte Munsel be the pulpit committee to look after the matter of pulpit supplies and a pastor."

It was then voted that the church hold a business meeting in three weeks, etc. The reference to the report or recommendation which it is stated followed has evident reference, we think, to a copy of the recommendation found on the page immediately preceding instead of following the minutes of this meeting. There is no other record and the witnesses so inform us.

Our conclusion on this branch of our inquiry is that the relation of Mr. Boyd to the church as its pastor terminated on January 24, 1906; that the will of the members unanimously expressed at this meeting was one which they were authorized to make, and that the meeting was regularly called.

There are many facts connected with the entire history of this association that show an inexperience in the matter of rules and

records and proceedings generally; but we should look to the substance of things and endeavor to ascertain just what parties are entitled to ask and just what they have at times sought to accomplish and what their relations are to one another, as shown by the transactions when analyzed and thoroughly examined.

This case has been a most unfortunate controversy and it has developed into one of those bitter feuds that we sometimes discover in bodies which should especially exemplify to the world that living Christian spirit which was inculcated by the Master. It is a kind of case which the courts dislike to approach. We have no disposition or wish to interfere in the affairs of religious organizations, and we have commented upon the transactions only in so far as a full consideration of the questions arising in law and submitted to us require.

I have sufficiently indicated how far the decree of the court should go and the journal entry will be drawn accordingly.

JUDGE PARKER: I think, in looking through the "star book" that the pastor's relation could not be terminated short of three months; the pastor is entitled to three months notice.

JUDGE WILDMAN: Then instead of it's being January 24th, it should be April 24th. What I said in relation to his pastorate terminating should be changed so that the date instead of being January 24th will be April 24th—three months from the time of the action of the church body as required by the custom or rule disclosed to us.

Ray & Cordill, J. C. Cloon and *J. C. Parson,* for plaintiffs.

John Schlatter, for defendants.

ACQUITTAL NOT A BAR.

Circuit Court of Huron County.

ALLEN BEAMER v. STATE OF OHIO.

Decided, 1906.

Criminal Law—Indictment for Theft—Acquittal—Prosecution for Receiving the Same Stolen Goods.

One acquitted under an indictment for stealing certain property may be subsequently indicted and tried for receiving and concealing the same property, knowing it to have been stolen.

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

Error to Huron Common Pleas Court.

Allen Beamer, plaintiff in error, was indicted and convicted of the offense of receiving and concealing stolen property, knowing that it was stolen. He filed a plea in bar, setting forth that at an earlier time in the same court he had been indicted for stealing this same property and that upon trial he had been acquitted. He sets forth distinctly that it was the same transaction and the same property, and his contention is, that this constituted a good plea in bar. To that plea in bar the state filed a demurrer. This was the proper method of presenting the question of law that the state desired to raise, *i. e.*, as to whether, upon the face of this pleading, it stated sufficient facts to constitute a good plea in bar. Counsel for plaintiff in error demanded a jury to try the issues, and complain because that demand was disregarded.

This question must be determined by the court from an examination and consideration of the record. As there was no controverted question of fact there was nothing to submit to a jury. If any of the averments of facts in the plea in bar had been denied by answer, then, of course, the question or issue of fact thus raised should have been submitted to a jury. This demurrer raises simply a question of law.

True, it is averred in this plea in bar that the offense on account of which he was tried and acquitted, and the offense

charged in the second indictment of receiving and concealing the stolen property, was the same offense; but we think the court was not bound to regard that conclusion as raising a question of fact for a jury, in view of the fact that it appeared upon the face of the record that the first crime charged was that of stealing, and the crime charged in the second indictment was entirely different, viz., the crime of receiving and concealing property stolen by another. We are satisfied that the decision of the court below upon that point was correct; that the offenses, within the meaning of the law on the subject of being twice in jeopardy, and a former acquittal being a bar, were separate and distinct; that the word "offense" in that connection means a crime, and these were not the same offense—were not the same crime, but were separate and distinct offenses or crimes, so that an acquittal of one would not amount to a bar to a prosecution for the other.

I read from brief of counsel for the state a citation taken from the case of *Arrington* v. *Commonwealth,* 87 Va., 96 (12 S. E. Rep., 224):

"The test is, 'not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes, and, if each statute requires proof of an additional act which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.'"

It is apparent that a conviction of one for receiving property stolen by another could not be had upon evidence showing that the defendant had stolen the property. On the other hand, a conviction for stealing property could not be sustained upon evidence that another had stolen the property and that the person on trial had only received and concealed it knowing it to have been stolen.

Again I cite from brief of counsel:

"'Although proof of one particular fact is necessary to a conviction under either of two statutes, yet, if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either is no bar to prosecution and punishment under the other.' *Morey* v. *The Commonwealth,* 108 Mass., 433."

"Unless the first indictment was such as the prisoner might have been convicted upon, by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second. *State* v. *Littlefield,* 70 Me., 452."

It is very evident that upon proof of the facts averred in this second indictment, *i. e.*, that defendant was the receiver of property stolen by another, the defendant could not have been convicted of theft of the same property.

I cite further from brief of counsel:

" 'The test relied on in determining whether a plea of former acquittal or conviction will avail as a bar is, that the facts alleged in the second indictment must be such that if proved they would have procured a legal conviction upon the prior indictment under which the prisoner has been acquitted or convicted.' *Roberts* v. *State,* 14 Ga., 8."

" 'A former trial is not a bar, unless the first indictment was such that the prisoner might have been convicted upon proof of the facts set forth in the second indictment.' "

" 'There was no error in charging a jury that a trial for, and acquittal of, the forgery of an instrument was not a bar to a subsequent indictment for uttering the same instrument as genuine, knowing it to be forged.' *Harrison* v. *State,* 36 Ala., 248-249."

" 'On a plea of *autrefois acquit,* the true test to determine whether the accused has been put in jeopardy for the same offense, is whether the facts alleged in the second, if proven to be true, would have warranted a conviction in the first indictment.' *Price* v. *State,* 19 Ohio, 423, 424."

"See also *Bainbridge* v. *State,* 30 Ohio St., 264."

Substantially the same test is laid down in the case of *State* v. *Warner,* 14 Ind., 572; in *1 Archbold, Crim. Pr. & Pl.* (6th Ed.), 112, note 2; *1 Bishop, Crim. Law,* Section 680*a*, 896, and some other cases that are cited in the brief.

We know of no law or authority running contrary to the authorities cited. The judgment of the court of common pleas will be affirmed.

J. R. McKnight, for plaintiff in error.

L. W. Wickham, for defendant in error.

WAIVER OF CONDITION AS TO PRE-PAYMENT OF PREMIUMS.

[Circuit Court of Hamilton County.]

PREFERRED MASONIC MUTUAL ACCIDENT ASSOCIATION v. MARGARET J. HARRINGTON.

Decided, May 11, 1907.

Amendment—Permissible after Verdict, when—Waiver—Trial—Effect of Production of Receipt without Explanation—Interrogatories—Failure of Jury to Answer—Error—Section 5114.

1. In an action on a policy of insurance, where the case has been tried in part on the theory that there had been a waiver of the condition of the policy as to prepayment of premiums, it is not error after verdict to permit an amendment of the petition setting up such waiver.
2. Moreover, the receipt of the company for the premium having been offered without explanation, it stands as *prima facie* evidence of compliance with the conditions of the policy, and the verdict should stand regardless of the question of waiver.
3. Failure of the jury to answer special interrogatories is not ground of error when not excepted to at the time.

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

This action was founded upon a policy of accident insurance. The plaintiff in her petition alleged full performance of all its conditions. The answer contains a general denial of such performance, and an averment that the last quarterly payment due before the accident was not paid, and that by the terms of the policy it thereby lapsed and became void and of no effect.

After verdict for plaintiff the court permitted plaintiff to file an amended petition, setting up a waiver of the condition of the policy requiring prepayment of the quarterly premium due January 30, 1903. The case was tried partly upon this theory, and there was no error in permitting the amendment. Section 5114, Revised Statutes.

The production of the receipt of the association for the quarterly premium was *prima facie* evidence of payment, and in

the absence of any explanation entitled the plaintiff to a verdict without regard to any question of waiver. *Neil* v. *Hepburn*, 6 Ohio, 534.

The deposition of the witness, Warner, attached to the bill of exceptions is not identified by any mark as the deposition offered in evidence, and hence can not be considered as a part of the bill, nor will the court consider the alleged errors that the verdict is not sustained by sufficient evidence, and that the court refused to instruct the jury to return a verdict for the defendant. *Railroad Co.* v. *Mackey*, 53 O. S., 370.

Such of the numerous special instructions requested by the defendant as were refused had either already been substantially given to the jury, or were afterwards embraced in the general charge, or were inapplicable to the case as presented by the record.

The failure of the jury to answer the three special interrogatories were not excepted to until after the jury was discharged, and will not avail as a ground of error.

We find no prejudicial error in the record and the judgment will be affirmed.

Frank T. Lodge, Boyce & Boyd and *M. C. Slutes*, for plaintiff in error.

M. G. Heintz, contra.

ACQUIREMENT BY PRESCRIPTION OF RIGHT TO USE STREAM FOR SEWER PURPOSES.

[Circuit Court of Hamilton County.]

JOHN SCHRENK, JR., v. THE CITY OF CINCINNATI.

Decided, June 22, 1907.

Pollution of Stream—Charge of Court with Reference Thereto—Acquirement by Municipality—To Use Stream for Sewer Purposes—Error—Damages.

A charge of court with reference to the time required by a municipality to acquire by prescription the right to empty sewage into a natural stream is erroneous and prejudicial, if it is nowhere stated that the time required to create the right *must* be at least twenty-one years.

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

The court charged the jury as follows:

"If you find from the evidence that Bloody run, as it flowed through plaintiff's property, has been polluted by the city of Cincinnati for long period of time, and that the stream and its deposits along its banks, and the smell, if any, arising from its waters are but different in slight degree from what they have been for many years as it flowed through plaintiff's property, then the plaintiff can not recover."

And again as follows:

"The burden of proof is on the defendant to show a prescriptive right to use the stream for sewer purposes and to show that the water as it flowed through plaintiff's premises was substantially as it was in 1903 for a period of time more than four years prior to that date."

The jury naturally would and no doubt did infer from these instructions that the city could acquire a prescriptive right to use the stream for sewer purposes by an uninterrupted use of the same in that manner for any period of time more than four years and less than twenty-one years. Although in another part of charge the court said that such right could be acquired in twenty-one years, it nowhere appears in the charge that the period of time required to create the right *must* be at least twenty-one years.

The instructions given were erroneous and prejudicial, for which the judgment will be reversed and cause remanded for a new trial.

M. G. Heintz, for plaintiff in error.

City Solictors, contra.

ASSESSMENTS FOR SEWERS.

Circuit Court of Lucas County.

KOHLER BRICK CO. ET AL V. CITY OF TOLEDO ET AL.

Decided March 9, 1907.

Sewers—Notice to Property Owners not Necessary, When—Proper Method of Assessing Unplatted Property to the Extent of Benefits —Ordinance Providing for Assessment for Sewer of a Special Nature—Publication of, not Necessary—Where Cost is to be Met by Bond Issue—Certificate of Auditor not Required—Assessment not Invalidated by Slight Change in Sewer Plan.

1. The notice required to be given, to the owners of property to be benefited, of resolutions and proceedings for the construction of a sewer system, is not applicable where council is proceeding to construct a sewer that is a part of a general system that has already been planned and provided for by proper proceedings.
2. Where unplatted property abuts on a sewer or other improvement within a municipal corporation, a part of which will not be benefited by the improvement, it is within the power of council to limit the assessment as to such property to the extent of the benefits received by fixing the assessment in proportion to the depth of an ordinary platted lot.
3. An ordinance providing for the assessment of property benefited by a sewer improvement is of a special nature, and not within the meaning of Section 1695, Revised Statutes, which provides for the publication of ordinances of a general nature.
4. Where a bond issue is required for the payment of the whole cost of a proposed sewer, no certificate is required from the auditor that sufficient funds are in the treasury and unappropriated to pay the cost thereof.
5. Slight changes in an adopted sewer plan will not invalidate the legislation or assessments, where the sewer is not rendered less servicable, or valuable, or more expensive, and is not affected thereby in any material manner.

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

This is an action brought to enjoin the collection of assessments made upon the lands of the plaintiff, which appear to be unplatted lands in sewer district No. 36 of the city, for the cost of construction of a sewer therein, designated as "main sewer

district 898." The case is submitted upon the pleadings and a agreed statement of facts. It is set forth in the petition, quo ing therefrom, that—

"On October 5, 1903, the common council of the city of T ledo adopted a resolution declaring the necessity for constru ing a main sewer for main sewer district number thirty-six, c of Toledo, Ohio."

Then the petition further sets forth that the sewer was c structed in pursuance of that resolution. It is claimed t these assessments are invalid and their collection should be joined for various reasons, and the reasons now urged by co sel for the plaintiffs, in brief and in oral argument, I will deavor to take up and discuss in the order in which they stated in the brief. I may say that a great many grounds invalidity set forth in the petition are abandoned or based u statements of fact that are not supported by any finding, ag ment or evidence of such facts.

The first point made against this assessment, and perhaps one that is most important, and the one which, if well foun has the most merit in it, is that with respect to an alleged w of statutory notice to parties interested of certain steps ta in the course of the proceeding. It appears that sewer dist No. 36 was established and a plan of sewer and sewage disp plant thereof was adopted by an ordinance passed and appr in August, 1900, and that when the council came to proceed respect to this particular sewer, their first step was the adop of a resolution declaring the necessity for constructing a n sewer and sewage disposal plant for main sewer district No Toledo, Ohio, in accordance with such plan. That resolu discloses the necessity of the sewer and describes it—its mensions, its length, its course, its outlet, etc.—and says it is to be constructed for the purpose of disposing of the se of said main sewer district No. 36 in accordance with plans, on file in the city engineer's office. It provides:

"That the cost and expense of the sewer and sewage dis plant shall be levied and assessed upon the lots and lands bo ing and abutting thereon and benefited thereby accordin

benefits accruing therefrom in a sum not to exceed the amount that would, in the opinion of council, be required to construct an ordinary sewer or drain of sufficient capacity to drain such lots and lands, and the remainder of the costs and expenses of constructing said sewer and sewage disposal plant, except the amount charged to the municipality and except the amount assessed for local drainage, shall be assessed upon all the real property in sewer district No. 36, in which said main sewer 898 is located, according to benefits—said assessments to be made in five annual installments in accordance with the sections of the Revised Statutes of Ohio applicable thereto."

And it is therein further provided that—

"All persons claiming damages for the foregoing improvements must file their claims thereto with the clerk of council within four weeks after the first publication of this resolution."

Provision was made for the publication of this resolution once a week for four weeks; and such publication appears to have been made.

The next step in the way of legislation was the passage of an ordinance, on January 13, 1904, which is entitled, "An ordinance, No. 46, determining to proceed with the construction of sewer No. 898, and sewage disposal plant for main sewer district No. 36." That ordinance provides for the construction of the sewer, the assessment of the cost, etc., in harmony with the provisions of the resolution; and it also provides for the issuing of the bonds of the city in anticipation of the collection of such part of said assessment as shall remain unpaid after the time prescribed in the assessing ordinance for cash payment, and in an amount equal thereto. It also makes provision for the assessments being paid in cash if the parties liable therefor shall choose so to pay. It provides how the contract shall be paid, how the contract for the work shall be executed, etc. It appears that in the course of the proceedings an assessing committee was appointed that proceeded to make an assessment upon the property abutting upon the streets through which the sewer extended, according to special benefits; and that this committee, in pursuance of legislation by the council, took into consideration so much of the property of the plaintiffs specially benefited by this

improvement as fronted upon the streets through which tl sewer district extended to a fair average depth of the platt lots contiguous to such unplatted lands and that the assessme upon said lands was laid upon such part of the lands only. A then, by an ordinance passed on March 27, 1905, these asse ments were confirmed, and proper provision was made for th being duly recorded and collected.

In the agreed statement of facts certain other particulars a set forth, to some of which I may make reference in the cou of this opinion.

It is contended by the plaintiffs that notice of this prelimin resolution should have been given them, as required by Sect 42 of the act of the Legislature (96 O. L., 40; Revised Statu 1536-212), called the new municipal code, passed on October 1902, and which took effect on May 4, 1903.

Section 51, 96 O. L., 39 (Revised Statutes 1536-211), provic

"Whenever it is deemed necessary by any city or village make any public improvement to be paid for in whole or in p by special assessments, council shall declare by resolution (th fourths of the whole number elected thereto concurring, exc as otherwise provided herein) the necessity of such improvem and thereupon prepare or cause to be prepared plans, speci tions, estimates and profiles of the proposed improvement, sh ing the grade of the same with reference to the property abut thereon, which plans, specifications, estimates and profiles s be filed in the office of the department of public service in c and in the office of the clerk in villages, and shall be open to inspection of all persons interested. Not earlier than two w after the passage of said resolution, and before any such provement is begun, council shall by ordinance (three-fourth the whole number elected thereto concurring) determine general nature of the improvement, what shall be the grad the street, alley or other public place to be improved, as we the grade or elevation of the curbs, and approve the p specifications, estimates and profiles for the proposed imp ment. Council shall also determine in said ordinance the me of the assessment, the mode of payment therefor and shall de whether or not bonds shall be issued in anticipation of the lection of the same."

There are some other provisions which I will not read last sentence in that section being:

"Said resolution and ordinance shall be published as required in Section 124 of this act."

Then Section 52, 96 O. L., 40 (Revised Statutes, 1536-212), provides:

"A notice of the passage of the ordinance required in the last preceding section shall be served by the clerk of council or an assistant upon the owner of each piece of the property to be assessed or upon the persons in whose names the same may be assessed for taxation on the tax duplicate, in the manner provided by law for the service of summons in civil actions; * * * ."

With some further provisions respecting service of corporations and non-residents.

It will be observed that in this case no such ordinance as is provided for in Section 51, 96 O. L., 39, was passed by the council—the ordinance which the counsel for the city here before us are in the habit of describing as the "intermediate ordinance"—and that Section 52, 96 O. L., 40, does not provide for this personal service of notice of any other legislation than such ordinance; so that, if such ordinance were required, the proceeding is defective, and fatally defective, not only because there was no notice of the ordinance, but because there was no ordinance of which notice could be given.

It is contended on behalf of the city that this provision as to the intermediate ordinance and as to the service of notice thereof, does not apply in a case like this where the council is proceeding to construct a sewer which is a part of a system which has already been planned and provided for by proper legislation in pursuance of Sections 77, 78, 79, 80, 81, 96 O. L., 47, 48 (Revised Statutes, 1536-240, *et seq.*), and perhaps some of the following sections of this same statute upon that subject; and so, disregarding the provisions of Sections 51 and 52, 96 O. L., 39, 40, the council proceeded under Section 84, 96 O. L., 48 (Revised Statutes, 1536-247), and adopted the resolution.

Section 84 reads:

"When it is deemed necessary by a city or village to construct all or a part of the sewers provided for in said plan, the council shall declare by resolution the necessity of such improvement.

Said resolution shall contain a declaration of the necessity of sai improvement, a statement of the district or districts or part thereof proposed to be constructed, the character of the material to be used, a reference to the plans and specifications, wher the same are on file, and the mode of payment therefor, and th council shall cause the resolution to be published once a week fo not less than two nor more than four consecutive weeks in on newspaper of general circulation in the corporation."

We are of the opinion that these special provisions with r spect to the construction of sewers in pursuance of a plan an appropriate legislation already adopted control the council an are independent of the provisions of Sections 51 and 52, 96 O L., 39, 40.

We had before us, recently, in Wood county, a question ver much like this, with respect to sidewalks, coming under the san subdivision of this part of the statute defining the powers municipalities. The case was that of *Westenhafer* v. *Hoytsvill* 8 C. C.—N. S., 284. It will be observed, on looking into the sta utes, that a mode of procedure with reference to the constructi of sidewalks, as well as other improvements, is provided for Sections 50, 51, 52, 96 O. L., 39, 40, and some following section but a more summary method of procedure is provided for Sections 70, 71, 96 O. L., 45, and some of the following sectior and we held that in proceeding under Section 70 *et seq.*, t council were not required to observe the formalities provid where the system or method described in Section 50 *et seq.*, w pursued; we held that—

"A special ordinance for the construction of a specific si walk is not required, where a general ordinance for the constr tion of sidewalks has been therefore enacted."

This case is analogous. If the council were proceeding h to construct a sewer not before provided for by legislation, a not before planned, it would doubtless be necessary to pursue course marked out in Section 51 and 52, 96 O. L., 39, 40; where they are proceeding in pursuance of a plan already ado ed, we think that is not necessary. That had been the law the state up to the time of the adoption of this act of Octo 22, 1902, and it was expressly provided, in original Revi

Statutes 2304 (Revised Statutes 1536-212), that in the case of sewers the twenty days written notice to the owners of the abutting property or to the persons in whose names the abutting property was assessed, was not required; and it is not apparent to us that in respect to these matters, the Legislature designed to make any radical change in the law; the general scheme appears to be the same. There are some transpositions of the provisions, and different arrangements of sections, and the omission of some language that, doubtless, appeared to the Legislature to be verbiage, and this particular provision respecting notice found in Revised Statutes 2304 (Revised Statutes 1536-212) was omitted from the new municipal code; but we think such omission effected no change in the law.

By an act passed on April 19, 1904 (97 O. L., 121), entitled "An act to amend Section 51" and a number of other sections of this new municipal code including Section 60 (Revised Statutes 1536-220), we observe that this provision was added to Section 60, which appears on page 123:

"In the case of construction of sewers hereafter, excepting main or district sewers, notice of the passage of the resolution therefor, as provided in Section 84 of the act of which this is amendatory, shall be made in the manner provided in Section 52 of said act as amended herein."

In other words, thereafter personal service of notice of the resolution should be given. Counsel for plaintiff, in his brief, asks:

"Is it not a fair argument that the Legislature thereby declared that original Section 52 as passed was intended to mean just what it said, and is, therefore, broad enough to include sewers and all special assessments where materials are used, and for reasons of their own no notice should thereafter be given in case of a main sewer?"

But I have already pointed out that what Section 52, 96 O. L., 40, provided for was service of notice, not of the resolution, but of a certain ordinance of a certain character which was not passed in this case, and which we hold was not required. So that this amendment of Section 60 can not be regarded as declar-

atory of the meaning of Section 52, 96 O. L., 40, as it originally stood; *i. e.*, that it should apply to the resolution provided for by Section 84, 96 O. L., 48; but this amendment provides for a new thing—it makes a new requirement—and that is, that personal service of the notice of the resolution provided for in Section 84 shall be made. And even now the provision is made to extend only to local sewers. Main sewers are expressly excepted from the operation of the provision; and this sewer, according to the averments of the petition, as well as by the agreed statement of facts, was a main sewer, notwithstanding the fact that it did not provide for the conveying away of any storm water or water from the streets; it was distinctively and exclusively a sanitary sewer, and yet to all intents and purposes a main sewer.

Our attention is called to the case of *Chicago & E. Ry. Co.* v. *Keith*, 67 O. S., 279, wherein it is held that the law providing for assessments will be invalid, unless it provides for notice to the property owner whose property is to be assessed, somewhere along the line of the proceedings, so that he may have an opportunity to come in and make objections. But it does not require that the notice shall be personal. This legislation of the council, and the law under which it was passed, provide for notice at several stages of the proceeding. The legislation was published; there was opportunity for hearing upon the original legislation with respect to the formation of the district and the plan of the sewers and sewage disposal therefor, and notice was given of the assessment which had been made and which was on file.

Secondly, objection is made because the council provide for the assessing of only a part of these unplatted lands; to-wit, the part abutting upon the streets where the sewer was laid, to a depth equal to the average depth of the platted lots in that vicinity. It is said that there was no authority for thus limiting the assessment to a part of these unplatted lands.

The statute formerly provided, in original Revised Statutes 2379 (see Revised Statutes 1536-248), that:

"The council shall provide for assessing the cost and expenses of constructing main sewers, upon the lots and lands bounding or

abutting upon the streets, lanes, alleys, highways, market spaces, public landings, and commons, in or along which the same shall pass, by the feet front, or according to the valuation of the same on the tax list, or according to benefits, as it shall determine."

And it is said that in the new municipal code no provision can be found corresponding with that, authorizing the laying of assessments upon the abutting property according to benefits, this original Revised Statutes 2379 (see Revised Statutes 1536-248), being repealed by the act which I call the new municipal code.

The authority for levying the assessments is found in Section 50, 96 O. L., 39 (Revised Statutes 1536-210), which then read:

"The council of any municipal corporation may assess upon the abutting, adjacent and contiguous or other specially benefited lots or lands in the corporation, any part of the entire cost of, and expense connected with, the improvement of any street, alley or public road or place by paving, repaving, repairing, constructing sidewalks, sewers, drains or water-courses, and any part of the cost of lighting, sprinkling, sweeping, cleaning, or planting shade trees upon the same, by either of the following methods:

"First. By a percentage of the tax value of the property assessed.

"Second. In proportion to the benefits which may result from the improvement, or

"Third. By the foot frontage of the property bounding and abutting upon the improvement."

And then the limitations as to the assessments, substantially as they existed theretofore, are to be found in Section 53, 96 O. L., 40. There is in Section 50 authority for assessing according to benefits upon abutting property. But let me go further in stating the plaintiff's position. His contention is, that the whole of this unplatted land should be considered as abutting property, and that there is no authority for limiting the lien of the assessment to this strip of land abutting upon the street where the sewer was laid. It was formerly provided, in the original Revised Statutes 2269 (Revised Statutes 1536-213), as follows:

"In making special assessments according to valuation, the council shall be governed by the assessed value of the lots, if the land is subdivided and the lots are numbered and recorded;

but if the lots are not assessed for taxation, or if there is land not subdivided into lots, the council shall fix the value of the lots or the value of the front of such land to the usual depth of lots, by the average of two blocks, one of which shall be next adjoining on either side."

But the last provision of that section is: "And this section shall be applicable to special assessments provided for in this chapter, excepting assessments according to benefits."

So that it is not apparent that there was ever a provision for thus limiting the scope of the lien of special assessments, where they were laid according to benefits, and there seems to be no particular reason why there should be such limitation in those cases. We are of the opinion that where it would be proper—where it would be just to the owner of the unplatted land to thus limit the scope of the lien—it is within the power of the council to do it, without any special provision upon the subject; and it seems to us that in a case like this, the lands extending a great distance from the street where the sewer was laid, when the council came to provide for the levying of an assessment upon the abutting property according to benefits, it would have been very wrong and very unjust to the owner of the property to have considered its full depth and allowed the assessment to be spread over the whole extent of the territory. One might own farm lands extending back from the sewer so that the rear part, or all except the very front part of the lands, would be without the local benefits contemplated or on account of which a special assessment might be levied. It is apparent that in a sanitary sewer of this description the only property that would be specially benefited would be the property lying immediately adjacent to the street where the sewer was laid; and it would seem to be not only proper, but just, but a thing that should be required of the council, that in considering the levy for this improvement it should take into consideration the depth of ordinary building lots upon which houses might be built which could have access to this sanitary sewer for the purposes of such sewer. If the assessment had been levied without this restrictive limitation, we think the plaintiff's lands might have been bound by it; but, in the absence of a showing that they

are prejudiced in any way by the course pursued by the council, we are of the opinion that they have no footing in a court of equity; and no express statutory provision upon the subject seems to have been violated or disregarded.

Complaint is made that the cost of intersections was levied upon the abutting property and was not paid by the city. It is conceded, as we understand it, by the city, that this was a mistake; that the amount of such costs was $1,314.60, and that a ratable proportion thereof should be deducted from the assessments charged against the plaintiffs.

It is said that the assessment ordinance was not published as required by Revised Statutes 1695 (see 1536-621); that is to say, that it was not all of it published. The assessment ordinance refers to the report of the assessors in these words:

"And the council further find and hereby further declare that the lots and lands assessed to pay the cost of said improvement are benefited thereby in proportion to the amounts assessed against the same respectively, by said committee, and that said assessment so reported by said committee upon each lot or parcel of land does not exceed its proportion of such special benefits and there is hereby assessed and levied upon the several lots and lands described in said report the amount therein set forth, for each of the several years therein named, as shown by the schedule of assessments hereto attached, signed by said committee, and dated December 27, 1904."

It is urged that thereby the report was made a part of the ordinance and should have been published with it. It appears that that was not done. But we are of the opinion that it was not necessary to publish this ordinance at all; so that we need not pass upon the question whether the schedule was made a part of the ordinance so that in case the publication of any part of it was required, the schedule should be published with it.

Revised Statute 1695 (see 1536-621) requires that—

"Ordinances of a general nature or providing for improvements shall be published in some newspaper of general circulation in the corporation."

This ordinance was not an ordinance providing for an improvement; the improvement had been provided for; and it was

not an ordinance of a general nature, but was of a special nature.

It is said that there was no certificate from the auditor of funds on hand to pay for this sewer, as required by Section 45, 96 O. L., 37 (R. S. 1536-205), as now found in the statutes. The ordinance provided for the issuing of bonds for the payment of the whole cost, and, under the authority of *Emmert* v. *Elyria*, 74 Ohio St., 185, we hold that no certificate from the auditor was required.

We are not required to meet or decide the question which is suggested, to-wit, as to whether this point touching the validity of the contract could be raised in this way after the work is all done and paid for.

It is said that there was some change in the plans—that is, in the length and dimensions of the sewer—a change from the plans originally adopted. It is not pointed out to us that this change was in any way material; that it rendered the sewer less serviceable or valuable, or more expensive, or that the change worked to the prejudice of the plaintiffs in any respect whatever; and we are of the opinion that the slight changes indicated could not invalidate the legislation nor assessments. It follows that our decree will be the same as the decree entered in the court of common pleas in this case. The parties are relieved from the expense of $10, the cost of improperly advertising the assessment ordinance. The costs of the appeal will be adjudged against the plaintiffs.

Holbrook & Monsarrat, for plaintiffs.

C. S. Northup, for defendants.

PROVING NEGLIGENCE BY CIRCUMSTANTIAL TESTIMONY.

Circuit Court of Fulton County.

GENEVEVE SMITH'S ADMINISTRATOR v. FRANK J. CURTIS.

Decided, May 29, 1907.

Evidence—As to What Caused an Explosion—Proof by Circumstantial Evidence—Not Applicable, When—Speculation and Conjecture—Contradictions—Negligence in the Sale of Gasoline—Application of the Scintilla Rule.

1. The rule which permits the proving of a case by circumstantial evidence requires that the evidence shall be such that the court or jury can reason from established facts to well defined conclusions, and is not applicable if the conclusions are based in any degree on conjecture or speculation.
2. While there is force in the contention that contradictions in testimony should go to the jury for determination, a trial judge is not warranted in sending to the jury a case involving damages for injuries, where the inherent weakness of the evidence renders it impossible for the court to say, as a deduction from the facts, that the accident happened in the manner claimed by the plaintiff.

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

This case comes into this court upon a petition in error to reverse the action of the court of common pleas in directing a verdict for the defendant at the conclusion of the plaintiff's testimony.

The case has been earnestly argued by counsel for plaintiff in error, and we have endeavored to give it careful consideration and have discussed it at some length. I shall not, however, go into an extended discussion of the testimony, but content myself with speaking of the leading points in the case.

It may be premised at the outset that it involves a close question under the system of practice in this state. It seems that on a certain day last November Mrs. Smith was injured by the explosion of a can of oil or a mixture of oil and gasoline. She lingered for a period of nine days before she died. Her evidence, of course, is not taken, and under the rules of law statements made by her could not be given in evidence in this case, so that what she had to say in regard to the occurrence is

a closed book. The case before the court rests largely upon the testimony of the defendant, Curtis, and the husband of Mrs. Smith and her daughter, her daughter being about thirteen years of age.

The injuries or burns received by Mrs. Smith were severe and were confined largely to points above the waist and to the face. The contention of the plaintiff is that this daughter of Mrs. Smith went to the store of the defendant and asked for coal oil, and it is claimed that the defendant gave her oil that was mixed with gasoline. It is stated in the testimony of Mr. Curtis that he had received a barrel of gasoline the day before and that his clerk, in pumping it into another receptacle, had put it in with certain coal oil by mistake, and that he had ascertained that fact a short time before this young girl came in to inquire for the coal oil, and he claims, in his testimony, that he directed his clerk to draw the oil from a coal oil receptacle that contained oil that was sold at a price of sixteen cents a gallon and sell it to her at eleven cents, being the price of the oil that she usually purchased and the price of the oil that had been mixed with the gasoline. And he claims that after giving the order he followed the clerk to the room where the oil was kept and saw him drawing it out of the receptacle, and that he knows he drew it from the receptacle which contained the sixteen cent oil.

The girl testifies that after she had inquired for the oil that some conversation occurred between Mr. Curtis and his clerk in regard to the matter of oil, but what it was she could not state or repeat even the substance of it, but she claims that Mr. Curtis remained in the part of the store which is denominated the dry goods store or dry goods part of the store, and that he was not where he could see the clerk when he drew the oil and that he did not go, as I understand her testimony, near that part of the room.

The oil was taken home and the girl filled the lamps from it that evening, and a portion of it remained in the can, which is a half-gallon can, I believe, and it was set down a distance of about eight or nine feet from the stove, and remained there until the next afternoon; the time differs, but it would seem until

about five o'clock in the afternoon. This was in the month of November. The girl was working at the hotel and was not at home much of the time. At the time Mrs. Smith was burned nobody seems to have heard any explosion. The alarm was given and certain men who were working in the vicinity ran to the building, and one of them testifies. Her husband was telephoned to and came home in a few minutes and found his wife at a neighbor's. Everything at that time was, of course, in confusion. The fire had been put out and the stove, it was said, was deluged with water which had been poured in.

It was claimed on behalf of the plaintiff that there was an odor of gasoline detected about the fluid that had been used in the coal oil lamps. It was claimed that there was a burn in the corner of the room where the can had been placed and that the ceiling there was burned. At the time when the can was picked up, it was in front of the stove some five or six feet. The bottom was gone, but it was otherwise in its natural condition. The can is in evidence. It is a small can. The bottom is off, as stated. The top that screws on is on the can, and it seems that there is in the nozzle through which the fluid is poured out a little ball, inside, that, whenever the oil is poured out, falls down into the orifice and is supposed to retain any odor or gases escaping from the oil into the room.

These are the leading outlines of the case. After this testimony had been given, the court stated its reasons for giving the decision it did, but the fact was it directed a verdict by the jury for the defendant, and the sole question for us is whether or not he erred in doing so, or whether there was sufficient evidence to constitute what is sometimes called a scintilla of evidence to go to the jury, upon which the jury could have been called upon to pass.

It is urged here by counsel for plaintiff in error that a case may be proved by circumstantial evidence. We do not doubt that. But there are rules in regard to that binding upon the court and upon which courts act. The evidence must be such that the court can act from established facts to well defined conclusions. They are not allowed to conjecture nor to speculate. They are not permitted to theorize about the matter, ex-

cepting when they have definite facts that are well established; they may reach from those to conclusions in regard to the cause of the accident. It is required by the Supreme Court of Ohio that they should be definite and well fixed, and they have held in a case that has been cited to us (*Andrews* v. *L. S. & M. S. Ry. Co.* (58 Ohio St., 426; same case, 64 Ohio St., 614), in what appeared to be a pretty conclusive case of circumstantial evidence, that the facts did not prove or authorize the jury to draw the conclusions that they did draw from them.

Now there is, of course, this contradiction between the defendant in erorr and this young woman here testifying. It is claimed that that is a matter which should go to the jury, and there is some force in the suggestion. But that is not the whole case. The weakness of the case is that there was not sufficient evidence to enable the court to say, as a deduction from the facts, that the accident happened by the explosion of the gasoline in this can by being ignited from the fire in the stove. The evidence given in relation to the position of the can, the location of the burns on the body of Mrs. Smith, and all these matters, were all before the jury and are all before the court; and from them all the court must be able to point out a definite conclusion, sustained by the facts and by a logical sequence. And after we get through reading this record and sit down to talk about it we are still in the land of conjecture; the cause of the accident may have been one of a number of things. Before a man can recover of another for alleged negligence, he must show that the negligence of the party caused the injury, and we think that the court was right in its conclusions that the evidence submitted to him lacked this quality, that it lacked certainty or reasonable probability that the accident occurred in the manner in which it is claimed by the plaintiff, and that therefore the plaintiff's claims should fail. It was a sad accident, but in finding who shall be liable civilly for the results of that accident, we must pay attention to the rules of evidence and the law of the case.

We therefore affirm the judgment of the court of common pleas.

Coldbram Schreiber, for plaintiffs in error.

Fites & Paxon, for defendant in error.

INTEREST ON INSTALLMENTS OF INTEREST OVERDUE.

Circuit Court of Columbiana County.

SOLOMON J. FIRESTONE v. JOHN A. DELLENBAUGH ET AL.

Decided, April Term, 1907.

Promissory Notes—Interest and Usury—Construction of Section 3179; Finding a Maximum Rate of Interest which may be Stipulated in Instruments.

A promissory note which provides that it shall be payable one year after date with eight per cent. interest to be paid annually, interest and principal after maturity to bear eight per cent. annual interest to be paid semi-annually, is not usurious.

COOK, J.; BURROWS, J., concurs in a separate opinion; LAUBIE, J., dissents.

Error to Columbiana Common Pleas Court.

The action below was for the foreclosure of a chattel mortgage given by John A. Dellenbaugh and Sarah A. Dellenbaugh, his wife, to Firestone Brothers, of whom Solomon J. Firestone is the successor, to secure the payment of several promissory notes—all of the same character—of which the following is a copy of one of the notes:

"NEW LISBON, OHIO, February 1st, 1888.

"On or before one year after date we or either of us promise to pay Firestone Brothers or order at the banking house of Firestone Brothers, New Lisbon, Ohio, the sum of five hundred dollars with eight per cent. interest to be paid annually. Interest and principal after maturity to bear eight per cent. annual interest to be paid semi-annually."

Between 1888 and the time of bringing the suit some principal and a large amount of interest had been paid upon the notes. The manner of computing the interest after maturity by consent of both parties was to compute interest upon the principal at eight per cent., payable semi-annually, and the interest upon the interest overdue upon the notes unpaid at eight per cent., payable semi-annually, and upon the interest upon interest which was unpaid at six per cent., simple interest, up to the time of computation and settlement.

The question made by the defendants before the referee in ascertaining the amount due upon the notes, was that the notes were usurious and that simple interest at six per cent. was all that could be collected upon the notes. The referee held against the contention of the defendants; that the notes were not usurious; that the manner that the parties had computed the interest made in their various settlements was correct and found for the plaintiff in the sum of about $12,000.

Upon his report being made exceptions were taken and the court confirmed the report in every respect, except upon the finding that the notes were not usurious, and held that they were usurious; and rendered a judgment and decree for about $6,000 instead of $12,000. The question made upon error is who was right, the referee or the court.

Section 3179 of the Revised Statutes, which was in force when the contract was made, provides:

"The parties to a bond, bill, promissory note or other instrument of writing for the forbearance or payment of money at any future time, may stipulate therein for the payment of interest upon the amount thereof at any rate not exceeding eight per cent. per annum, payable annually."

While it would seem from the text of the statute that the intent of the Legislature was that money should in no case earn more than eight per cent. per year, yet it is now well settled that such is not the fact, and that although the statute provides that interest may be reserved at eight per cent. "per annum, payable annually," the words "payable annually" have no effect in qualifying the language of the statute whatever, and that it should be read the same as if the words were eliminated (*Cook* v. *Courtwright*, 40 O. S., 248).

In that case it was held that under the act of May, 1869 (66 Ohio Laws), 91, which is the same as Section 3179, Revised Statutes:

"A promissory note stipulating for the payment of the principal at a future time with interest therein at eight per cent. per annum payable semi-annually until paid is not usurious."

In the opinion, on page 251, it is said:

"Under a contract to pay eight per centum per annum, payable semi-annually, upon a given principal, the interest to be paid, upon that principal, is precisely the same as under a contract to pay 'eight per centum per annum payable annually,' upon the same principal. If the installment of interest falling due at the end of six months should not be paid, and the law would permit interest to run upon it at six per cent. until paid, no part of that six per cent. interest would be interest upon the principal named in the note. And such interest upon interest, if collectible, would not form any part of the interest 'stipulated for.' If collectible at all it would be because of the other sections of the same statute.

"The third section applies to 'all cases other than those provided for in the first and second sections of this act.' The first section we have quoted in full. The second applies to judgments, decrees and orders rendered upon any contract made under the first section. As the first section relates only to contracts for interest upon the principal, a suit for interest upon overdue interest may be considered a case 'other than' those provided for by said section, and is therefore collectible under said third section. And, if separately sued for, the judgment obtained would draw interest under the fourth section."

In the case of *Taylor et al* v. *Hiestand & Co.*, 46 O. S., 345, it is held:

"A promissory note bearing interest at the rate of eight per cent. per annum, payable semi-annually, is not usurious, although it stipulatd that the semi-annual installments of interest shall bear interest at the same rate if not paid when due."

And in the opinion, in referring to *Cook* v. *Courtwright, supra*, it is said:

"This statute was under consideration in *Cook* v. *Courtwright*, 40 Ohio St., 248, and the court there held, first, that a promissory note is not usurious though it contain a stipulation for the semi-annual payment of interest at the rate of eight per cent. per annum; and second, that the semi-annual installments of interest will bear interest at the rate of six per cent. per annum from the day they fall due, but form no part of the interest stipulated for 'upon the amount of the note.' This decision has become a rule of property, and we see no sufficient reason to disturb it now; and it furnishes a rule by which the rights

of parties to this action can be ascertained. It establishes the doctrine that the payee of a promissory note may receive at the end of the year, as interest, a sum of money equal to eight per centum on the face of the note, with six per centum for six months on the first installment of interest added thereto.

"Therefore, the fact that it is apparent on the face of a promissory note that it will earn in any one year, as interest, a sum of money greater than eight per cent. on the principal sum, will not necessarily render it usurious. The court says in that connection (40 Ohio St., 251), 'no part of that six per cent. interest would be interest upon the principal named in the note.' This is equally true of the note here, and the only difference in this respect is, that in that case the unpaid installment bears interest at six per cent. and in this case at eight per cent. In either case the promissory note on its face earns more than eight per cent. per annum on the principal.

"It is said, however, that in the case here, there is an expressed stipulation for interest on the several installments of interest as they respectively fell due, whilst in the case of *Cook* v. *Courtwright, supra,* there was none, but that the installment bore interest by operation of law; and this distinction seems to have been in the mind of the judge who wrote the opinion in that case; but it does not appear to be the principle on which the case turned. The judge there must have referred there to an express stipulation, for surely the interest on the installment in that case was the result of the stipulation for semi-annual payments of interest. If there had been no such stipulation, there could have been no interest on interest, and it can not be important whether the interest on the installments resulted from an express stipulation for its payment, or necessarily, by operation of law, from another stipulation; in either case the result was apparent on the face of the paper."

It is said that the note in this case differs in an essential particular from the notes that were before the Supreme Court in the cases referred to, in that it provides "interest and principal after maturity to bear eight per cent. annual interest, to be paid semi-annually"; that this provision makes it a compound interest-bearing note. We do not think so. There is no distinct provision in the note for rests at stated periods at which time the interest should be added to the principal and to bear interest in the same manner as the principal sum; and if a compound interest-bearing note at eight per cent. in this state is usurious,

about which there might be some doubt, this is not such a note and we can see no substantial difference between this note and ones referred to, especially the note in the case of *Taylor et al* v. *Hiestand & Co.*

In the case of *Cook* v. *Courtwright* it was said that if interest could be collectible at all on the semi-annual payments of interest, that only six per cent. could be collected and that by operation of law, under the third section of the statute which is now Section 3181 of the Revised Statutes, but that was doubted in the case of *Taylor et al* v. *Hiestand & Co.*, and it was held that a note of eight per cent. per annum payable semi-annually is not usurious, although it stipulates that the semi-annual installments shall bear interest at eight per cent. if not paid when due.

What material difference is there under these decisions between interest bearing interest at eight per cent. payable annually and payable semi-annually? In either case the interest upon the interest could only bear simple interest at six per cent., which was charged and paid in this case. *Anketel and wife* v. *Converse et al,* 17 O. S., 11.

Indeed, what difference is there between the note specifying that the note shall bear interest at eight per cent. payable semi-annually and that the interest shall bear interest at eight per cent. payable semi-annually? In either case more than eight per cent. per annum payable annually is charged for the use of the money.

In the 16th American & English Encyclopedia, 1085, in summing up the authorities upon this question, it is said:

"But it is believed to be a safe statement, as a loose general rule, that interest on interest at a rate not greater than the statute permits should never be held usurious where payment of the interest installments was actually contemplated on the date fixed, although the aggregate of interest on interest would, if contracted for on the original principal, exceed the rate allowed by law."

We are of opinion that the referee was right and that the court erred in sustaining the exception to his report. Judgment of court of common pleas will be reversed and, this court

rendering the judgment the common pleas should have rendered, the report of the referee is confirmed.

BURROWS, J.

I desire briefly to give the reasons that have induced me to decide in favor of a reversal of the judgment of the court below. I have been brought to the conclusion that the notes in suit are not usurious against my preconceived notions and prejudices. I had the impression that a contract wherein interest in excess of eight per cent. per annum is stipulated for was usurious; especially where such excess was the result of allowing interest upon interest to bear interest. These notes according to their express terms contain the stipulation that after maturity *interest* upon principal and *interest* shall bear interest at eight per cent., to be paid semi-annually.

If these notes do not provide for the compounding of interest semi-annually after maturity it is difficult to conceive what language could be used to accomplish that purpose.

Counsel for plaintiff in error contend that they do not so provide; and contend further, that a contract to pay more than eight per cent. per annum for a loan of money, and for the payment semi-annually at the same rate of interest upon accrued interest overdue, is not usurious in this state; and in support of their contention they cite *Cook* v. *Courtwright,* 40 O. S., 248, and *Taylor et al* v. *Hiestand & Co.,* 46 O. S., 345.

Section 3179, Revised Statutes, provides:

"The parties to a bond, bill, promissory note or other instrument in writing for the forbearance of payment of money at any future time, may stipulate therein for the payment of interest upon the amount thereof at any rate not exceeding eight per centum per annum payable annually."

In *Cook* v. *Courtwright,* it is held by the Supreme Court Commission that it is not usurious to stipulate in a promissory note, due one year after date, for the payment of interest semi-annually, whereby the holder of the note would be entitled at its maturity to eight per cent. interest on the sum loaned for

twelve months and also six per cent. interest for six months on the semi-annual installment of interest.

It is plain that the holder of an eight per cent. promissory note given "for the forbearance or payment of money at any future time" will receive more than eight per cent. per annum for the use of his money if any part of said interest is paid or to be paid prior to the expiration of said "future time," except, of course, where the interest is payable annually.

It is idle to attempt to criticize the validity of the reasoning upon which *Cook* v. *Courtwright* is grounded, as that decision seven years later was approved by the Supreme Court on the ground that "it had become a rule of property."

In the case of *Taylor et al* v. *Hiestand & Co.*, the question of the validity of a stipulation to pay interest at eight per cent., semi-annually, on a note payable three years after date, with interest at the same rate on installments of interest overdue, was fully considered, and a precise and comprehensive rule established for such cases.

It is there held that whatever stipulations may legally be put into a new contract between the parties, made after any installment of interest has been paid in respect thereof, may be made in advance and in the original promissory note.

This rule and the reason for it are given at page 348:

"Take another view of the subject. If the first installment had been paid it is clear that a new loan could have been made between the parties of the money at the rate of eight per cent. per annum. If it was not paid, a right of action to recover would at once accrue to the payee; and we think it clear the parties would be clothed with full power, under the statute, to stipulate for its payment at a future day with interest at eight per cent. per annum. If this can be done after default in the payment of an installment, no reason is apparent why the parties in the first instance might not anticipate and provide in advance for the contingency of a default. This we think may be done, and is what the parties to the note in fact did in the case before us."

Under this rule no good reason can be given why parties may not stipulate in a promissory note payable at a future time that interest upon interest may be made to bear interest indefinitely

with such periodic rests as may be agreed upon, for surely they could so stipulate in a new contract as to such interest in case the same had been paid. If we understand this rule correctly, the case we have in hand is easy of solution.

The claim that more than eight per cent. interest per annum was agreed to be paid, and that interest upon interest is to bear interest to be computed with semi-annual rests, become immaterial incidents, so long as only an eight per cent. interest rate is applied and reapplied to the interest upon interest as it periodically falls due.

It is of no importance that we think this rule of decision indefensible, and that it virtually ignores the evident intent of Section 3179, which in terms permits an eight per cent. rate of interest per annum to be received and no more on the sum loaned from the date of the loan till the time the loan is paid. Nor is it important that we think that a provision for compounding the interest on a loan was not contemplated by the Legislature in passing this or any other statute relating to interest; but we must adopt and apply the interpretation placed upon the statute by the Supreme Court; and this interpretation, as we understand it, leads the majority of the court to hold that the notes in suit are not usurious.

Potts & Wells, for plaintiff in error.

J. R. Carey and *Y. T. Farrell,* for defendants in error.

APPEAL FROM OVERRULING OF MOTION TO DISSOLVE ATTACHMENT.

Circuit Court of Hamilton County.

WILLIAMS v. MCCARTNEY.

Decided, July, 1907.

Attachment—Motion to Dissolve Overruled by Magistrate—Procedure on Appeal to the Common Pleas—Section 6494.

Where property is held by a justice of the peace under attachment and an appeal is taken from the overruling of the motion to dissolve the attachment, the proper procedure under Section 6494 is for the common pleas to determine within three days whether the action of the justice in overruling the motion was right and the decision with the original papers returned to the justice to be entered by him on his docket as the final determination of the motion.

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

This was an action before a justice of the peace in attachment. After the attachment was made the defendant moved to discharge the attachment, which motion the justice overruled. Thereupon the defendant appealed the question to the court of common pleas. This may be done under Section 6494, Revised Statutes. This section provides that the question as to whether the judgment of the justice was right may be taken to the court of common pleas, where it shall be heard by the court or a judge within three days; and the decision is to be returned with the original papers to the justice, and is to be entered by him on his docket as the final determination of the motion.

It is quite clear from the provision of this section that all the court or a judge of the court of common pleas can do so when the matter is brought before him is to ascertain whether the provision of the statute has been comlpied with, and if so, to proceed to determine whether the justice did right in overruling the motion, and to transmit his decision to the justice. There is no case pending in the court of common pleas. The case itself is still pending before the justice. It is not in the court

of common pleas for any purpose of a trial, is not to be heard upon evidence, is not subject to motion or demurrer; the only question is whether the justice ruled rightly in overruling the motion to discharge the attachment.

When this matter came into the hands of the clerk of the court of common pleas it was regularly docketed as a case pending in that court; was continued on application from time to time, and finally on motion of plaintiff, McCartney, the appeal was "dismissed, set aside and wholly held for naught" at the costs of the defendant, Williams.

This action was unauthorized, and the plain provision of the statute was disregarded. The court should have either affirmed the ruling of the justice, or reversed it, and sent its decision together with the original papers back to the justice, which judgment of the court the justice was bound to enter as his final determination of the motion. After this was done, but not until then, the defendant, Williams, would have had the right to go to a higher court on the whole case. But the way the case stands now, Williams having appealed from the judgment of the justice on the motion to discharge the attachment, and there being no question as to the form of the appeal having been proper, there is no final judgment of the justice on this question.

The judgment of the court of common pleas will be reversed, and we suggest that the court proceed in the manner above indicated.

J. H. McMakin and *E. H. Williams,* for plaintiff in error.

Brink & Deasy, for defendant in error.

DISCHARGE OF SERVANT BEFORE TERM OF SERVICE HAS EXPIRED.

Circuit Court of Geauga County.

AARON D. BAIRD v. THE BURTON TELEPHONE COMPANY.

Decided, February Term, 1907.

Master and Servant—Action for Damages by Servant—For Discharge Before Term of Service had Expired—Charge of Court as to Burden of Proof—Error—Presumption as to Character of Service Rendered —Review of the Evidence.

1. In an action for damages by a servant against the master for discharging him before his time of service has expired, it is the duty of the master to aver and prove that the discharge of the servant was for reasonable cause, and a charge of the court "that the burden of proof rests upon the servant to show that the discharge was without any just cause therefor" is error.
2. But where the whole evidence adduced upon the trial is made part of the record by a bill of exceptions, the court in determining whether the judgment should be reversed will examine the evidence as well as the charge with a view to determine whether under all the circumstances substantial justice has been done, and if it has the judgment will not be reversed for error in the charge.

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

Error to Geauga Common Pleas Court.

The action below was by Aaron D. Baird, plaintiff in error, against the Burton Telephone Company, defendant in error, to recover damages for breach of contract in wrongfully discharging him from its employ before his term of employment had expired.

Burton was employed by the telephone company as its manager and collector and the evidence shows that he was employed for a definite period.

The first question that is presented is upon whom the burden of proof rests. The court charged the jury as follows:

"If you find in this case by a preponderance of the evidence that the plaintiff and defendant entered into a contract by which he was, as general manager and collector of the company,

to perform certain services for the company at an agreed price to be paid him therefor by the company, and that that contract was to continue for a definite period of time; and you find also that before the contract had expired the defendant, without any cause discharged the plaintiff, then the plaintiff would be entitled to recover such damages as he actually sustained by reason of such wrongful discharge.

"The burden of proof in this case rests upon the plaintiff; it is incumbent upon him, to entitle him to recover, to prove that the contract of service was entered into between him and the defendant, and that the defendant, without any just cause therefor, discharged him from such employment and refused to allow him to continue longer therein."

Is the charge correct in this regard? We do not think it is. The law would not presume that the servant was derelict in his duty simply because his employer discharged him. Who would know whether or not the servant was derelict in duty better than the master? He justifies for the reason that the servant was derelict in duty. It is in the nature of confession and avoidance, and the master must allege and prove the ground of avoidance.

In this case one of the allegations of the petition is that the discharge was without reasonable cause, and by reference to the approved books of pleading this is the usual form of petition in cases of this character; but that is of no importance. The answer was a general denial, and that only puts in issue the necessary averments of the petition but not the unnecessary averments or such as are merely surplusage.

The duty devolved upon the defendant to specifically aver and prove the cause of discharge; in what respect the servant was derelict in duty. Such was the holding in the well considered case of *Charles B. Linton* v. *The Unexcelled Fire Works Company*, 124 N. Y., 533. The syllabus of that case is as follows:

"The law will not assume that a servant has been derelict in duty simply from the fact that his employer has discharged him before the expiration of the term of employment, and in an action by him for a breach of the contract of employment, upon proof that he was discharged while engaged in the performance

of the contract, and before his term of service had expired, the burden is cast upon the employer of proving, and hence of alleging, facts in justification of the dismissal.

"A general or specific denial in an answer controverts only material allegations, or such facts as the plaintiff would be compelled to prove to establish his cause of action.

"In such an action the complaint set up the contract of employment and alleged that plaintiff entered defendant's employ under it; that before its termination defendant, without right or cause, discharged him. The answer admitted the contract, denied the breach, alleged that plaintiff was discharged for cause, and separately specified twelve acts of plaintiff in alleged violation of the contract. Both parties gave evidence tending to sustain the allegations in their respective pleadings, and in addition thereto defendant offered to show other acts of misconduct and unfaithful service on the part of plaintiff not alleged in its answer. This was, upon objection, excluded. *Held*: No error."

In the opinion it is said:

"The law will not assume that a servant has been derelict in duty from the fact that his employer discharged him, but upon proof under proper allegations that he was discharged while engaged in the performance of the contract and before his term of service had expired the burden is cast upon the employer of proving, and hence of alleging, facts in justification of the dismissal. Such a defense confesses the contract and the discharge, but avoids the cause of action by showing new matter which, by the command of the statute, must be pleaded (Code Civ. Pro., Section 500; Code Pro., Section 149; *McKyring* v. *Bull*, 16 N. Y., 297). Any other rule, as was said by this court in the case cited, would 'lead to surprises upon the trial, or to an unnecessary extent of preparation.' A general or a specific denial controverts only 'material' allegations or such facts as the plaintiff would be compelled to prove to establish his cause of action (*Griffin* v. *Long I. R. R. Co.*, 101 N. Y., 348, 354; *Fox* v. *Turner*, 17 N. Y. S. R., 666). It does not put at issue immaterial averments, because the code does not require that they should be denied (Section 500). The language of the statute is that the answer 'must contain a denial of each material allegation of the complaint controverted by the defendant,' etc. That the plaintiff was discharged before the contract had expired was material. That he was discharged without cause was immaterial, so far as the complaint was concerned, because a recovery could be had

without proving it. It was sufficient for the plaintiff to allege a violation of the contract by the defendant. His effort to anticipate and deny any possible defense to his cause of action was surplusage."

But while there is no doubt about there being error in the charge, was the error prejudicial? We think not. The whole evidence is before us and it conclusively shows that the judgment is right; that the jury could not, at least should not, have rendered any other verdict than it did.

The evidence clearly shows that Baird was not discharged at all but that he left the employ of the company upon his own accord. There is some little evidence to the contrary, but it is very slight and not worthy of consideration.

"The court, in every stage of the action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed, or affected, by reason of such error or defect." R. S., 5115.

"An erroneous instruction to the jury is not a ground for the reversal of the judgment where it clearly appears from the record that the party objecting was not prejudiced thereby." *Berry* v. *State*, 31 O. S., 219; *Banning* v. *Banning*, 12 O. S., 437; *Fuller* v. *Coats*, 18 O. S., 343; *Marietta & Cincinnati R. R. Co.* v. *Strader*, 29 O. S., 448.

It would be difficult to find a case where this just rule of law could be more appropriately applied.

Judgment of common pleas court affirmed.

W. H. Osborne and *N. H. Bostwick*, for plaintiff in error.

Wm. G. King, for defendant in error.

BREACH OF CONTRACT FOR CONVEYANCE OF REAL ESTATE.

[Circuit Court of Hamilton County.]

ALPHONSE ZUTTERLING ET AL v. CHARLES W. DRAKE.

Decided, May 18, 1907.

Election Between Remedies—Made, When—Specific Performance—Damages—Tender—Breach of Contract.

1. An election between remedies can be made but once, and where a plaintiff has chosen to ask for specific performance he can not subsequently maintain a suit for damages.
2. Where a suit is filed for specific performance, followed on a later date by an action for damages, the election will be regarded as having been made at the time of the filing of the first suit, and the subsequent dismissal of the suit for specific performance by the plaintiff without prejudice, while the action for damages was still pending, does not create a bar to the prosecution of a new action for specific performance.

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

Under the contract set up in this case, the plaintiffs originally had two remedies for the enforcement of their rights against the defendant. One was an action on the contract for specific performance; the other was a suit at law for damages for breach of contract. They could not assert both.

On April 15, 1902, plaintiff filed a suit in specific performance, No. 123558 in the court of common pleas. Afterwards, on May 26, 1902, they filed an action at law for damages.

The suit for specific performance was dismissed October 6, 1905, "*without prejudice*" while the suit for damages referred to above was still pending. Subsequently, on October 9, 1905, a new suit for specific performance was filed by plaintiffs against the defendant, which last suit was tried, appealed to this court, and is this present case.

Defendant claims that this suit can not be maintained, as plaintiffs dismissed their first suit for specific performance.

We are of the opinion that on April 15, 1902, plaintiffs made their election between their remedies against the defend-

ant, by bringing their suit in specific performance. Having so elected, this was a bar to any suit for damages they might subsequently file. They could not choose the second time. 7 Ency. Plead. & Prac., page 364.

Did the dismissal therefore of the original suit in specific performance "*without prejudice*" preclude the plaintiffs from instituting a new suit for like character within a reasonable time, and thus avail themselves of their election already made?

We think it does not have such effect. Dismissal "*without prejudice*" meant, that the petition of the plaintiffs was not to be unfavorably affected thereby. All their rights were to remain as they then stood. *Creighton* v. *Kerr,* 20 Wallace, 8.

Having once elected to bring suit in specific performance, when the same was dismissed "*without prejudice*" and a similar suit was again instituted, any and all rights and advantage that had accrued to plaintiffs through the bringing of the first suit still remained to them.

On the evidence we are of the opinion that specific performance of the contract entered into between the plaintiffs and defendant should be decreed in favor of the plaintiffs. The defendant himself admits that he made no tender of the deed to the plaintiff, Alphonse Zutterling, but says that he showed the deed to Mrs. Zutterling; and while he denies that the plaintiffs tendered him the notes and mortgage agreed upon under the contract, yet plaintiffs' evidence is corroborated, tending to show that such a tender was made together with the amount paid by defendant into the building association.

A decree may therefore be taken in favor of the plaintiffs.

Eugene C. Pocicy, for plaintiffs.

Simeon M. Johnson, contra.

SEDUCTION OF A PUPIL.

Circuit Court of Huron County.

HARRY ESLEY v. STATE OF OHIO.

Decided, September, 1906.

Criminal Law—Prosecution under Section 7024—Having Reference to Intercourse of Teacher with Pupil—Necessary Averments—Proof as to Other Acts than that Charged in the Indictment—Discrepancy in Testimony as to Day of the Week on which the Offense Occurred—Meaning of the Word "Term" as Used in the Statute.

1. In an indictment under Section 7024, Revised Statutes, charging a teacher with having sexual intercourse with a pupil, it is not necessary to aver that such teacher and pupil were not husband and wife.
2. A judgment of conviction of a teacher of music of the crime, under Section 7024, of having sexual intercourse with a female pupil, will not be reversed because the evidence fails to disclose that the term of employment was for a definite length of time, where the fact is that the teacher was employed to give a certain number of lessons at a stated price per lesson, no provision being made as to the time within which the lessons should be given. The word "term," as used in this statute, was not intended to mean a definite period of time, but the time within which the teacher continues to fill his engagement, and by virtue of his employment has unusual opportunities for such unlawful conduct.
3. Frequent acts of sexual intercourse between a teacher and his female pupil at times other than that charged in the indictment for such an offense, even acts at a time when the term of employment of such teacher has ceased, and acts outside of the county in which the indictment is returned, if such acts are continuous and consecutive with the act charged, may be given in evidence on the trial under such an indictment as reflecting light on the relations between the parties.
4. The positive testimony of a witness of an act of sexual intercourse between a teacher and a female pupil, that such act occurred at a certain place on Wednesday, is sufficient to sustain a verdict of guilty, even though the complaining witness testified that no such act occurred at that place except on Sunday. Such testimony will not be excluded as not corroborative of the complaining witness.

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

Error to Huron Common Pleas Court.

Harry Esley was indicted under Section 7024, Revised Statutes, for having sexual intercourse with Lelia Burrell, it being charged in the indictment that he was her teacher in music, that she was his pupil, and that this sexual intercourse was with her consent and during the time that this relation existed. He was convicted and sentenced to a term in the penitentiary, and prosecutes error to this court. Various grounds are alleged and urged upon the attention of this court for a reversal.

In the first place it is said that the indictment does not aver that these parties were not husband and wife, and that, since this offense could not be committed if the parties were husband and wife, that fact should be averred. The absence of such relationship is no part of the description of the offense, and it need not be averred, therefore, as a part of the description of the offense. It is true that the statute would not reach a case of this kind if the parties were husband and wife; but it does not follow that it must be averred that they were not husband and wife.

There are various circumstances that might exist that would prevent a conviction that need not be negatived by the indictment. If, for instance, the defendant were insane, that would be a good defense; that would be a circumstance which, if developed, would show that he had committed no crime; but his sanity need not be averred. Other illustrations might be given.

Though it is not distinctly averred, this indictment discloses the fact that they were not husband and wife. The statute describes the different relationship that is essential to the commission of the crime, a relationship not necessarily inconsistent with that of husband and wife, but one which does not usually accompany the matrimonial relationship—that of teacher and pupil. It is averred here that they stand in that relation to one another—the one being a pupil and the other a teacher; and it also appears that they have different names—the one is the defendant, Harry Esley, and the other is the pupil, Leila Burrell.

It is also urged that the testimony does not disclose that this offense was committed during such a term of tutelage as is contemplated by this statute. It is said that when the statute was first enacted, it applied only to superintendents or teachers in parochial seminaries and other public institutions, and that, therefore, when it provided that the offense must be committed during the term of engagement of such instructor, it used the word "term" in the sense that it is used with respect to such avocations and such schools, *i. e.*, a time for teaching having certain definite limitations—a term that begins at a certain period and ends at another certain period; and that having had that meaning when the word was incorporated into the statute, when the statute was afterwards amended so as to include instructors of females in music, dancing, roller skating and athletic exercises or any branch of learning, the word "term" must be deemed to have still retained the meaning which it originally had.

The testimony in this case discloses that the plaintiff in error was a music teacher of the girl against whom this offense was committed, and that he was employed to give her a term of lessons. According to the testimony of the girl there is some uncertainty about whether the employment was for a full term—whether she or her mother, who seems to have managed the employment, were not at liberty to discharge the teacher at any time even before he had given a term, twenty lessons; but we think the jury was justified in finding from all that was said and done at the time the teacher was engaged and subsequently, that there was an employment in the first instance to give twenty lessons, that these lessons were to be given as often as once a week and under certain conditions, that they might be given oftener, and that the price of fifty cents a lesson was fixed upon the theory that a full term of lessons was to be given; that the engagement was for that. Now, if they were to be given regularly once a week, a term of lessons would occupy a period of twenty weeks; but if they were to be given oftener, of course, the period would be shorter. It appears in evidence

that after about ten lessons had been given they were then given at the rate of two per week and that shortened the time.

Counsel for plaintiff in error urged that, since there is such uncertainty as to the length of a term—the period of time to be covered by a term—it is not the kind of a term meant in the use of this word in the statute. If this contention should prevail it would destroy the statute, or render it ineffectual in so far as it applies to instructors in music and dancing and roller skating and athletic exercises, and the like; at least it would have that effect in most cases, for it is a matter of common knowledge that terms of lessons of these descriptions mean a certain number of lessons not necessarily given at a certain stated period, and that a term may be long or short, depending upon the frequency or infrequency of the lessons.

We think that a fair and reasonable construction of this statute is, that if this offense were committed during the time that this relationship existed—while one is teacher and the other is pupil; while one has certain opportunities for familiarity and may exercise certain wrong influences, if so disposed—the word "term" should not receive the narrow construction contended for it, but punishment should follow. We hold that the jury were justified in finding that there was a term of employment within the meaning of the statute.

The evidence discloses that these persons had been guilty of frequent acts of sexual intercourse. The teacher, the plaintiff in error, was a colored man and a married man. The pupil was a young girl, a white girl under eighteen years of age, apparently a girl of not very strong moral sentiment so far as this particular line of conduct was concerned, or of very strong resolution, and it fairly appears that this man, older than she, went to work deliberately to seduce and ruin her, and that he accomplished his purpose; that their acts of sexual intercourse covered a period of several weeks running through the months of July and August of 1905. The indictment charges the act upon August 18. The testimony having developed a number of acts, the prosecutor was required by the court, on motion of defendant, to elect upon which act he would rely for convic-

tion, and he elected to rely upon a certain act testified to by a witness of the name of Reynolds as having occurred some time in July in a certain woods northeast of the city.

The court, in charging the jury, was careful to say to them that they could not convict for any other act of sexual intercourse than that; that they must be convinced by the evidence beyond all reasonable doubt that the particular specified act of illicit intercourse transpired. But, in the course of proving the relations that had grown up between these parties, it was shown that a few days after the plaintiff in error had been discharged as the teacher in music of this girl, they met at Cleveland and stayed all night together at a hotel, and there, according to the testimony of the girl, slept together and performed acts of sexual intercourse.

A motion was made on behalf of the prisoner to take this testimony from the jury. The ground of the motion is not stated in the record, but it is sufficiently apparent, and it is now urged that it was incompetent, upon the ground that these acts occurred after the termination of the term of the employment, and that, therefore, there could not be a conviction for such acts; and also that they occurred in another county than Huron county and that therefore there could not be conviction for such acts.

The court said, in overruling the motion, that there could be no conviction for such acts, but, the jury should understand that the defendant was not being tried for those acts; that for acts committed outside of Huron county the defendant could not be convicted in this case. On another occasion, when a like motion was made, this was repeated by the court; and in the charge to the jury they are instructed that they are to consider this evidence only as it may reflect light upon the relations of the parties.

It is urged by the plaintiff in error that it was not competent for any purpose, and we are cited to *State* v. *Lawrence*, 74 Ohio St., 38, a case recently decided by our Supreme Court. That was a prosecution for having intercourse with a girl under sixteen years of age with her consent. It appears that the de-

fendant in conversation with various people admitted that he had intercourse with the girl at certain times two years later than the time charged in the indictment and after she had reached the age of consent. The court held that it was error to admit this evidence, and the judgment of the trial court was reversed on that account by the circuit court, and the Supreme Court affirmed the circuit court. Judge Price dissents from that proposition but concurs in the judgment. It was concurred in by Shauck, Price and Summers. But that we think is very different from a case like this where the testimony tends to show a continuous and consecutive line of conduct, running olong day after day, between these parties. We think that the objection to the admissions of the defendant in *State* v. *Lawrence, supra,* might well have been sustained on the ground that the time was too remote, it being two years subsequent to the acts charged, and there being no evidence, that the record discloses, tending to show that the illicit relation had continued along day after day, between these parties. We think that the intercourse within that period.

I will not stop to read or to comment upon the authorities cited to us by the prosecuting attorney, but remark that we think that the great weight of authority and of reason supports the doctrine that, under circumstances like these shown here, such evidence for the purpose for which it was admitted is competent.

The witness Reynolds testified very clearly to the act of intercourse at the time in July, in the woods. It is said that this does not corroborate the complaining witness or the person against whom the offense was committed, because Reynolds testified that this occurred upon a certain Wednesday, whereas the girl testified that she never had any intercourse with the defendant in those woods at or about that time, except upon a Sunday.

If the jury were compelled to rely upon the testimony of the girl as to this act—if the jury were basing their verdict upon the testimony of the girl—it might be logical to urge that the girl was not corroborated as the statute requires in a case of

this character. But we have the clear testimony of Reynolds, and Reynolds, under the law, needs no corroboration. The testimony of Reynolds standing alone would be sufficient to sustain a verdict, unless there was something tending to show that he was not worthy of belief, even though the girl did not testify upon the subject, or flatly contradicted him; but aside from that, we see no very serious matter in the difference in the days of the week testified to by these parties. One or the other may be honestly mistaken about the day of the week. As far as the offense is concerned, the testimony is clear that it occurred and at about that time and place.

We find no error in this record that would justify us in reversing the judgment of the court below and it will therefore be affirmed.

S. M. Young, for plaintiff in error.

L. W. Wickham, Prosecuting Attorney, for defendant in error.

CONSTITUTIONALITY OF THE COUNTY SALARY ACT.

Circuit Court of Montgomery County.

JOHN L. THEOBALD v. THE STATE OF OHIO, EX REL.

Decided, July, 1907.

Constitutional Law—Office and Officer—Who are Officers—Definition of the Word "Salary"—Change of Compensation during Term of Office Law Regulating Salaries to be Paid to County Officers. —Legislative Power—What Constitutes Uniform Operation of a

1. An "officer," in the sense in which the word is used in the Constitution of Ohio, is an individual who takes the oath of office and becomes responsible to the public for his own official acts and those of his subordinates.
2. It is competent for the Legislature to fix the salaries of county officers, leaving it to the county commissioners of the several counties to fix the sum to be paid to deputies, assistants, bookkeepers, clerks and other employes.
3. A salary is a determined and stipulated sum to be paid for a fixed period. Officers receiving their compensation under a fee system

are not salaried officers, and a change in the method of compensation from fees to a salary is not a change which "affects the salary of any officer during his existing term."

4. An act providing that the salaries of county officers shall be fixed under a rule based on population does not fail of uniform operation throughout the state.

5. The act of March 22, 1906 (98 O. L., 89), is not in contravention of Article II, Sections 20 or 26 of the Constitution of Ohio, and is a valid enactment.

SMITH, J. (sitting in place of DUSTIN, J.); WILSON J., concurs in a separate opinion; SULLIVAN, J., concurs in both opinions.

The original action was brought by the State of Ohio, by Edward T. Hall, a tax-payer, against John L. Theobald, recorder of Montgomery county, Ohio, to recover from him moneys received from January 1, 1907, to March 31, 1907, as fees of his office, which sum he refused to pay into the county treasury as public money belonging to said county, under Section 6 of an act passed March 22, 1906, entitled, "An act to fix salaries of probate judges, county auditors, county treasurers, county recorders, clerks of the court of common pleas and sheriffs, and to provide for the employment and compensation of the clerks, deputies and assistants" (98 O. L., 89). It is claimed by said defendant, that the law requiring such payment by him is unconstitutional.

To this petition a demurrer was filed on behalf of the defendant, which was overruled by the trial court, and judgment rendered thereon, to reverse which judgment this cause is brought to this court.

It is claimed on behalf of the plaintiff in error that the act in question is unconstitutional, because—

1st. It contravenes Article II, Section 20 of the Constitution, which provides: "The General Assembly in cases not provided for in this Constitution shall fix the term of office and compensation of all officers, but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished"; and

2d. That said act contravenes Article II, Section 26 of the Constitution, which provides, that "All laws of a general nature shall have a uniform operation throughout the state."

Upon the first contention we are of the opinion that Article II, Section 20 of the Constitution is not infringed by this act. The act in question makes it incumbent upon the Legislature to fix compensation of all officers, and as this term "officers" is used in the Constitution, we are satisfied that "deputies, assistants, bookkeepers, clerks and other employes," are not "officers" as contemplated in the Constitution. An officer is one who is elected or appointed to an office in the state, and the Constitution recognizes that no person can be elected or appointed to an office in the state unless he possesses the qualifications of an elector, and as the subordinates might all hold their positions without being electors, then in the constitutional sense of the word "officer" they would not be such, and the "officer" in question is the individual who takes the oath of office and is responsible for his official acts as well as those of his various employes.

It is therefore within the purview of the Constitution to allow the Legislature to direct the county commissioners to fix the sum to be paid for the compensation of all "deputies, assistants, bookkeepers, clerks and other employes" of said "officer," leaving it to the Legislature to fix the compensation or salary of the "officer" himself.

Nor do we think the law is unconstitutional because it is claimed it contravenes the second clause of Article II, Section 20 of the Constitution, which provides: "That no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

Heretofore the various officers mentioned in this act received their compensation under what was known as the fee system, but it is evident that fees can not be construed as a salary, which is a determined, stipulated sum for a fixed period, and an examination of the debates of the Ohio Convention of 1851, Vol. 1, page 233, reported by J. V. Smith, official reporter, shows, that the convention recognized a distinction when this clause was up for debate between an "officer" receiving fees and one receiving compensation by way of salary. See, also, *Thompson* v. *Phillips*, 12 O. S., 617; *Gobrecht* v. *Cincinnati*, 51 O. S., 68.

The "officers" mentioned in the act were not upon a salary,

but were paid their compensation under certain rules prescribed by the Legislature.

As to the second claim that said act is in violation of Article II, Section 26, that "All laws of a general nature should have uniform operation throughout the state," we are of opinion that the act does have uniform operation throughout the state. The Legislature simply prescribes the rule by which compensation should be had in various counties. This article in the Constitution does not mean that each officer in each county should receive the same amount of money as salary, but simply that the rules of compensation shall be uniform; and the Legislature having seen fit to base this rule upon population, the exercise of that rule through the various counties of the state must of itself in its action be uniform. The reason of this is, that the basis of operation is the same, and the result attained by the operation of the rule is the same, although the amount of money in dollars and cents may be different. See *Cricket* v. *The State*, 18 O. S., 79.

So long as the rule upon which compensation is based is uniform throughout the state, it matters not whether in one county of the state the recorder receives more by reason of the increased population, than a recorder in another county receives less by reason of a less population. The compensation belongs to the officer under the act for his services. The fact that there is a limit upon the annual salary, that it shall not exceed a certain fixed sum, does not change the uniformity of the operation of the law, as this also applies to every county in the state.

We are therefore of opinion that there is no error in the judgment rendered below, and the same will be affirmed.

WILSON, J. (concurring in the opinion of SMITH, J.)

As to the purpose of the law: Prior to the enforcement of this act, county officers were paid by fees which they were permitted to charge the public for the performance of their duties. Necessarily these fees were uniform throughout the state, as one citizen could not be charged more than another for the performance of the same public duty. The consequence was that a

fee system which would support the offices in a small county afforded an exorbitant compensation to the officers in a large county. It was to remedy this evil more than any other that the act under review was passed.

In the opinion of the Legislature the services of the officers in the larger counties were not commensurate with the fees they were permitted to charge and collect. The policy is now, as it was before, to support the offices by fees charged to those demanding the services, and because the existing fee system affords but a meager support to the offices in the smaller counties, the fees were not reduced. The principal purpose of the act is to divert the excess in the larger counties over and above a fair compensation for services from the officers to the county general fund.

As to the unequal operation of the law: It should not be said that the services of an officer must be valued by the standard of fees alone. The larger duties of the offices are common to all the counties. They must be kept open for business, requiring the officers' time; the same reports must be made by all; the same system of bookkeeping must obtain in all; the trust imposed upon the officer is alike in kind, if not in degree. The multiplied fees in the larger counties principally entail more bookkeeping and for this the law in question undertakes to make compensation independently of the officers' salaries. Of course there is increased responsibility and enhancement of the trust in the larger counties, calling for increased attention and ability in office; but in the opinion of the Legislature the graded salary is a corresponding compensation.

The salaries are not so unequal under the law as to make unreasonable classification. The glaring inequalities enumerated by counsel are based upon a wrong construction of the statute; as for instance, the salary of the auditor in Auglaize county, estimated on a popualtion of 31,192, is $2,530, not $2,475, and of the auditor in Brown county, based on a population of 28,237, is $2,345, not $1,500, as stated by counsel. The salaries of the same officer in Allen (47,976) and Miami (43,105) are respectively $3,390 and $3,190; and so, correspondingly in all the

other counties until the maximum of $6,000 under the law is reached.

In order that the officer may be compensated for each full thousand at the given rate in any fifteen thousand, it is not meant, as conceived by counsel, that the fifteen thousand must be full before he can be allowed the rate per full thousand. Under this interpretation of the law the salaries approach uniformity and equality in a remarkable degree.

As to the proposition that the act authorizes the board of county commissioners to fix the compensation of the officers when it fixes the aggregate to be paid his subordinates for assisting to perform the duties of his office: The Legislature takes absolute control and makes full and final disposition of the entire funds arising from fees in all of the offices, and this it may do. It prescribes how much shall be paid therefrom to the officer; how much to deputies, assistants, bookkeepers and clerks, and transfers the residue, if any, to the county general fund.

In contemplation of the act, the fees no longer attach to the officer, but to the office, and to the extent they are not needed to support the office they are devoted to the general good.

It can not be said that the officer is entitled to claim the fees as perquisites belonging to him by virtue of his office. The Legislature has always bestowed or denied them at pleasure. Nor can it be claimed in reason that it intended to make an appropriation to the officer as part of his compensation, when it authorized the board of county commissioners to fix the compensation, in the aggregate, of deputies, assistants, bookkeepers and clerks. The law expressly negatives such intent, when it makes it a crime for the officer, directly or indirectly to receive or appropriate any part of the allowance to his own use and benefit. It would be an anomaly to charge an officer with a crime for receiving his own.

The law recognizes the necessity for an additional working force in some of the offices of some of the counties. The existence of the necessity and its extent are questions of fact local in their character, and should therefore be referred to some local tribunal for determination.

The Legislature has conferred upon the board of county commissioners in each county the power to judicially determine these

questions. The selection of the tribunal must be left to its wisdom. If, under the law, an officer should make application to the board for assistance in the prescribed way, and be refused, then should he be physically unable himself to perform all the duties of the office because of their magnitude, the default would be not his, but that of the board. It must act with legal, not arbitrary, discretion, in the bestowal or refusal of the fund.

The public have a right to expect and demand a reasonable and proper regard, both by the officer and the board, for the amount of labor necessary to be performed in each office.

The aggregate sums allowed in the various counties are not required, or expected, to be uniform. As is said by counsel, they should be governed by environments—cost of living, the prevailing wage and the like. It is to the interest of the officer, and the public as well, that the compensation should be no greater than the wages paid for like services in the particular community to be served, and this may be as variant as the judgment of the boards in the different counties. It must not be overlooked that the officer fixes the compensation of each particular employe, as well as the number of employes. With that the board has nothing to do, save that it may limit the aggregate that may be thus expended. If not left to it, to whom should be left the determination of the amount? Manifestly the Legislature could not determine it. If left to the officer the tendency would be to expend the whole of the fee fund in this way, defeating the purpose of the law.

I am of the opinion, therefore, that the act does not violate either Section 20 or Section 26 of Article II of the Constitution, and the judgment should be affirmed.

SERVICES BY PROSECUTING ATTORNEY OUTSIDE OF HIS OFFICIAL CAPACITY.

Circuit Court of Hamilton County.

GEORGE H. HIGH, A TAX-PAYER, v. STATE OF OHIO, ON RELATION OF HIRAM M. RULISON, PROSECUTING ATTORNEY FOR HAMILTON COUNTY, OHIO, ET AL.

Decided, June 22, 1907.

Error—Can not be Prosecuted by a Tax-payer, When—Recovery from County Treasurers of Interest Received by them on Public Deposits—Not Within the Official Duty of the Prosecuting Attorney—Reasonable Compensation for Such Services—Sections 1277 *and* 1278*a.*

1. Where an action, brought on relation of the prosecuting attorney on behalf of the tax-payers of the county, is prosecuted to a final judgment favorable to the county, it is not competent for a tax-payer to prosecute error to the allowance made by the trial court to the prosecuting attorney for the services therein rendered.
2. Services rendered by a prosecuting attorney, in an action for recovery from county treasurers of amounts received by them from banks as interest on county deposits and appropriated to their own use, are services outside of his official capacity; and where such an action results in the recovery of $215,000, which has been turned into the county treasury, it is not an abuse of discretion for the trial judge to fix the allowance to the prosecuting attorney for the services so rendered at $7,500.

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

The original actions in the court of common pleas were brought by the State of Ohio, on relation of Hiram M. Rulison, Prosecuting Attorney of Hamilton County, and Louis A. Ireton, Legal Council for Hamilton County, against R. K. Hynicka, John H. Gibson and Tilden R. French, as treasurers of Hamilton county, to recover for the use of said county about $215,000, which it was claimed said treasurers had received and appropriated to their own use, as interest upon deposits of county funds from various banks in the city of Cincinnati, said actions being brought under Section 1277 of the Revised Statutes.

These actions resulted in judgments being obtained against each of the defendants for the amounts claimed, which sums were paid to the prosecuting attorney and by him turned into the treasury of the county, satisfactions of said judgments being filed in each case. After the rendition of said judgments the prosecuting attorney filed a motion for compensation for services in said cases, the court fixing an aggregate amount in all three cases at $7,500, under Section 1278*a*.

Prior to the entry being made on said motion for allowance the trial court, on application of the plaintiff in error herein, allowed said plaintiff in error to be made a party defendant. Said plaintiff in error thereupon filed a motion for a new trial on the question of compensation, which was overruled, and he now brings this suit as plaintiff in error against the defendants in error to reverse the action of the court of common pleas in its allowance of compensation to the prosecuting attorney, the defendant in error herein.

At the outset, upon an examination of the record and the sections under which said action was brought (1277 and 1278*a* of the Revised Statutes), the court is of the opinion that this suit can not be maintained by the plaintiff in error.

Under those sections the original actions were brought by the State of Ohio on the relation of the prosecuting attorney and legal counsel, in behalf of all the tax-payers of Hamilton county, and was prosecuted in their behalf. Final judgments were secured in behalf of the state of Ohio, and the object sought by the tax-payers through the prosecuting attorney was attained.

Having, therefore, no substantial right or interest in the litigation, the suit having been brought and determined in favor of the tax-payers, and as a proceeding in error is an entirely independent action from the original case, there remained nothing to be done but for the court under the statute to fix the compensation, if any, to the prosecuting attorney for his services.

The plaintiff in error was not, therefore, a proper party in the court of common pleas. The statute does not provide for the prosecution of error by a tax-payer where suit is brought on relation of the prosecuting attorney at the request of a tax-

payer and the suit is successful; nor does the order made in favor of Mr. Rulison affect a "substantial" right of the plaintiff in error as understood by Sections 5115 and 6707 of the Revised Statutes.

But if this is not correct, the court is of the opinion that no error was committed by the trial court in the allowance to the prosecuting attorney in the three actions brought. It is clear under the statute relating to compensation for such services that the amount so fixed is within the sound discretion of the trial court; and this discretion can not be reviewed unless there is an abuse of that discretion. It is urged that the services rendered by the prosecuting attorney were in the line of his duty as an official. The trial court found that many of the services connected with the bringing of the suits and the collection of the amounts were performed as a part of his duties as prosecuting attorney, and that others were not. The language used in Section 1278*a*, Revised Statutes, is "that for all services rendered by the prosecuting attorney under the provisions of Section 1277, in which the state is 'successful,' the court shall allow the prosecuting attorney reasonable compensation for his services, and proper expenses incurred." It can not be claimed in these cases that the state was not "successful; and if "successful" that the court should not allow the prosecuting attorney reasonable compensation. Upon an examination of the record setting out the services rendered, we are of the opinion that he was "successful" in these actions, and the services were rendered by him outside of his official capacity. The allowance made by the trial court is not excessive. The discretion of fixing the allowance is lodged solely in the court itself, who has the right to determine the amount either from extrinsic testimony or from its own good sound judgment, and as this discretion was not abused by the court, its action can not be reviewed on error.

Judgment affirmed.

COMPENSATION OF COUNTY SURVEYORS AND THEIR DEPUTIES.

Circuit Court of Wood County.

ELMER L. SPAFFORD v. STATE OF OHIO.

Decided, March 4, 1907.

County Surveyor—Can not Charge Extra Time for Services Rendered —Actual Services, not Estimates, Control his Compensation—May Charge Full Rate per Diem for Deputies—Though Employing Them at a Lower Rate—Work on County Ditch Improvements—Criminal Law—Prosecution of County Surveyor for Making out and Presenting False Claims—Effect of Comment on Matters not in Evidence —Section 4364-62a.

1. Where a prosecuting attorney, in his closing argument to the jury in a case where the guilt of the defendant is not free from doubt, refers to a paper he supposed had been put in evidence, but on objection and investigation it was found had not been so introduced, and his remarks are such, when taken in connection with the contents of the document, as would tend to create an impression of the guilt of the defendant on the minds of the jury that would not likely be removed by a mere charge by the court and a request by the prosecutor to disregard the incident, the subsequent conviction of the defendant should be set aside and a new trial granted.
2. A county surveyor performing services for the county does not come within the purview of Section 4364-62*a*, Revised Statutes, fixing a day's work for mechanics and laborers at eight hours; and when on a calendar day he devotes more than eight hours to such services, he can not charge the county for his excess time, as hours of another day, in addition to his regular *per diem*.
3. A county surveyor is entitled to payment at the rate of four dollars per day for all the days of service of his deputies, though he may not have been required to pay his deputies at that rate, or for all their days of service.
4. A county surveyor is not authorized to estimate and charge the county for the days of his service upon a given ditch or other improvement upon the basis of a certain number of days or hours per mile, but his charges must be based on the days of his actual service.

Per Curiam.

HAYNES, J., PARKER, J., and WILDMAN, J.

Error to Wood Common Pleas Court.

In December, 1906, an application was made to two members of this court on behalf of the plaintiff in error for a stay of execution of the sentence herein requiring his imprisonment in the Ohio penitentiary, so that said sentence might not be carried into effect pending the hearing of the cause by the court at its next session, to-wit, in April, 1907.

After hearing and considering the statements of counsel as to the alleged errors and the questions involved in the record, it seemed to the two judges that the questions were so important and their proper solution so doubtful that it would not be expedient or just to permit sentence to be carried into execution until the court could have an opportunity to hear full argument and give careful examination to the questions involved, and, therefore, the usual order in such cases, *i, e.*, for a stay of execution, was made.

Since then the prosecuting attorney has applied to the full membership of this court for an order setting aside said order of suspension, and we have been asked to make such full investigation of the case as is usual upon final hearing, to the end that the prosecuting attorney may have the advantage of our views upon certain questions involved, in the prosecution of other cases, civil and criminal, pending in the Court of Common Pleas of Wood County, Ohio; and, upon his suggestion that it may be of assistance to him in expediting said business if we will express our views upon such questions now, instead of waiting until April, we have acceded to this request and have made a careful examination of the record, and have given consideration to the arguments of counsel and the authorities by them cited, besides many other authorities bearing upon the question argued, and other questions that seem to be involved in the case. We can take no action in the way of either affirming or reversing the judgment herein, until the circuit court as such, sits in April, but we may foreshadow the action that it now seems to us we will be required to take at that time, though the opinion now expressed is not final, but we will hold ourselves at liberty to

change or modify the same if persuaded that we should do so upon further argument.

We shall now discuss all of the questions presented or examined, but it may be understood that we have found nothing in this record that seems to us to require a reversal of the judgment, except as herein specifically pointed out. It is made apparent by the result of the trial that one of the important questions of fact, if not the chief question that was submitted to the jury for its determination, of which a proper solution was doubtful, was, whether the plaintiff in error, Spafford, had knowingly and corruptly made excessive charges for the services of himself and his assistants as engineers upon a certain ditch, to-wit, the Hutson joint ditch, an improvement promoted by Wood and Hancock counties, upon which Spafford, county surveyor of Wood county, was employed as engineer.

The prosecution was under Section 7075, Revised Statutes, and the specific charge in the indictment was, in substance, that Spafford had made out and presented for allowance a bill which included a charge for the services of his assistant, W. H. Wood, for twenty-one days at the rate of $4 per day, making $84, whereas Wood had served but eleven days, on account of which Spafford was entitled to $44 and no more, so that his bill was excessive and fraudulent to the extent of ten days, or $40. It appears that the same bill in which the aforesaid charge was made on account of the services of Wood upon this ditch contained a charge for forty-five days at $4 per day, for services performed by Spafford, and forty-five days at $4 per day for services of another assistant (all upon the same ditch), so that the whole charge was for one hundred and eleven days, or $444.

By the testimony of Wood, it was shown that he had kept a private memorandum of the time of his service upon this ditch, and that while he had worked on fifteen calendar days thereon, he had reckoned some of said days as fractional, or parts of days, whereby the total number of days of service, or working days, were by him computed as eleven days only. Within the period comprised in this service, *i. e.*, between No-

vember 25, 1903, and January 12, 1904, Wood performed other services of like character for Spafford, but on other jobs or improvements, and early in December, 1903, he made a report to Spafford of the days he had worked on different jobs in November, 1903; and likewise early in January, 1904, he made a report for December, 1903, but it is not clear from the testimony of Wood, nor from any evidence in the case, that by any accounts, reports, statements, settlements or other means, Wood made it plain to Spafford, before said account was presented by Spafford, that any one of the fifteen calendar days he reported that he had worked on this ditch were reckoned by him, or should be computed as fractions of days instead of full days, or that he reported the number of hours that he worked on any of the so-called fractional days. The importance of this will be pointed out farther on.

It is shown by the undisputed testimony of several witnesses that while at work on the Hutson ditch, Spafford and his assistants were crowded and hurried by their work, so that they often started out upon their work quite early in the morning and did not quit until late in the evening, and sometimes would not reach home until long after nightfall, and, besides, they felt obliged to, and did work thereon Sundays and nights, so that if Spafford might lawfully reckon the days of service of himself and his assistants according to the statutory rule provided for laborers and mechanics, that is, at eight hours for a day (as his counsel contended he might properly do) many of the calendar days upon which they were so employed would have yielded from one and a fourth to one and three-fourths of such work days; and it is not apparent that by such method of computation less than one hundred and eleven days were so devoted to this work by Spafford and his assistants.

Again, it was contended on behalf of Spafford that in employment of the character of that in which he was so engaged, the law reckons as a full day every calendar day upon which he performed any service, even though the number of hours of such service might not equal those required to make up a full work day in the case of a common laborer or a mechanic; and

there was testimony tending to show that there was a custom among surveyors and engineers to charge on that basis, and we have been cited to some authority tending to support that view of the law.

Again, it was testified by Spafford that on works of the character of the Hutson ditch, it has been the custom of the office for many years to reckon the time of the engineer thereon at a certain number of days per mile, a rule and method which he claimed resulted in a fair average, and which was made necessary by the impossibility of keeping an exact account of the time employed on any certain improvement, especially in the office work, because of the constant interruptions to which the engineer and his assistants were subjected in being required to drop one job or improvement to take up another for a time; and it appears that, charging according to such alleged custom (as he says he did) the charge for one hundred and eleven days was not excessive. Spafford also testified (and in this he was supported by other witnesses) that the work on account of which the one hundred and eleven days were charged was not all completed on January 12, 1904, when the bill was presented, but that a large part thereof was performed subsequently to said date; and he says that at the time the bill was presented it was made known to the commissioners that it covered not only the services already performed, but an estimate of the time that would be required to complete the necessary preliminary engineering work for the ditch; and he declares that though too many of the one hundred and eleven days may have been attributed to Wood in his account and estimate, this error was immaterial, since one hundred and eleven days were not excessive or an overcharge for the services of himself and his two assistants engaged upon the work, even though the rule as to a certain number of days per mile were not applied. All these claims and contentions on behalf of Spafford were disputed by the state, and evidence was introduced by the state in opposition thereto, and all were properly submitted to the jury upon the question whether the charges were in fact excessive and unauthorized.

The court refused to charge the jury that the statutory rule of eight hours constituting a day applied to the engineer or his assistants, but charged them that any custom in that behalf shown by the evidence to prevail amongst engineers and surveyors should control. Upon this subject we have to say generally that we find no error in the statement of the law by the trial judge; and we can not say that the jury was not fairly warranted in finding Spafford guilty of knowingly making charges in some degree excessive and unauthorized, and therefore fraudulent; but, as the evidence stood at its conclusion, it is apparent that there was room for honest doubt in the minds of the jury as to whether Spafford had willfully perpetrated the fraud and crime charged, and, if so, whether he had presented a bill that was known to him to be excessive, and which was, therefore, fraudulent for as much as $40, or for as much as $35.

We think it probable that the jury was brought to resolve this doubt against the accused by either or both of two circumstances, to-wit: First, a failure of the jury to appreciate the importance of determining the exact amount for which the bill might be deemed fraudulent, and therefore to note the uncertainty of the evidence before mentioned as to the information possessed by Spafford of the number of working days devoted to this work by Wood at the time Spafford presented his bill; and, secondly, by an unfortunate reference of the prosecuting attorney in his closing argument, to matter not in evidence, but which the prosecutor apparently supposed was in evidence. It is to be remembered that the guilt of the accused must be shown by the evidence produced at the trial, and the evidence must show guilt so clearly as to produce in the minds of the triers a moral certainty of guilt admitting of no reasonable doubt thereof. While, as before stated, we are not persuaded that the proofs in the case do not meet these requirements so as to warrant the conclusion of Spafford's guilt of some offense, we are persuaded that they do not warrant his conviction of knowingly presenting a bill that was excessive to the extent of $40, or for as great an amount as $35.

The whole charge and the only charge against the plaintiff in

error, and the only matter the jury had a right to consider, was that respecting the twenty-one days on account of the services of Wood on this particular ditch, and as set forth in the particular account wherein it appears. Whatever other offenses of like character on the part of Spafford the testimony may show him to have committed, and however much the amounts involved therein, no part thereof could properly be added to the amount that was fraudulent in the bill of January 12, 1904, or could have been considered legitimately in this case, except as the same may have reflected light upon the knowledge, motive or intent of Spafford in making up and presenting this bill. Looking at the evidence bearing on this subject, we find, as before stated, that Wood worked on the ditch on fifteen different calendar days; that he so reported to Spafford, but we fail to find that he reported to Spafford that some of these days were but fractional work days, or that he had not worked enough hours on any of said days to justify their being reckoned as whole work days. It might be fair to infer that Wood did make this known to Spafford if this were a civil action, and the probability that he did so, in such a case, might be strong enough to support a verdict based thereon; but that he did so, is not shown with the degree of certainty required to support a conviction in a criminal case.

A significant thing noticeable in the testimony of Wood, to which allusion has been made, is the fact that while he states that he reckoned his services on some of these calendar days at a half a day, three-fourths of a day, etc., he does not in any instance state how many hours he devoted to the work for which he made the charge of only a partial day, but he seems to be quite unable to do so; and, for aught that appears, he may have worked enough hours on every one of those so-called fractional days to have justified a charge therefor as full days. As was properly held by the trial judge, how much, or how little, Wood charged to or received from Spafford for his services, is wholly immaterial and aside from the real question; for Spafford was authorized to charge $4 per day for the services of Wood even if he was required to pay less per day to Wood; and likewise, Spafford was authorized to charge at that rate for what amounted to a day

even if Wood reckoned it at less than a day and charged accordingly. The importance of care and exactness in fixing the amount, if any, for which the bill should be found to be fraudulent, may not have been, and it seems to us probably was not, understood and appreciated by the jury; and it may have been, and probably was, regarded as a matter of indifference. As a matter of fact, it involved in this case all the difference between a felony, punishable by imprisonment in the Ohio penitentiary, and a misdemeanor, punishable by a fine and imprisonment in the county jail for a limited period, or both. No emphasis was by the charge of the court placed upon the importance of determining the exact sum that might be deemed fraudulent. The record discloses that the jury, after about two hours deliberation, returned a verdict of guilty, but in their verdict they stated no sum; and that upon being informed by the trial judge that the verdict was therefore imperfect, and that they must again retire and insert the amount for which they found the bill fraudulent (but without any suggestion of the importance of this matter, or that different amounts might involve different consequences) they thereupon again retired, and in a very few minutes returned into court with the full amount stated in the indictment, to-wit, $40, inserted in the verdict.

We do not criticize the action of the court herein, but merely call attention to what occurred as something suggesting the thought and the apprehension that the question of the amount involved may not have received the careful consideration at the hands of the jury that its importance merits, or that it would have received had the jury appreciated the consequences. However this may be, we repeat that we are of the opinion that the evidence does not make it sufficiently certain that Spafford knew that the work done by Wood on the fifteen days reported was not sufficient to justify a charge for fifteen full days; and if he proceeded upon the assumption or belief that there were fifteen full days, or that the time of service by Wood exceeded twelve and a quarter days, or that the work comprehended enough time to justify a charge for so many days (assumptions not irreconcilable with the evidence), he could not have been guilty of

making and presenting a bill that was false to an amount as great as eight and three quarter days, or $35, and therefore he could have been guilty of no more than a misdemeanor. To repeat, as at present advised, we are of the opinion that a conviction of a felony can not be said to be supported by the evidence with that degree of positiveness required in criminal cases; and as it is not in our power to amend the verdict or reduce the penalty, we feel bound to reverse the judgment and remand the case for a new trial, unless, on further argument, we shall be brought to a different view of the matter.

In this connection we again call attention to the statements of the prosecuting attorney made to the jury in his closing argument. The record recites the incident as follows:

"Thereupon counsel proceeded to argue said cause to the jury, and the prosecuting attorney in his closing argument and near the conclusion thereof made the following statement to the jury: 'That the bills presented by the defendant were false and fraudulent is shown by the fact that he paid $626 back into the county treasury.'

"Mr. Baldwin interrupting, said to the court: 'We object to this statement of the prosecutor. There is no such evidence in the case.'

"The prosecuting attorney replied: 'There is such evidence in the case,' and he thereupon took from the trial table a paper marked 'Exhibit B-3' and held the same in his hands before the which had been identified by the witness George Spencer and jury, and further said, 'Here it is.'

"Mr. Baldwin said: 'That paper was not admitted in evidence.'

"The prosecuting attorney replied: 'It was and was sworn to by George Spencer.'

"The court then said: 'I don't think that paper was admitted in evidence, or that anything was testified to relating to the refunding of any money.'

"The prosecuting attorney replied: 'I am very certain it was, and it will be so found in the stenographer's notes.'

"Thereupon the court directed the stenographer to examine the notes. This the stenographer did, occupying several minutes, during which time no other proceedings were had. And after such examination the stenographer reported to the court that said paper marked 'Exhibit B-3' had not been admitted in evidence.

"Thereupon the court instructed the jury as follows: 'The statement made by the prosecuting attorney to the effect that the defendant paid a certain sum of money back into the county treasury was improper; no such evidence is before the jury, and you are instructed to disregard that statement.'

"The prosecuting attorney resuming his argument said to the jury: 'I thought that paper was in evidence. It seems I was mistaken about it. You may disregard what I said about it.' Thereupon the defendant excepted."

We are assured that the prosecuting attorney made the statement in entire good faith, believing that this matter had been properly brought before the jury, and we see no reason to doubt this. Nor do we see what more could well have been done by him, or the court, to correct the mischief probably done by his unwarranted statement; but whether what he did was done in good faith or from improper motives, is not a question of so much importance as the question whether his action had a damaging effect upon the cause of the prisoner; and this involves the further question, whether such effect was merely temporary and was dissipated by the admonition of the court and the request of the prosecuting attorney that the jury should disregard what he had said. The vital question is, not "Did the prosecuting attorney willfully commit a fault," but, was something done that prevented the accused from having a fair trial. It has already been pointed out that the whole question of the guilt or innocence of the accused as presented to and considered by the jury, probably turned upon their decision as to whether he acted in good faith in presenting the bill in question. That being true, and the evidence bearing thereon not being free from doubt, it is not only conceivable, but altogether probable that a statement to the effect that he had acknowledged his bad faith in the transaction by paying back part of what he had thus obtained from the county, together with the exhibition of a paper in which it was said this acknowledgment of his guilt appeared, would sink deep into the minds of the jury and would tend to resolve all doubts on that question against the prisoner. The prisoner, or his counsel, had no means of defense against the alleged evidence thus produced and exhibited, though, if the paper had been regularly offered

and admitted in evidence, it might have been explained so as to make it quite harmless. Under the circumstances, counsel for the prisoner could only protest and object to the court, and the court could only say to the jury that the paper and statements were to be disregarded. But, after all, it seems to us that the jury would naturally reflect that the existence of such a paper was manifest, and that counsel for the prisoner had simply succeeded in preventing them from examining it, and in procuring a direction of the court that they should not give it consideration, and that the failure to bring it properly before them must have been due to some oversight upon the part of the prosecuting attorney. Is it not probable that such direction to the jury was entirely fruitless; that the mischief was of a character that could not be corrected by such means? If so, it is manifest that the prisoner did not have a fair trial, and that he should be granted a new trial without respect to the question whether the prosecutor acted in good faith or bad faith.

In the making up of a jury for the trial of a criminal case, extreme care is taken to procure for such service men who have minds free from impressions supposed to be produced by talking with witnesses about the facts of the case. Why is this done and required if it may be suposed to be possible to remove such impressions by a simple request that the jury shall disregard what they have so heard? And if such impressions can not be thus obliterated, why should it be thought that like impressions made by the solemn assertions of the state's representative, who is supposed to stand for the protection of the prisoner against wrong as well as for the enforcement of the rights of the state, can be effaced by the mere request of them to banish the matter from their minds, though (as here) the statements stand unrefuted? In many cases, perhaps in most cases, it is held by the reviewing courts that it will be presumed that such admonitions to disregard matters coming to the attention of the jury by improper admissions of evidence afterwards ruled out, by improper statements, and the like, have been regarded by the jury and have been effective; but it is not always so held; and where a statement as damaging as this would naturally be, is made by

the prosecuting attorney in his closing argument, and upon a point so vital to an issue of fact, the proper solution whereof is left in so much doubt by the legitimate evidence in the case, we think it would be unsafe to assume that the mischief has been cured by the cautionary remarks of the court, and that such assumption would not be supported by the experience of mankind. As said by Judge Smith, in the first circuit, in the course of an opinion in the case of *McGuire* v. *State*, 3 C. C., 551:

"We can readily see that the introduction of some kinds of incompetent evidence might be of such a character as greatly to prejudice a defendant, and that in such cases its withdrawal would not rectify the injury done, and that it would be proper for a new trial to be granted under such circumstances."

In *Scripps* v. *Reilly*, 35 Mich., 371, an action for libel, the judge at the trial permitted counsel in closing the case, to read, against objections, papers not admissible in evidence, and which were not afterwards offered in evidence. This was held to be such an abuse of discretion as to require the granting of a new trial; and it was further held, that the error was not cured by a subsequent instruction to the jury to disregard said papers.

In *Martin* v. *Orndorf*, 22 Iowa, 504, the counsel were permitted to read and comment upon testimony taken at the former trial between the same parties; and this was held to be error sufficient to call for a reversal, and that the error was not cured by a charge to the jury not to consider such testimony.

The statutes of Ohio, and many other states, permitting a defendant in a criminal case to testify on his own behalf, provide that, if he does not do so, no reference to such failure to testify shall be made by the prosecuting attorney; and it is held in many cases that such prohibited reference to the failure of the prisoner to testify constitutes error requiring a reversal, and that such error can not be cured by any admonition of the court to the jury to disregard such reference.

Many other illustrations might be given of matters improperly, or even accidentally brought to the attention of a jury during the course of a trial, or during their deliberations, resulting in

a mistrial, even where no person connected with the trial could be said to be at fault.

In the case of *Angelo* v. *People,* 96 Ill., 209, counsel for the people commented on the omission of the defendant to testify in his own behalf, and it was held that that was ground for a new trial, although the counsel was stopped by the court and the jury were instructed to disregard such comments; and in the course of the opinion, this was said:

"It is true, that when stopped by the court, he said it was inadvertently done, and the jury were directed by the court to disregard that portion of his argument. Notwithstanding what he said, and the direction of the court to disregard it, who can know what effect it may have had on the jury in forming their verdict? * * * * Where such things are done, whether intentionally or inadvertently, it may make an impression on the minds of the jury that nothing can remove. And who can say that this inadvertence may not have produced the verdict of guilty?

"We think the plaintiff in error has not had a fair trial, and the judgment of the court below must be reversed and the whole cause remanded."

And in the case of *Smith* v. *State,* 44 Tex. Cr. App., 137 (68 S. W. Rep., 995), counsel for the state, in his closing speech to the jury, commented upon the atrocious character of the crime and declared that while he did not believe in mob law as a rule, that its enforcement in a case like this would be justifiable, and continued: "I will be doing my duty as a citizen and a father if I can induce this jury to hang the defendant as high as Haman and then go home and tell my wife what I have done, and hear her remark, 'Well done, thou good and faithful servant, you have performed your duty.'"

These remarks were objected to at the time and the court reprimanded counsel and instructed him to desist from any further remarks upon that subject, which he did, and the court at the request of the appellant instructed the jury not to regard said remarks; but the reviewing court, while recognizing the rule that ordinarily, a charge of the court instructing the jury to disregard improper remarks made in argument will cure the

error, declared that this was a case where the rule would not apply, because it seemed to the court that the admonition of the trial judge to the jury to disregard such remarks, could hardly eradicate from the minds of the jury the effect of such appeal made to them by counsel for the state.

But illustrations need not be multiplied. If the evidence were so clear as to compel the belief, beyond a reasonable doubt, of the bad faith of Spafford in presenting the bill, we would be disinclined to regard this episode as one probably resulting in prejudice to his rights, and we are not prepared to say that, in any event, standing alone, it would require a granting of a new trial. But, under the circumstances of this case, we believe the trial judge should have regarded and given weight to it on the motion for a new trial as a circumstance that probably had some influence in producing the verdict of guilty.

It seems to us that the trial judge was more confident than the circumstances warranted that his direction to the jury, that they should disregard what the prosecutor had said about the exhibit not in evidence, was effective, and eradicated the impression made by the action and remarks of the prosecutor. In our opinion the uncertainty in the evidence touching the information possessed by Spafford of the number of work days devoted by Wood to the Hutson joint ditch at the time the bill in question was made out and presented, coupled with the probability that such remarks by the prosecutor had a damaging effect, prejudicial to the cause of the accused, and the further fact that the conviction was of a felony, instead of a misdemeanor, requires the reversal of this judgment and the granting of a new trial; and, holding these views, of course the motion to set aside the order suspending the execution of sentence should be, and accordingly is, overruled.

Later, to-wit, April 27, 1907, in the same case, before the same court, Judge Parker stated as follows:

"The case of *Spafford* v. *State of Ohio* has been submitted to this court upon the briefs formerly filed with and considered by the court at the time a motion was submitted by the prosecuting

attorney to set aside the order suspending the execution of sentence, and we have been furnished with no further light from counsel either in the way of briefs or oral argument, so that we assume that if they are not content with our decision made at that time they are at least not prepared to point out any new considerations that should influence the court to change the views then entertained and expressed.

"We examined the case very carefully at that time and we have had no reason since upon reflection or upon any suggestion that has been made to us to doubt the correctness of our views then expressed, and therefore the judgment of the court of common pleas will be reversed upon the grounds stated fully in the opinion handed down at that time."

Baldwin & Harrington, for plaintiff in error.
J. E. Ladd, contra.

LICENSING OF VEHICLES.

Circuit Court of Franklin County.

LEWIS L. PEGG ET AL v. CITY OF COLUMBUS; J. F. LINTON v. CITY OF COLUMBUS; AND COLUMBUS v. BADGER, MAYOR. *

Decided, March, 1907.

Municipal Corporations—Use of Streets—Regulation of, by Vehicle Licenses—Exemptions from Payment—Can not be Based on Non-Residence—Ordinance—Constitutionality of—Uniformity of Operation—Injunction.

The term "use" in an ordinance regulating the use of vehicles on the streets of a municipality and requiring payment of certain license fees therefor, has reference to continued or repeated use; and the ordinance applies to all who use the streets with the vehicles described whether residents or non-residents of the municipality.

WILSON, J.; DUSTIN, J., and SULLIVAN, J., concur.

* Affirming in part *Pegg* v. *Columbus*, 5 N. P.—N. S., 436, which see for a full statement of the issues.

The ordinance in question, No. 21927, is "to license and regulate the use of the streets of the city of Columbus, state of Ohio, by persons who use vehicles thereon," etc. Bearing in mind the definition of "use" as a continued and repeated practice, we are of the opinion that the ordinance applies to those who, in the above sense, use the vehicles described. This construction would apply to non-residents as well as residents, and must be settled in each case according to the facts.

The other questions are disposed of as we think in the case of *Marmet* v. *The State*, 45 Ohio State, 63.

As the above construction will not give a common relief to all the plaintiffs in *Pegg* v. *Columbus*, the decree in that case as in the others must be for the defendants.

M. E. Thrailkill, for Lewis L. Pegg et al.

Paul Jones, for city of Columbus.

J. A. Godown, for J. F. Linton.

G. S. Marshall, *C. E. Carter* and *E. L. Weinland*, City Solicitors, for defendants.

IMPROVEMENT UNDER THE COUNTY DITCH LAW.

Circuit Court of Fulton County.

JOHN R. MASON ET AL v. COMMISSIONERS OF FULTON COUNTY ET AL.

Decided, May, 1907.

Ditches and Drains—Power of County Commissioners to Improve Water-course which is Partly Artificial—Water-course Established by Prescription—Location of Ditch in Living Stream—Injunction against Collection of Ditch Assessment—Estoppel—Apportionment of Expenses—Finding of Commissioners Final, When—Defect in Proceedings not Fatal, When—Sections 4490, 4491 *and* 4500.

1. County commissioners have power to improve a water-course, partly natural and partly artificial, by deepening, widening, straightening and otherwise improving it. *Greene County Commissioners v. Harbine*, 74 O. S., 318, distinguished.
2. Although Section 4500, Revised Statutes, provides that the uninterrupted use of an established ditch for seven years constitutes a natural water-course, notwithstanding errors, defects, or irregularities in the location, establishment, or construction thereof, it was not designed to take away rights which the public had acquired over it as a ditch or drain.
3. County commissioners may locate a ditch substantially along the line of the channel of, or adjacent to, or in the valley of, a living stream or water-course, though they have no power to convert a living stream of water into a ditch by proceedings for the location and construction of a ditch.
4. Plaintiffs are estopped to question the right of county commissioners to establish and maintain a ditch or water-course, which has existed for a great many years and has been improved on several occasions by proceedings instituted by the county commissioners, and the plaintiffs have in some of these proceedings paid the assessments without objection.
5. Where plaintiffs, by reason of artificial improvements on their own lands above, helped to make it necessary for the protection of the lands below that improvements be made in a ditch or water-course, they should contribute toward payment thereof.
6. Unless injustice is apparent in the assessment of the expense incurred in ditch improvement proceedings, a court of equity will not disturb the findings of the county commissioners.
7. Under Sections 4490 and 4491, Revised statutes, the failure of county

commissioners to find affirmatively and enter upon their docket that a ditch improvement is conducive to the public health, convenience and welfare is an irregularity that may be disregarded or cured, and is not necessarily fatal to the validity of the proceedings.

WILDMAN, J.; HAYNES, J., concurs; PARKER, J., concurs in a separate opinion.

Heard on motion to dismiss action, made at close of evidence on behalf of plaintiff.

I approach the consideration of the case, the title of which I have just given, with considerable misgiving and with an appreciation of the great importance of the issues involved and the magnitude of the investigation that would be required to apprise the court of the precise character and condition of every tract of land involved in the inquiry, with a view to the ascertainment of the equity or inequity of the assessments made on such lands.

We have before us a proceeding to enjoin the collection of assessments for an improvement under the county ditch law. I will not go into any elaborate recital of the facts which have been disclosed to us by the evidence. The petition is brought by one John R. Mason in behalf of himself and some three hundred or more others who, he informs us, are interested in like manner with himself in the restraining of the collection of the assessments upon the lands assessed for said improvement.

The ditch or water-course sought to be enlarged, widened and deepened by the proceedings of the county commissioners seems to be of a somewhat double character. The proceedings are described as the improvement of what is known as "the Bean Creek Improvement" and also "Chesterfield No. 2." The claimed water-course extends from a point in the northerly line of the county of Fulton southwesterly until it strikes the line of Williams county, and its entire extent is said to be some twenty-five miles. It is supposed to drain a large section of territory, the precise acreage of which it is not essential to state, but it runs well up into the thousands, something over 75,000 acres, I believe, if we consider the land which the persons favoring the improvement claim to be benefited by it.

The first question which confronts us—not the one first stated in argument or brief, but the one which seems of vital consequence to the whole inquiry—is as to the jurisdictional power of the county commissioners to make the sort of improvement which is described in this proceeding and to make it by the procedure which has been adopted. We are confronted with a recent decision of the Supreme Court of this state, that of *Greene County* v. *Harbine*, 74 Ohio St., 318, which for the first time, so far as we are aware, attempts to add to the statutory definition of the word "water-course," as used in the county ditch law. The statute, Section 4447, Revised Statutes, provides, substantially, for two things, which will be noted as I read the section:

"The commissioners of any county, at any regular or called session, may, in the manner provided in this chapter, when the same is necessary to drain any lots, lands, public or corporate road or railroad, and will be conducive to public health, convenience, or welfare, cause to be located and constructed, straightened, widened, altered, deepened, boxed, or tiled, any ditch, drain, or water-course, or box or tile any portion thereof."

That is the first sort of improvement to which I referred, and the provision following the word "or" which I now read constitutes the second kind of improvement to which I have made reference—

"Or cause the channel of all or any part of any river, creek, or run, within such county, to be improved by straightening, widening, deepening, or changing the same, or by removing from adjacent lands any timber, brush, trees, or other substance liable to form obstruction therein."

The first part of the section provides for the improving of a ditch or drain, the second part of the improving of a natural water-course comprised within the terms "river, creek or run."

In Section 4448, Revised Statutes, we have the statutory definition of the word "ditch" as follows:

"The word 'ditch' as used in this chapter shall be held to include a drain or water-course."

The Supreme Court, having this section before it, after discussion by counsel for the litigants in the case cited, gave a construction of its own, which I read in the syllabus, on page 318:

"The word 'water-course' as used in the county ditch law, Title 6, Chap. 1, Rev. Stat., is synonymous with the word 'drain,' and the county commissioners are without authority to convert a living stream of water into a ditch by proceedings for the locating and constructing of a ditch."

In the case before the Supreme Court, it was contented by the owner of a certain milldam that the object of a contemplated improvement of a stream by the county commissioners was to destroy his milldam and to do it without recourse to another section of our statutes which I need not stop to read, under which the county commissioners are authorized to proceed for the removal of a milldam from a water-course. This was denied by the defendants in the case, but it was not denied that the stream in which the milldam was maintained was a natural water-course; that it was such a stream as would not come under the ordinary definition of the term ditch. It was contended, however, by counsel who were seeking to collect the assessment that the statutory definition which I have read in Section 4448, Revised Statutes, so enlarged the term "ditch" as to make it include not only a water-course which had been constructed by artificial means, but also a natural stream such as has the character of a river. The Supreme Court, however, did not adopt this contention and came to the conclusion which is embodied in the syllabus which I have read. And this latest announcement of the Supreme Court upon the subject would seem to dispose of the question of the present power of the county commissioners to change a living stream having a natural flow of water within banks, such as we know to be a river, or creek, or brook, into a ditch or drain.

There is no qualification, however, in this decision, of the power of the commissioners to remove obstructions from a river or cause the channel of a river, creek or run to be improved in the other ways specified in Section 4447, Revised Statutes, to-wit, by widening, deepening or changing the same.

The petition before us and upon which the plaintiff bases his claims to equitable relief on behalf of himself and other persons affected, recites that the petition which was theretofore filed with the commissioners prayed for the deepening, widening,

straightening and otherwise improving a certain water-course, partly natural and partly artificial, known as Bean creek, with its branches in said county.

Without tarrying long upon this particular branch of the case, important as it is, we have arrived at a conclusion from an examination of the evidence offered on behalf of the plaintiff. I should have said, perhaps, in my statement of the present status of the case, that at the close of the plaintiff's evidence a motion was made to us by the defendants for a judgment, upon the ground that the evidence offered by the plaintiff would not justify the equitable interposition of the court. The evidence clearly discloses that from a very early period in the history of this county a water-course has been maintained along the greater part of the line of the proposed improvement. It has perhaps been extended from time to time, and it has certainly been improved at different times in the course of the years, and assessments have been made upon property owners near and remote for the cost of such improvements. Up to the present time, so far as we are informed, no contention has been made by anyone that this had not become a drain or water-course subject to the jurisdiction of the county commissioners under the statutes as to ditches, drains and water-courses.

Now, we have one section of the ditch law which may have some incidental bearing upon the effect of this long recognition of the so-called Bean creek improvement as a county ditch. It is Section 4500, Revised Statutes. I read it:

"When a ditch has been established and constructed for the public health, convenience, or welfare, either by private agreement between two or more individuals, whose real property has been affected thereby, or by a board of township trustees, or by a board of county commissioners, and such ditch has been used for the purpose of drainage of private lands or public highways for seven years or more, without obstruction or interruption, the same shall be, and hereby is declared to be, a public water-course, notwithstanding errors, defects, or irregularities in the location, establishment, or construction of the same, and such public water-course shall, in all respects, be considered and treated as a natural water-course, and the public shall have and possess, in and to such public water-course, the same rights and privileges which pertain and relate to natural water-courses."

The last clauses of this section are somewhat peculiar and at first reading might seem to throw some obscurity upon the construction of the section. It can hardly be contended, however, that it was the intention of the legislators that after the uninterrupted use of an established ditch for seven years, even if it had been erroneously or irregularly located, it should become a public water-course and that thereupon the commissioners should lose their jurisdiction over it to improve by deepening or enlarging or straightening its channel. We think that this is rather a statutory limitation against claims of error and irregularity in the original construction, and that, although the section says that it shall be treated as a natural water-course and the public shall have and possess in and to it the same rights and privileges which pertain and relate to natural water-courses, it was not designed to take away any rights which the public had acquired over it as a ditch or drain.

Now, the principal error, which it is claimed is a jurisdictional one, is substantially this, although not stated, perhaps, in precisely these words, that the county commissioners in the original location of this ditch and in their location of the contemplated improvement, are placing it along the line of the channel of a living stream or water-course, and that that sort of a location is one which the law will not permit, and it is contended that the decision in *Greene County* v. *Harbine*, *supra*, substantially so asserts. The Harbine case says that the county commissioners are without authority to convert a living stream of water into a ditch by proceedings for the locating and constructing of a ditch. It does not say that the commissioners may not locate a ditch substantially along the line of one, or adjacent to, or in the valley of, a living stream or water-course. But if they could or not, the error would be one in locating the ditch where they had no jurisdictional or proper power to locate it. But here we have a construction which in the petition is described as partly natural and partly artificial, and which has existed for I know not how many years, but certainly a good many, and which has been improved upon several different occasions by proceedings instituted before the county commissioners. In some of these proceedings some of the very lands now

sought to be assessed and owned or managed by some of these claimants said to be represented by Mr. Mason, the plaintiff, were assessed to pay for those former improvements, and no objection seems to have been raised.

We think that, applying the general principles as to the acquiring of easements by prescription, and also the principles embodied in Section 4500, Revised Statutes, it is too late now to question the right of the commissioners to the establishment and maintenance of what is known as the Bean creek improvement. That rights are acquired not only by individuals by long use, but that the public may also acquire such rights is a doctrine which needs no support by citation of authority. It would not be hard to find numerous adjudications in support of the position. In a case which happens to have been cited for another purpose I have found some authority which would entirely justify, I think, the holding that the public have established by long, public and undisputed use the character of this improvement. The case to which I refer is *Cleveland* v. *Bag & Paper Co.*, 72 Ohio St., 324. It was cited, perhaps, by counsel for the purpose of showing the acquisition by long use of a right by a private individual, but the principle of the case applies just as clearly in favor of the public, where there has been a like uninterrupted and undisputed public use.

This improvement is said by the plaintiff to be partly natural and partly artificial, or, rather, that it is the deepening, widening, straightening and otherwise improving of a certain water-course, partly natural and partly artificial, known as Bean creek, etc. And the question presents itself as to what are the rights of the landowners along the line of such a water-course, or landowners near to such water-course and who drain toward it and ultimately into it.

It is urged with very much force and after industrious research among the authorities and unquestionably industrious examination of the facts involved in this case, that lands owned by the plaintiffs here and lying, some of them, miles from the proposed improvement, are not benefited within the meaning of the law so as to justify the imposition upon them of any part of the cost of the improvement. And it is also insisted, as

an incident to this claim, that these landowners have a right to discharge the surface water from their lands or to drain their lands by tiling in such wise as even to increase the flow of streams running into Bean creek. It is said that where there is a natural water-course—a living stream—the owners, in the first place, have a right to the natural drainage of their lands; that when they bought their lands they bought the lands with the right attached to them as an incident, and that the lower lands over which the waters might flow owe a service to the land above. Authority has been cited in support of the contention, and we think that some of it goes the full length of the claim made by counsel for plaintiff. But is this the law recognized in Ohio? Is it in harmony with the principles which have been established or suggested in the adjudications which have reached our court of last resort?

In a case much relied on and often quoted in the progress of the case, *Blue* v. *Wentz*, 54 Ohio St., 247, the Supreme Court held that certain lands were not liable to assessment for the cost of a ditch improvement, and in arriving at this conclusion laid down certain principles to which we may justly look for guidance in the determination of the rights of the present litigants. I read from page 247 (this language is in the syllabus):

"A lower tenement is under a natural servitude to a higher one to receive from it all the surface water, accumulating from falling rains and melting snows, or from natural springs, that naturally flow from it to and upon the lower one. This advantage of the higher tenement is a part of the property of the owner in it, and he is not indebted to the lower tenement therefor.

"In making an assessment on lands, benefited by artificial drainage, the extent of their watershed is not the proper rule, but the amount of surface water for which artificial drainage is required to make them cultivable, and the benefits that will accrue to the lands from such drainage. However much water may fall on them or arise from natural springs, if, by reason of their situation, they have adequate natural drainage therefor, they are not liable for the cost of artificial drainage to other lands."

On pages 254 and 255 Judge Minshall, who announced the opinion for the court, very carefully guarded the rule which

he was laying down to cover this class of cases. He says (using a portion of the language which we find embodied in the syllabus and with other phraseology qualifying the doctrine):

"It is a principle of property well recognized in many of the states, and particularly in Ohio, that, where lands are situated as above supposed, the lower tenement is under what is called a natural servitude to receive such waters as flow to and upon it from a higher one, provided the industry of man has not been used to create the servitude. The right which the higher tenement has to require the lower one to receive from it the surface water that naturally drains to and upon it, is a right incident to the higher tenement, and a part of the property of the owner in it; and for any invasion of this right the law will afford him a remedy."

Several authorities are cited in support of the doctrine, among them Washburn, Easements, from which several quotations have been read by counsel for plaintiff.

Among the cases cited in support of the qualification of this doctrine is the case of *Butler* v. *Peck*, 16 Ohio St., 334, holding that where upon the lands of B there is a marshy basin, from which, in times of high water, a portion of the water contained in the basin overflows its rim and naturally finds its way through a swale to and upon the lands of P, while the remaining portion of the water of the basin has no outlet, and is dissipated by evaporation, B can not rightfully, by an artificial drain, conduct the water that has no natural outlet from the basin, and along said swale, so as to cause them to flow upon the lands of P to his damage.

Of course, there is no suggestion in that case as to riparian rights; that is, the right to increase the drainage from land by artificial means, so as to accelerate or increase the flow in a natural water-course—a stream or river; a swale is mentioned in the decision. But after all, the general principle seems to be enunciated that a person has certain natural rights which he may maintain with regard to the discharge of water from his land and he is not liable for damages arising therefrom; but in this case as in the other, the doctrine seems to be qualified by the feature that when he increases or changes the natural course of events by his own industry, or by artificial means, then he be-

comes, to a certain extent, responsible for the results.

There is no claim in the present suit for damages. There is no suit brought against these upper landowners upon the theory that they have damaged some one below, but it seems to be a conceded fact that, as to a number of persons who are said to be represented by the plaintiff, they have treated their lands artificially; that they have improved the drainage of their lands into the various tributaries to Bean creek, and that they may thereby have increased or accelerated the flow of water in Bean creek. Even if no more water flowed into Bean creek by reason of this artificial drainage than flowed before, still the constant or more rapid accumulation of the waters by artificial drainage might cause such injurious results below as would call for the more rapid taking away of the water from the lower part of the stream. But it can not be said that there will be no increase in the actual aggregate dicharge of water during a season by reason of artificial drainage, because the water which is permitted to stand upon the surface of the lands will oftentimes by gradual evaporation pass off in another direction, instead of taking the course by rivulet, brooklet or creek, and so finding its way down to the larger streams.

The county commissioners deemed these upper lands benefited in greater or less degree by reason of the improvement of what we have called the Bean creek improvement and Chesterfield No. 2. It is not now altogether a question as to the extent to which the lands above have been artificially drained. If, by reason of the improvement of Bean creek improvement and Chesterfield No. 2, facility is given to the carrying away of water which may be brought down by future artificial drainage from above, we think that it is a matter which has to be taken into consideration, and we have the evidence of several witnesses who have apparently permitted Mr. Mason to represent them as their agent in the bringing of this suit, that they have actually tiled to a considerable extent their lands, both upland and lowland, which are said by the commissioners to be benefited and which are sought to be assessed. Mr. Ely so testified with regard to his land, Mr. James Randel as to his, Mr. E. H. Butler, Mr. A. M. Rogers, Mr. J. M. Keesy, Mr. W. M. Griffin, and

perhaps others. This is but illustrative of the fact that many of these people deem it beneficial to their lands to drain them by artificial means; they are not satisfied to let the water flow away by merely natural means.

Tootle v. *Clifton*, 22 Ohio St., 247, was a case of damage caused by the increased flow of water from upper land upon lower. It was held that the erection of an embankment upon one's own land, whereby the surface water on the adjoining land of another is prevented from flowing in its natural course, and caused to flow off in a different direction over the land of the latter, is a nuisance for which an action may be maintained without showing any actual damage, and for which nominal damages, at least, may be recovered. In that case it was also held that title by prescription may be acquired by twenty-one years' adverse enjoyment of an easement. In Washburn's work on Easements I think there is, to a certain extent, a recognition of the same idea as to the increase of the flow of water by artificial means, and that it is not treated as a right to which protection will be afforded in the way claimed by counsel here.

In *Blue* v. *Wentz*, *supra*, the court lay down another rule exactly in line with the idea which I am endeavoring to express. On page 255 it is said:

"But if the lands of the plaintiff were subject to assessment, the rule adopted for making the apportionment would still be open to objection. The benefits for which an assessment may be made, must relate to the betterment of the land for the purposes to which it may reasonably be put. It is difficult to see how this may be done by simply establishing the amount of its watershed. It is not the rain that falls on the land that determines its need of drainage—rain is necessary to its fertility—but it is the amount that falls on it for which artificial drainage is needed. This, from the natural situation of the land, may be little or nothing; and where it is nothing, there can be no ground for an assessment upon it for the purposes of drainage, however much rain may fall on it. The situation of lands with respect to drainage is a controlling factor in their value; the purchaser pays for this advantage in acquiring his property; and there is no principle of justice upon which others, less favorably situated, can compel him to contribute toward making their lands as good as his in the matter of drainage. Each

owner has the right to enjoy his property with its advantages and he can not be deprived of his advantages for the benefit of others upon some fictitious notion of benefits conferred."

There is no hint or suggestion in these Ohio cases that the criterion of assessability upon plaintiffs' land is to find, if we can, whether the waters below in the improvement will back up upon the plaintiffs' lands. I find no suggestion of that kind. Counsel, however, seem to have entertained the view that if with perfect facility the plaintiffs may discharge the water from their lands by either natural or artificial means and if those waters can not get back to them, that then they will not be benefited by any improvement below. We think that this is not a just rule nor the rule contemplated by the law. We think that if, by reason of the artificial improving of their own lands above, the plaintiffs have helped to make it necessary for the protection of the lands below to make these contemplated improvements, then they should equitably help to pay for them. Surely there is nothing unjust in that; if they have necessitated this expense they should contribute to its payment. We are not inclined to think that by the present contemplated improvement or improvements, in time of flood or freshet the waters will be prevented from backing up upon the lands of the plaintiffs. We are entirely in harmony with the contention of the plaintiffs in that regard; but our judgment is, that that is not the determining principle here. The question is: Will they be benefited by having conferred upon them the right to pour this water out from their lands in such wise that it will increase the flow in the improvement below? If they are assessed for this benefit or claimed benefit, it is by reason of this principle.

The case of *Winters* v. *Fangboner et al,* decided by this court in Sandusky, is, in this respect, quite analogous to the present case, and the same conclusion was reached by the court.

There are some incidental matters involved here. I think that I have sufficiently discussed the two leading questions which have been presented to make clear the views entertained by the court. There are certain minor questions which, perhaps, should not be forgotten, and to which I will briefly refer.

It is claimed that the assessments made are inequitable; that they were not made upon a careful examination of each tract of land; that the commissioners did not go upon all of these premises and view them; and that, therefore, there ought to be a readjustment and reapportionment, if the assessments are permitted to stand at all. The burden is upon the plaintiff to show the inequity of the apportionment, and we are not satisfied that there is anything substantially inequitable in the principles upon which the commissioners have made the assessments. We do not think that the law requires them to go upon each individual tract of land. The law does require that they shall go along the line of the contemplated improvement; that they shall do it with a view of determining the necessity for it, and, of course, they should avail themselves of all proper means to make a just estimate of the benefit to each tract of land by reason of the contemplated improvement. This, we think, they have sought to do, and the presumption is, that their judgment is not at fault. We can not presume error in this regard, and the law indeed does not permit us to disturb the assessments which they have made except for gross inequity or injustice. Such has not been disclosed to us. There is another matter to which I wish to refer before I end what I have to say, and that is the sort of doubtful position occupied by the plaintiff here in the representative capacity in which he brings this suit, and also the incidental question raised by the demurrer. Demurrers were filed by the auditor, treasurer and county commissioners, setting up different grounds of claimed insufficiency in the petition. One was, that there was a misjoinder of causes of action; another, that there was a misjoinder of plaintiffs. There is but one plaintiff in fact, although he seeks to sue for the benefit of all.

We think that there is much force in the contention of counsel for defendants, that, even if these three hundred or more persons were all nominal plaintiffs, after we got past the question of jurisdiction to establish the improvement, they are not precisely upon the same footing. The interests of the so-called plaintiffs are identical in claiming that this is a natural water-course and that the commissioners have no right to make the improvement

with regard to it which they seek to make. We have disposed of that question. But when it comes to an adjustment of the assessments, no one landowner is interested in having the assessment upon any other landowner decreased; he is interested in having the assessment upon his own land decreased, and that might very naturally result in an increase of the assessments upon others. Their rights do not lie along the same line; they are rather antagonistic than harmonious. It is to the financial interest of each landowner to place the assessment upon others rather than himself, if the burden is to be borne by assessment at all; and while each individual landowner might have a claim for a reduction of the assessment upon him, or to the setting of it aside altogether, we fail to see that he has any such interest in the assessments made upon others as would justify the joining of them in one action. Perhaps I ought not to say that we fail to see that this could be done. What I mean to say is, that we think, as I said at the outset of this particular branch of the inquiry, that there is much force in the contention of the defendants, and if we found it necessary to touch that question and if these persons were all plaintiffs, we should, perhaps, hold the demurrer upon the ground of misjoinder of claims well taken.

The real plaintiff is John R. Mason, suing in his own behalf and in behalf of others. So far as his land is concerned, his assessment is trivial, and he says himself that it is more a matter of principle than of money; it makes no difference whether the assessment is fifty cents or whether it is five dollars, or whether it is any other sum, he is contending for a principle rather than to be saved from as expenditure of money. Courts do not sit to decide abstractions; there are too many substantial matters constantly pressing upon the courts for their consideration to permit the spending of very much time in the consideration of abstract principles. It is true, however, that courts will decide questions of right and will maintain the right of a party to litigate, although they may render judgment for nominal damages, when going with the awarding of nominal damages is the setting of some principle which may be important to him in the future. A trespass case, for instance, will be maintained, where one is trespassing upon land under claim of right or

title, for which the courts will award nominal damages, although he may have done no mischief, because there is involved the determination of whether his right to enter and persist in entering can be maintained.

I will not tarry longer upon the question of the right of Mr. Mason to sue, except to make a mere reference to the case of *Quinlan* v. *Myers*, 29 Ohio St., 500, which holds, in substance, that if the nominal plaintiff, who sues not only in his own behalf but in behalf of others, fails to maintain his individual action, the whole case will fall, and to refer to the statement made by Mr. Mason in evidence, that along in the year 1905, I think it was, he wanted the ditch improvement below him extended to his place, or else that he should not be assessed, implying a concession that, if that improvement were extended to his land or upon his land, then the assessment might be made. I do not know that we should place very great weight upon such concession, but it bears upon his right to question the legality of these improvements; it is a question whether there has not been an acquiescence upon his part in some of these improvements that have been established in years past.

I have not time to refer to the other discussion incidental to these main questions, which I have treated somewhat briefly, perhaps hastily, and it suffices to say that it is the judgment of the court that this important improvement, which, we believe, from all the indications of the evidence, is one demanded by the public welfare and convenience, should not be stayed by any action of ours in disturbing the assessments which have been made upon these landowners. We think that the commissioners have sought to make a just distribution of the cost of the improvement. The setting aside of their first estimate and the adoption of an improvement costing little more than half the first, against which remonstrances had been filed, indicates an intention on their part to deal fairly with the people in this corner of the county. No intimation has been made, indeed, of any intentional injustice or favoritism. It is said, to be sure, that one of the commissioners owned land lying upon, or adjacent to, this improvement, subject to assessment; but, without comment upon authorities or making citations, it is enough

to say that we do not think that a sufficient ground is thereby afforded for interference with the action of the commissioners or disturbance of these assessments. Indeed, after as careful an examination as we have been able to make of the whole field of inquiry, we have been unable to arrive at the conclusion that plaintiffs' petition should be sustained.

Our judgment is that neither Mr. Mason, nor the other persons associated with him and whom he seeks to represent, have any claim to the equitable interposition of the court to set aside the assessments which have been made upon them, and for this reason the finding of the court will be in favor of the defendants upon the motion which has been made for a judgment of dismissal of the plaintiffs' petition.

PARKER, J., concurring.

Judge Haynes calls my attention to the fact that in the course of his opinion Judge Wildman did not mention the contention respecting the failure of the commissioners to find affirmatively and enter upon their docket that this improvement was conducive to the public health, convenience and welfare. If he mentioned the contention, he failed to mention certain sections of the statutes that we think bear upon that question. Under Sections 4490, 4491, Revised Statutes, we think that an error of that kind may be disregarded or, in effect, cured; that, where an application for injunction, like this, is made to the court, it is not necessarily fatal to the validity of the proceedings. I read a part of it:

"* * * the court in which any such proceedings are begun shall allow parol proof that said improvement is necessary and will be conducive to the public health, convenience, or welfare, and that any steps required by law for any improvement have been substantially complied with, notwithstanding the record required to be kept by any board or officer."

C. L. Newcomer, for plaintiffs.
Handy & Wolf, for defendants.

CERTIFICATES AS TO "FULLY PAID AND NON-ASSESSABLE STOCK."

Circuit Court of Cuyahoga County.

JOSEPH R. NUTT v. MINNIE A. WHEELER.

Decided, October 21, 1907.

Corporations—Liability of President for Deceit—In Certifying that Stock is Fully Paid and Non-Assessable—Does not Arise, When.

One who purchases stock in an Ohio corporation on the open market for about twenty-five per cent. of its face value, without inquiry as to the assets of the company, or the representations made upon the face of its certificates of stock, can not, upon the subsequent insolvency of the company, recover the amount paid for said stock from the president of the company in an action for deceit, upon an alleged misrepresentation made by him when he signed certificates of stock certifying that they were "fully paid and non-assessable," notwithstanding said president knew that upon the original issue of said stock property greatly over-valued had been received by the company in payment for it.

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

Error to the Court of Common Pleas.

It appears from the record of this case that defendant in error, who was plaintiff below, was a school teacher, who also speculated in stocks dealt in on the stock market in Cleveland, Ohio, and that in September, 1902, through a broker in said city, she bought on the open market thirty-five shares of the capital stock of the Springfield & Xenia Traction Company, for which she paid $28 per share. Her instructions to her broker were contained in the following letter to him:

"GARRETTSVILLE, OHIO, September 16th, 1902.

"MR. CARL S. RUSSELL.

Dear Sir: I beg leave to acknowledge your favor of the 15th. Accept my thanks for the execution of the Western Railway commission upon such favorable terms. I also desire to thank you for taking such very good care of my interests in the C., D. & T. deal. I wish you would expend the proceeds from the sale of that stock in the purchase of some good trac-

tion stock which your best judgment leads you to believe will be a rapid riser. How is that new Springfield & Xenia road financed? I have faith in any road under the Mandelbaum and Pomeroy syndicate, or in the ultimate success of a company financed by the Everett-Moore combination. I am out of the city, so can not talk over the investment with you, but I assure you my previous transactions lead me to trust implicity in your business sagacity. Yours truly,

"MINNIE A. WHEELER."

This stock did not prove a "rapid riser," but turned out to be a "rapid faller," the company defaulting in the payment of interest on its bonds, a receiver being appointed, and a suit being brought in behalf of its creditors in the Common Pleas Court of Clark County, against Miss Wheeler and other stockholders of the company, to enforce their stockholders' statutory liability.

Thereupon Miss Wheeler brought an action in deceit against Nutt, he being president of the company at the time her stock was transferred to her, and having as such signed the certificate for thirty-five shares issued to her, which on its face he certified to be "fully paid and non-assessable."

In her petition she sets forth what she claims to be the transaction whereby $500,000 of the stock of the company was originally issued to said Nutt and his associates, without any consideration whatsoever; that Nutt signed her certificate as president of the company, knowing at the time he signed it that the company had never been paid for it; that at the time of the disposal of the stock of the company, it was insolvent and that Nutt knew of its insolvency.

The petition further alleges that certificates so issued found their way into the market, where Miss Wheeler, relying upon the statement upon their face, that the stock was fully paid and non-assessable, bought thirty-five shares for which she paid $980; that she believed said statement to be true and later discovered that it was untrue and that her stock was worthless.

The prayer of the petition is that she recover from Nutt the money she paid another for her stock, plus the amount which she alleges as her contingent liability in said suit pending in Clark county.

The conceded facts regarding the deal whereby the $500,000 of stock of the company was originally issued, as shown by the record, are as follows:

One Martin and associates having acquired franchises for a traction company in the cities of Springfield and Xenia and made some progress towards acquiring a right of way for a suburban road between said cities, and being unable themselves to finance the proposition, applied to Nutt to help them out. He agreed with them to organize a company with $500,000 stock, cause it to issue $400,000 of bonds and deliver to Martin and associates $140,000 of said stock and $40,000 of bonds, and sell the balance of the bonds, $360,000, using the proceeds thereof in completing and equipping the proposed road. Martin and associates were to deliver to Nutt or the company so to be organized by him, all their franchises and property; and also agreed to furnish a complete private right of way between Xenia and Springfield along lines satisfactory to the purchasers.

This agreement was carried out, but Nutt, in turning the property over to the company, which later became known as the Springfield & Xenia Traction Company, induced it to issue to him therefor $500,000 of stock and $40,000 in bonds. He delivered to Martin and associates $140,000 of this stock and $40,000 of bonds, as he agreed, though this is questioned by one of Martin's associates who thinks only $30,000 in stock and $30,000 in bonds were so delivered. Whether Martin dealt fairly with his associates, however, is immaterial.

The $360,000 of stock remaining in Nutt's hands by this transaction he gave as a bonus to the subsequent purchasers of the $360,000 of bonds sold for construction purposes, each purchaser of a $1,000 bond thus receiving ten shares of stock.

It is a part of this bonus stock which subsequently found its way upon the market in Cleveland, and was bought by Miss Wheeler, not from Nutt, but from some third person.

Upon the fact that Nutt paid Martin some $360,000 less for the property than he sold it to the company for, and the opinion of one expert, A. B. Dupont, that at the time it was probably not worth more than $100,000, the point was attempted

to be made by the plaintiff below, that the stock issued by the company was never paid for. This expert, however, admitted that if the franchises "were in the hands of somebody who had the power and would build the railroad, he could probably unload the railroad at a great deal more than its physical cost."

On the other hand, five experts for the defendant, all well-known traction men, testified that the franchises transferred to the company were worth from $500,000 to $750,000.

The trial court submitted the cause to the jury, limiting the plaintiff's right to recover to the amount she had paid for her stock, with interest, and the jury brought in a verdict for her in that amount.

In this court several errors in the record are complained of, but the most important ones, in our view of the case, are that the verdict is against the weight of the evidence, and that the motion of defendant at the close of plaintiff's evidence, to direct a verdict for the defendant, should have been granted.

If Mr. Nutt made any misrepresentation to Miss Wheeler, it was made either by the express language on the face of the stock certificate which she bought, or it was implied from the existence in the market of stock certificates signed by Mr. Nutt, or placed on the market directly or indirectly by him.

As the record discloses that Miss Wheeler never saw a stock certificate of the Springfield & Xenia Traction Company until after she had bought her thirty-five shares and had her own certificate issued to her, there was no express representation to her, and as her testimony shows that she had no thought as to the difference between "certificates of stock" and "stock" itself, but was looking for a "rapid riser" as a speculation, there was no implied representation arising from the presence of *certificates* of stock in the market.

In other words, bearing in mind that the original issue of this stock was not absolutely void, as in the case of fraudulently issued or over-issued stock, but, at the most, was voidable only, we think that no material representations upon which Miss Wheeler relied as to the *value* of this stock arose from the mere presence of certificates in the market which, indeed, purported to be fully paid and non-assessable, but which she

had never seen, heard of, or, apparently, thought about. She wanted to get rich quick and more than one broker having told her that Springfield & Xenia was good "stock," and believing it would be a "rapid riser," she bought without inquiry as to its assets or the amount of stock it had issued, and paid $28 per share.

The price she paid for the stock is significant, as pointed out by Judge Sharswood in the case of *McAleer* v. *McMurray,* 58 Pa. St., 126, 129, and rebuts the remote inference arising from the mere presence of stock certificates on the market, that they had been issued but a short time before her purchase upon the payment of par for them.

It is unnecessary to recite Miss Wheeler's evidence at great length, but is sufficient for us to say that as we weigh it, she failed to show that she parted with her money at the time she bought this stock by reason of her reliance upon the representation which she now says Nutt falsely made to her.

As we view this case, there is another reason why Miss Wheeler can not recover under any view of the evidence.

Miss Wheeler is a transferee of stock, not a creditor of the company. The representation made to her and the class she belongs to, to-wit, stockholders, in law is no misrepresentation, but is true.

Nutt, when as president of the company, he signed stock certificates purporting to be fully paid and non-assessable, stated to the persons to whom he issued said certificates and their transferees, what was clearly true under the facts of this case.

This court held in the case of *Orton* v. *Edson Reduction Machinery Company,* 5 C. C.—N. S., 540, 543 (affirmed without report, 75 O. S., 580), that:

"A corporation having issued its stock as fully paid, in exchange for property transferred at an agreed valuation, can not thereafter, without the consent of the stockholders, treat his stock as only partially paid and assess him for the difference between the market value of said property and the par value of the stock issued in exchange for it."

At the bottom of page 543, we say:

"The authorities, however, agree that:

"The corporation itself, after issuing its stock as paid up stock, and declaring it so to be, can not subsequently repudiate that declaration and agreement and proceed to collect, either from the person receiving the stock, or his transferee, the unpaid part of the par value. It is estopped from so doing. Where, however, actual fraud enters into the transaction, then a corporation is not estopped from having the agreement set aside. The person receiving the stock can then be compelled to return the stock or its market value, and take back that which he gave to the corporation for it. But the corporation can not hold him liable for the par value of the stock." (1 *Cook on Corp.*, Section 38). See also 2 *Thompson on Corp.*, Chapter XXVII, *passim.*

So we see that this representation, as made to stockholders and transferees, was truthful and it was Nutt's duty, as president of the company, to make it to them.

As to the right of stockholders, as such, among themselves, if Nutt ever received stock which he never fully paid for, and as to the rights of creditors in such case, we say nothing. We simply hold that Miss Wheeler has misconceived her remedy against Nutt, which must be for the fraud in his original transaction with the company, if any, and not for his subsequently signing and issuing stock certificates.

In this connection it is significant that the pleadings and record disclose that the creditors of the company in the case pending in Clark county have not claimed that there was any fraud in the original issue of stock, but are suing for an assessment of the stockholders' statutory liablity. There the matters here complained of can be fully investigated, while here the fact that the property was over-valued when stock was issued for it, is made to depend upon the opinion of one expert, contradicted, as he is, by five others, equally good. However, we do not desire to be taken as approving the example of high finance here made public.

There are other errors in the record, besides the overruling of the defendant's motion to direct a verdict in his favor, which we shall briefly mention.

We think it was error to admit in evidence the Kushman

stock certificates, as it was not claimed that the plaintiff had ever seen them before she purchased her stock.

It was error to refuse to submit the defendant's eleventh and twelfth interrogatories to the jury.

By the jury's answer to the defendant's third interrogatory it showed that it did not understand the case submitted to it. The interrogatory and answer are as follows:

"What misrepresentation, if any, was made to the plaintiff by the defendant, with knowledge on the defendant's part of its falsity and with intent to deceive and on which she relied in making her purchase?"

Answer: "The fact of J. R. Nutt being connected with the Springfield & Xenia Traction Company as president."

This "fact" was not a misrepresentation, nor was it the one charged in the petition.

The answer is not responsive to the question, and, of course, is no justification for the jury's verdict. While we would not say that this special finding is so contrary to the general verdict as to warrant a judgment on it for the defendant, it nevertheless shows plainly that the jury had no intelligent conception of the case before it, and would be sufficient reason for a new trial, were we disposed to send the case back for further proceedings.

For the errors pointed out the judgment is reversed, and because, upon the conceded facts as to the original issue of stock, we think the plaintiff below has misconceived her remedy, judgment is rendered for the plaintiff in error.

McGraw & Messick, for plaintiff in error.

Arnold Green and *Thomas Gibbons,* for defendant in error.

WHEN JUDGMENT MAY BE SET ASIDE AT A SUBSEQUENT TERM.

Circuit Court of Wood County.

FRANK FRAZIER ET AL v. WILLIAM WALKER.

Decided, April 27, 1907.

Judgments and Decrees—Action upon, at Subsequent Term—Motion for, must be Filed, When—Appeal—Dismissal of, for Default for Petition—Sections 6589 and 5354 to 5357—Error—Pleading—Continuance—Notice.

1. A motion to set aside a default judgment and revive the cause for further consideration may be heard at a term subsequent to that of the entry of the judgment, only when the motion has been filed during the term of the entry and duly continued.
2. An appellate court has authority, under Section 6589, to dismiss an action and adjudge the costs against the appellant on its own motion, when the appellant is the plaintiff and is in default for a petition.

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

Error to Wood Common Pleas Court.

William Walker sued Frank Frazier and Richard Priest before a justice of the peace on November 8, 1905, in an action for money. The verdict of the jury upon the trial was against plaintiff and judgment was entered on this verdict on December 11, 1905; he gave notice of appeal and perfected his appeal to the court of comomn pleas by giving bond and filing his transcript in that court on January 15, 1906. The transcript was due January 15, 1906; it was in fact filed upon January 4, 1906, so that it was filed in due time. The petition was due on the third Saturday after January 15, which would be upon February 3, 1906. No petition was filed at that time or during that term, which was the January term. No petition was filed at the following term, which was the April term, and on May 7, 1906, the action was dismissed.

The journal entry dismissing the case reads as follows:

"This day this cause came on for trial, and it appearing to the court that the plaintiff has failed and neglected to file his petition herein and has neglected to prosecute said cause to final judgment, and that the time has long since passed for the filing of said petition, it is hereby ordered and adjudged that the said cause be dismissed and that plaintiff pay the costs herein taxed at $——, and execution is hereby awarded."

It does not appear that any action was taken by the defendant, Frazier, to bring about the dismissal of this cause; so far as appears the court proceeded upon its own motion, upon the matter being brought in some way to its attention.

It is suggested that there was some irregularity in this proceeding, because it should have been based upon a motion, and Walker should have received notice of the motion in due time so as to be present and resist it. Section 6589, Revised Statutes, provides:

"If the plaintiff, in the action before the justice, shall appeal from any judgment rendered against such plaintiff, and after having filed his transcript and caused such an appeal to be docketed, according to the provisions of this chapter, shall fail to file a petition, or otherwise neglect to prosecute the same to final judgment, so that such plaintiff shall become non-suit, it shall be the duty of the court to render judgment against such appellant, for the amount of the judgment rendered against him by the justice of the peace, together with interest accrued thereon, and for costs of suit, and to award execution therefor, as in other cases."

We think that necessarily includes authority, where there is no judgment to be rendered against the plaintiff except a judgment for costs, to dismiss the action for want of prosecution and render judgment against the appellant for costs, and that this may be done by the court upon its own motion because of the non-prosecution of the action. So we hold that there was no irregularity in that proceeding.

At the April term, to-wit, June 11, a motion was filed by Walker to have this judgment of dismissal set aside; the ground of the motion was that he was prevented by an unfortunate

casualty from looking after his case—that he had received an injury about the time his petition was due and that he has been disabled and confined to his house ever since so that he could not look after his case. The motion was not verified. It does not appear that any notice of the filing of the motion was served upon anybody, though it is stated in argument, and we will assume that it is correct, that counsel for Frazier were advised of the motion and were present to resist it at the April term. There is nothing in the record however disclosing whether that is so, but that we regard as immaterial. No action was taken upon this motion at the April term. The next thing that appears in the record is an entry under date of November 16, 1906, which was at the September term, as follows:

"This day this cause came on to be heard upon plaintiff's motion filed at the preceding term of this court to set aside the judgment by default rendered at said term on account of failure of plaintiff to file his petition herein and for leave to plaintiff to file a petition in said cause, and, on due consideration thereof, and of the affidavits and all the proceedings in said cause and being fully advised in the premises, the court does grant said motion. It is, therefore, ordered and adjudged that the judgment by default heretofore rendered in this cause, be, and the same hereby is, set aside and held for naught, and the plaintiff is hereby granted leave to file his petition herein by November 24, 1906; to all of which the defendant excepted."

Now Frazier prosecutes error in this court to reverse this action of the court of common pleas in setting aside the judgment of dismissal and reinstating the cause and giving the plaintiff leave to file his petition.

We are of the opinion that the court of common pleas erred. That it had no authority in the premises to make this order. We do not quite agree upon all points—that is to say, we do not all arrive at this conclusion by the same process of reasoning, but we are all agreed in the conclusion, which is after all the material thing. The question has been debated before us and by us whether this motion, filed during the term at which the judgment was dismissed, could keep alive the matter with respect to which it

had invoked the action of the court—whether thereby the matter could be kept pending in court until another term so that the court might at such subsequent term hear and act upon the motion. About that we have differed somewhat; some of us being of the opinion that by a specific or a general order of continuance it might have been kept pending so that it could have been lawfully acted upon at a subsequent term, but those of us entertaining that view also entertain the view that it was not so kept pending, because there was no order of continuance either special or general, and we are of the opinion that a matter of that kind, a proceeding to vacate a final judgment which has finally disposed of a case, differs essentially from an undetermined cause, which will remain pending until it is disposed of; that this proceeding can not be kept alive from term to term without an order of continuance of some description, either general or special. One member of the court is inclined to the opinion that if it could be acted upon at all at a subsequent term as a motion, it might be continued by operation of law or might be regarded as still pending until disposed of. Those of us entertaining the opinion that it could have been continued are of the opinion that if continued it might have been acted upon at a subsequent term as a motion, while the member who is of the opinion that it might have been continued by operation of law is of the further opinion that even if that were done, it could not as a matter of law be acted upon at a subsequent term by reason of the provisions of Sections 5354 to 5357, Revised Statutes, and especially Section 5358. These sections are in a chapter upon the subject of new trial and other relief after a term at which the judgment is entered, and Par. 7 of Section 5354, Revised Statutes, has reference to the rule for relief from the consequence of unavoidable casualty or misfortune, preventing a party from prosecuting or defending an action, and Section 5358, Revised Statutes, provides that proceedings upon that account must be by petition, duly verified, whereas in this case there was no petition and no verification of the application.

I have said enough perhaps to indicate the conclusion of the court, *i. e.*, that if the application could have been heard and

granted upon a motion at a subsequent term it must be by reason of the motion being filed during the term and duly continued, and a majority of the court are of the opinion that it might have been done in that way. And we are of the opinion that if it could not be acted upon at the subsequent term as a motion—if the failure to continue amounted to a discontinuance of the motion, no petition having been filed, then it follows that the action of the court was erroneous; and we all agree that upon one or the other of these grounds, the action of the court was erroneous, and therefore it is reversed, with costs.

Baldwin & Harrington, for plaintiff in error.

Eugene Rheinfrank, for defendant in error.

CONSPIRACY TO INJURE BY LIBEL OR SLANDER.

Circuit Court of Erie County.

ED. H. ZURHORST v. KATHARINE KROLL AND CHARLES P. CALDWELL.

Decided, September, 1907.

Conspiracy—Libel or Slander—Actions for, Distinguished—Gravamen of, Where Combined—Pleading and Evidence Required—Resulting Injury—Where Loss of an Office is Alleged—Damages—Application of the Statute of Limitations—Sections 4982 and 4983.

1. An action for conspiracy to injure one by libel or slander and an action for libel or slander are not so identical in character as to bring them both into one category under the statute of limitations; and where the conspiracy forms the gist of the action and the libel or slander is merely incidental to the accomplishment of that purpose, the action is not barred by the statute applying to libel or slander.
2. In an action for conspiracy the damage sustained constitutes the gravamen, and proof of special damage is required and can not be implied from the mere effort to injure the plaintiff by a conspiracy to that end, although the efforts in that behalf may consist of declarations which would raise such an implication in an action for libel or slander.
3. Where the petition charges an unlawful conspiracy to injure the plaintiff in his reputation and deprive him of a public office by

uttering and publishing slanderous words and a certain libelous affidavit, there is an entire failure to show an accomplishment of the purpose alleged, where the testimony merely establishes the means used for the carrying out of the conspiracy, and fails entirely to show any resulting injury; and it is not error in such a case to instruct the jury to return a verdict for the defendants.

Per Curiam.

HAYNES, J., PARKER, J., and WILDMAN, J.

The action was instituted in the common pleas court by the plaintiff in error against defendants in error, charging them in much detail with unlawfully conspiring to injure plaintiff in his reputation and deprive him of the position of United States Collector of Customs at Sandusky; and averring that in furtherance of said conspiracy they falsely wrote and published a certain libelous affidavit concerning him and spoke in the hearing of divers persons certain slanderous words. It is claimed that the wrongful purpose of the conspirators was accomplished, that by reason of their acts said official position was lost to him, and that he suffered other loss in the way of injury to his good name, pain and humiliation, all to his damage in the sum of $10,000.

The action failed below, the court, at the close of the plaintiff's evidence, directing a verdict for defendants, and judgment was given accordingly. To reverse this judgment the proceeding is before us.

The petition does not disclose when the acts of the defendants in the carrying out of their alleged unlawful purpose terminated; but the case as developed by the evidence failed to show the writing or speaking of defamatory words within the year prior to the commencement of the suit.

The action of the trial court in directing a verdict for the defendants was invoked by a motion based upon the following grounds:

1. Absence of evidence to sustain the charge of conspiracy;
2. Bar of the statute of limitations; and,
3. Absence of proof of damages resulting from the acts of defendants, either jointly or severally.

No opinion of the trial judge in support of his ruling is furnished us, but we are informed by counsel for plaintiff in error that he based his action on the view that the case was one for slander and libel, and that the action was barred by the statute of limitations of this state, limiting the period for bringing such actions to one year (R. S. 4983). Counsel for defendants does not quite concede that this was the sole basis of the decision. But whatever the views of the trial judge, his decision should not be disturbed if warranted by the character of the action and the evidence.

There was, in our judgment, evidence tending to sustain plaintiff's averment of a combination or conspiracy, and the first ground of the defendants' motion was not well taken. The ruling of the court must be supported, if at all, by one or both of the other grounds.

Cases of this general character are not infrequent in the adjudications of this country and England, and the right of action for conspiracy to deprive one of an office or employment or to injure his business, not only by defamation of his character but by other undue or unlawful means, is clearly established. The action will not lie, however, for the conspiracy alone. It must be consummated by some act or acts resulting in injury to the plaintiff. But the courts do not hold that the defamation of character, where that is the means employed to accomplish the wrongful purpose of the conspiracy, is anything more than such means. It is no more the gist of the action than are malicious acts of any kind to effect the unlawful purpose of the conspirators. It is distinguished from a libel or slander suit in that it is unnecessary to plead the words of the verbal or written statements made to the injury of the plaintiff or to allege declarations that would sustain an action for libel or slander. It is further distinguishable in this, that a conspirator may be held liable for either the written or spoken words or the conduct of his confederates; but one person, not conspiring with another, can not be held liable for the libels or slanders or other conduct of such other. As to verbal slander, it has been held that there can be no joinder of defendants, because, to quote one of the pioneer

judges of our own Supreme Court, "verbal slander can not be jointly committed by two or more." *Orr* v. *Bank,* 1 Ohio, 46.

The action for conspiracy, then, and the action for libel or slander, are not so identical in character as to bring both into one category under the statute of limitations. Section 4983 of our statutes limits the bringing of actions for libel or slander to one year from the utterance or publication of the defamatory words; but no section of the statute of limitations so limits the bringing of actions for conspiracy, although the means adopted to accomplish the purpose of the conspiracy be libel or slander. In the one case, the libel or slander is the gist of the action; in the other it is a mere incident to the accomplishment of the purpose for which the conspiracy was formed.

This distinction is clearly drawn by the Supreme Court of Texas, in *Brown et al* v. *Amer. Freehold Land Mort. Co. of London,* 80 S. W., 985, the case especially relied on by plaintiff in error, and upon the authority of which it is said in the brief of his counsel the petition in this case was drawn. It is recognized with equal clearness and supported by exhaustive reasoning in the able case of *Van Horn* v. *Van Horn,* 56 N. J. L., 318 (28 Atl., 669).

To the extent that the petition before us involves and charges a libel and slander, setting out *in haec verba* the alleged defamatory written and oral statements, the statutory limitation as to actions for slander and libel would, doubtless, apply, upon failure to prove the alleged conspiracy and an effort to base a judgment on the slanders and libel alone. In view of this double aspect of the petition, the statute of limitations was properly invoked; but if the conspiracy and the accomplishment of its wrongful purpose, to the plaintiff's injury, were shown, the one year limitation was not available to bar the action.

It is not contended by defendants in error that sufficient time has passed since the accruing of the right to sue, to effect a bar under any other section of the statute. It is probable that Section 4982 of the statutes is the one applicable to this class of actions as one for "an injury to the rights of the plaintiff not arising on contract and not hereinafter enumerated."

It is our judgment, however, that the evidence offered to support the claims of the petition does not tend to establish the accomplishment of the purpose of the alleged conspiracy. It tends to show the use of means to reach the desired end, but it utterly fails to show any resulting injury. True, the plaintiff asserts in general words that he lost his office thereby, but this is barely more than an argumentative statement, a claimed conclusion rather than the assertion of a fact, and has no valid force when coupled with his testimony that he filed his resignation with the Secretary of the Treasury at Washington, asking for its immediate acceptance, and not claiming that he had been requested by any superior to resign. It is said that the term of his appointment had expired, and that he was not re-appointed. He was, however, continuing to hold the office and no successor had been appointed. When we add that the record fails to disclose any previous assurance by the appointing power that his tenure would be extended by re-appointment, or any expression of loss of confidence in him as an official or otherwise, it becomes manifest that his action, so far as proof of loss of office is concerned, fails. There is no evidence that he was engaged in any other occupation which suffered impairment, or that he received substantial injury in any other respect.

The courts have not held, so far as we are apprised, that damage will be implied from the mere effort to injure one under a conspiracy to that end, although such effort may consist of declarations which would raise such implication in a suit for libel or slander. Proof of special damage seems to be required, and the damage, not the conspiracy, is said to be the gravamen of the action.

We think that the court did not err in instructing the jury to find for the defendants, and we find no prejudicial errors in any other respect.

H. C. DeRan, for plaintiff in error.

H. L. Peake, for defendants in error.

OVERLAPPING OF LOCAL OPTION DISTRICTS.

Circuit Court of Scioto County.

JOHN KILCOYNE v. WELLS A. HUTCHINS, MAYOR OF THE MUNICIPALITY OF PORTSMOUTH, OHIO.

Decided, November 8, 1907.

Elections—Under the Jones Local Option Law—Overlapping of Districts—Motive of Signers of Petitions can not be Inquired into—Policy of the State Tending toward a Stricter Regulation of the Liquor Traffic—Construction of the Phrase "Residence Districts."

On May 21, 1907, a majority of the electors of a residence district in the city of Portsmouth signed a petition under the act, 98 O. L., 68, in favor of prohibiting the sale of intoxicating liquors in that district. This petition was filed with a judge, found sufficient, and the residence district duly established prior to October 24, 1907. On the latter date another petition was filed with the judge, also in favor of prohibiting the sale in the residence district described in it. The residence district described in the second petition overlapped the first and was identical with it, except that the second had an additional block attached containing forty-five electors.

Held: Residence districts established under said act are territorial units; the act does not authorize the overlapping of a valid prior residence district by a later petition.

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

This case comes to this court on error. It appears from the record of this case that on May 21, 1907, a petition was filed with the judge of the court of common pleas of this county, under what is known as the Jones law, being an act in 98 Ohio Laws, page 68, signed by a majority of the electors of a certain residence district, in favor of prohibiting the sale of intoxicating liquors as a beverage in that district.

The judge of the court of common pleas held that petition sufficient, and thereupon a certificate was filed with the clerk of the municipal corporation. The finding by the judge was made on June 24th, 1907, and under that finding the petition became effective.

Later, on October 24th, 1907, another petition was filed with the same judge, signed by a majority of the electors of a residence district, which residence district was constituted largely from the territory that was incorporated in the first petition, with an additional block attached to it, in which there were forty-five electors. The latter petition was presented to the common pleas judge, under Section 1 of this act aforesaid, for the purpose of having him pass upon the sufficiency of that petition, and for the purpose of declaring the second residence district dry.

It is an undisputed fact in the case that the territory in the second petition overlaps that contained in the first. The only additional territory in the second is this block that I have spoken of in which there was an additional number of electors to the number of about forty-five.

A motion was made to dismiss this petition. It came on for hearing upon the motion and upon the agreed statement of facts. And the case is presented to us to determine the construction of the Jones law, and to determine whether or not the common pleas judge erred in overruling the motion and sustaining the second petition.

I will say that, ordinarily, we would not pass upon a question of such importance as this immediately after the close of the argument, as we do in this case, were it not for the fact that we are fully satisfied with the position that we are now taking.

The first question presented is this:

It appears that some of the petitioners who had the first district established by the petition of May 21st, 1907, were acting in behalf of the saloon interests, and that it was partly through their efforts that the first district was established; and their motive is attacked in this case. We do not think that the motive of the signers of this first petition can be inquired into in this court. But I will say upon that question, were we to pass upon it—were it necessary to pass upon it—we would probably hold that, when the first petition was filed, May 21st, 1907, the motive could not be considered in the case under the authorities as we view it.

Under Section 1 of the act the electors of any residence district have the right to sign the petition. Therefore under that act a statutory right was given them. And the case of *The Cincinnati Volksblatt Company* v. *Hoffmeister*, 62 Ohio State, page 198, will probably apply here, where Judge Spear, citing a number of authorities, says:

"Ordinarily the motive, or purpose, of the party who is in the exercise of, or is about to exercise, a clear legal right, is unimportant. * * * We are of the opinion that where a suitor demands the enforcement of a clear right given him by the law, whether the remedy be legal or equitable, his motive for such action is not a proper subject for judicial investigation."

It appears from the opinion of Judge Spear that since the qualified electors of any residence district have a right to sign a petition, whether it be one to create a dry district or a wet district, that their motive can not be called in question. Of course in cases of this kind the motive of one section of the residence district is for the purpose of creating a dry territory, and of the other section of the same district probably will be to do all it can to create a wet territory. No more, do we think, can the motives of a signer of these petitions be attacked because he was interesting himself on the wet side of the proposition than could the motive of one who is interesting himself upon the dry side of a proposition. But, however that may be, it can not be questioned in this case, because that would be drawing the question into the case collaterally; if it could have been raised at all, it should have been done when that first petition was filed; but here we have the finding of the judge passing upon that petition—upon every incident connected with it—and his adjudication that the petition was sufficient.

Coming down to the real question at issue it is this:

That when dry territory has been created under Section 1 of the act, by a majority of the qualified electors of the residence district who sign a petition, present it to the common pleas judge, and a residence district established, whether or not a second petition could be filed which overlaps the first district.

In the construction of statutes, where statutes are ambiguous, the rule is without question that the purpose of the court is to ascertain, if it possibly can, what the legislative intent was. If there is no ambiguity, the court can only follow the statute as it finds it. We agree also to the proposition that the policy of legislation for years past has been tending towards the stricter regulation of the liquor traffic. And the trend of judicial decisions for a number of years has been to the same effect. The power of the Legislature is supreme when it comes to legislating upon the question of the sale of intoxicating liquors. It comes, as we have heretofore held in one of the counties of this circuit, within what we term the police power of the state.

We have no doubt but that the Legislature, if it felt proper to do so, could have created by positive enactment a law which would provide for the overlapping of territory in a second petition. We think it could have provided, and it would probably be an answer to the argument of counsel in this case, that if it had so provided for county local option, that the county would in that case be a unit, and the vote taken latter on county local option would control the smaller units, such as towns and townships. But we do think that the authorities cited by counsel in support of that proposition depend largely upon the fact that the Legislature of Texas and Kentucky, and of other states, has given by exact terms the power for the larger unit to control the smaller.

Now in construing this act, counsel must concede that we must construe its sections so as to make them all harmonize, if possible. The three sections of the act that are important in this case are the first, second and sixth. I will read briefly from the three sections.

Section 1 provides, in substance, that whenever a majority of the qualified electors of any district of any municipal corporation sign a petition in favor of prohibiting the sale of intoxicating liquors as a beverage in such residence district, and file the petition with the judge of the court of common pleas of the county, that the judge shall examine the petition at a public hearing, and cause a copy of his decision to be filed with the clerk

of the municipal corporation. Then provided, that if it shows that a majority of the voters of such residence district are in favor of prohibiting the sale of intoxicating liquors as a beverage, that it shall be *prima facie* evidence that the selling, etc., shall be unlawful.

Section 2 provides, in substance, that whenever a majority of the qualified electors of any residence district in which the sale has been prohibited under the provisions of Section 1 of this act, shall sign a petition against prohibiting the sale of intoxicating liquors in the same residence district, and file a petition with the judge of the court of common pleas, the judge shall decide upon the sufficiency of that petition and cause a copy of his decision to be filed with the clerk of the municipal corporation. And that shall be taken as *prima facie* evidence that the sale of intoxicating liquors in the residence district is not then and there prohibited.

Then the section provides that the petition provided for in this section shall not be filed until after two years or more shall have elapsed after the filing of the petition provided for in Section 1 of the act.

Section 6 of the act provides, in substance, that the territory enclosed by the boundary of any residence district within which the sale of intoxicating liquors has been prohibited, as provided for in Section 1 of this act, shall be controlled by the result of such action, and the law shall remain in full force and effect in such residence district for two years and thereafter until another petition is presented under the provisions of Section 2 of this act in said residence district. After a petition against prohibiting the sale of intoxicating liquors has been presented, and held sufficient by the judge, another petition can not be presented for two years thereafter.

It is claimed here that under the provisions of Section 1 of this act, which provides that whenever a majority of the qualified electors of "*any residence*" district shall file a petition in the first instance, that they have a right under the purview and the construction of that section to create as many districts as they may please, any one of which may overlap prior districts.

And the force of the argument is spent upon the words found in the first section, that electors of "*any residence*" district may take such action. And they say the court must construe the various sections of this act so as to give effect to that language in Section 1. But with due deference to the very able and certainly very ingenious argument of counsel who represent that view of the case, we are unable to come to that conclusion. And I will give our reason, very briefly, for it.

As I have stated, all the sections of this act should be harmonized, if possible, and none of them should be in effect nullified or repealed by action of the court. The judiciary can not legislate. Nor can it nullify legislation. And we think that were we to give the effect to the act that counsel claim, it would be in effect a nullification of certain provisions found in Sections 2 and 6.

The Legislature has provided by Section 1 of the act that the qualified electors of any certain district may carve out a district, present their petition, and that district shall remain dry for the space of two years or more. In two years thereafter, or at any time after two years, the same electors or a majority of them may file a petition, if they see fit, seeking to create a wet territory out of that dry territory. Now there is no room, we think, for the construction of these various sections. And we think that the Legislature has established these districts as units; and that when the district has been established it remains a district; and that action on various petitions that may be filed thereafter must be taken in connection with that fact; that if one district has been established, and a court has passed upon it, certain rights have accrued to the electors of that district.

Take the case in question. Here was a residence district, created in May, 1907, which, by the action of the judge of the court of common pleas, was made dry. Under a later petition, dated October 24th, 1907, various electors of this dry district aforesaid, together with forty-five others, in a block of territory attached to it, have filed another petition asking that this overlapping district be also constituted dry territory. Can that be done? What would the effect be? Unquestionably, under Sec-

tion 2 of this act, when a district has been created by the finding of the court as dry territory, the qualified electors of that district in two years time have the right to change the character of that district by petition. The electors residing in the district established by the petition of May 21st, 1907, on May 21st, 1909, have a right to again petition that the sale of intoxicating liquors shall not be prohibited. But suppose that the judge of the court of common pleas should have found the second petition also sufficient and valid (which overlaps the territory in the first), what would be the effect?

Assume, for instance, this proposition: That the electors residing in the first territory would be perfectly satsified to rest under the rights acquired by them under the first petition. They would not only rest satisfied for a period of two years, but for a period of three years, or indefinitely. Now with that assumption, assume now that the qualified electors of the second district in two years after October, 1907, or in October, 1909, would again petition for the purpose of establishing a wet territory; that the judge would thereupon find that petition sufficient. What would be the effect of it? That territory or part of it would necessarily be wet. What part of it would be wet? Could the first residence district be wet? Unquestionably, no. Because its electors have acquired rights under these various sections which accrue to them as residents of the first district.

The contention further, as I understand it, however is that all the territory in the second district would not be wet after October, 1909, but the block that was attached to it only would be wet under a petition of that kind. And what would be the result? The result would be that in the residence district, created by the second petition, part of that residence district would inevitable have to be dry and part wet. And the part wet, in the case at bar, would have but forty-five qualified electors. I think counsel understand me when I take the proposition as counsel claim it. And I will state it again, although I may state it possibly more at length than I should in my judicial opinion, which is this:

If the qualified electors of the first district established by the

petition of May 21st, 1907, were content to rest upon their rights acquired under that section for a period of two, or three, or four years, and no petition should be again filed for that district, but if under the second petition filed on October 24th, 1907, that district with an additional block attached, a majority of the electors of the second district in October, 1909, should again file their petition in the interest of wet territory, and such third petition found sufficient by the judge, the effect would be to do either one of two things. Either to make the entire second district wet, which would be in contravention of Section 2 of this act, under which the electors of the first district would have a right in their own limits after two years or more to petition; or it would create in the second territory or district a state of affairs as folows: it would create part of a district wet (which would be the block in question, containing forty-five electors) and the balance of that entire district would have to be dry. The result would be, we would have a wet district containing forty-five electors, when the statute required that every district—residence district—under the provisions of this act must have at least three hundred.

Secondly. If you can overlap territory by a second petition, you can do it by a third, you can do it by a fourth, you can do it *ad infinitum*; and if these various dry districts are overlapped, and remain in *statu quo* for a period of two years or more, respectively, and contests came on from the other or wet side of the issue, it would do this—we would have this condition of affairs—that there would be no finality with reference to any residence district in any municipal corporation, because after two years time if there had been various overlappings before that time, the wets could come in and file petitions time after time, or according to the number of petitions that have been filed for the drys, and the result would be contests in the same residence district by one side or the other. This, of course, may be an extreme assumption, but it could be done, and when we take into consideration the motives that underlie the action of parties where this issue is in question, why it might be done frequently. When the qualified electors of the first district signed—the ma-

jority of them signed the first petition in this case—we think that they acquired a vested right which could not be interfered with except by legislative authority. Counsel upon both sides will probably agree to that proposition, but they will disagree as to the next proposition, whether or not that right has been interfered with. The right which they have acquired is that the electors of that district should have that district dry for a period of two years and more. Now, speaking for the full court, this right is interfered with should we follow the construction asked by counsel in support of the second petition. I say, it might be interfered with. For instance, if, under the second petition or under a third petition overlapping territories that were incorporated in the first petition, which are entitled to remain dry for a period respectively of two years, later petitions from the wets came in to create or establish such as wet territory, we would have additional territory overlapping the first in which electors had rights acquired under the first petition and in its exact territorial limits. In other words, it is not impossible to assume that in this class of cases after two years of time have passed, that the electors of such first district may sign wet petitions. thus establishing wet or dry districts as they see fit in their own residence district.

Now when we construe (and we think it really needs no construction), but were we asked to construe the words "in residence district" in Section 1 of this act, we think that that means a district that has been established by petition as a unit. And that when the said district is afterwards referred to in the various parts of this act as the "same district," or as the "said district," it refers to that unit as established by such a petition. We think any other holding would in effect be a judicial nullification of Sections 2 and 6 of this act. What else could Section 6 mean than a nullification were we to hold otherwise? That section provides that the territory enclosed by the boundary of any residence district, in which the sale of intoxicating liquors has been prohibited as provided by Section 1 of this act, shall be controlled by the result of such action, and the law shall remain in full force and effect in said residence district for two years.

If a petition is filed in the second district it surely can not affect the first district under the provisions of Section 6. And if it could not affect the provisions of the first district under Section 6 it would mean nothing more or less than what I have said, it might have the effect of creating a block of wet territory out of the district in question, leaving only the balance of that residence district dry—leaving a residence district partly dry and partly wet.

Counsel have cited but very few authorities in this case bearing upon the question here, except those that have been cited for the second petition, to which I have alluded. They are correct in principle and were they applicable to the case here we would be inclined of course to follow them. But we think undoubtedly that the position that we have taken in this case is the only construction that can be harmoniously given to the various sections of the Jones residence local option law, and uphold the entire law. We have no doubt. The result will be that the action of the lower court, or the judge rather, will be reversed. The petition will be dismissed.

Theodore K. Funk, Nathan Gumble and *Oscar W. Newman,* for plaintiff in error.

Wayne B. Wheeler, Harry Ball and *W. B. Richardson,* for defendant in error.

ESTOPPEL AS TO THE COLLECTION OF A STREET ASSESSMENT.

Circuit Court of Lucas County.

GRAFF M. ACKLIN ET AL v. PETER PARKER, TREASURER, ET AL.

Decided, June 8, 1907.

Streets—Ordinance for Improvement of—Council not Estopped by Preliminary Resolution—From Laying a Heavier Burden, When —Requisites of Estoppel in Pais—Evidence as to Mistake—Incidental Items Chargeable in Paving Assessment.

1. Council is not estopped from fixing a different proportion in an assessing ordinance, and thus laying a heavier burden on property owners, by reason of the fact that in the original resolution and ordinance declaring it necessary to improve the street they fixed the proportion they intended to assess upon the abutting property, where property owners have done nothing in reliance upon the declarations in such ordinance and resolution.
2. To constitute an estoppel *in pais*, the party claiming such estoppel should have proceeded upon the admission, or declaration, or statement, or whatever it may be to his prejudice.
3. To establish a mistake in the proceedings of a city council preliminary to the making of an improvement, the proof must be clear and satisfactory.
4. A charge against an abutting owner in a paving assessment for removing the water boxes on the street, which were put in by the city, and not by a private person or corporation, is a legitimate item of expense.

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

Appeal from Lucas Common Pleas Court.

This is a companion case to the case of *Lippert* v. *Toledo*, 9 C. C.—N. S., 455, recently decided by this court against the plaintiff, wherein the decision of this court was affirmed by the Supreme Court, without report. For a general statement of the case as well as for the particulars and the views of this court we refer to that case.

Had the petition of the plaintiff, Acklin, remained unchanged, the cases would be precisely alike; but, after the decision of the Lippert case by this court and its affirmance by the Supreme

Court, Mr. Acklin amended his petition by adding three things which he deems material and as affording him a right of relief notwithstanding the views of the court expressed in the Lippert case.

The amended petition sets forth, in the first place, that the original resolution declaring the necessity to improve the street and the original ordinance determining to proceed with the repaving were duly published and that Mr. Acklin had notice thereof, and therefore the city is estopped from levying the assessments for the repaving upon any other basis—by any other method—than that described in that preliminary legislation. This amendment seems to have been suggested by a remark of the court in delivering the opinion in *Lippert* v. *Toledo, supra*, that there was no element of contract or estoppel in that case; and Mr. Acklin, or his counsel, seems to have concluded that they had better have an element of estoppel in this case, if it was possible to get it in. Now we do not find in the averments or in the proofs submitted the essential elements of estoppel *in pais*. It is apparent that what counsel for plaintiff is relying upon is an estoppel *in pais* or equitable estoppel. That there is no estoppel by the record, is determined by *Lippert* v. *Toledo, supra*. A general statement of the doctrine of estoppel *in pais* is found in 11 Am. & Eng. Enc. Law (2d Ed.), 421, as follows:

"The most usual application of the doctrine of estoppel *in pais* arises from the misrepresentation or concealment of material facts on the part of the person to be estopped. Thus, it is a well-settled rule of equity which has been adopted by the courts of law that where A has, by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence induced B to believe certain facts to exist, and B has rightfully acted on this belief, so that he will be prejudiced if A is permitted to deny the existence of such facts, A is conclusively estopped to interpose a denial thereof."

The theory apparently under which plaintiff seeks to make application of this doctrine is, that the city had decided to proceed in a certain way, and that, therefore, he having been advised of this declared purpose of the city, it could not change the method of proceeding so as to lay a heavier burden on his

property. But one very important element of this doctrine—one element which is necessary to give rise to an estoppel—is, that the party claiming it should have proceeded upon the admission, or declaration, or statement, or whatever it may be, to his prejudice; that is to say, so that a change upon the part of the person making the declaration or admission would prejudice the party claiming the estoppel. As stated in this same work, at page 436:

"Another essential element of estoppel by misrepresentation or concealment is, that one party should have relied upon the conduct of the other and been induced by it to act or to refrain from acting so that he will be substantially injured if the other party should be allowed to repudiate his action. And this rule applies as well where the conduct of the party to be estopped consists of silence as where it consists of positive acts."

There is no averment and there is no attempt to show that Mr. Acklin changed his position, or that he could have changed his position to his prejudice, in reliance upon the disclosed purpose of the city; it is not asserted that it would have been possible for him to have done or to have omitted anything in reliance upon that ordinance that should have precluded the city from proceeding as it did to correct the blunder that occurred therein. As was said in the Lippert case, the city proceeded upon its own initiative. No petition was required and no petition was submitted to the council, and we held there—and we were affirmed upon that proposition—that a blunder occurring in the preliminary resolution and ordinance might be corrected in the final assessment. No matter what the council may have said or may have omitted to say, we do not see how the city would have been precluded from correcting that blunder. But here, as I say, it is not averred and there is no attempt made to show that Mr. Acklin did anything or omitted to do anything, in reliance upon the declaration in the preliminary resolution and ordinance. So we find no element of estoppel here.

The second thing added by the way of amendment to the petition is the allegation that there was a mistake on the part of the council in assessing upon the property owners $10,521.47 instead of $306.67; and in support of this our attention is called to a re-

port of the engineer in which he sets forth that the amount to be assessed upon the property owners is $10,521.47; but as to that item he quotes the language of the original resolution and ordinance, which as we construe them, and as we construed them in the Lippert case, would not authorize so heavy an assessment upon the property owners.

We do not think, however, that this discrepancy was the result of a mistake upon the part of the engineer, afterwards followed by the council in the making of the computation, or in setting down the real amount that they desired to assess upon the property owner; but we believe that the mistake occurred earlier than that—it was a mistake in the phraseology of the original resolution and ordinance. It was apparent to us that what the authorities had in mind all the time is the assessment of this larger amount upon the property owners. This mistake in the phraseology of the original resolution and ordinance was afterwards corrected in the final assessing ordinance. That comes very far, we think, from establishing by evidence clear and satisfactory (such as is required in order that a mistake may be found in the proceedings) that such a mistake was made as he here avers.

Now the third and last thing which was added to the petition by way of amendment whereby it was made to differ from the Lippert case, was the averment that $2,124.91 of the amount assessed was for removing the gas and water boxes upon the street. The paved part of the street was widened—the curb lines were set in nearer to the lots—and that made it necessary to make some changes in the service pipes that conveyed the water to the lots. It turned out that this change for which this charge was made, or this expense was incurred, was in the water boxes only, which are put in by the city, and not by a private person or corporation, and we think that this was a legitimate item of expense, which might properly be charged as a part of the expense of the improvement.

The finding and judgment will be against the plaintiff. The petition will be dismissed at the cost of the plaintiff.

B. A. Hayes, for plaintiff.

O. W. Nelson, for defendant.

JURISDICTION IN ATTACHMENT.

Circuit Court of Cuyahoga County.

CHARLES OAKMAN v. ROSE FURNITURE CO.

Decided, October 21, 1907.

Constitutional Law—Jurisdiction of Justices of the Peace in Attachment—Amendment to Section 584 Invalid.

The amendment of Section 584, Revised Statutes, passed April 18, 1894 (93 O. L., 146), excepting Cuyahoga and Franklin counties from the general provisions of said section as to the jurisdiction of justices of the peace in attachment cases, is unconstitutional; and justices of the peace in said counties, as well as in all the counties of the state, have jurisdiction co-extensive with their counties "to issue attachments and proceed against the goods and effects of debtors in certain cases."

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

Error to the Court of Common Pleas.

The only question involved in this case is whether justices of the peace in Cuyahoga county have jurisdiction co-extensive with said county to issue attachments.

Previous to April 19, 1898, such jurisdiction was undoubted, for Section 583, Revised Statutes of Ohio, then read:

"Justices of the peace within and co-extensive with their respective counties shall have jurisdiction and authority: * * * 7. To issue attachments and proceed against the goods and effects of debtors in certain cases."

On the date mentioned, however, the Legislature amended said section by adding the following language to said paragraph seven:

"Except in counties containing a city of the second grade of the first class, or of the first grade, second class, the jurisdiction and authority in such cases is co-extensive only with the township for which the justice was elected, but when said justice has jurisdiction of the defendant because he resides in the township for which said justice was elected, or otherwise, as provided in Section 584 of the Revised Statutes, the jurisdiction in attachment shall be co-extensive with the county." 93 O. L., 146.

It needs no citation of authorities to show that it was beyond the powers of the Legislature to exempt Cuyahoga and Franklin counties from the operation of the general law on the jurisdiction of justices of the peace in attachment cases.

This amendment was unconstitutional.

But counsel for plaintiff in error contends that if the amendment of 1898 is unconstitutional, it is the whole of paragraph seven of Section 583 and that only, which is unconstitutional.

With this view we do not agree. Our examination of the law of 1898 shows that the only purpose in amending paragraphs five and seven of Section 583, and paragraph four of Section 584, was to exempt Cuyahoga and Franklin counties from the operation of said laws.

That purpose was unlawful, and, upon familiar principles of construction of legislative enactments, the whole law, including the repealing clause, may be held unconstitutional, the former law then standing unrepealed.

But we are not remitted to this rule of construction alone. As the only unconstitutional parts of Sections 583 and 584 are exceptions added by the amendment, we may strike out said unconstitutional exceptions, leaving the law as it was before amendment.

Our conclusions are consistent with the holdings of the Lucas County Circuit Court in the case of *Collins* v. *Bingham Brothers,* 22 C. C., 533, and of the Hamilton County Circuit Court in the case of *Rogers* v. *Prushansky,* 3 C. C.—N. S., 366. though neither of said courts found it necessary to pass upon the constitutionality of said amendment of 1898, while it is necessary, for a determination of this case, that we do so.

The common pleas court having come to the conclusion here indicated, its judgment is affirmed.

Carpenter, Young & Stocker and *J. A. Fenner,* for plaintiff in error.

Max P. Goodman, for defendant in orror.

RIGHTS OF A LESSEE IN POSSESSION UNDER AN UNEXECUTED LEASE.

Circuit Court of Lucas County.

ROBERT RAITZ & COMPANY v. ELIZA J. DOW.

Decided, June 22, 1907.

Landlord and Tenant—Defective Lease—Tenant in Possession Thereunder—Effect of Holding Over—Property Changes Hands—Purchaser with Knowledge of the Facts Brings Proceedings for Dispossession—Magistrate's Judgment of Ouster not a Bar to Action for Injunction—Forming of a Partnership by Lessee without Effect, When—Tender—Proper Place for Payment of Rent.

1. Where a tenant has been in possession for a considerable period under an imperfectly executed lease, the writing will be treated as a contract for a lease, and as against a purchaser of the property having knowledge of the fact, who is seeking to oust the tenant, a decree will be granted directing that a valid lease be executed.
2. An action in forcible entry and detainer in such a case, in which a judgment of ouster has been taken by the purchaser, is not a bar to injunction proceedings brought by the tenant to prevent interference with his possession.
3. The fact that the lease in its imperfect form was made to R, who subsequently with the knowledge of the lessor brought in another as a partner with him in the business, would not operate under the statute to invalidate the agreement for occupancy.

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

This case comes into this court upon a petition filed for the purpose of reforming a certain contract and for the purpose of enjoining the defendant from taking certain actions in the case.

It appears from the pleadings and the evidence in the case that about this state of facts existed here: George Ketcham had been the owner of certain land in lower town, fronting on St. Clair street and near Cherry. He rented it for a period of five years to Robert Raitz, and Robert Raitz went into possession—Robert Raitz & Company, the company consisting of his son-in-law and another partner. They occupied the premises, or a certain portion of them at least, for several years, and

when the first lease was supposed to expire or about to expire a new lease was taken, and it was made out in the names of Ketcham and Robert Raitz. It was from the 12th day of October, 1904, to the 12th day of October, 1909, and in its execution it was simply signed by Raitz and Ketcham, with the name of one witness attached to the lease. Raitz & Company continued in possession, doing business there and paying rent to Ketcham until about the 20th of September, 1906, when a warranty deed of the whole premises, of which this, as I understand, is a part, was made by Ketcham to a man by the name of Close—a deed to the whole property in fee simple, being a warranty deed. Two days after that Close made a deed to Eliza J. Dow, who is the party who now owns the title and the defendant in this controversy. That also is a warranty deed of the whole premises, including this lot, which is lot No. 359, Vistula Division.

We think the evidence taken in the case—all the facts in the case—clearly show that at the time this deed was made from Ketcham to Close and from Close over to Dow, because the title was taken through Close simply as a matter of form, the real party in interest was Dow, who took the deed in the name of his wife. I think the testimony clearly shows that at the time that deed was made or taken it was understood and known by all of the parties that Raitz was in possession of the property, Raitz & Company occupying it under this lease which had not been acknowledged, and that they had knowledge of the lease and of all of the rights of the plaintiffs under it, and were chargeable with all the rights that they might claim under it. And it appears to us from the testimony that at the time it was taken the lease mentioned was passed over, and there was really an understanding between the parties that, so far as the lease was concerned, Dow took it with chances of breaking it, setting it aside, treating it as a nullity; and very soon after that Mr. Raitz was approached with a claim that he should make an advance in rent, it being claimed that his lease was void. He declined to do that, and a suit was commenced soon afterwards before one of the justice's courts in this city in forcible

detainer for the purpose of ousting Mr. Raitz, or Raitz & Company, and such proceedings were had there that a judgment on that account was rendered. About the same time this suit was commenced for the purpose of enjoining these parties from proceeding under that judgment in forcible detainer and seeking to enforce the perfection of the lease so that it should continue for the term which was originally agreed upon between Ketcham and Raitz. The case was tried in the court of common pleas and is brought into this court by appeal, and the case has been very earnestly argued, and some testimony has been taken.

We start with these leading facts: That Ketcham owned the property; that he had made a lease to Raitz, and had renewed that lease at the expiration of the first term, at least Raitz continued in possession and continued to pay rent down until this time, to the making of these deeds; and that these parties who received these deeds had full knowledge of all the facts of the case, the imperfection of the lease, the possession of Raitz and of his rights under the possession.

The case has been argued to us by counsel for the defendant, Mrs. Dow, their contention being that this lease, being imperfect, it conveyed no right and no title, and that the deed to Close cut off any rights that the party had under the lease. They have cited 65 Ohio State, the case of *Langmede* v. *Weaver*, that arose out of a controversy over a conveyance made in regard to an oil lease. In that case the oil lease had been made and was imperfectly executed; but no one had ever taken possession under it. The lease had simply been made and recorded. Subsequently another party purchased the property, and the court held in that case that, under the circumstances of that case, the plaintiff could not obtain any rights as against the purchaser. The court enters into quite a long discussion of the various questions that arose, the opinion having been delivered by Judge Williams for the court, who cites the case of *White* v. *Denman*, 16 Ohio, 59, in relation to an imperfectly executed mortgage. The court says there:

"As between the original parties to it, there is no difficulty in making the instrument effect the intended object; for equity would regard as done that which the parties agreed to do. They intended it should operate as a valid incumbrance, and, so far as they are concerned, it must be treated as a sufficient mortgage."

It has been claimed here that this imperfect lease might be treated as an agreement to make a lease. This has been denied by counsel for defendant, and in this case that he cites himself, the validity of this instrument as a contract is recognized as a contract for a lease. In other words, as the court say, treat the paper as carrying out the purpose that the parties had at the time they made the instrument.

We think there can be no question—we have always so considered and so consider in this suit—that an agreement of this nature is a contract for a lease and may be treated as such. We think it very clear here that these parties have a right to come in and file this petition and ask that this lease be declared to be a valid lease; or, in other words, that the court direct that it be executed as a valid lease so as to conform with the statute. It must be remembered that these parties were in possession and had been for years; that their rights in regard to the matter were known to the defendant. Certainly they could not, as against that knowledge, do anything as against these parties who were thus in possession and who had the rights of parties under a lease, imperfectly executed, it is true, but who had possession under it.

It is said that they never took possession under this particular lease, and that they have no beneficial rights under it. Counsel for defendant refer to the case of *Baltimore & Ohio Railroad Company* v. *West,* and it is suggested that as against this case cited in 65 Ohio State the court perhaps changed its opinion, or that the two cases could not be reconciled. The case of *Baltimore & Ohio Railroad Company* v. *West* is found in 57 Ohio State, 161, and was a case that went up from this court to the Supreme Court, being in regard to some property in the city of Sandusky. There was a lease made there and

the railway company went into possession of the premises under the lease. It purported to be a five year lease, and was made for a five year lease, but the parties failed to have it acknowledged and recorded. They continued in possession during the five years and then held over. Subsequently and during the middle of the year they vacated the premises, and Mr. West brought suit for the whole of the lease, the rent of that year. Counsel have, as I have said, suggested a doubt about the contention of the court in this regard, or in regard to the fact that they have departed from a decision in another case. But we see no departure; we see no change in the views of the court in any manner or form. The court say:

"The well settled rule appears to be, however, that where the lessee enters into possession of the demised premises under a lease for a term of years at an annual rent, if the lease for any cause be void he becomes a tenant for a year at the rent reserved in the lease, and subject to all of its provisions, except its duration; and when his possession is continued into the next year, a tenancy from year to year is created, and continues so long as he enters upon a new year, until the end of the term; and this is so, though the rent be payable quarterly, or monthly, or at shorter periods. And when, after the expiration of the term, he holds over into another year without any new agreement or arrangement with the landlord, the latter may treat him as a tenant for that year at the same rent and upon the same terms and conditions of his prior occupancy, or, as a trespasser, at his election; but if the landlord accepts the rent, or acquiesces in such holding over for a considerable time, his election will be regarded as made in favor of the tenancy, and then it can not be terminated before the end of the year by either party without the consent of the other."

Now, at the time these deeds were made, as I have stated, these parties were in possession of these premises, the lessor receiving the rent right along and treating them as tenants under the lease. Nearly two pages here of authorities on this subject are cited, and I don't care to read them, because it establishes the doctrine that is claimed by the plaintiff here, and it was claimed by the plaintiff in the case there.

Now, in regard to holding over, and the point stated that

there was no new possession, I will read what the court says in this connection in the West case:

"The tenant, by holding over, is regarded as consenting or proposing to enter upon a new term for another year at the same rent and upon the conditions of the prior occupancy, and the landlord's acceptance of the proposed tenancy is presumed from his receiving the rent, or other acquiescence. The agreement arises by implication of law from the conduct of the parties after the expiration of the former tenancy; and, in this respect, is essentially different from those agreements made by parties while in possession under an existing lease, for a new lease to commence in the future; as was the case of *Armstrong* v. *Kattenhorn*, 11 Ohio, 265, and *Crawford & Murray* v. *Wick*, 18 O. S., 190.

"Here the new agreement grows out of, and is founded upon, the possession evidenced by the holding over, and is therefore referable to it, rather than to the possession under the prior agreement which had expired. The holding over is equivalent to a new entry; or, as said in Reed on the Statute of Frauds, Section 806, concerning the application of the statute in such cases, the 'effect of entry under a void lease, and of holding over after the expiration of a valid one, is identical.' And it is the settled law of this state that a parol lease for a year, accompanied by possession, is not within the statute of frauds."

If I understand that decision correctly and the points that are being made by the court there, this continuing possession, holding over, is equivalent practically to a new entry.

It is claimed here that this decision of the justice court was a bar; that is to say, the judgment in the forcible detainer action, and any future action was a bar to this action. We are unable to see how it can be a bar to this action in any manner or form. In a case that arose in Fulton county within the last year we had occasion to discuss this matter, and we adhered to the language of the statute, overruling the court of common pleas, this court holding that the first suit was not a bar to a new suit.

A point was made here by counsel for the defendant that the lease was taken in the name of Raitz. Raitz was the particular party in the firm, the particular man carrying on the business. He took the original lease in his own name and

afterwards took in a partner, which was continued without any objection by Ketcham. When this lease was made it was made by Raitz. He signed it, and Raitz and his firm were in possession, and without objection on the part of Ketcham they continued in possession and continued to pay rent. We think there is no trouble about that. We think that as a matter of fact Raitz was in possession, and taking these persons in partnership with him would not operate under any clause of the lease to defeat the object and purpose of the lease, and while there are not many authorities to be found on that point, still under "landlord and tenant" there are some authorities.

Another point that was made was that after the property was purchased by Mrs. Dow there was an attempted tender of the rent. The rent had been paid, was payable so much a year and payable in advance, whether it was quarterly or any other way, $1,400 a year. As a matter of fact during the five years Mr. Raitz was in possession he was continually doing work for Mr. Ketcham, and from time to time they had settlements; sometimes there would be a balance due from Mr. Raitz to Ketcham on the rent and he would pay it, and it would go on to another period. But when the new party came in, they wanted to make payments from month to month in the way it had been computed between Ketcham and Raitz theretofore. Well, we don't place much reliance upon that matter. The lease is a modern lease and provides that the party need not demand his rent from the premises. The common law, of course, required that the lessor should demand his rent on the day when it falls due, at a certain place upon the premises and at a convenient time before sunset. It seems the only change that was made by these provisions is that he is released from the obligation to appear on the premises and demand his rent; but there is nothing to show that the tenant is bound to hunt up the landlord and follow him around and tender his rent. It seems to me that a fair construction of these contracts would be that the landlord should present himself at the place for receiving the rent and that the tenant should be ready to pay at that time, unless there is a stipulation to pay somewhere

else. We see nothing in the facts here that should authorize a forfeiture of the premises under that arrangement.

Judge Parker suggests that the parties have never placed themselves in any position to ask for any forfeiture. The ground upon which they have proceeded is that the lease was void; that there was no lease at all. They were there demanding that there should be a payment of $2,000 in rent. There is no demand for forfeiture by reason of failure to pay the $1,400, and as I have stated already we see no ground upon which there should be a defeat of this action by the allegation that has been made in that regard.

MR. DAVIS: Doesn't the lease itself provide that the demand of rent is waived?

JUDGE PARKER: Yes; but the rent is to be paid somewhere. Now where? The lease does not stipulate that the lessee shall leave the premises to hunt up the lessor to pay the rent. The general rule, in the absence of stipulation to the contrary, makes the leased premises the place for the payment of rent. We think a fair interpretation of this lease in that regard is that the rent is payable at the premises. The lessor is not required to demand the rent to put himself in a position to claim forfeiture, but he should go to the premises in due time and give the tenant an opportunity to pay the rent there unless there is a stipulation for the payment of the rent elsewhere.

JUDGE HAYNES: The authorities referred to in regard to the partnership are found in Jones on Landlord and Tenant, Sections 468-469. Now the authorities seem to be very few in regard to transfer, assignment or under-letting. They hold here in a case where a lease was made of a house to a single woman which contained a provision that it was let only for herself to occupy as a residence, with covenants against disposition of the whole or any part, that—

* * * "her marriage to a widower with four children and the continued residence of all in the house was not a breach of the proviso or covenants. The whole instrument taken together clearly contemplated that the lessee should occupy the premises in person, but it did not follow that the narrow construction contended for was the true one. That construction

would exclude every one, relative, companion and friend, as well as husband. If the lessor intended that, he should have used language expressing such intent, and should not have left it to be inferred from language of doubtful meaning. The lease as drawn could fairly and reasonably be so interpreted as to allow the lessee to receive a relative, friend or husband as a companion. Where a lease is joint to two and by an arrangement between them each occupies a several portion of the premises, such several uses can not justly be regarded as breaches of a covenant not to under-let."

In Section 469 they say:

"Where a tenant without license from his lessor takes a third party into partnership with him and lets such party enjoy joint possession with him, it is not a breach of a covenant not to sub-let, even though the partnership is formed for the express purpose of not breaking the covenant against subletting. If one of the new partners taken into the firm by the lessee is put in exclusive possession of a portion of the leased premises, that would be a breach of the covenant not to assign or under-let."

I think that where a lease is taken as in this case—of course Raitz was the principal party in interest, who had some subordinates who became partners with him—it is not proper to hold that it was a forfeiture of the lease by simply taking them in as partners. Now, he made the lease and the parties went on and continued in possession, and the lessor recognized it by receiving the rents and treating them as tenants, as lessees under the lease, and really we see no ground whatever for forfeiture under that clause of the lease. We are clearly of the opinion from all the evidence in the case that the prayer of the petition should be carried out and enforced. We think the equities of the case are with Robert Raitz and the firm who rented the premises. He was in possession; he was doing a straight-forward business, paying his rent and going on, and these parties purchased with full knowledge of that. We think by every principle of equity and justice between the parties, between these parties who had knowledge of it, that the prayer for the enforcement of the lease

should be granted and it should be held to be a lease of the premises up to the period of time stated in the lease, October, 1909.

PARKER, J.: The lease as reformed will stand as it is written. The only reformation will be in the matter of the execution, and if a new lease is not executed, or this lease is not acknowledged, of course the decree of the court will supply it. It will devolve upon the parties to solve this question, as to whether that rental is payable at the rate of $1,400 a year, yearly in advance. We do not pass upon that question. It is not involved in this case at all.

MR. BOYD: If Your Honors please, counsel for plaintiff has requested to state the time within which the defendants are allowed to execute a lease, whether it is five days or ten days.

PARKER, J.: Oh, well, it is not a matter of much importance.

MR. BOYD: The order in the court of common pleas was five days.

JUDGE PARKER: Well, they can take their time to it; give them ten days.

JUDGE HAYNES: If they don't, the decree of the court will stand exactly as the same. It is not very important whether they execute it or not.

J. Harrington Boyd and *C. A. Seiders*, for plaintiff.
E. E. Davis, contra.

ASSESSMENT FOR COUNTY DITCH.

Circuit Court of Wood County.

WILLIAM H. MILLIKIN v. GEORGE W. FEARNSIDE, TREASURER.

Decided, April 27, 1907.

Drains and Ditches—Validity of Assessment for Construction of—Acquiescence in Improvement by Silence—Joint Owner may Bind his Co-tenants for a County Ditch Improvement—Jurisdiction of County Commissioners—Sections 4483, 4484 and 4485.

1. Where a county ditch is converted into a brick sewer, thereby changing it from an open ditch to a closed sewer to the benefit of the land through which it runs, one joint land owner, who has stood silently by and allowed his land to be benefited by the improvement without objection, can not resist collection of the assessment on the ground of irregularity in the proceedings.
2. One of five joint owners of a tract of land within a municipality, who has the actual control of the land, may bind his co-tenants to the proposed improvement of a county ditch running through the premises by signing a petition therefor.

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

Appeal from Wood Common Pleas Court.

The case of Millikin v. Fearnside, Treasurer, is in this court on appeal from the Common Pleas Court of Wood County, in which court the action was brought to restrain the collection of a ditch assessment. It appears that the commissioners of Wood county, upon the petition of one Frank Griffin and others, caused a ditch —originally constructed as a county ditch, known as the "Gorrill ditch No. 1133"—to be made by constructing therein a brick sewer, whereby it was substantially changed from an open ditch to a sewer. Whether the whole Gorrill ditch as originally constructed is within the limits of the city of Bowling Green or not is not certain, but we regard it as immaterial.

The lands of the plaintiff, consisting of a large number of city lots, located in what is known as the Gorrill addition to the city of Bowling Green, were assessed according to benefits for the making of this improvement. A part of this assessment has gone

upon the tax duplicate of the county for collection, and this action is brought to enjoin the treasurer from making the collection; and it is alleged that the mayor of the city was not authorized by the council to sign a petition for this improvement, and that he did not sign the petition; that no notice of the improvement was served upon the mayor or the municipal authorities as such, and that, in short, no steps were taken in pursuance of Revised Statutes, Sections 4483, 4484, 4485, to obtain the co-operation of the city in moving for this improvement or to proceed against the city as such; and it is contended on behalf of the plaintiff that this renders the proceeding so irregular as to make it entirely null and void, and to render the assessment wholly invalid.

It appears that this improvement extends in a direction substantially from a point beginning at about the southern limits of this Gorrill addition and extending through it, passing across a large number of lots and then diagonally across the addition, thereby cutting several of the lots in a diagonal way, then leaving the addition and passing further towards the north. The course of the original ditch was substantially the same. The result of the improvement is that the open ditch crossing these premises no longer remains, but instead, they have a covered sewer.

There is no question made as to the improvement being a valuable improvement for this addition. It is not contended nor pretended that the assessment upon these lots exceeds the benefits to the lots; indeed a witness on behalf of the plaintiff, who is a part owner of the premises, testifies very candidly, that he favored the improvement because he regarded it as a benefit to the property, and it is apparent that it is a benefit to the property; but the whole objection, the whole contention is based upon the ground that the county commissioners were without authority or jurisdiction in the premises, and that therefore the proceedings are null and void.

Now it should be remarked that the county commissioners are not without jurisdiction of the subject-matter; in other words the county commissioners are authorized in cases of this kind to construct improvements of this character within the limits of a municipal corporation, provided they observe the requirements

of the sections of the statute to which I have referred. Those sections are a part of Chap. 6, title 1, Rev. Stat., devoted to county ditches, so it appears to be a case if there was a lack of jurisdiction, it was a lack of jurisdiction over the parties, treating the municipality, the city, as a party, as an entirety as this statute does, in proceedings of this character, and treating the owners of the lots as parties over whom jurisdiction is obtained through the action of the municipal authority, under and in pursuance of the proceedings of these sections of the statute; so it presents a question widely different from that where public authorities act without jurisdiction over the subject-matter. In such a case, that is to say, where there is no jurisdiction over the subject-matter, the action is generally not only utterly void but incurably so, whereas if the authorities have jurisdiction over the subject-matter but there is some irregularity in the proceedings even to the extent of having to obtain jurisdiction over persons, it is not necessarily true that the action taken by the authorities is so far invalid that it may be disregarded altogether.

As I have stated, the petition for this improvement was signed by Frank Griffin and others. This Gorrill addition was owned by five persons; for convenience, the legal title had been taken by the plaintiff William H. Millikin, but he held it as trustee for the five. Charles H. Draper was one of the five owners; he was also the agent and general manager for the five; the five being called, by themselves at least, "the Gorrill Syndicate." Upon being applied to sign this petition, Mr. Draper signed it as follows: "Charles H. Draper, agent for the Gorrill Syndicate." Whether he as agent was authorized to sign this petition may be very doubtful—I think it is—but being a part owner, one of the tenants in common, he seems to have been practically in possession and control and having the management of the affairs of this Gorrill addition syndicate, we think he might sign the petition and bind his co-tenants. It is conceded too that notice of the improvement was duly served in pursuance of the statute upon Mr. Millikin by leaving a copy at his residence in this city, and that all of the five owners had knowledge of the progress

of the work of this improvement as it was being performed over and across their premises, the Gorrill addition. Whether Mr. Draper was authorized to sign and bind his co-tenants or those he represented, and whether leagl notice was duly served upon the five or upon Mr. Millikin who had the legal title to this tract, we regard as not very important; the validity of the proceedings in our view of the matter, does not depend upon that; the validity of the assessment does not depend upon that. That they had knowledge of the progress of the work over and across their premises is not disputed. Even if the petition had been duly signed or service duly made, it is doubtful whether that would give the county commissioners sufficient jurisdiction in the premises to proceed within the limits of the municipality, but the important fact is that these owners of those premises knew of the progress of this improvement, and therefore we think that they are bound by this assessment and may not be heard to question it, notwithstanding there may have been the irregularity and notwithstanding there was the irregularity shown with respect to the failure to properly bring in the city as such. We think they are bound by the principle annunciated by the Supreme Court in the case of *Kellogg* v. *Ely,* 15 Ohio St., 64. This is a leading case upon the question involved and it has been followed by the courts in a great many cases in Ohio, both in the supreme and lower courts and its authority has never been questioned.

The syllabus is:

"Where county commissioners, acting ostensibly under the provisions of the act of March 24, 1859, 'to provide for locating, establishing, and constructing ditches, drains, and water courses,' have established and constructed a ditch, and, to pay for the same, have levied an assessment on the lands of persons benefited thereby: *Held:* That where a party on whose lands such ditch has been wholly or in part, constructed, has stood by and failed to resort to any remedy, legal or equitable, until after the ditch was made, a court of equity will not interfere by injunction to prevent the collection of such assessments, even if it be assumed that the proceedings of the commissioners have so far failed to conform to the provisions of said statute as to render them wholly illegal and void in law."

It will be observed that this is limited to cases where improvements are made upon lands of persons assessed. The same principle does not apply at all if they are assessed for an improvement that is not upon their lands even though it may be beneficial to their lands. But they could not allow their lands to be benefited by a public improvement and sit by without objection, and afterwards resist the assessment, no matter how irregular or void in law the proceedings may be, and upon the authority of this decision our finding and judgment will be in favor of the defendant, dismissing the petition at the costs of the petitioner.

James & Kelley, for plaintiffs.

P. J. Chase, contra.

STATUTE OF LIMITATIONS AND STREET ASSESSMENTS.

Circuit Court of Franklin County.

WM. R. GAULT ET AL v. THE CITY OF COLUMBUS ET AL.*

Decided, 1904.

Street Assessments—Contest of, not Barred at the End of Four Years —Benefits—Laches—Estoppel—Purchasers of Abutting Property Chargeable with Notice—And Liable for Assessment, When.

1. Section 4982, Revised Statutes, limiting to four years the time for bringing certain actions, does not apply to an action for the reduction of a street assessment in excess of benefits.
2. Abutting owners, who knew of the defective construction of a street before the work was approved and the reserve fund paid to the contractors, are thereafter estopped from contesting the assessment on the ground of such faulty construction.

DUSTIN, J.; WILSON, J., and SULLIVAN, J., concur.

In this case we do not concur in the view of the common pleas court that the action is barred by reason of not having been

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* Reversing the third paragraph of the syllabus in *Gault* v. *City of Columbus*, 1 N. P.—N. S., 201.

brought within four years from the making of the assessment.

The threatened injury of which plaintiffs complain is the collection of assessments in excess of benefits, and such threatened collection was impending at the commencement of the action.

But we do think that the defendants are estopped to complain of the defective construction of the street, because they knew of such defects long before the work was approved and the reserve fund paid to the contractors, and took no action to prevent such approval or payment. They thus, by their laches, allowed the city to lose the fund it had reserved for such contingencies, and have not an equitable standing before the court.

The plaintiffs who became purchasers after the assessment, and in their deeds assumed and agreed to pay the same as part consideration for the property, are also estopped.

Other purchasers (if any) who became such after the assessment, but did not assume the payment in their deeds, are nevertheless chargeable with notice of the assessment through the records and stand in the shoes of their grantors so far as knowledge of the defects is concerned.

As to the claim that the assessments are in excess of benefits we are not satisfied that it is clearly made out.

The decree, therefore, will be in favor of the city, and the injunction dissolved, at plaintiffs' costs.

W. O. Henderson and *DeWitt C. Jones*, for plaintiffs.

Butler, Marshall & Keating, contra.

APPLICATION TO SET ASIDE DECREE OF DIVORCE FOR LACK OF NOTICE.

Circuit Court of Lucas County.

JOSIE CASTO v. JOHN CASTO.*

Decided, April 6, 1907.

Divorce and Alimony—Decree Granted on Service by Publication—Application to Set Aside under Section 5355—Proceedings in Error Following Overruling of Application—Bill of Exceptions Necessary.

Where, upon an application to set aside a decree of divorce on the ground that the party filing the application had no actual notice of the pendency of the action against her, service having been had by publication, the court finds against such claim, the appellate court can not determine whether or not the question was correctly decided, unless a bill of exceptions containing the evidence submitted in support of the application is filed with the record.

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

Error to common pleas court.

John Casto brought suit in the court of common pleas against his wife, Josie Casto, to obtain a divorce on the ground of her adultery. Service upon her was obtained by publication; the allegations of the petition were found to be true and the divorce was granted, and in pursuance of the statute providing therefor her right to dower in the property of John Casto was denied and cut off. At a subsequent term of court she filed an application for the setting aside of the judgment, so that she might be let in to defend, and she set forth in her motion and in the affidavit filed therewith, among other things, that she had no actual notice of the pendency of the action until after the decree and after the term at which it was entered, and that she had no opportunity to appear and make a defense. This motion was denied by the court below, and Josie Casto prosecutes error in this court to that order.

* For a further holding in the same matter see opinion immediately following.

It is contended on behalf of the defendant in error that such proceedings after judgment is not authorized in divorce cases; that it is against the policy of the law to set aside a decree for divorce upon such grounds, and that Section 5355, Revised Statutes, under which the plaintiff in error proceeded in the court below, has no application to cases under the chapter on Divorce and Alimony, even though service is by publication, as provided in Section 5693, Revised Statutes, of that chapter. But we do not see that that question is properly brought before us for consideration and decision; there is no bill of exceptions showing what the evidence was that was submitted to the court upon that motion.

Even if the plaintiff in error might proceed under Section 5355, Revised Statutes, to have the case opened up to and be let in to defend because the service was by publication, she must show, upon the hearing of such application, or, to quote the language of the statute, she must make it appear to the satisfaction of the court, that during the pendency of the action she had no actual notice thereof in time to appear in court and make her defense. In her application she recognizes this. In her affidavit—looking at that for the purpose of ascertaining her view of the matter—it is apparent that this necessity was recognized; but whether she had actual knowledge of the pendency of the suit concurrently therewith was a controverted question in the court below, and there is no bill of exceptions here bringing up the evidence. Affidavits are attached to the record, but we are not authorized to look at and consider or weigh them, and undertake to determine what they show or prove.

Counsel for plaintiff in error said, in his brief, that no bill of exceptions was necessary, since the action of the court below was based solely on legal propositions, to-wit, that this motion or application for leave to defend could not be entertained by the court, because in an action for divorce Section 5355, Revised Statutes, did not apply. But, from the journal entry, that appears to be an incorrect statement.

A counter-motion was filed on behalf of John Casto to strike the motion or application of plaintiff in error before mentioned

from the files, but when the matter came on to be heard, as the journal entry recites. it was heard upon the motions "and the proofs, and the court being fully advised in the premises, is of the opinoin that said motion of said heirs of John Casto, deceased, should be and the same hereby is granted and said motion of said Josie Casto is hereby overruled and stricken from the files of the case." It would have been sufficient if the journal entry had set forth that the matter was heard upon the proofs and the motion of Josie Casto was overruled, and the addition—that the motion was stricken from the files after it was overruled—was idle. To sustain the motion to strike from the files, was quite unnecessary; but the important fact appears in the journal entry, *i. e.*, that the motion was heard upon the proofs and was overruled. Therefore the question of fact as to whether Josie Casto was advised of the pendency of this action and had due knowledge of it during its pendency, was before the court and was determined against her; and for this court to determine whether or not the question was correctly resolved in the court below, a bill of exceptions incorporating the evidence is necessary. Counsel says, in his brief:

"However, should the court be of opinion that any alleged testimony should be before this court, the same is before the court in view of the holding of the court in the recent case of *Pullman Co.* v. *Washington.* The court has, in substance, laid down the rule that whenever papers are filed in the common pleas court, and thereafter in a reviewing court, the reviewing court will treat them as in the case. By reference to the transcript from the court of common pleas, it appears that all affidavits which were filed in the lower court are attached to and filed with the papers in this court. The necessity, therefore, of a formal bill of exceptions no longer exists, and this court will, of course, take judicial notice of all papers which appear with the files in this case."

We are at a loss to know how this most extraordinary statement should be regarded—whether as a sarcastic reference to the former decision of this court in the case of *Pullman Co.* v. *Washington, supra*, or as an attempt at humor. In the case of *Pullman Co.* v. *Washington*, there was a bill of exceptions, properly signed

and filed. Certain depositions were referred to as exhibits and attached to the bill of exceptions, but they were not manually attached to the bill; they were, however, brought up with the record and were attached to the journal entries and other papers. We found that they were so clearly and distinctly identified as the exhibits referred to in the bill of exceptions, that they should be regarded as constructively attached—following, as we believe, the rule laid down by the Supreme Court in the case of *Swart* v. *Dock Co.*, 69 Ohio St., 574. It will be seen at a glance that the question there and that here are as different as daylight from darkness.

It is entirely clear that this contention is not worthy of serious consideration since it is founded on a proposition of law that is quite untenable.

The judgment of the court below will be affirmed.

Templeton & Templeton and *C. A. Thatcher,* for plaintiff in error.

E. E. Davis, contra.

OPENING DECREE OF DIVORCE TO SET ASIDE SERVICE BY PUBLICATION.

Circuit Court of Lucas County.

JOSIE CASTO v. JOHN CASTO. *

Decided, June 27, 1907.

Judgments and Decrees—Opening of Decree of Divorce—Section 5355 has no Application to—Service by Publication—Burden of Proof as to Lack of Notice—Evidence Bearing on that Issue—Bill of Exceptions Necessary—Plaintiff in Error may not have Record Corrected, When.

1. Section 5355, providing for the opening of judgments where service was had by publication and no actual notice was had thereof, has no application to divorce cases.
2. Upon one who seeks to have a judgment, obtained on service by publication, set aside on the ground that no actual notice of the pen-

* For further holdings in the same matter see opinion immediately preceding.

dency of the suit was had, is imposed the burden of proving that he had no such notice; and a record showing that no evidence or proof was produced on the hearing of such application would disclose that the court did not err in overruling the same.

3. Where a party prosecuting error with full knowledge of the state of the record, and of what actually transpired in the court, the judgment whereof is to be reviewed, voluntarily submits the cause to the reviewing court, a motion of such party, after judgment of such reviewing court against him, to set the same aside on the ground that the record which he so submitted to the court is incorrect in some particular, will be overruled, especially where the reviewing court is clearly of the opinion that the record changed as desired by such party would still require the same judgment.

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

Heard on motion to set aside judgment.

This case was submitted to us on March 19 on briefs. It was held under consideration until April 6, when the decision of the judge of the court of common pleas was affirmed. On June 24—being at the same term—the plaintiff in error filed the following motion in the court:

"Now comes the plaintiff in error and represents to the court that on the hearing of this case in the court of common pleas, the same was submitted to the court upon the motion of the plaintiff in error for leave to defend, and upon a motion of the defendants in error to strike said motion of the plaintiff in error from the files. That said motions were submitted to the court without the introduction of any evidence or proofs of any character, and that the court sustained the motion of the defendants in error and overruled the motion of plaintiff in error, solely on the ground that the court was without jurisdiction to grant the relief which plaintiff in error asked in her said motion.

"Plaintiff in error further represents that by a mistake of the clerk and irregularity in obtaining the judgment in the court of common pleas in this cause, the original entry recited the fact that said motions were heard upon proofs, while in fact said motions were not heard upon any proofs whatever.

"Wherefore, plaintiff in error suggests a diminution of the record herein and moves the court to set aside the judgment, order and decree of the court heretofore entered herein, and that the same may be remanded to the Court of Common Pleas of Lucas County, Ohio, for the purpose of having the entry, order and judgment of said court corrected so that the same

will correspond to the facts. [Signed] Josie Casto, by Templeton & Templeton and C. A. Thatcher, her attorneys."

In support of this motion the affidavits of C. A. Thatcher and J. B. Templeton are filed. In his affidavit, Mr. Thatcher says:

"C. A. Thatcher, being duly sworn, says that he was one of the attorneys for the plaintiff in error in the Court of Common Pleas of Lucas County, Ohio, in the hearing of the above entitled case on the motion of the defendants in error to strike the motion of the plaintiff in error for leave to answer in said case from the files, and also such attorney upon the hearing of said motion of the plaintiff in error for leave to answer in said cause.

"Affiant further says that no proofs or evidence of any character were introduced or received in evidence by the trial court on the hearing of said motions. That the statement in the journal entry, that said motions were heard upon proofs, is a mistake and is not true. [Signed] C. A. Thatcher."

The affidavit of Mr. Templeton is in precisely the same form. We have also had submitted to us a statement from the *Legal News* of a brief opinion of the trial judge in deciding the matter; and the trial judge—Judge Tyler—has been before us and has given his statement of his recollection of what transpired.

It will be noticed that counsel do not pretend that since the cause was heard and decided by us they have gained any new light or information as to what actually transpired in the court below, or as to what that court actually considered or did in the case.

Our opinion upon the case as submitted to us was taken down by a stenographer, has been preserved and may be referred to, so that it will not be necessary to go into the history of the case very fully. I may say, briefly, that the action in the court below was by John Casto against his wife, Josie Casto, to obtain a divorce, on the ground of adultery of the wife. Service was obtained by publication, as provided in the chapter of the Revised Statutes on the subject of divorce, and a divorce was granted on the ground of such adultery of the wife. This, of course would have the result, in law, of depriving the wife of certain interest in the estate of her husband, if she should sur-

vive him, which but for such misconduct and the divorce on account thereof she would have in his estate.

After this divorce was granted, the husband died. He left some estate. Certain of his heirs, in Greece, laid claim to it, and thereupon Josie Casto came forward and became active and filed a motion in the case, in which she set forth that she had not been served with process, that she had no knowledge of the pendency of the action, and that she had a good and valid defense; in other words, that she was not guilty of the misconduct charged, and desired to be let in to defend and have the divorce case retried in order that it might be determined and adjudged that she was not guilty—the ultimate purpose, of course, being to give her a status under which she could claim an interest in her husband's estate.

Her proceeding was under Section 5355, Revised Statutes. The court of common pleas being of the opinion that this section of the statute had no relation to divorce cases; that service by publication in such cases could not be set aside and a party be let in to defend by virtue of this statute, ruled against Josie Casto upon her motion. It seems that at the time of this ruling by the trial court Josie Casto had on file in that court, in support of her application under Rev. Stat. 5355, certain affidavits in which her innocence of these offenses was asserted, and the fact that she had not been personally served and had no personal knowledge of the pendency of the action was stated.

As to the affidavits, it may be said that they would make a *prima facie* case in her favor under Section 5355, Revised Statutes, if it had any application to a suit of that character; but it appears that the trial judge, being of opinion that that section had no application, and (as said by Josie Casto in her motion now under consideration) he overruled the application solely on the ground that the court was without jurisdiction to grant the relief which plaintiff in error asked, and therefore he ignored the affidavits supporting the application. When the journal entry was drawn it set forth that this motion to set aside the service by publication, and as well a motion to strike such motion from the files and dismiss it, were heard "upon the

proofs," and that journal entry closes with a paragraph which seems to be consistent with the theory that the hearing was upon the proofs, or, at least, that it was so considered by the parties —that is to say, that though the proofs may not have been given any weight or consideration by the court, they were properly presented so that if they were entitled to receive consideration, the court was bound to consider them. It is this clause:

"Wherefore, it is considered, ordered and adjudged that the said George Athan Constianto, Melpomene Papagheorgiou, Phelo Sakellario and Maria Papadopouulo, recover of the said Josie Casto the cost herein, taxed at $——; to which judgments and orders the said Josie Casto, by her counsel, excepts, and is granted forty days in which to file bill of exceptions."

Of course, if the court below had proceeded upon the application as it would upon a pleading to give judgment upon the statements thereof, without respect to any evidence which might have been submitted or proffered in its support, upon the theory that the sufficiency of the statements were to be tested first, as in the case of a demurrer to a pleading, and that the evidence on file was not to be considered as even proffered, the statement that time was given for preparation of a bill of exceptions would be quite unnecessary and inappropriate. This motion, however, according to our view, was not a paper or pleading in the case which could be tested or treated in that way by the trial court.

These affidavits were on file. The motion, or the "application" as it is called in Section 5355, Revised Statutes, would be of no consequence—would not entitle the applicant to the first move in her favor at the hands of the court below, unless it were supported by evidence, either in the form of affidavits or otherwise, presented or proffered to the court. The application must be accompanied by a proper showing of certain facts. The statements of the party in the so-called motion or application are really of no special consequence except as a matter of introduction of the subject to the court; but what is essential in order to move the court to action in favor of the applicant, is, that the applicant shall "make it appear to the satisfaction of the court, that during the pendency of the action he had no

actual notice thereof in time to appear in court and make his defense." Counsel for the plaintiff in error seem to have had that understanding of the matter when error was prosecuted to this court, and therefore brought up with this record—or attempted to do so—the affidavits which had been filed with the application, and insisted that the court had erred, not only in the view it had entertained with respect to the case not coming within the purview of Section 5355, Revised Statutes, but that the court had also erred in denying the application, in view of the proof that was submitted in support thereof. The brief was very full upon this point. But counsel seem to have conceived the motion that in order to get these proofs before this court it was not necessary to have a bill of exceptions, so the affidavits are simply attached as if they were pleadings in the case—as if they were a part of the record without being incorporated into a bill of exceptions; and when we came to consider the matter, as will be seen by the former opinion which was handed down, we held that we could not consider the affidavits because not incorporated in a bill of exceptions. Thereupon we affirmed the judgment of the court of common pleas.

The matter has stood in that way for about three months; and now comes this motion to set aside our decree of affirmance, together with the suggestion that the record is not complete, and an application for such action as will enable the plaintiff in error to go back to the court of common pleas and have this entry amended so that it may show that the hearing was not upon the proofs, but that, on the contrary, no proofs were submitted in support of the application filed in that court on behalf of the plaintiff in error. Assuming for a moment that the plaintiff has shown herself entitled to this extraordinary action at the hands of this court in her behalf, let us consider the result of granting what she asks. This motion distinctly states that both of said motions—meaning thereby the application to set aside the service by publication and allow Josie Casto to come in and answer, and the motion to dismiss that application—were submitted to the court, and further, "that said motions were submitted to the court without the introduction of any evidence or proofs of any character."

Suppose that were true; suppose the plaintiff in error should succeed in getting back into that court and in having the journal entry in the case so changed? According to our view of the matter, it would then unquestionably devolve upon that court to deny the application, even if the case came within the purview of Section 5355, Revised Statutes, because, as I have said, it is not sufficient for a party to make the application and state therein the reasons or grounds in support thereof, but it is necessary for the party making the application to support it by making it appear to the satisfaction of the court that, during the pendency of the action, he had no actual knowledge thereof in time to appear in court and make his defense; and, therefore, if the plaintiff in error should ever succeed in getting back into the common pleas court and in having this journal entry of the court so changed as to make it appear that there was not an iota of evidence of any description or character submitted or proffered to the court in support of the application, she would succeed in making it appear clearly that the court had not erred in dismissing her application; or (as it is stated in the journal entry), in overruling her motion. Now that is one reason, and an all-sufficient reason in our judgment, why this motion should be overruled.

It is somewhat extraordinary practice for parties to come into this court after a case has been submitted, and a judgment has been obtained upon a record with the condition of which the parties were well acquainted when the case was submitted, and ask the court to set aside its judgment and give the parties an opportunity to go back into the court below and try to make up a different record in order that they may present a different question to this court; and yet, we can see that if the parties were misled about the facts, it might not only be possible but proper for the court to grant them this extraordinary relief. But, in the showing upon this motion by the affidavits filed here in its support, it is not stated and it is not pretended that when this case was submitted to this court, the plaintiff in error or her counsel were ignorant of the state of the record, so that we are bound to assume that they were fully acquainted therewith.

No reason appears why they should not have been. The record is plainly typewritten, and the journal entry that counsel desires to have modified in the court below is one to which his signature is appended, approving it.

Some consideration is due to the other parties litigant, and where we are persuaded that the parties or counsel have not been diligent, but have been remiss, or where we are persuaded that what they are asking for would be of no possible avail to them, we think we should not grant a motion of this character in order to gratify a desire they may have to debate and present some other question; especially not when our minds are fully made up, as they are in this instance, that if the question were presented it would be resolved by this court against them.

As I have said, this evidence was filed in the court below; it was before that court for its consideration in the event that it concluded that the case came within the purview of Section 5355, Revised Statutes. The court could not refuse to either consider it or grant a bill of exceptions showing that the evidence had been presented and that the court refused to consider it. The very fact that the plaintiff in error brought this evidence before this court as a part of this record, and insisted upon this court's giving it consideration upon the hearing of this case, is evidence to our minds that counsel for plaintiff in error understood that the evidence had been so presented to the court below as that the court was bound to consider it, if the court had jurisdiction of the application; otherwise counsel would not be acting in good faith in asking this court to consider the evidence —for it would not be proper, it would be a gross impropriety for counsel to come to this court and ask us to consider evidence that had not been either considered by or proffered to the court below. We conclude that the evidence was not only before the court for its consideration, but that counsel so understood it, and that the only mistake or oversight in that regard, was that of counsel in failing to incorporate this evidence in a bill of exceptions. It would be idle to send the case back to the court below because it is now too late to have a bill of exceptions perfected in that court.

We overrule this motion: First, because the cause was submitted to this court by counsel who have not shown to us that they were under any misapprehension at the time as to the state of the record or as to what was actually considered and done by the trial court; secondly, because a bill of exceptions is necessary, and it is now too late to obtain it, and it would be, therefore, idle to remand the case to the court below; thirdly, because in our opinion the court below was clearly right in holding that Section 5355, Revised Statutes, has no application to divorce cases. Under these circumstances, to set aside the former judgment and giving counsel an opportunity to make the application desired to the court below, would be an abuse of discretion upon our part, and an injustice to the other parties litigant.

Templeton & Templeton and *C. A. Thatcher*, for plaintiff in error.

E. E. Davis, contra.

EVIDENCE AS TO RELATIONSHIP OF VICE-PRINCIPAL AND SUBORDINATE.

[Circuit Court of Hamilton County.]

JOHN GILL v. THE P., C., C. & ST. L. RAILWAY CO.

Decided, June 29, 1907.

Charge of Court—Evidence Establishing the Relation of Superior and Subordinate—Instructions which in Effect took the Case from the Jury.

Evidence which shows that the defendant's foreman told the plaintiff to help A whenever A called upon him to do so is sufficient to establish the relation of vice-principal and subordinate between A and the plaintiff.

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

The court gave the following special instructions to the jury at the request of defendant:

"If you find that the plaintiff was instructed by his foreman to help Achten when called on by Achten, and that this was the whole of the foreman's order on that point, your verdict must be for the defendant."

Also—

"If the jury find that the only evidence on the subject of direction or control of Achten over Gill was in the words that Gill should help Achten whenever he called on him, this alone would not be sufficient to make Achten a superior servant."

The testimony shows that the foreman ordered the plaintiff to help Achten whenever he called on him to do so, and is substantially the same testimony presented by the record of the first trial of this cause, wherein this court held it sufficient evidence of the subordinate position of plaintiff, and of authority and control of Achten over him. The judgment in that trial was reversed because the court arrested the case from the jury. The above instructions, in effect, took the case from the jury by designating the only evidence of the relationship of vice-principal and subordinate as insufficient.

We are still of the opinion that the order to plaintiff "to help Achten whenever he called upon him" placed plaintiff under the control of and subordinate to Achten. Hence the instructions were erroneous and prejudicial.

Judgment reversed and cause remanded for new trial.

J. T. Harrison, for plaintiff in error.

Maxwell & Ramsey, contra.

MAINTENANCE OF WORK HOUSE PRISONERS.

Circuit Court of Cuyahoga County.

THE CITY OF CLEVELAND v. THE COMMISSIONERS OF CUYAHOGA COUNTY.

Decided, November 6, 1907.

Municipal Corporations—Action against County for Maintenance of Prisoners Convicted of Violating State Statutes—Construction of Section 1536-369, and Section 2834b.

1. The liability of county commissioners for maintenance of prisoners, sentenced by the common pleas court to a city work house, is not essentially contractual, but is based rather on the mandatory requirements of Section 1536-369, Revised Statutes.

2. Section 1536-369 is comprehensive, and excludes the interpolation of any supposed but unexpressed policy of the state as reflected by past legislation with reference to the distribution of the expense of maintaining prisoners offending against state statutes and city ordinances respectively.

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

The sole question involved in this proceeding in error is the sufficiency of the petition. The action below was brought by the city to recover from the county the agreed price for maintenance in the city workhouse of prisoners committed thereto for violation of state statutes. The theory of the city is that the county is ultimately liable for such maintenance in all cases where the offense is statutory, and that the city's ultimate liability for such maintenance is confined to cases of violations of city ordinances. The petition alleges four causes of action differentiated according to the committing tribunals, viz: the Cuyahoga common pleas court, justices of the peace throughout the county, the mayor of Berea, and the Cleveland police court.

The correctness of the city's claim as to the first cause of action is substantially conceded, except that the contract price was not lawfully agreed upon between the parties in compliance with Section 2834*b*, Revised Statutes, in that the county auditor made no proper certificate as to the funds in the treasury.

This contention is, we think, without merit in view of the petition's averment that the contract was "duly" made, and also because the liability asserted is not essentially contractual, but is derived rather from the mandatory requirements of Section 1536-369, Revised Statutes.

The agreement as to the forty per cent. *per diem* price for maintaining each prisoner should, under the allegations of the petition, and in the absence of any averment to the contrary, be treated as an accord, respecting the actual cost of such compulsory maintenance.

So far, therefore, as the first cause of action is concerned, the judgment of the court of common pleas is affirmed.

Respecting the remaining three causes of action, Section 2104, Revised Statutes, repealed when the municipal code was enacted in October, 1902, would were it still in force, have settled the

whole controversy favorably to the city's contentions. And the city contends that the policy of the state, as reflected in past legislation and in the manifest equity of the matter, is still such that counties are the appointed agencies, constituted by the state, for maintaining those incarcerated in local penal institutions, for violation of its general laws, but that municipal corporations are made chargeable only with the maintenance of those incarcerated for violation of their own ordinances. Various analogies of other expenses thus apportioned between counties and municipalities are cited in support of this contention.

Section 1536-369, Revised Statutes, is the municipal code provision now applying to this subject, and it seems to be both explicit and comprehensive, so as to exclude the interpolation of any supposed but unexpressed policy of the state regarding the distribution of expense of maintaining these two classes of prisoners. It reads:

"When a person over sixteen years of age is convicted of an offense, under the law of the state or an ordinance of a municipal corporation, and the tribunal before which the conviction is had is directed by law to commit the offender to the county jail or corporation prison, the court, mayor, or justice of the peace, as the case may be, shall sentence the offender to the workhouse, if there is such house in the county; provided, that when a commitment is made from a city, village or township in the county, other than in the municipality containing such workhouse, the council of such city or village, or the trustees of such township, shall transmit with the mittimus a sum of money equal to forty cents per day for the time of such commitment, to be placed in the hands of the superintendent of such workhouse for the care and maintenance of such prisoner."

This section seems, moreover, to be in exact accord with the provisions of law in that behalf made by the municipal code of 1869 (66 O. L., 195), Sub-sections 275 and 280, as modified by 73 O. L., 211.

It was not until the enactment of Section 2104, Revised Statutes, March 11, 1884, that the policy asserted by the city was given legislative expression, and then only as to a part of the state. Without reviewing in detail here the history of legislation

upon this subject, it is enough to say that our examination thereof fails to reveal the fixing by the General Assembly of any such definite or continuous policy as the city declares to have been established.

If it be contended that a literal enforcement of Section 1536-369, Revised Statutes, would saddle the city with the expense of maintaining some prisoners convicted by its own police court, or before justices of the peace elected and sitting within its boundaries, of state offenses committed outside its corporate limits, it may be answered that such tribunals are presumed to be clothed with and to exercise their extra-municipal jurisdiction for the benefit of the community within and for which they act, just as similar tribunals in outlying townships of the same county may in certain like cases, and with equal propriety charge their own communities in respect of offenses committed in such city. Concerning the possibility of a trifling over-lapping of benefits or expenses as between the taxpayers of a city and the taxpayers of outlying municipalities and townships in the same county, the maxim *de minimis non curat lex* is peculiarly applicable.

We have followed the interesting discussion in the city solicitor's brief of the statutes permitting contracts to be made for the maintenance of prisoners from foreign counties without perceiving that they involve any irreconcilable conflict with our construction of the laws applicable to the subject more immediately before us.

The judgment of the court below having followed the principles thus defined, is affirmed.

Newton D. Baker, City Solicitor, for plaintiff in error.

John L. Cannon, Assistant County Solicitor, for defendants in error.

QUESTIONS OF NEGLIGENCE IN MAKING UP TRAINS.

Circuit Court of Lucas County.

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY v. BOTEFUHR, ADMINISTRATOR.

Decided, June 22, 1907.

Negligence—In the Switching of Cars in a Railway Yard—Custom in the Matter of Signals—Evidence Relating Thereto—Brakeman may Rely on Signals of Conductor—Charge of Court with Reference to Custom—Non-prejudicial Error in Charge—Evidence of Defects in Apparatus not Charged in the Petition Admissible, When—Error —Master and Servant.

1. Evidence that it was the custom of a railway conductor to give warning to the trainmen, assisting him in the making up of a train in the yards, is admissible upon the question whether, knowing the custom, the conductor exercised ordinary care, and also upon the question of whether the deceased, being aware of the custom and habit of the conductor, was guilty of contributory negligence.
2. A yard brakeman of a railroad company, in the pursuance of his duty in the making up of a train in the yards of the company, it being desired to reverse the location of the cars on the track and it being necessary in so doing to pass between the cars to couple them up, has a right to expect that the cars will not be moved without a warning to him from the conductor, where it has been the habit or custom of the conductor to keep track of the trainmen assisting him.
3. Where the court in its charge to the jury refers to a habit as a custom, evidently meaning a custom in the general acceptation of the term, and not a custom having the force of law, it devolves upon the plaintiff in error, before he can be heard to complain thereof, to frame a charge that would correct the alleged error; a general exception to the charge is not sufficient for that purpose.
4. Where rules of a railroad company in evidence go no further than to impose upon employes such duties and obligations as are imposed upon them by law, and such rules of law in so far as they bear upon the issues are correctly set forth in the charge of the court, the failure of the court to mention such rules of the company specificially, or to state that such rules also impose the duties and obligations arising under the law, is not prejudicial error.
5. Where the only negligence charged is that of the conductor of the train in the operation whereof the plaintiff's intestate was in-

jured, it may be competent to show defects in the cars of such train in explanation of the movements of the train and the conduct of the parties, though no recovery could be based upon such defects.

PARKER, J.; HAYNES, J., and TAGGART, J. (sitting in place of WILDMAN, J.,) concur.

Error to the Common Pleas Court of Lucas County.

The action in the court below was by the administrator of Elmer F. Grover against the railroad company for damages to the next of kin of Grover, resulting from his death, which it was charged in the petition was brought about through the negligence of one Ford, a conductor of the railroad company, superior in authority to the deceased, and while the deceased was in the line of his duty as an employe of the railroad company, to-wit, as a yard brakeman.

The negligence alleged was in the failure of the conductor to keep himself advised of the situation of the deceased while they were both engaged with other trainmen in the making up of a train in the yards of the company near the Union passenger station in this city, and in directing a certain movement by the engineer of his locomotive whereby the cars were brought together and the deceased was killed, without waiting for a signal from the deceased, or being otherwise apprised that the deceased was in a place of safety.

The trial in the court below resulted in a verdict in favor of the plaintiff for $5,500, upon which judgment was entered. Error is prosecuted by the railroad company to this court to obtain a reversal of that judgment.

Upon the trial of the case the railroad company took exceptions upon the admission of evidence; upon the overruling by the court of a motion on its behalf to withdraw the cause from the jury and direct a verdict in its favor at the close of plaintiff's evidence; upon the overruling of a like motion when all the evidence was in; on account of alleged errors in charges given at the instance and request of the plaintiff below; and in the general charge of the court with respect to various propositions.

I can not undertake to discuss all the questions that are presented for our consideration, but will give brief attention to those which we consider most important and material, and most worthy of attention.

I shall not go into details as to the transaction or movements which resulted in the death of Grover. I have already mentioned the capacities in which Grover and the conductor were acting. They were engaged with the other trainmen in making up a passenger train; that is to say, in bringing the coaches and cars into position and connecting them together, so that they would be in proper form to make a regular trip. In doing this, the position of the cars upon a certain track as the train was brought into the station were being reversed; the train coming in from the east and stopping at the station, and it being intended that it should go out toward the east, it became necessary to reverse the location of the cars upon the track. So the eastermost car, which was a parlor car, was taken from the train by the locomotive and pulled away from the train, and then shoved in upon another track, and the next car, which was a passenger day coach, was likewise disconnected from the train, pulled away from it, and pushed in on the track with the parlor car, so that it stood eastward of the parlor car; then the smoking car was likewise changed, and then the baggage car was likewise changed. So it will be observed the order of the position of the cars was merely reversed.

In the course of these operations it became necessary for the deceased and for Ford, the conductor, to pass from one track to the other, Ford, as conductor, directing the operations. It seems that when the cars were all in proper position it then became desirable to shove them together and couple them up. They were provided with so-called automatic couplers, but that as the train was being made up upon a track which had considerable curve the couplers would not operate automatically without some adjustment or manipulation by the trainmen to put them into position so they would couple together.

When it seemed to the conductor desirable to couple up the cars, he discovered that the last car brought in, to-wit, the bag-

gage car, was not likely to couple onto the smoking car because of some need of adjustment of the coupler; so he passed in between these cars, and he says before doing so he signaled the engineer that he was about to do so, in order that no movement might be made that would be likely to injure him; but he passed in and made the necessary adjustment and stepped out, and then signaled to the engineer to back up. This was done. He says that at that time his purpose was simply to effect a coupling up of those two cars, supposing that by other movements that had been made in the making up of this train all the other cars had been coupled together. But in coupling up these cars the cars standing to the westward of him were moved, he thinks, not more than six inches, and he thinks that the westermost, to-wit, the parlor car, could not have been standing more than six inches distant from the day car standing immediately to the east of it. Then he says that in order to determine whether all the cars were coupled together he directed the engineer to move them all forward toward the east, and upon this movement being made it was discovered that the two rear cars were not coupled together. So he stepped back to the rear end of the train, or to the space between these two cars, to see why it was they had not coupled together—to see what the trouble was—and there they found Grover lying between the tracks, dead, with his head crushed; apparently his head had been crushed between the buffers of these two cars. The conductor says that until then he was not aware that Grover was in that position. He did not see him go there. He was unaware that it was necessary for anybody to go to that position to attend to any duty, to look after the coupling up of the cars or to do anything else. He had not seen Grover from the time they had hauled the last car from the other track, to-wit, the baggage car, and he says that he supposed that Grover had gone about some other business or duty in the yard, and was no longer assisting in the making up of this train; and it appears that Grover had various duties to perform in the yard, sometimes one thing and sometimes another, so that he was likely to be called upon to do a variety of work in the yard.

It is contended on behalf of plaintiff in error that if Grover did go in between the cars for the purpose of assisting about their coupling up, he was negligent in that he did not give warning to the conductor or to the engineer that he was about to go into that perilous position.

On behalf of the defendant in error, it is contended that the deceased was not necessarily negligent, even if he went into this place without giving any warning, because it was customary in doing the work there to take that position between the cars and adjust the couplers, and it was customary for the conductor to keep track of the trainmen assisting him, and the conductor had every reason to anticipate, Grover not being within view, that he was about the performance of such duty, and that Grover, on the other hand, had every reason to believe and anticipate that the conductor would be regardful of his safety and looking out for him.

Upon this contention the plaintiff below produced witnesses, of whom counsel inquired as to the custom that had prevailed there in the yard for a period of years in the making up of trains, and especially in the making up of this train, and more especially in the manner that Grover performed his work as a brakeman while working under Ford; and various witnesses testified that the custom was as contended for by the plaintiff below; that Grover was in the habit of going between the cars and making these adjustments of the knuckles or couplers, and that Ford was not in the habit of giving any signals for the movement of the train until Grover would step out and give a signal that a movement might be made.

There was testimony, on the other hand, tending to sustain the contention of plaintiff in error that the custom was not so. Questions are made as to the admissibility of evidence of this character, and also as to its sufficiency in this case.

As to the admissibility of evidence of this character, we think there can be no question. The views of this court upon that subject have been expressed by Judge Haynes in the case of *Carl* v. *Pierce*, 20 C. C., 68 (affirmed, without report, *Hunt* v. *Pierce*, 64 Ohio St., 578); and especially page 712 (70), and by

myself in the case of *Pennsylvania Co.* v. *Mahoney,* 22 C. C., 469.

It is, according to our views, admissible upon the question of whether, knowing the custom, or knowing the habit of trainmen there, and especially of Grover, the conductor exercised ordinary care; and also upon the question of whether the deceased, being aware of the custom and of the habit of the conductor, was guilty of contributory negligence, or exercised ordinary care.

The evidence in the case, we should say, is hardly sufficient to establish a custom having the force of law, and perhaps not one having the force of an established and promulgated rule binding upon all employes of the company, at all times and places. But we think it is quite sufficient to show this habit in the performance of the work upon the part of this conductor and this trainman when working together in the making up of that train, and our view of the matter upon the weight of the evidence is, that their habits as contended for by the defendant in error were fairly established. The fact that at times, in the questions and in the remarks of the court, and perhaps in the charge of the court, this habit has been designated as a custom, which might mean a custom of the general character I have alluded to, was not, in our judgment, a matter prejudicial to plaintiff in error. Perhaps it would be more correctly described as a habit of these people in the performance of their work, the habit of each being known to the other. But we hold with respect to the charge upon the subject, that if counsel for the plaintiff in error apprehended that the evidence might not be properly understood or applied by the jury—that the jury might have had in mind the subject of customs rather than the habits or usages of these parties—it devolved upon him to frame a charge embodying his views (*Columbus Ry.* v. *Ritter,* 67 Ohio St., 53). We hold that a general exception would not reach to the alleged error upon the part of the court in that respect.

It is contended on behalf of plaintiff in error that the trial judge erred in his charge to the jury in that he failed to charge that they were to be guided by certain rules introduced in evidence, the charge being that they were to be governed by the

customs or usages or habits of the employes in the making up of this train at this station. What I have said with respect to the general exception on the other point we think is as well applicable to this; but, aside from that, we have considered these rules very carefully, and we have failed to discover any specific rule applicable to this situation, though many of the rules provide generally that in all operations the employes are to be heedful of their own safety and the safety of their fellow employes. In so far as the rules provide for this, they provide for no more than the law requires of the employes; or, in other words, they impose no different burdens or duties upon employes than those imposed by the law. And when the judge came to charge, as he did very fully, upon the respective duties and the relative duties of the deceased and the conductor, he, in effect, gave in charge all that was material and pertinent in these rules upon the subject, though the rules were not specifically mentioned. It would have given no additional force to the law, as laid down by the judge, to say that the company had adopted and promulgated certain rules in which these same duties of care were imposed upon the employes.

In the course of the trial, to explain why it became necessary for the trainmen to go between these cars in order to adjust these knuckles, witnesses were permitted to testify that certain parts of the apparatus were not in order so that they could be worked by standing in any other place than between the cars; they would not work automatically, and they could not be operated from the platforms. This was objected to upon the ground that the plaintiff was attempting to show defects in the couplers that had not been charged in the petition. We think that objection was not tenable. The only negligence alleged as a ground of recovery was that of conductor. The fact that this apparatus was in the condition that witnesses testified, whether defective or not defective, was only incidental to explain the purpose and necessity of trainmen going between the cars and standing upon the ground while operating the same, and that necessity it was competent to show, even though incidentally it turned out that it was made necessary

by defects in the car. It did not follow that recovery could be had upon the ground of such defect, because it might well be shown that the risk of those defects had been assumed, or that the deceased was negligent in so far as he undertook to operate defective machinery; and the court was careful in the charge to advise the jury that the only ground of recovery was the alleged negligence of the conductor. If the conductor was negligent as charged, of course that was a risk entirely distinct from any risk of injury from defective machinery or defective appliances which the deceased might have assumed, and was a risk which was not assumed by the deceased.

Without spending further time in the discussion of the facts, we simply state our conclusion, that the evidence justified the finding of the jury that the deceased was in the line of his duty when he was killed, and that he was not negligent, and that his death was brought about by the alleged negligence of the conductor. To discuss the evidence upon which we think the jury might well have relied, and to set forth the course of reasoning by which we reach this conclusion, would require considerable time, and we think it would hardly be profitable.

We find no error in this record prejudicial to plaintiff in error, and the judgment of the court of common pleas will be affirmed.

O. S. Brumback, for plaintiff in error.

Doyle & Lewis, contra.

INJUNCTION AGAINST THREATENED LIBEL.

Circuit Court of Erie County.

CHARLES A. JUDSON v. EDMUND H. ZURHORST.

Decided, September, 1907.

Threatened Libel—Jurisdiction in Equity to Enjoin—Necessary Allegations as to Injury—Freedom of Speech—Obscenity of Publication—Insolvency of the Offender—Injury to Reputation—To Property Rights.

A court of chancery has no jurisdiction to restrain the publication of a lewd, obscene and lascivious pamphlet merely because it is libel, and will injure plaintiff in his reputation and cause the public to believe he is unfit to hold office.

HURIN, J. (sitting in place of PARKER, J.); HAYNES, J., and WILDMAN, J., concur.

Error to Erie Common Pleas Court.

The sole question before this court is: "Has a court of equity power to enjoin a threatened libel, when—as in the case at bar—it is alleged that the pamphlet, whose printing and circulation is sought to be enjoined, is false and untrue and is of an obscene, lewd and lascivious character, known to be such by the defendant, and tending to corrupt the morals of the community, and that its publication will irreparably injure the complainant in his reputation, official position and property rights, for which injury he has no adequate remedy at law, there being no way of stopping the circulation of said circulars when once commenced and the defendant being utterly insolvent and a judgment against him uncollectible."

This question is raised by demurrer to the second amended petition, defendant objecting especially to the jurisdiction of the

court over the subject-matter and that the petition fails to state a cause of action.

The defense is based on the constitutional protection of freedom of speech and of the press.

Article I, Section 11 of the Ohio Constitution declares that:

"Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libelous it true and was published with good motives and for justifiable ends, the party shall be acquitted."

It is clear that the Constitution here provides for the fullest liberty of speech, but subject always to the proviso that every citizen must be held responsible for his abuse of the right.

The defendant claims that this responsibility extends only to the criminal liability referred to in the latter part of Section 11, and to the civil liability to respond in damages for the abuse of the right of free speech.

Plaintiff, however, claims that this responsibility goes further and includes the liability to be shut off from a future abuse of that right, where it is shown that such future abuse is contemplated, and that neither a criminal action nor a suit in damages will adequately protect a complainant or compensate him for the threatened wrong. He therefore asks an injunction restraining defendant from such abuse.

The question appears to be a somewhat novel one in Ohio, never authoritatively settled by the Supreme Court. In other states, the great preponderance of authority is against the power of the courts to restrain threatened libels, and the same may be said of the restraint of threatened crimes. For both libel and crime are supposed to be so guarded by other forms of procedure that courts of equity will not assume the unnecessary prerogative of forestalling and preventing their commission. Yet

the courts and legal authorities are by no means unanimous in repudiating this prerogative. In England, the courts for a long time refused to assume such power, though occasionally a chancellor hinted at his right to do so. Now, by reason of powers specially conferred by statute and, independently of statute, by reason of a broader view of the subject, the English courts do restrain the publication of libelous matter and especially when property rights are involved.

In this country the older English rule was formerly universal, but in recent years the courts have shown a tendency to break away from it, and to assume the power to prevent injuries, at least to property by libelous publications, though usually giving other reasons than that of the mere libel in support of their decrees.

So great an authority as Story in his "Equity Jurisprudence," Volume 2, Section 948*a*, said:

"Courts have never assumed, at least since the destruction of the court of Star Chamber, to restrain any publication which purports to be a literary work upon the mere ground that it is of a libelous character and tends to the degradation or injury of the reputation or business of the plaintiff who seeks relief against such publication; for matters of this sort do not properly fall within the jurisdiction of courts of equity to redress, but are cognizable, in a civil or criminal suit, at law."

And Pomeroy's "Equity Jurisprudence," Volume 6, Section 629, says:

"A libel occupies much the same relative position as a crime in considering the remedy of injunction. Equity will not restrain by injunction the threatened publication of a libel, as such, however great the injury to property may appear to be. This is the universal rule in the United States, and was formerly the rule in England. The present rule in England, *contra*, rests on statute."

But in Section 630, the same author says:

"But while the libel as such will not be restrained, just as a crime will not be prevented by equity, yet when there is other legitimate ground for equity to issue the injunction, the fact that

the publication is also a libel will not prevent the injunction being issued, even if there is a constitutional provision forbidding injunction against libels, as an interference with the right of free speech."

And in support of this doctrine the author cites *Beck* v. *Railway Teamsters' Union*, 118 Mich., 497 (42 L. R. A., 407), where the court says:

"It is urged that courts of equity will not restrain the publication of a libel, and that this boycotting circular is a libel, the publication of which can not be enjoined. The same claim was made that courts of equity have no jurisdiction to restrain the commission of a crime. But the answer is, and always has been, that parties can not interpose this defense when the acts are accompanied by threats, express or covert, or intimidation and coercion, and the accomplishment of the purpose will result in irreparable injury to, and the destruction of, property rights. * * * The purpose of this (libelous circular) was not alone to libel complainant's business, but to use it for the purpose of intimidating and preventing the public from trading with the complainants. It called upon them to protect them."

And so for other reasons libelous publications have been enjoined, as in *Emack* v. *Kane*, 34 Fed., 46, where one manufacturer was enjoined from sending out circulars to customers of another, threatening them with litigation, tending to intimidate them and prevent their dealing with plaintiff.

See, also, *A. B. Farquher Co.* v. *National Harrow Co.*, 102 Fed., 714 (49 L. R. A., 755), where the bad faith of defendant in sending out damaging circulars regarding plaintiff's business was one element leading to the granting of the injunction. Pomeroy cites Lord Cairns' statement in the case of *Prudential Assurance Co.* v. *Knott*, 10 Ch. App., 142, which is perhaps the clearest statement of the rule that can be found. It was announced in a case decided in 1874 before the change in the statutes of England, and is as follows:

"It is clearly settled that a court of chancery has no jurisdiction to restrain the publication merely because it is a libel. There are publications which a court of chancery will restrain, and those publications as to which there is a foundation for the

jurisdiction of the court to restrain them, will not be restrained the less because they happen also to be libelous."

This may fairly be said to be the rule followed by the vast majority of the courts of this country.

We are thus led to inquire whether there is anything in the libel complained of in the case at bar which, aside from its libelous character, justifies the interposition of a court of equity. We have seen that courts have found publications containing various forms of intimidation proper subjects for the exercise of injunction power. Threats of the boycott and threats of litigation, circulated by means of pamphlets have been thus enjoined, not because the statements of the pamphlets were false or libelous, and not merely because they tended to injure plaintiff in his business, but because they tended to intimidate others and prevent them, through fear, from dealing with complainants, thus interfering with the rights of the public to freedom of choice in dealing with plaintiff and interfering with plaintiff's right to the benefit of that freedom of choice. And so where officers of a trades union gave notice to workmen by means of placards and advertisements that they were not to hire themselves to plaintiffs, pending suit between the union and the plaintiffs, it was held, upon demurrer, that the acts of the defendants, as alleged by the bill, amounted to crime, and that the court would interfere by injunction to restrain such acts, inasmuch as they also tended to the destruction or deterioration of property. *Springhead Spinning Co.* v. *Riley*, L. R., 6 Eq., 551; *Consolidated Steel & Wire Co.* v. *Murray*, 80 Fed., 811; *In re Debs*, 158 U. S., 564.

But in the case at bar no such claim in made. Plaintiff does say in his petition that he is a public office-holder and enjoys a property right in the emoluments of his office, and that the circulation of the pamphlet complained of is an injury to the reputation of plaintiff and to his property rights in said office, by causing people to believe that he is unfit to hold said office.

But here we find no allegation that people are intimidated or in any other way prevented from dealing with him in his said office, or even that his tenure of said office is threatened or likely to be interfered with because of defendant's acts. The charge

thus made is in effect merely another form of the statement that plaintiff's reputation will be injuriously affected by defendant's circulation of said pamphlet. In reality, there is no allegation that the property rights of plaintiff will be at all interfered with, but only that people will believe that he is unworthy of enjoying them.

No destruction or deterioration of these property rights is even suggested in the pleadings of plaintiff. He fails to bring his case within any of the rules laid down in any of the cases so far referred to.

The only other ground on which irreparable injury to plaintiff himself is claimed is that of damage to his reputation by reason of the fact that this obscene, lewd and lascivious pamphlet will injure him in his reputation and cause the public to believe that he is unfit to hold office.

It is argued by counsel for plaintiff, and with great plausibility, that, when the obscene character of the pamphlet is known, plaintiff ought not to be compelled to sit still and allow such a thing to be published concerning him and trust to the doubtful result of an action for damages to reimburse him in money for an injury to his reputation for which no money judgment can ever compensate him, and for which no punishment, which under the criminal law can be inflicted on the defendant, can ever sufficiently atone.

There is much reason and sound sense in this statement of the case. Were we empowered to formulate original principles of law and lay down new rules by which courts of equity should be guided, such an argument would appeal strongly to our consciences and judgment. But we have no such power. We must be guided solely by principles already enunciated and accepted as sound by courts generally throughout this country and in England.

It may be admitted at once that no self-respecting man would willingly suffer his reputation for morality to be sullied for any amount of money damages, even though such amount were assured him. From an ethical stand-point the action for damages is never an adequate remedy in such cases, yet it is the only

way known to the law for compensating a man for an injury done him; and in a legal sense it is and must be considered an adequate remedy where available at all.

The criminal punishment of the offender has another purpose than compensation, but it would not necessarily follow that because this kind of a remedy is open to defendant for an injury already done, he is therefore without the right to prevent future injuries of like character. The difficulty is to find some authoritative case where a court of equity has in this country exercised the power of preventing such injuries—that is, to the reputation of an individual.

A somewhat extended search has failed to disclose such a precedent, and, in the absence of both statute and of precedent, this court is not at liberty to assume a power whose exercise would be of such far-reaching consequences.

While it is plaintiff's misfortune that defendant is not responsible financially and therefore can not be made to respond in damages even should a verdict be obtained against him, yet, if the injunction power is not applicable to an injury of this kind generally, the mere insolvency of the defendant will hardly afford a judicial reason for its arbitrary exercise.

There remains one contention for the granting of this injunction on the facts alleged in the petition. That is on the alleged indecency of the pamphlet. The law does not favor obscenity or indecency. In a proper case instituted by one legally authorized to represent the public, the public exhibition of lewd pictures, immodest statuary, or immoral plays, would unquestionably be enjoined or otherwise suppressed; and for the same reason an obscene book or pamphlet is prohibited transit through the United States mails. The case presented to us, however, is not of that character and does not authorize the relief sought.

For these reasons the demurrer to the second amended petition should be sustained.

H. L. Peeke, for plaintiff in error.

H. C. DeRan, for defendant in error.

NOTICE OF DEFECT IN STREET.

[Circuit Court of Hamilton County.]

CITY OF CINCINNATI v. ADOLPH KLEIN.

Decided, June 22, 1907.

Streets—Defect in—Constructive Notice of to the Municipality—Error—Evidence as to Appearance of Defective Place.

In an action for injury resulting from an alleged defect in a street, it is error to overrule a motion by the city for an instructed verdict in its behalf, where actual notice of the condition of the street is not claimed, and there is no evidence of constructive notice except as based on speculation.

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

We think there was error at the trial of the above case in that the court overruled the motion of plaintiff in error to arrest the case from the jury, and to instruct a verdict in its behalf.

There was no evidence of constructive notice to the city of the existence of the defect in the street, actual notice not being claimed. The rule is, "that if the defect is shown to have existed such a length of time that the city authorities, by the exercise of ordinary care, would have known of its existence and could have repaired it, then the city is charged with constructive notice of such defect" (*Cincinnati* v. *Frazer*, 18 Cir. Ct., 50; *Leipsic* v. *Gerdeman*, 68 O. S., 1). No such evidence was offered. The jury could not speculate as to the length of time the defect in question existed from statements of witnesses as to the appearance of the defective place after the accident, and thus establish constructive notice to the city.

Judgment reversed.

W. A. Geoghegan, for the city.

Moses Ruskin, contra.

WRONGFUL DEATH BY CONTACT WITH ELECTRIC WIRES.

Circuit Court of Fulton County.

DAN W. RAKER, ADMINISTRATOR, v. TOLEDO & INDIANA RAILWAY.

Decided, May 29, 1907.

Negligence—In Failing to Provide a Safe Place to Work—Exposed Electric Wires—Construction of Warning and Notice as to Danger—Admissibility of Evidence of Statements Made by the Deceased as to his Safety.

1. Where, in an action for damages for the death of a workman, alleged to have been caused by the negligence of the defendant, an electric railway company, the evidence shows that before the completion of a building, which was to be used as a power house, certain transformers were installed, and connecting wires carrying heavy currents of electricity were strung from them across the room, and that while doing necessary work in the completion of said room the deceased was killed by striking his head against a heavily charged and unguarded wire, a *prima facie* case of negligence is established against the electric company, and, it not appearing clearly that the deceased was guilty of contributory negligence, an instruction to return a verdict for the defendant is error.
2. Whether or not a warning to such a workman not to touch the machinery or wires, which had been placed in the room in which he was working, should be regarded as a warning of extreme danger to himself from touching them, or merely a calling of his attention to the wires and machinery as something not to be disturbed, is a question for the jury to determine when the evidence is such as would lead reasonable minds to differ.
3. Where a workman is killed by striking his head against an electric wire, while doing work required and necessary for the completion of the building on which he is employed, statements made by him to other workmen as to whether there was danger in working in such a place are admissible for the sole purpose of showing the state of mind of the deceased touching the safety of working there, as bearing upon the question of contributory negligence.

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

Error to the Common Pleas Court of Fulton County.

This, in the court of common pleas, was an action to recover damages on account of the death of Frank Durst, which the plaintiff alleged was caused by the negligence of the defendant. After the testimony on behalf of the plaintiff was in, the court directed a verdict for the defendant, which was returned, and judgment was entered upon it. The question presented for our consideration and determination is, whether the court erred in so directing the verdict.

The Toledo & Indiana Railway Company operates a railroad upon which the cars are propelled by electricity. At one of its stations, Pettisville, it has a station house, and in one of the rooms thereof it has certain electrical machinery and apparatus —specially, three transformers of electricity and one other machine the name of which I do not at this moment recall. A. L. Guthrie was employed by the railroad company to construct this building, and he with his employes did so. Before it was finished, however, the company installed this machinery in this apartment of the building.

It seems that in connection with this machinery, leading to and from it, were electric wires carrying a very strong current of electricity, said by the witnesses to amount to 13,200 volts, which, it is admitted, is a deadly current to one coming in contact with it. These three machines were set up close together upon the west side of this room. There were a variety of wires in this room, but the particular wires carrying this high voltage came into the building somewhere near the ceiling of the room, then came down the walls to near the top parts of these transformers, and then were carried across to the tops of the transformers. That brought the wires to within four feet or four and one-half feet of the floor. The transformers were situated within from twenty to twenty-four inches of the west wall. On the west side of the room was a door leading to the outside of the building. On the east side was another door leading into the ticket office and waiting room.

A part of the work which remained for Mr. Guthrie to do was to hang this door at the west end or side of the building with certain heavy weights whereby it might be operated, and an-

other part devolving upon him was the putting in of cement floors. It appears that he had been called upon by Mr. Darrow, the general manager of the company, and shortly before January 12, 1906, to finish up his work upon the building; that he had had some conversation with Mr. Darrow about the apparatus and wires in the room where he would be required to work; and, according to the testimony of Mr. Guthrie, he had been assured by Mr. Darrow that there would be no danger in his proceeding with his work at that place.

The deceased, Frank Durst, was one of the employes of Guthrie, and upon January 12, 1906, he was, under the direction of Guthrie, put to work putting down the cement floor in this room where the electric wires and apparatus were situated. It does not appear, directly at least, that Mr. Durst had been informed of the conversation between Guthrie and Darrow respecting the danger or safety of the place, but there is testimony tending to show that Durst had been warned or cautioned by Guthrie and had been warned by the station agent, Mr. Laver, that he should be careful about the machinery and the wires—that he should not get against them. By most of the witnesses who testified upon this subject it is not stated definitely that he was warned that there would be any danger to him in so doing. For aught that appears in most of the testimony, it was simply a warning that might be construed to mean that he might do some damage to the wires or machinery by getting against the same. But by one witness it is said that he was warned that the machinery and wires were dangerous.

He worked at the floor to the eastward of these machines during the forenoon of that day. Shortly after the noon hour, Mr. Guthrie came to the place and set about about hanging this door or hanging the weights to the door. One of the weights was inside of this room near the door that opened between this room and the waiting room. It appears that the most direct and convenient way to convey that weight to the door to which it was to be fastened, to the place where it must be hung, was the way pursued, to-wit, by carrying it toward the westward,

to the southward of these machines near to the wall, and then between the machines and the west wall to near the northwest corner of the room. In doing this, it was necessary to go under these wires carrying these powerful currents of electricity.

Frank Durst, at the request of Guthrie, took hold of one end of the weight which was lying on the floor, which appears to have been somewhat bulky, perhaps ten or twelve inches wide and twenty to twenty-four inches long, weighing from ninety to one hundred pounds. Mr. Guthrie took hold of the other end, and together they carried it, Mr. Durst proceeding backward, Mr. Guthrie following, Mr. Durst in a stooping position, and Mr. Guthrie also, as he passed under the wires, necessarily in a stooping position. Thus they both passed safely under those wires. About that time, Mr. Laver, to assist the parties, climbed upon a ladder set up against the west wall, the top of it resting over the top of the door, the bottom upon the floor, and stood in that position, giving some directions. The weight was laid down by these men who had been carrying it, and Mr. Durst appears to have arisen to a standing or upright position, and in doing so brought the back of his head or neck in contact with one of these wires, the one, we judge, which led from the northermost of these transformers over to the wall—the one near the northwest corner of the room. He was not noticed in the act of making this movement, but at the time he reached the upright position and struck the wires he made some exclamation which attracted the attention of those present, and they say that he at once straightened up and apparently became rigid and then fell forward to the floor, and they carried him out in an unconscious condition, and in about ten minutes he died.

The negligence charged against the company is, that it failed to keep the deceased away from this wire by guarding it or barricading it properly, and that it failed to insulate the wire so as to make it safe for one working in and about the building, and that it failed to give him specific warning of the danger of working in that place; in short, that it put him in an unsafe place to work without proper safeguards or proper warnings so that he might take care of himself.

We think there can be no question but what a *prima facie* case of negligence was made out against the company. As we understand it, it is hardly contended, on behalf of the defendant in error, that that is not true. We believe it was such a case of negligence as the court would be required to submit to the jury. But it is said that the case was withdrawn from the jury because it was apparent from the evidence introduced on behalf of the plaintiff that the deceased was himself guilty of such contributory negligence as would have defeated his right of recovery had he lived and sued on his own account, and such as would, therefore, defeat the right of recovery of those suing on account of his death.

This conclusion of the court of common pleas appears to have been based upon the evidence touching the warnings given to the deceased, as well as upon the other circumstances. The general rule upon the subject is, as we understand it, that where reasonable minds may differ in their views and conclusions as to whether a party is guilty of negligence—that is, as to whether, upon the facts, applying proper rules of law and properly construing the facts, he is guilty of negligence—the case should be submitted to a jury. It is only where negligence is so apparent, so clear, that reasonable minds could not differ about it, that a court is authorized to withdraw the case from the consideration of the jury. Was this a case that might be properly withdrawn from the consideration of the jury?

As bearing upon the conduct of the deceased, it should be borne in mind that his employer, and he, through his employer, were directed to work there in that place at a certain kind of work in the finishing up of that building and room. The hanging of the door was a part of the work. Doing that, it seems to us, must almost inevitably bring them into dangerous proximity to these wires. There was no effort made to shut off the current, and they appear to have been advised that they would be expected to work while the machines were in operation, while the current was flowing. Not only were they expected and directed to do that, but the cementing of the floor,

which had not yet been finished, upon the west side of these machines, in that little narrow space or alley between the machines and the west wall of the building, devolved upon them, and it appears that they were expected to do it without the current being cut off, and this work must necessarily have brought them into close and dangerous proximity to these wires, so that a misstep, any unconscious movement, might result in instant death to the person thus employed. This, to our minds, not only discloses culpable negligence upon the part of the company, but it reflects a light upon the conduct of the deceased; because unless we are otherwise convinced by most potent evidence, we would conclude that the deceased must have supposed that those wires were less dangerous than they in fact turned out to be; otherwise he would not be apt to do that kind of work in that kind of a place.

To merely say to him, if it was said to him, that the machines were dangerous and that the wires were dangerous, would not, in our judgment, be adequate warning of the extreme danger—not simply of some injury which might be of a trifling nature—but of the extreme danger of instant death resulting from coming into collision with those wires. If, after being warned of the danger of the wires, the deceased had voluntarily approached them and come in contact with them consciously or purposely, the case would be quite different; but it appears that he came in contact with this wire accidentally; that he had backed into this position; that his position was such that the wire was behind him and slightly above him. For aught that appears, he was at that moment unconscious of the presence of the wire in that place. For aught that appears he had never been apprised, either by having it pointed out to him or otherwise, of the presence of the wire in that particular position or place. And when he came to do the very natural thing of straightening up, after laying down the weight, he accidentally came in contact with the wire and was instantly killed.

We must regard this, then, as an accidental contact with the wire; and the question is presented whether, under all the circumstances, this accidental contact with the wire upon his

part makes it clear that he was guilty of contributory negligence precluding recovery. After a full consideration of the matter and much discussion we have arrived at a different conclusion from that which seems to have influenced the direction of the jury by the learned judge of the court below. We think evidence of contributory negligence is not so clear as to justify withdrawal of the case from the jury, and that the order in that respect was erroneous.

Another question is presented by this record. James Bundy, a fellow workman of the decedent, was produced as a witness on behalf of the plaintiff. He was at this place upon this day. It appears from his testimony, as well as from other testimony in the case, that Mr. Durst was not familiar with electrical apparatus and wires and currents, and was probably not aware of the ordinary dangers incident to such things. Bundy was asked:

"Q. I will ask you to state to the jury, if you know, what, if any, information Mr. Durst had received as to this being a safe place to work? A. He told me it was a safe place."

That answer, "He told me it was a safe place," was allowed to stand. There was no motion to take it from the jury, and no objection made. But we take it that the scope of the argument upon what follows would include it in what counsel for defendant in error conceive to be improper and inadmissible testimony in the case, and, as the matter is to go back for retrial, unless some higher court entertains a different opinion about it, we will express our views as to this as well as to what follows:

"Q. What did he say to you? [Objected to by Mr. Files on the part of the defendant; question withdrawn.] Q. I will ask you what, if anything, Mr. Durst said to you with reference to Mr. Darrow, the general manager of the road, having said it was a safe place to work? [Objected to by Mr. Files on the part of the defendant; objection sustained; to which ruling of the court Mr. Handy, upon the part of the plaintiff, then and there excepted. Statement of proof: The plaintiff expected to prove by the answer of the witness to this question that Mr. Durst stated to him on the morning of the day he was killed that Mr. Darrow, the general manager of the com-

pany, had stated that it was a safe place for the men to finish that work.]"

Now, one of the important questions here was as to the state of mind of the deceased upon this occasion, the information or lack of information that he possessed as to the dangers incident to his occupation at that time and place. Manifestly it would not be competent to introduce this evidence for the purpose of showing that this was a safe place, nor for the purpose of showing that Mr. Darrow had said that it was a safe place, but was it not admissible for the purpose of showing the state of mind of the deceased, and therefore reflecting light upon the question of whether he was guilty of negligence? For whether he was guilty of negligence or not must depend in a measure upon the knowledge or information that he possessed or that he supposed he possessed touching the safety or danger to him of the place and his employment upon that occasion.

Generally, evidence of this character would be denominated hearsay, and perhaps self-serving declarations, an objectionable kind of hearsay; but the rule as to self-serving declarations does not apply where it is quite apparent from all the circumstances that the declaration is not made for the purpose of being self-serving. As evidence to establish that it was a safe place, or that Mr. Darrow had said it was a safe place, it would clearly be hearsay, and, therefore, inadmissible; but as an expression or declaration indicating the state of mind or belief of the deceased at that time and place, we do not regard it as being opposed to any rule of law of which we have knowledge.

In the case of *Norman* v. *Will*, 5 W. L. J., 508, which was an action to recover back money paid upon notes by mistake, this is said in the syllabus (I should say this is an opinion by the Supreme Court of Ohio sitting in Gallia county at the March term, 1846, and April term, 1847, for they had the case before them on two occasions):

"Money paid under a mistake of fact can be recovered back. Such mistake consists in the present belief of the party paying the money that it has not previously been paid.

"The declaration of the party, made to one holding his note, between the times of the two payments, recognizing the note as a subsisting note, are admissible in favor of sueh party, to show that he believed the note was not paid."

The note had in fact been paid, but Norman not being fully advised of the fact by reason of the peculiar circumstances which are set forth in the case, went to an officer of the bank and talked with him in such a way as to disclose that he supposed that the note was not paid. He afterwards paid it. Still later he discovered that his payment of the note was a mistake, for it had been previously paid. Thereupon he undertook to recover back the money paid by mistake, and in support of his contention that he paid it by mistake, he undertook to prove what he himself had said as indicating that he was laboring under a misapprehension—that he was mistaken about the state of the case. The trial court, over the objection of the defendant, admitted the evidence, and this was assigned for error. The Supreme Court held that it was admissible, citing a number of authorities.

Another decision of our Supreme Court is more nearly in point perhaps. It is the case of *Railway* v. *Herrick,* 49 Ohio St., 25. It went up from Huron county and Judge Wildman, of this court, was one of the attorneys, and his contention respecting the matter which is important here was sustained by the Supreme Court. It was a case wherein Herrick undertook to recover from the railroad company for damages resulting to him by being struck by a train which came into a certain station on time, and which he had been informed and supposed was late; and his misinformation upon the subject was one of the things that explained his action in coming in contact with the train. It is said in the syllabus:

"Where, in such case, it became material to establish that the plaintiff was at the station to take passage on one of its trains, a declaration, made by him as he left his house on his way to the station, that he was going to another station on the same railway, is competent evidence to establish his character as a passenger."

That was one of the points in issue of course. It will be seen, I think, from the opinion, that the court goes even further than that and allows evidence of this character to establish not only his character as a passenger, but to establish his state of mind upon that occasion—precisely the thing which we deem it important to establish in the case at bar with respect to the deceased. (Reads from opinion beginning on page 27.)

The Supreme Court points out that it is very material that the court below should be advised of its views upon this evidence, because the case was to go back for a new trial, and in the meantime the plaintiff had died, so that it would be very important that this evidence of what the plaintiff himself had declared should be admitted upon the retrial of the case, which brings the case in some of its aspects very close to the case at bar.

In looking into this matter we consulted the last edition of Greenleaf on Evidence, under the head of "Hearsay Evidence," and we became very well satisfied therefrom that upon general principles this evidence should be admitted; and we found many cases there cited so like the case at bar as to be fairly in point. We do not find that edition in this city, so we can not now give precise reference thereto.

On account of the error of the court in giving this direction to the jury to return a verdict in favor of the defendant, and on account of the error of the court in excluding this evidence, the judgment of the court below will be reversed.

Bailey, Mallahan & Conway and *Handy & Wolf*, for plaintiff in error.

King & Tracy and *Files & Parson*, contra.

TELEPHONE MAINS IN STREET AN ADDITIONAL BURDEN.

Circuit Court of Franklin County.

WILLIAM T. BURNS v. COLUMBUS CITIZENS' TELEPHONE CO. AND DANIEL E. SULLIVAN v. COLUMBUS CITIZENS' TELEPHONE CO. *

Decided, 1907.

Telephones—Additional Burden Placed upon Street—By Placing Wires under Ground—Abutter Entitled to Compensation therefor—But not to an Injunction—New and Inconsistent Use of Street—Eminent Domain—Easements—Constitutional Law.

1. An abutting owner who consents or submits to the use of the street in front of his premises for telephone purposes by means of poles and wires is not, as a matter of law and an invasion of his private rights, entitled to an injunction restraining the company from placing its wires in a conduit in said street.
2. The putting of a street to a new and inconsistent use is not necessarily a taking of private property within the meaning of the Constitution. The new use must be such a use as palpably and injuriously affects the adjacent property, and to plead or prove merely the invasion of a private right does not stir the conscience of a court of equity.
3. The use of a street for telephone purposes, being a permanent occupancy of a part of a highway by a private corporation for private gain, and to that extent an exclusion of the public, is an additional servitude for which an abutting owner is entitled to compensation.

Appeal from the Common Pleas Court of Franklin County.

The petitions and answers in these cases are substantially the same, and the cases are submitted together as involving the same questions in law.

The petitioners aver the corporate existence of the defendants and their ownership of property abutting on North High street in the city of Columbus; that without the consent of the plaintiffs, and without having compensated or offered to compensate

* For opinion below see *Burns* v. *Telephone Co.*, 3 N. P.—N. S., 257.

them the defendant is about to construct a conduit about five feet in depth and three feet in width in front of their premises; that they have an easement in the soil of the street; that they notified the defendant not to construct the conduit; that said conduit if constructed will interfere with the access to and the enjoyment of their said premises, and will work a material and irreparable injury to the same, and will greatly impair and injure the street, entirely destroying the asphalt covering thereof; that the damages which would be caused by the threatened construction would be impossible of ascertainment in an action at law. They ask that the construction of the conduit may be enjoined.

The defendant, in the answers, denies that the plaintiffs have an easement in the soil of the street in front of their premises; that the construction of the conduit will interfere with the plaintiffs' access to and enjoyment of their premises, or will work any material and irreparable injury to the said premises or the street and its covering in front of the same.

The defendant then avers that High street where said conduit is being constructed, is about one hundred feet wide, and is in a very thickly settled portion of the city, largely devoted to business purposes; that the ditch for the conduit will be twenty-two feet from the curb in front of the plaintiffs' premises, and that the sidewalk in front of the same is more than fifteen feet wide; that it is constructing said conduit in compliance with the terms of the agreement entered into with the city defining the mode of use of said street for telephone purposes; that it is under bond to restore the street in as good condition as it was before the construction of the conduit, and that the interruption of the use of the street will be but temporary and the injury resulting therefrom only such as is common to the public; that at this time the wires of the defendant in the vicinity of the plaintiffs' property are strung on poles above the surface of the ground (it was conceded in argument that the poles and wires are in front of said property on the same side of the street), by the surroundings made dangerous to the public, and that the placing of the wires in the underground conduit will be a

benefit to the adjoining property owners, as well as to the public.

A general demurrer was interposed to the answer in each case in the court of common pleas, and sustained by that court. A temporary injunction having been allowed, it was made perpetual, and the injunction is still in force. The cases are submitted in this court for final determination on the demurrer to the answers.

WILSON, J.; SULLIVAN, J., and DUSTIN, J., concur.

Two questions are raised upon the pleadings:

First. Is an abutting property owner entitled to an injunction against a telephone company engaged in putting its wires in a conduit in a street of a city, as for an invasion of his private rights?

Second. Do the averments of the petition which are not denied by the answer, and the averments of the answer which are admitted by the demurrer, entitle the plaintiff to relief in a court of equity?

Upon the question as to whether the use of a street for telephone purposes is an additional servitude for which an abutting property owner is entitled to compensation, the authorities are not agreed.

The authorities holding that it is not, are supported by the argument that it is simply a new method of intercommunication, and, therefore, not a preversion of the original use. *Price* v. *Drew*, 136 Mass., 75; *Coburn* v. *Telephone Co.*, 156 Ind., 90; *Julia Bldg. Assn.* v. *Telephone Co.*, 88 Mo., 258.

The contrary doctrine is sustained for the reason that it is a permanent occupancy of a part of the highway, not a moving or passing use, by a private corporation for private gain, and to that extent an exclusion of the public. *Krueger* v. *Telephone Co.*, 106 Wis., 96 (81 N. W. Rep., 1041); *Smith* v. *Printing & Tel. Co.*, 2 C. C., 259; *Daily* v. *State*, 51 Ohio St., 348.

This view is supported, we think, by the weight of authority as well as by the better reason.

In support of the claim that it is an extension, merely of the dedicatory use, it is not sufficient to say it facilitates intercommunication. The steam railroad facilitates travel, yet it is admittedly a new use. The telegraph is simply a new method of communication, yet in *Daily* v. *State, supra,* the Supreme Court holds it an additional burden. It is not the purpose, alone, but the character and construction of the use as well, that determine whether or not it is a perversion. But a new and inconsistent use is not necessarily a taking of property, within the meaning of the Constitution. It must be such a use as palpably and injuriously affects the adjacent property; and in order to invoke the power of injunction the injury should be made to appear.

To plead or prove merely the invasion of a private right does not stir the conscience of the court. *Domschke* v. *Railway,* 148 N. Y., 337; *Castle* v. *Telephone Co.,* 30 Misc., N. Y., 38 (61 N. Y. Supp., 743); *Irwin* v. *Telephone Co.,* 37 La. Ann., 63.

The answer wholly negatives any material injuries. Moreover, it is averred in the answer that the defendant is using the street in front of the plaintiff's property for telephone purposes, by means of poles and wires, and that this use, as regards any rights the plaintiff may have, is more objectionable in form than would be the conduit. It is not sought to prevent the present use by mandatory injunction or otherwise, but rather to prevent the defendant from changing it into what is averred and would appear to be a less obstructive form. If the plaintiffs are consenting or submitting to the present use, as against the right to construct a conduit, they would seem to have no standing in equity and should be remitted to their remedies, if any, at law.

The demurrers to the answer respectively, will be overruled, and, the case having been submitted on the pleadings for final determination, the injunctions heretofore granted will be dissolved and the petitions dismissed; the defendant to recover its costs.

Barton Griffith, for plaintiff.

F. A. Davis, contra.

PAROL TESTIMONY AS TO CONSIDERATION EXPRESSED IN DEED.

Circuit Court of Mahoning County.

LUCIUS M. SHEHY v. ELIZABETH CUNNINGHAM ET AL.

Decided, October Term, 1907.

Consideration—Where Expressed in a Deed as Valuable—May be Shown by Parol to have been for Love and Affection, When—Distribution—Receipt for Advancement—Section 4172.

In an action for the distribution of a decedent's estate coming by inheritance, parol evidence is admissible to show that a deed which, upon its face expresses a valuable consideration, was in fact a gift for natural love and affection as an advancement. *Cowden* v. *Cowden et al*, 7 C. C.—N. S., 277, overruled.

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

Error to Mahoning Common Pleas Court.

The action in the common pleas court was by Lucius M. Shuey to recover from his three sisters the sum of five thousand dollars, it being the one-fourth part of twenty thousand dollars received by them from the sale of real estate inherited by him and his three sisters from their father.

The sisters admitted that Lucius was entitled to the one-fourth part of the real estate, but claimed that there should be deducted from the same the value of a certain parcel of real estate given by the father to Lucius as an advancement.

By the evidence it appears that on April 15th, 1890, some years before his death, the father conveyed to Lucius ninety-nine acres of land by deed of general warranty for the consideration expressed in the deed of forty-seven hundred dollars, and the son went into possession of the property. At the time of the execution of the deed the father took from the son a receipt setting forth that the conveyance was made on account of Lucius' interest in his father's estate. The case was tried to the court, a jury being waived, and the court found that the conveyance of the ninety-nine acres of land was an advancement, and gave judgment for the plaintiff for the sum of $726.65, the

difference, with interest, between the $5,000 and the value of the land so conveyed.

While there is some conflict in the evidence yet we are satisfied that the court was fully justified in finding that the conveyance from the father to the son was an advancement under the evidence, if the same was admissable.

The principal question, however, made below and also before us is, that the parol evidence admitted for the purpose of showing that, while the deed upon its face stated that the consideration was a valuable one, yet in fact it was a gift as an advancement, was improperly admitted.

Waiving the question as to whether or not the receipt should be read in connection with the deed and as part of the same, we think the court below was right in admitting the parol evidence.

No question of title was involved as to the ninety-nine acres; it was simply as to whether or not Lucius should account for the $4,700. If the manner of descent of the ninety-nine acres had been at issue the consideration could not be changed by parol evidence from a valuable one as shown in the deed to a good one for natural love and affection. *Brown* v. *Whaley et al*, 58 O. S., 654; *Groves et al* v. *Groves*, 65 O. S., 442.

Indeed, in this case the question of consideration is not involved at all only in so far as it shows the value of the ninety-nine acres in the division and distribution of the estate. Section 4172, Revised Statutes.

But it is said that the case of *Samuel A. Cowden* v. *Hugh T. Cowden et al*, 7 C. C.—N. S., 277, decided by this court at the October term, 1905, is contrary to the holding now made. So it is. That case was properly decided under the evidence, but, in so far as the law laid down in that case upon this question, the court was wrong. The law as stated in the syllabus was correct but was misapplied to the facts of the case. We will not be controlled by that decision and the same is overruled.

Judgment affirmed.

Arrel, Wilson & Harrington, for plaintiff in error.

Moore & Craver and *S. M. Thompson*, contra.

ATTACHMENT FOR NECESSARIES.

Circuit Court of Cuyahoga County.

JOSEPH W. RANCOURT v. ARTHUR W. HAHN.

Decided, December 9, 1907.

Grounds for Attachment—Reckless Statements in Affidavits for Purpose of Obtaining Attachment—Seizure of Household Goods Loaded on Car for Transit to Canada—Exemptions in Lieu of Homestead—Residence—Domicile—Attachment for Necessaries—Failure to Specify Section under Which Selection is Made—Jurisdiction of Justice to Discharge Attachment—Sections 6493 and 5441.

1. Where the debt for which suit is brought is for necessaries or for labor, the plaintiff may have an attachment for that cause alone, without reference to the existence of the other grounds for attachment provided in Section 6493.
2. One who is the head of a family continues to be a resident of the state within the meaning of the attachment laws, and is entitled to exemptions in lieu of homestead, so long as he and his family are still here, and without regard to the fact that he is preparing to remove from the state with his family and is on the eve of so doing.
3. Where a defendant in an attachment suit states by motion that he has selected and demanded the property attached in lieu of homestead, and neither he nor his wife is the owner of a homestead, the fact he has not specified under what clause or section of the statutes he made his selection will not defeat his claim, but he will be presumed to have made it under a section which entitled him to the exemption, and it will be available to him under Section 5441.
4. In such a case the motion, if supported, discharges the attached property, whether it is in the form of a discharge of the attachment or not, and the justice has jurisdiction to entertain and dispose of the contention.

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

Error to the court of common pleas.

Hahn brought suit against Rancourt before a justice of the peace in Cuyahoga county, Ohio, upon an account, and at the time of the beginning the action filed an affidavit for attachment against the defendant's property, setting up various grounds

for the attachment, among which is the statement that the claim on which judgment is sought is for necessaries contracted for since April 26th, 1898, and that said defendant is a non-resident of said county of Cuyahoga.

All of the other grounds which under the statute authorize the issuing of an order of attachment by a justice of the peace are stated in the affidavit, except the one ground that the defendant fraudulently and criminally contracted and incurred the obligation for which suit is about to be brought.

There is no claim at all that any one of these statements in the affidavit is true, except the one as to the necessaries, and the one as to non-residents. Attention is called to this, because of the apparent recklessness with which the plaintiff below resorted to a proceeding in attachment, and it is a practice which should be severely criticised, that men will allow themselves to make an affidavit for the purpose of obtaining an attachment, which contains statements which are not true, and which the plaintiff has no reason for supposing to be true. One of the averments in the affidavit is: "That the defendant is not the head or support of a family." Another is: "That the defendant has left the county of his residence to avoid the service of summons; and that said defendant so conceals himself that a summons can not be served upon him." Another is: "That the defendant has assigned, and removed and disposed of and is about to assign, remove and dispose of his property, or a part thereof, with intent to defraud his creditors."

There was no reason, so far as appears for the plaintiff who made this affidavit, to believe that the defendant was about to convert any property into money for the purpose of defrauding his creditors, and the very fact that the suit was brought for necessaries, furnished to the family of the defendant, negatives the idea that the plaintiff supposed that the defendant was not the head or support of a family. It is said in reference to this, that a printed form of affidavit was used, and that the party preparing it neglected to erase such parts of it as the plaintiff did not rely upon. If this be so, it shows, to use the mildest term, recklessness on the part of the person making the affi-

davit, and neglect on the part of the officer before whom it was made, in not distinctly calling the attention of the party making it to the facts he was making oath to.

Perhaps it may as well be said here that equal recklessness is manifested in the affidavit filed by the defendant in support of his motion to discharge the attachment, for he made oath denying each and every and all of the allegations in the affidavit of the plaintiff; whereas he states in his evidence that the suit was brought for necessaries. It is a most unhappy thing that men will thus make oath to so many things in affidavits which, if they carefully considered them, they would know were not true.

However, the attachment was issued, the property taken under the attachment consisting of household goods. These goods were loaded on a car of the Pennsylvania Railroad Company for transit to Canada. The defendant below moved the court to discharge the attachment on the ground "that he is a married man residing in the state of Ohio, and living with his wife and four children; that neither he nor his wife is the owner of a homestead; that the property taken by virtue of the attachment issued in these proceedings is his household goods, consisting of bed and bedding, furniture, chairs, etc., necessary for himself and family to keep house with; that the same are exempt under the laws of the state of Ohio; that said household goods will not exceed four hundred dollars ($400) in value; that he demands and selects the same as exempt under the laws of the state of Ohio."

This motion was overruled by the justice. Appeal was taken to the court of common pleas on the overruling of the motion, and upon a hearing had in that court the motion was there overruled, and it is for the purpose of reversing this action of the court of common pleas that the present proceedings are prosecuted here. The bill of exceptions filed in the case, which contains all of the evidence, shows that the defendant below was at the time of the commencement of the action indebted to the plaintiff below in the sum of $22.98, for groceries furnished as necessaries to his family. That he had for a long time resided

in Cleveland, Cuyahoga county, Ohio; that he was living here with his said wife and children, but was about to remove his family to Canada, where he had a particular job of work to do which might last for two years or more, and upon the completion of which it was his intention to return to Cleveland. It shows further, that neither the defendant nor his wife is the owner of any homestead, and the question is thus raised: First, was he at the time the attachment was issued a non-resident of Cuyahoga county, so as to justify the issuing of attachment? And second, was he a resident of the state of Ohio in such sense that he was entitled to exemptions in lieu of a homestead; and if he was so entitled, did he make selection of and demand his goods attached in such wise as to entitle him to have them exempt; and still further, if all the goods seized in the attachment were exempt, was a motion to discharge the attachment the proper means of obtaining the release of the exempted goods?

We consider first the question raised as to whether, even if the defendant was a resident of Cuyahoga county, the plaintiff was entitled to an attachment; and we have reached the conclusion, after a careful analysis of Section 6489, Revised Statutes of Ohio, that the fact that the debt for which suit was brought was for necessaries, authorizes the issuing of the attachment, without reference to whether any one of the other causes provided for in the statute existed. The language of the statute is somewhat prolix, but we hold that where the suit is brought to recover for work or labor or for necessaries the plaintiff may have an attachment for such cause alone.

We consider next the question of whether the defendant was entitled to exemptions, and this depends first upon the question of whether he was a resident of Ohio, for it is shown without contradiction that he was the head of a family, a husband, living with his wife and children. We reach the conclusion that he was, at the time of the levying of this attachment, a resident of Ohio, and therefore entitled to exemptions, as provided for residents of this state who are heads of families. We have already called attention to the facts upon which this is based.

Whatever other definition may be given, it is certain that he is a resident of the state, under our attachment laws, who is actually in the state, and has his home here, and not elsewhere. And when one has acquired a residence here he can not lose it and become a non-resident by simply determining to move elsewhere, without actual removal, while he and his family are still here, though he is preparing to remove elsewhere with his family; until such actual removal he has not become a non-resident of the state.

In Jacobs on Domicile, at Section 73, it is said that the word "domicile" is not synonymous with "residence," and that the word "residence" commonly imports something less than "domicile." This author says that no certain and accurate definition of the word "resident" or "residence" as used in the statutes of the several states seems to have been found, but nowhere does he intimate that one's residence can be changed, after having been once acquired, without actual removal of his person.

In all the cases examined we find none where it has been held that after one has acquired a residence, in a particular state or county, he can cease to be a resident of such state or county, until he has actually left the place of which he had been a resident.

In *Wailkamp* v. *Loher,* 53 N. Y. Sup. Ct. Repts., 79, the decision tends to strengthen the positions taken here, and the authorities cited and quoted from the opinion in *Thompson* v. *Ogden,* 3 C. C.—N. S., 51, as well as the case itself, tend to support the same view.

Drake an Attachment, Section 58 and 59, says:

Section 58. "In determining whether a debtor is a resident of a particular state, the question as to his domicile is not necessarily always involved; for he may have a residence which is not in law his domicile. Domicile includes residence, with an intention to remain; while no length of residence, without the intention of remaining, constitutes domicile."

Section 59. "A *resident* and an *inhabitant* mean the same thing. A person resident is defined to be one 'dwelling or having his abode in any place'; an inhabitant, 'one that resides in

a place.' These terms will therefore be used synonymously, as they may occur in the cases cited."

The question here so far as residence is concerned is one applicable to the matter of exemption, because we have already held under the affidavit charging that the debt sued upon was for necessaries, the attachment properly issued. When we consider the use of the word "*resident*" in connection with exemption laws we must keep in mind that exemption laws are always to be liberally construed; this is the universal holding, and, with that in mind, attention is called to Waples Homestead & Exemption Laws, page 774, under the heading "Resident."

Among other things, this is said:

"But an intention to leave the state; suspension of business, and the taking of machinery (claimed as exempt), to a railroad station for shipment to a place beyond the state, do not make the debtor a non-resident or affect his exemption privileges." See *Wood* v. *Bresnahan*, 63 Mich., 614; *Birdsong* v. *Tuttle*, 52 Ark., 91.

It follows that if the defendant below made the proper selection and demand for his exemptions, he was entitled to them. It is true that the goods claimed by him as exempt are not shown to be such as are specifically exempted by the statute, but, under Section 5441, Revised Statutes of Ohio, neither the defendant nor his wife being the owner of a homestead; if he was, as we hold, a resident of Ohio, he was entitled to property of greater value than this property here attached is shown to be, in lieu of a homestead. In his motion he stated that he selected and demanded the property attached, exempted under the laws of the state of Ohio. It is true that he did not specify under what clause or section of the statutes he made his selection, but it is but fair to say that he must be presumed to have made it under such section of the statutes as entitled him to the exemption, and so that the exemption provided for in Section 5441, Revised Statutes, was available to him under the selection which he made. As to whether the making the claim should have been before the justice of the peace instead of to the officer who held the property, we regard that as settled by the case of *Kirk* v.

Stevenson, 59 Ohio State, 556, where the court say, in reference to a similar state of facts:

"Nor was the demand made of the wrong person; the justice had jurisdiction to entertain and dispose of the contention."

It is said, however, on the part of the defendant in error, that even if the facts and the law would exempt all the property taken in the attachment, still a motion to discharge the attachment was not the proper means of obtaining the release of the property. This contention, we think, is disposed of by *Kirk* v. *Stevenson, supra,* and that the court should upon motion have discharged the property whether it was in form a discharge of the attachment or not.

In Swan's Treatise, 18th Edition, at page 444, it is clearly implied that the justice, upon a motion to discharge the attachment, should in a proper case release the property attached, and forms are given for a discharge of all of the property attached and for a discharge as to some part of the property attached. We find, then, that the court below should have discharged from this attachment on this motion all of the property attached, and for error in overruling the motion and refusing so to discharge, the judgment of the court below is reversed and the case remanded.

Hart, Canfield & Croke, for plaintiff in error.

O. W. Broadwell, for defendant in error.

ASSESSMENT OF DAMAGES FOR NUISANCE JOINTLY CREATED.

Circuit Court of Franklin County.

CITY OF COLUMBUS v. AMOS T. ROHR, EXECUTOR.

Decided, October 10, 1907.

Nuisance—And Damages for the Creation Thereof—Where Due to the Wrong-doing of Various Parties—Joint Liability in an Action to Abate—But not in an Action at Law for Damages—Separation of Damages—Charge of Court—Error—Pollution of Stream—Noxious Vapors.

The liability of different persons and agencies contributing by independent action to the production of a nuisance, while joint in a suit in equity to abate the nuisance, is not joint in an action at law for damages; and where a jury is impanneled to assess damages against one only of the independent wrong-doers, they should be instructed to find, with a liberal hand if necessary but as accurately as possible, the amount of damage resulting from the acts of that particular wrong-doer.

WILSON, J.; SULLIVAN, J., and DUSTIN, J., concur.

This action was prosecuted in the court below against the plaintiff in error to recover damages for creating and maintaining a nuisance. It appeared in the evidence that the county infirmary and the garbage plant contributed to the injury by adding to the pollution of the stream which caused the damages to the plaintiff's property. The court charged the jury that the city was not liable for the damages, if any, caused by the garbage plant or the county infirmary, but that if they could not separate the injury done by the city from that done by others, a judgment for the entire damage should be rendered against the city.

The plaintiff below recovered a judgment, and it is here claimed that the judgment should be reversed for error in the charge.

It will be noted the immediate cause of the injury was polluted water and noxious vapors, which could not be sep-

arated, and distributed between the offending parties but the ground of action was negligently discharging sewage into the stream so as to cause the pollution of the water and air in the vicinity of the plaintiff's premises. The deposit of the sewage was the tort, while the pollution of air and water was only the consequence. There was no concert between the offending parties. Their acts were separate and independent.

In 21 Am. & Eng. Ency., page 719, the general rule is said to be:

"All persons co-operating or participating in the creation or maintenance of a nuisance are liable. * * * But if one acts independently and not in concert with others, he is liable for the damages which result from his own act only. And the fact that it is difficult to measure accurately the damage which was caused by the wrongful act of each contributor to the aggregate result does not affect the rule."

The text is supported by numerous citations from which may be noted: *Little Schuylkill Nav. Co.* v. *Richards, Admr.*, 57 Pa. St., 142; *Chapman* v. *Palmer*, 77 N. Y., 51; *Sellick* v. *Hall*, 47 Conn., 260; *Lull* v. *The Fox & Wis. Imp. Co.*, 19 Wis., 112; *Slogg* v. *Dilworth*, 38 Minn., 179; *Harley* v. *Menill Brick Co.*, 85 Ia., 73; *Lockwood Co.*, v. *Lawrence*, 77 Me., 297; *People* v. *Gold Rim D. & M. Co.*, 66 Cal., 138.

In *Sellick* v. *Hall, supra,* an analogous case, the court in laying down a rule to guide the jury, on page 274, said:

"It may be very difficult for a jury to determine just how much damage the defendant is liable for, and how much should be left for the city to answer for; but this is no more difficult of ascertainment than many questions which juries are called upon to decide. They must use their best judgment and make their result, if not an absolutely accurate one, an approximation to accuracy. And this is the best that human tribunals can do in many cases. If the plaintiff is entitled to damages, and the defendant is liable for them, the one is not to be denied all damages, nor the other loaded with damages for which he is not legally liable, simply because the exact ascertainment of the proper amount is a matter of practical difficulty."

In the case of *The Little Schuylkill Navigation Co.* v. *Richards, Administrator, supra,* which was a case of injury to a

water power by deposits from several independent collieries, the court on page 147 says:

"True, it may be difficult to determine how much dirt came from each colliery, but the relative proportions thrown in by each may form some guide, and a jury in a case of such difficulty caused by the party himself would measure the injury of each with a liberal hand. But the difficulty of separating the injury of each from the others would be no reason that one man should be held to be liable for the torts of others without concert."

In *Partenheimer* v. *Van Order, supra,* where cattle of different owners united in committing a trespass, the rule laid down was that where the owner of the premises could not prove the injury of each cow, the jury would be justified in concluding that each did an equal injury.

In *Lull* v. *The Fox & Wis. Imp. Co., supra,* it is said:

"The argument that there is difficulty in ascertaining the damage by the erection of each dam, *or that it is impossible,* is certainly no reason why one defendant should pay the damages caused by another with whom he is in no way connected."

The authorities are, generally, that persons contributing to the creation of a nuisance, though acting independently, are jointly liable in equity in a suit to abate the nuisance, but they are not jointly, or jointly and severally, liable in an action at law for damages.

In the case of *Boyd* v. *Watt,* 27 Ohio St., 259, it was held in an action to recover damages for habitual intoxication caused by the illegal sales of intoxicating liquors that—

"Where the damages resulting arise from incapacity for business and loss of estate, caused by such habitual intoxication, and it becomes impossible to separate the damages caused by others from those caused by the defendant, he is liable for all such damages, if the natural and probable consequences of his illegal acts were to cause such injury."

Presumably the trial court proceeded upon the authority of that case, which is said by Johnson, J., who wrote the opinion, to present the precise question involved in *Stone*

v. *Dickinson*, 5 Aleen, 29, distinguished in *Little Schuylkill Navigation Company* v. *Richards, Administrator, supra,* from a case like the one at bar. The parties were held therein to be jointly liable because they joined in a single act incapable of division or separation, but authorized by all.

In this case the trial court did not proceed upon the theory that the wrong-doers were jointly liable. On the contrary, the jury were instructed that the defendant was not liable for the injury done by the others. We are constrained both by reason and authority to hold that the case at bar is not of such character as that the court was justified in following the rule in *Boyd* v. *Watt*. On the contrary, the jury should have been instructed to separate the damage done by the city from that done by others, with a liberal hand it may be, but with the nearest approach to accuracy under the circumstances. The amount of sewage discharged into the stream by each, and the degree of polluting properties in each, would furnish an approximate guide to a reasonable division of the damages.

The judgment is reversed for error in the charge, and the cause is remanded for a new trial.

Geo. S. Marshall, for plaintiff in error.

Geo. D. Jones, for defendant in error.

WIDOW MADE QUASI TRUSTEE FOR CHILDREN.

Circuit Court of Cuyahoga County.

FLORENCE MAUD HOBSON v. S. LOUISE LOWER ET AL.

Decided, 1907.

Wills—Life Estate in Widow—Residue to Children—Improvident Expenditures by Widow—May be Required to Answer as Quasi Trustee.

A widow to whom property was devised for life, with power of disposition "for her use and benefit," the residue at her death to be divided among the testator's children, is a *quasi trustee* for said children, and must answer to their charge that she has improvi-

dently and wastefully used sums in excess of the reasonable expense of her support, moved out of the state and is dissipating the estate.

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

Error to the Court of Common Pleas.

The will under consideration in this case gives all of the testator's property to his widow in the following language:

"for the term of her natural life, and with full power to hold and dispose of part or all of the same for her use and benefit as she may see fit.

"Upon the death of my said wife, if there should be any residue of said estate, it is my will that such residue shall be divived equally among my four children."

Following the decision in the case of *Johnson* v. *Johnson,* 51 Ohio St., 446, we hold that the widow is a *quasi trustee* for the remaindermen, to-wit, the testator's children.

The petition alleging that the trustee has improvidently and wastefully used considerable sums in excess of the fair and reasonable expense of supporting and maintaining herself, has moved out of the state, and that the plaintiff, one of the remaindermen, fears that the estate will all be dissipated by the widow during her life time, we think she is called upon to answer the petition, and therefore overrule her demurrer to it.

Horr & Lewenthal, for plaintiff in error.

A. B. Thompson, for defendant in error.

ASSESSMENT FOR COUNTY DITCH PARTLY WITHIN VILLAGE.

Circuit Court of Wood County.

BENJAMIN F. MCCASLIN v. VILLAGE OF PERRYSBURG. *

Decided, April 27, 1907.

Ditches and Drains—Improvements of, where the Ditch is Partly Within a Village—Individual Tax-payer in Unincorporated Village having no Solicitor—Can not Sue to Enjoin Misapplication of County Funds—Constitutional Law—Notice to Property Owner—Appeal—Sections 1778, 4483 and 4484.

1. An individual tax-payer of an unincorporated village having no solicitor can not, under Revised Statutes 1778, which provides for suit by a tax-payer on behalf of municipality, bring action in his own name solely on behalf of the municipality and against the county commissioners to restrain them from proceeding under provisions for the improvement of a county ditch lying partly within the limits of a municipality.
2. Sections 4483 and 4484, providing procedure for the petitioning by a municipality, through its mayor, for the improvement of a county ditch lying partly within the municipal limits, is not unconstitutional for failure to provide for notice to property owners, or for appeal, or for a jury, inasmuch as these sections are to be taken as part of the entire chapter applying to ditches wherein provisions are made for such matters.

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

Appeal from the Common Pleas Court of Wood County.

The case of McCaslin, on behalf of the village of Perrysburg against the village of Perrysburg, Wood county, Ohio, and others is an action on appeal from the court of common pleas, and it involves the power of a citizen and tax-payer in an incorporated village to restrain proceedings by the officials of a county acting under the provisions of Rev. Stat., 4483, 4484, in the improving of a county ditch, a part of which lies within the territory of an incorporated village.

Proceedings had been taken under Rev. Stat., 4483, and the mayor of the village had presented a petition signed by him

* Affirming *McCaslin* v. *Perrysburg*, 6 N. P.—N. S , 48.

officially and with bond to the county commissioners for the establishment of the improvement, and the petition recites in detail the action being taken thereunder by the county commissioners. A demurrer is filed by the county commissioners to this petition, upon the ground that the petition does not state facts constituting a cause of action.

The plaintiff seems to act under Rev. Stat., 1778 (1536-668), which section provides that upon the failure of the solicitor of any municipality to take certain action when requested in the way of instituting suit for the protection of the municipality, a tax-payer may act and may institute the suit, provided that no such suit or proceeding shall be entertained by any court until such request shall have been first made in writing, and provided further that no such suit or proceeding shall be entertained by any court until such tax-payer upon motion of the solicitor or corporation counsel shall have given security for the costs of the proceeding.

In this case it is not alleged that any request was made of the solicitor, but instead thereof it is alleged that the village has no solicitor. The petition does not ask to enjoin the municipality or any of its officers from doing any act; the petition is directed solely at the county authorities—the county commissioners and other officers of the county; and it seeks to prevent the carrying out of the proposed plan for the improvement, because, as claimed, a general system of sewage has already been established by the municipal authorities and the attempt made by the county commissioners is useless, will entail great expenses upon the tax-payers and the municipality without any corresponding benefit. The plaintiff sues, however, not in his own behalf as a tax-payer personally, but in behalf of the municipality, and upon the assumed right to do so because of there being no solicitor to take action.

Revised Statutes 4483, 4484 provide the procedure for the petitioning by a municipality through its mayor for the establishment of such an improvement, and the action of the county commissioners in accordance with such petition. It is insisted by the petitioner here that these two sections last cited

are unconstitutional and invalid in that they provide no means for the protection of property owners by notifying them of the proceedings; no time and place for presentation of claims for damages; no provision for appeal or petition in error, and no provision for jury, and for other reasons stated. The court of common pleas, to whom this same demurrer and petition were presented for consideration, sustained the demurrer and in the consideration thereof rendered an opinion which we have read with interest, and we find that it so clearly states the position at which we had already arrived in considering the oral and written argument and in the examination of the authorities cited, that we do not care to enter into any elaborate discussion of the questions involved. We think that the trial judge in the court below in passing upon the demurrer has stated very ably and correctly the principles which govern the issues presented in this demurrer. The question is a very serious one, at least as to whether the plaintiff has any right at all to sue in behalf of an incorporated village, notwithstanding the fact that there is no solicitor whose duty it would be first so to do. We think that in any event the power of the citizen to act in behalf of the corporation can rise no higher than what would be the power of the solicitor, if there were one; and the petition as presented to us we think is not such a petition as is contemplated by the section to which I have referred authorizing a citizen to act in lieu of the solicitor, or by the other section authorizing the solicitor to sue for the village. We think also, as held by the court of common pleas, that Rev. Stat. 4483 and 4484 are not designed to be the complete procedure of the county commissioners, but that they are to be taken as a part of the entire Chap. 1 of Title 6 applying to county ditches, and for this reason that sufficient powers are given to the county commissioners to protect, under the forms and provisions of other sections of the chapter, the rights of citizens. We think that the statute is not invalid for the reasons urged by counsel for plaintiff or any other reasons that occur to us.

In the case of *Pleasant Hill* v. *Commissioners*, 71 Ohio St., 133, the Supreme Court having these sections before it, recog-

nized, by implication at least, their validity, so far as any constitutional questions are concerned; and while this might not be a conclusive determination of the question of constitutionality, still the fact that the matter is so treated by the Supreme Court is not to be overlooked.

It may be remarked before completing our consideration of the case, that some analogy to the procedure adopted here under Rev. Stat. 4483 is to be found in Rev. Stat. 4450, wherein provision is made for an application for a ditch improvement to the county commissioners, to be signed not only by the individual owners of the lots and lands which will be drained or benefited thereby, but also by the street commissioner or supervisor of the road district in which the same is to be constructed, or the trustees of any original surveyed township owning land granted by Congress for the support of common schools; or the infirmary directors of any county. Each of these bodies is treated as a landowner, or a person interested in the construction of a ditch, upon precisely the same basis as private owners. So a municipality, an incorporated village or a city, is treated as if it were an individual owner. It may have no such especial interest in the construction of a sewer for the drainage of a street as would induce it to adopt a particular sewer or a particular ditch, whereas the contemplated county ditch improvement passing into or through a city or village might be essential to the welfare, the convenience or health of the people living along the line of the proposed improvement. I see no reason why one person, natural or artificial, who may be liable to pay a portion of the cost of such improvement, should be permitted to maintain an action to enjoin the construction of the entire improvement upon the ground stated in this petition. As already stated, this petitioner, although he says he is a heavy tax-payer in the municipality, is suing only on behalf of the municipality as a corporate entity.

Our judgment is that the demurrer to the petition should be sustained for the reason that the petition does not state facts constituting a cause of action.

F. E. Bowers, for plaintiff.

J. E. Ladd, for defendant.

INJURY TO EMPLOYE WHILE EATING HIS DINNER ON THE PREMISES.

Circuit Court of Belmont County.

CARNEGIE STEEL COMPANY v. PATRICK ROWAN.

Decided, May Term, 1907.

Master and Servant—Negligence—Fellow-Servant—Privilege to Employes—Resulting Advantage to Master—Continuance of his Liability for Safety of his Men—Distinction between Licensees and Those Acting by Invitation.

A corporation, permitting its servants for a number of years habitually to use a building on the premises as a place to deposit their dinner pails while at work and in which to eat their dinner, owes such servants the duty not to injure them by its negligence while they are using the building in the customary manner; and if a servant is injured while eating his dinner there, through the want of ordinary care on the part of the corporation, it is liable, although the building is used for other purposes, and although the servant would not have been injured had he remained at his usual place of work.

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

Error to Belmont Common Pleas Court.

Plaintiff in error was engaged in the manufacture of steel and in connection with its works had several blast furnaces. In a blast furnace there are a number of water blocks inserted for the purpose of keeping the walls of the furnace as cool as possible. In this furnace there were at least two hundred of these blocks. The blocks are made of a certain character of bronze metal adapted to the purpose, and are about twenty-six inches long, oblong in shape corresponding with the outside of the wall, extending through the wall twenty-seven inches, tapering to what is called the nose, and are five or six inches deep. These blocks are at the lower part of the furnace where the heat is most intense, and run around the furnace in rows, one above the other. They are connected together so that the water circulates freely through all of them from a tank located considerably higher than the blocks and finally emptying into a well in the ground.

Defendant in error, Rowan, was employed by the company to mix clay which was used about the different furnaces; and his box at which he worked was from seventy-five to a hundred feet from the furnace when the accident occurred. He had nothing to do with the working or operation of the furnace.

For two or three days before the accident it had been observed by the superintendent and men connected with the operation of the furnace that one of the boxes had become impaired and was leaking, but not to such extent as to require immediate removal.

A water block is ordinarily removed during a cast, when the blast is off, and the pressure is reduced to the minimum.

The evening before the accident the superintendent gave notice to his men in charge of the furnace to prepare the impaired block for removal, and the men did so during the night by removing the casing all around the block, which is made of cement about one-half inch thick, to a depth of ten inches into the wall. Casts are made at three, six, nine and twelve o'clock in the first half of the day and at the same time in the last half. The superintendent came at eight o'clock in the morning and it was his intention to remove the block at the nine o'clock cast but he changed the time to twelve for the reason, as claimed, that some difficulty had arisen in the water appliance and that the water was not circulating as freely through the blocks as it should do. After the nine o'clock cast was made the supply of water became more impaired and at twelve o'clock the blocks became considerably overheated. After the cast was made at twelve o'clock, which lasted some forty-five minutes, the blast was again put on, perhaps inadvertently, as it was evidently the intention of the superintendent to remove the block at the twelve o'clock cast.

Soon after the blast was put on, a very short time, it was observed that this block had become very much overheated, indeed red hot, and before the engine could be stopped and the blast taken off the block was forced from its place and the hot metal was forced through the aperture, striking a small building, which was about twenty feet away, in which Rowan and others were finishing their dinner, whereby all of them were badly

burned, including a man by the name of Lowe; Rowan's injuries being very serious. This building in which Rowan had just finished eating his dinner was about sixty feet from the box at which he worked and the box was not at all in line with the escaping metal, and if he had been at his box or close to it he would not have been injured. The building was a small frame structure twenty-eight by twelve feet and was used for different purposes, primarily, however, for storing clay, keeping it warm and pliable, so that it would be ready for use at any time. A stove was in the center of the building and the clay was in one end. At the other end and around the sides up to the stove benches had been placed by the men who used them while eating their dinners; also nails had been driven in the walls on which the men hung their clothes while at work; also their dinner pails were left there.

The employes had been in the habit of using this building in which to eat their dinners when the weather was inclement for fifteen or twenty years, and Rowan had been in the habit of eating his dinner there for a long time as the company's agents well knew—the superintendent of the furnaces frequently eating his dinner there. There were other buildings of a similar character scattered through the premises of the company which were used by other employes in a similar manner. There were about fifteen hundred employes of the company and nearly two-thirds, or one thousand, ate their dinners on the premises. The employes were allowed fifty minutes to get their dinners at noon hour. The day Rowan was injured was in January and the weather very inclement.

The verdict and judgment below was against plaintiff in error and it is now sought to reverse the judgment upon two grounds:

First. The verdict is against the evidence.

Second. There was error in the charge of the court.

It is claimed the verdict is against the evidence for two reasons. First, there was no negligence upon the part of defendant causing the injury; and, second, if there was, the negligence was the act of a fellow-servant.

In the case of *National Steel Co.* v. *Lowe*, 127 Federal Re-

porter, 311 (United States Circuit Court of Appeals), arising out of the same accident, the question of the negligence of the company and also the question whether or not the rule of fellow-servant applied were fully considered, and it was in that case held:

"1. Plaintiff, a stove tender in defendant steel works, was burned by molten iron from a blast furnace, caused by a water block being forced from the wall of the furnace. The block had become defective on the evening of the previous day, and the superintendent ordered preparations made to remove it. That evening the packing was removed to a depth of nine or ten inches, and between 7 and 8 o'clock the next morning the superintendent, though it had been his intention to remove the block when the blast was off the furnace during the 9 o'clock cast, on his being notified that the water was not running freely through the different blocks, by reason of the strainer being clogged, directed that the block should not be removed until 12 o'clock, and that the water strainer be repaired at the same time. Before noon, and while the blast was still on the furnace, and as certain workmen were preparing to pull out the block, the inside of which had become melted off by reason of the defect in the water apparatus, the block was suddenly forced from the wall by the pressure in the furnace, and plaintiff was burned by the flame and molten material issuing from the aperture. *Held:* That whether treated as a place at which to work or an appliance with which to work, it was the positive duty of the company to keep the furnace reasonably safe for its employes at work about it. For any neglect to do this, the company was responsible, as the duty could not be delegated.

"2. Whether the neglect was that of the superintendent or foreman, or a workman, in neither case was the person guilty of negligence a fellow-servant of the plaintiff, so as to relieve the company of responsibility."

We have examined that case with care and we are content with the judgment and decision of the court, and that case makes it unnecessary to consider those questions further.

There is one question made in this case that was not made in the Lowe case and that is, the degree of care that was required of the steel company toward Rowan at the time of the injury.

On behalf of the steel company it is claimed that Rowan at the time of his injury was not engaged in the business of the

company; that he was a mere licensee and that it owed him no duty save and except it should not willfully injure him by its gross negligence; while upon the part of Rowan it is claimed that the company owed him the duty of ordinary care. This question is made in the requests of both parties and in the charge itself, the court taking the view that the company at the time of the injury owed Rowan the duty of exercising ordinary care, and charged the jury that although Rowan was in the building at his dinner at the time of the accident, and would not have been injured had he been at his clay box or close to it, yet the duty of exercising ordinary care devolved upon the steel company.

We think the trial judge was right in his instructions to the jury. As we have seen from the statement of facts this building had been used in the manner Rowan used it for a long number of years. It was suitable, convenient and reasonably necessary for the purpose of providing a place where the employes could eat their dinners in inclement weather. Rowan had been in the habit of eating his dinner there since he entered the employ of the company. All this was known to the officers and agents of the company. This certainly was an invitation to the employes to so use the building.

In the case of *C., C. & St. L. R. Co.* v. *Martin,* 39 N. E. R., 759, it was held:

"In an action against a railroad company for the death of an employe it appeared that deceased was employed to work on the side-tracks of defendant, at a point near which defendant had a pump house, and that it was the custom of defendant's employes at work at that point to eat their dinners in the house, it being the only place in which they could keep warm. The time given deceased for his dinner was so short that he was unable to go home, and defendant never objected to its employes using the pump house during dinner time. Deceased, while eating his dinner in the pump house on a very cold day, was killed by an escape of steam, resulting from defects in a boiler in the house. *Held*: That defendant was liable."

In the opinion the question of mere license and invitation is fully discussed, and it is clearly shown that the appellant was not a licensee but was at the pump house by invitation.

In the case of *Taylor* v. *George W. Bush & Sons Co.*, 61 Atlantic Reporter, 236, it was held:

"1. A day laborer who, by virtue of his employment, is permitted to carry his dinner to his work, and eat it on his employer's premises during the noon hour, and leaves his pail on the premises until the day's work is done, continues to occupy towards his employer the relation of a servant on going to get his pail at the close of the day, although his day's work is then done, and he has received his day's pay."

In the opinion it is said:

"It appears that the plaintiff, Lewis E. Taylor, on the day of the accident, was in the employ of the defendant company, and had been in their employ for about three months immediately preceding that day; that in the course of his employment, from day to day, he was in the habit of taking his dinner pail to the stable in the morning, eating his dinner on the premises at noontime, and, after the day's work was over, of taking his dinner pail away from the place where he had kept it during the day; that this privilege was incident to and connected with the employment, extended to him as an employe, and by that right he took his pail there, kept it there, and took it away from there at the close of each day; that at the time of the accident he had been actually paid at the office for that day, and had gone, as was his custom, to take home his dinner pail. He was therefore in the enjoyment of a privilege which was granted to him by his employers only as an employe. It was connected with and incident to his employment at the time of the accident, and the enjoyment of it therefore continued unbroken the relation of master and servant, at the time of the accident, between the plaintiff and the defendant company."

These cases it seems to us fully support the charge of the court.

The case of *Pomponio* v. *New York, New Haven & Hartford River Railroad Company*, 50 American State Reports, 124, is very much relied upon by counsel for the steel company. In that case it was held that the distinction between a mere licensee and a person upon premises by invitation was whether the privilege of user exists for the common interests or mutual advantage of both parties. If it was, then it was by implied invitation; and it is claimed that the use of this building was of no advantage to the steel company.

Can that be so? Was it not to the advantage of the steel company for its employes to have a comfortable place on an inclement day in which to eat their dinners during the fifty minutes of noon hour. The company so understood it by permitting them to use the building, knowing their comfort would be subserved and their capacity for more and better work secured, saying nothing for the dictates of humanity.

But, conceding that Rowan was a mere licensee, would not the steel company be held to ordinary care in a case of this character? This is not a case in which the premises were not kept safe; suffered to go to decay and injury resulted from such negative act. These men were in this building with the knowledge and consent of the company. There had been no revocation of the license, or notice given to not enter the building upon that day, and while there, by the active negligence of the company, Rowan was injured. The superintendent was there doing his work of removing the block and by his negligence, the block was blown out.

An owner of premises may permit a licensee to come upon his premises and travel over an excavation covered over and, if the plank rot out and the earth give way without his knowledge and the licensee while using the premises as he was accustomed to do, falls into the pit and is injured, the owner may not be responsible, but can he remove the plank and permit the excavation to remain open without revoking the license, or notice to the licensee, permit him to continue to use the premises without being responsible? We think not.

In the case of *Pomponio* v. *New York, New Haven & Hartford River Railroad Company,* 50 American State Reports, 124, referred to, it was held:

"With respect to the safety of the premises of a land owner, he owes a more limited duty to a mere licensee than he does to a person who is there by invitation, either express or implied; but owes to both the equal duty of not injuring either by his own active negligence and is liable if he does so.

"A railroad company, which has for years maintained a planked crossing upon its premises for the use of a manufacturing company having shops extending along either side of the rail-

road, is liable for its negligent act in switching its cars at the crossing, whereby a person, going to his work at one of the shops, after the noon intermission, is, without fault upon his part, struck and killed, whether he is upon the crossing as a licensee, or by implied invitation."

In the opinion it is said:

"The defendant contends that the decedent was upon the crossing as a mere licensee, and, consequently, that its duty towards him was a more limited one than if he had been there upon implied invitation. As a general statement, it is undoubtedly true that a owner in charge of land owes a more limited duty to a mere licensee than he does to a party invited, in the technical sense of that word. A licensee must take the premises as he finds them, and the owner is not, as to him, bound to use care and diligence to keep the premises safe while he does owe such a duty to one using his premises upon invitation. 'It has often been held that the owner of land, or a building, who has it in charge, is bound to be careful and diligent in keeping it safe for those who come there by his invitation, express or implied, but that he owes no such duty to those who come there for their own convenience, or as mere licensees' (*Plummer* v. *Dill*, 156 Mass., 427; 32 Am. St. Rep., 463). This distinction between the case of a licensee and that of a party invited, in respect to the duty of keeping the premises safe for their use, is recognized in the following cases and in many others: *Nicholson* v. *Erie Ry. Co.*, 41 N. Y., 525, 532; *Barry* v. *New York, etc., R. R. Co.*, 92 N. Y., 289 (44 Am. Rep., 377); *Byrne* v. *New York, etc., R. R. Co.*, 104 N. Y., 362 (58 Am. Rep., 512); *Sweeny* v. *Old Colony, etc., R. R. Co.*, 10 Allen, 368 (87 Am. Dec., 644); *Gordon* v. *Cummings*, 152 Mass., 513 (23 Am. St. Rep., 846).

"But while this is so, it is also true that the landowner must not himself, by what has been called 'his own active negligence,' injure either the licensee or the party invited, while they are upon his land. This is a duty due to both equally. Toward both, in this respect, he is bound to exercise the same amount of care. Both are upon his premises, not as wrong-doers, but by his permission, and, in respect to the duty in question, we know of no good reason why the nature and extent of it should not be the same in cases of license as in cases of invitation. In a Massachusetts case it appeared that the plaintiff, being sent by his mother upon an errand, passed through a passageway upon the defendant's premises, over a portion of which way a roof had been constructed; and that it was the defendant's

habit to supply ale to their workmen, who were accustomed to throw the empty kegs out of a window down upon this roof, from which from time to time the kegs were taken away. Just as the plaintiff, in going through the passageway, emerged from under this roof, one of the workmen threw a keg so carelessly that it fell off the roof and injured the plaintiff. It was held that the defendants were liable, and that it made no difference whether the way was public, and thus the plaintiff was traveling upon it as a matter of right, or whether it was private and he was traveling upon it merely by permission. The court said: 'Even if he were there under a permission which they might at any time revoke, and under circumstances which did not make them responsible for any defect in the existing condition of the way, they were still liable for any negligent act of themselves or their servants which increased the danger of passing and, in fact, injured him. *Corrigan* v. *Union Sugar Refinery*, 98 Mass., 577 (96 Am. Dec., 685).

"In another Massachusetts case the court says: 'The licensor has, however, no right to create a new danger while the license continues: *Oliver* v. *Worcester*, 102 Mass., 489, 502 (3 Am. Rep., 485); *Corrigan* v. *Union Sugar Refinery*, 98 Mass., 577 (96 Am. Dec., 685); *Corby* v. *Hill*, 4 Cou. B., N. S., 556). So a railroad company, which allows the public habitually to use a private crossing of its tracks, can not use active force against the person or vehicle crossing under a license, express or implied.' *Stevens* v. *Nichola*, 155 Mass., 472, 475.

"In a New York case the court said: 'There can be no doubt that the acquiescence of the defendant, for so long a time, in the crossing of the tracks by pedestrians, amounted to license and permission, by the defendant, to all persons to cross the tracks at this point. These circumstances impose a duty upon the defendant, in respect of persons using this crossing to exercise reasonable care in the movement of its trains. The company had a lawful right to use the tracks for its business, and could have withdrawn its permission to the public to use its premises as a public way, assuming that no public right therein existed; but so long as they permitted the public use, it was chargeable with knowledge of the danger to human life from operating its trains at that point, and was bound to use such reasonable precaution in their management as ordinary prudence dictated to protect wayfarers from injury. * * * The ground of liability in this case is negligence, and the duty of the defendant to exercise reasonable care existed irrespective of the fact whether the plaintiff's intestate had a fixed legal right to cross the track, or was there simply by the defendant's

implied permission.' *Barry* v. *New York, etc., R. R. Co.*, 92 N. Y., 289, 293 (44 Am. Rep., 377)."

Such we also understand to be the holding of our own Supreme Court: *Harriman* v. *Railway Company*, 45 O. S., 11; *Railway Company* v. *Aller*, 64 O. S., 183; *Railroad Company* v. *Marsh*, 63 O. S., 236; *The Cincinnati, Hamilton & Dayton Railroad Co.* v. *Aller*, 64 O. S., 183; *The Cleveland, Akron & Columbus Railway Company* v. *Workman, Administrator*, 66 O. S., 509-540.

In the case of *Cincinnati, Hamilton & Dayton Railroad Co.* v. *Aller, supra*, Judge Shauck, in the opinion on pages 193 and 194, says:

"But it is urged that in the circuit court it was thought, and rightly, that the judgment under review was required by the latter case of *Harriman* v. *Railway Co.*, 45 Ohio St., 11. Attention to the facts presented in the cases will show that in the legal view they are materially different. In the present case there has been a recovery because the end of the platform as it had been constructed six years before the accident and maintained without change, was not constructed or guarded so as to make it a safe way for footmen passing from the junction to the village, although such use was not within any invitation which the company extended to the public. While in *Harriman* v. *Railway Co.*, the recovery was by one who was upon the ground of the company by permission only, the injury was not occasioned by any real or alleged defect in the construction of the road. The injury there resulted from the operation of the road. The doctrine of the case is, that when the company became aware that persons were using the road for purposes of their own it became its duty, not to alter the construction of its road, but to operate it consistently with the facts thus known to it. It was held to be a violation of that duty to add new and further peril to such permitted use without taking precaution against injuries which would naturally result therefrom. Not only does such added peril from the operation of the road appear as a fact in the case, but in the syllabus it is stated as a ground of recovery; and in the opinion the question for decision is stated as follows: 'An owner may, without protest or objection, permit his premises to be used by the public so long, in the same condition, that his acquiescence in the continuation of such use, until some warning or notice on his part, might reasonably be expected; and if under such circumstances and with knowledge of the same, he should place or leave some new, dangerous

structure or instrument in the way so used, and from which he might reasonably apprehend danger of injury, to those accustomed to such use, can he claim exoneration from liability in case such injury shall occur, on the ground that the law imposed no duty on him to keep his premises in a safe and suitable condition for trespassers and licensees who enter by permission only?' ''

Judgment of court of common pleas will be affirmed.

Tallman & Spriggs, for plaintiff in error.

Lynch, Handland & Jones, for defendant in error.

ACTION IN TORT FOR CONSPIRACY.

Circuit Court of Cuyahoga County.

MARCUS FRIEDMAN ET AL v. WALTER E. MYERS, TRUSTEE IN BANKRUPTCY OF JACOB PROTTER.

Decided, December 9, 1907.

Bankruptcy—Title of the Trustee—Actions which he may Maintain—Conspiracy—Pleading.

A trustee in bankruptcy can not maintain an action in tort for conspiracy in assisting a bankrupt to place his property beyond the reach of his creditors, against persons who are alleged to have performed their acts of conspiracy during the pendency of the bankruptcy proceedings but before the adjudication therein, where no allegation is made that any of the defendants received any portion of the bankrupt's estate, and the sole result of the conspiracy is to turn the bankrupt's property into money in his hands which he himself failed to account for to his trustee.

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

Error to the court of common pleas.

This was an action in tort, the defendant in error being plaintiff below. His petition sets forth the fact that he was the duly appointed trustee in bankruptcy of one Jacob Protter, against whom proceedings in involuntary bankruptcy were begun by the filing of a petition on the part of three of his creditors on the 24th day of October, 1902, the said Protter being adjudi-

cated a bankrupt on the 27th day of May, 1904, over a year and a half later. The petition sets forth at length a series of acts committed by the five defendants, S. S. Samuels, Adolph Eisenberg, Marcus Friedman, Louis Goodman and Simon A. Grossner in conspiracy with said Protter *during the pendency of said bankruptcy proceedings, but all consummated before the adjudication,* which are alleged to have been mere shams and devices to cover up goods of the value of $8,000 belonging to said Protter, and to place the same beyond the reach of his creditors, and to cheat and defraud said creditors of their just dues and damages. There is no allegation in the petition that said five named defendants received any part of said property nor that they have possession of any of it, though a suggestion is made that they were paid for their services in assisting in the scheme of concealing said property from the creditors of said Protter. The only inference to be drawn from the petition as to what became of the property, though that is not clearly stated, is that it was converted into money which Protter himself received.

A judgment is asked against the five conspirators in the sum of $8,000, the alleged value of the goods, which it is alleged, "by said wrongful acts of said defendants, in pursuance of said unlawful, wrongful and fraudulent purpose and conspiracy aforesaid, were diverted from the creditors of said Jacob Protter and from this plaintiff."

To this petition a general demurrer was interposed, which, we think, should have been sustained, for the following reasons:

No right of action against the defendants and in favor of the bankrupt, which would pass to his trustee in bankruptcy, ever existed. The so-called conspirators could not have been sued by Protter, for the result of the conspiracy was to benefit him by getting all his property into money in his hands. If this is not clear, still the right of action, if any, sounds in tort, and such rights do not pass to the trustee. Under Section 70, paragraph 6 of the bankruptcy act the trustee is vested with the bankrupt's "rights of action arising upon contract, or from the unlawful taking or detention of or injury to his property." An action, *ex delicto,* for conspiracy, such as we have here, does not pass

under the bankruptcy act to the trustee in bankruptcy. Citation of authorities on this point, and there are many of them, is not necessary, for the language of the act is clear.

Nor can it be said that the acts complained of were committed against the trustee or his property, though they are alleged to have been committed during the progress of the proceedings in bankruptcy, for they were all consummated before the adjudication.

Under Section 70 of the act, the trustee is "vested by operation of law with the title of the bankrupt, *as of the date he was adjudged a bankrupt.*" Such being the case, the acts complained of were committed before the trustee had any interest in the estate. Nor had he any lien upon the bankrupt's property or special interest therein antedating the adjudication upon which he might base this action. The *caveat,* arising upon the filing of the petition in bankruptcy, as suggested in the case of *Mueller* v. *Nugent,* 184 U. S., 1, has regard only to those causes of action which the act itself provides for, in Sections 67*e*, 70*a* (4) and 70*e* for the recovery of property of the debtor conveyed, transferred, assigned or encumbered in fraud of his creditors, or for the recovery of its value, from the person to whom it may have been transferred, or whoever may have received it.

By the sections referred to, the trustee is vested with the title to the property so transferred, as of date of the adjudication, and entitled to bring the actions mentioned, which are those of replevin and conversion, under which each fraudulent transferee would be liable for the value of the property to him transferred or by him received. The petition is not framed to bring it within the act, for there is no allegation that the defendants received any part of the property, and it seeks to hold them all jointly for the full value of the property of the bankrupt which it is alleged that they conspired to put beyond the reach of the creditors. As before stated, this action is strictly *ex delicto,* and we find no warrant in the bankruptcy act for its maintenance in any court by a trustee in bankruptcy, and without such warrant the action must fail, for no wrong was done the trustee, as such, nor his property.

This conclusion makes it unnecessary to examine the other errors complained of.

For error in overruling the demurrer to the petition the judgment is reversed and vacated, and the cause remanded to the court of common pleas with directions to sustain said demurrer.

Herman Preusser, F. J. Wing and *A. Hahn,* for plaintiffs in error.

White, Johnson, McCaslin & Cannon and *A. B. Thompson,* for defendants in error.

BROKER'S COMMISSION FOR FINDING A PURCHASER.

Circuit Court of Guernsey County.

JENNIE BARBER v. STEPHEN R. HEADE.

Decided, April Term, 1907.

Contract with Broker—For Sale of Land—Purchaser Found—Tender of Agreed Amount Made—Commission Payable Notwithstanding Offer to Purchase was not in Writing.

When an owner contracts in writing with a broker to *sell* a parcel of land, and the broker secures a purchaser who offers to take the land in accordance with such contract, and duly tenders the money to and demands a deed from the owner, such broker is entitled to his commission although no memorandum in writing of the contract between the broker and purchaser was signed by the purchaser.

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

Jennie Barber entered into a contract in writing, duly signed by her, by which she employed Stephen R. Heade to sell a parcel of land situated in the city of Cambridge. The contract provided:

"I agree that in the event of the sale of the property by S. R. Heade, agent, at the consideration of sixty-four hundred dollars, that I will make a good deed of general warranty to such grantee as shall be named by the said S. R. Heade, agent. Said option

to expire within fifteen days. Said S. R. Heade to receive a commission for his services in making the sale, the sum of one hundred and thirty dollars."

S. R. Heade sold the land to Marrietta H. Keenan for the sum of sixty-four hundred dollars, but had no contract in writing with her or memorandum signed by her of said sale. Within the fifteen days Marrietta H. Keenan went with S. R. Heade to the owner, Jennie Barber, and duly tendered her the purchase price, sixty-four hundred dollars in gold, and demanded a deed for the premises in accordance with the contract with her agent, S. R. Heade, but she refused to make the same, stating she had concluded not to sell the premises. S. R. Heade demanded payment of his commission but she refused payment, and suit was brought for the same. The court below rendered judgment for the plaintiff for his commission.

Plaintiff in error defended below, solely upon the ground that defendant in error never secured a purchaser for the property, and makes that claim upon error as her only defense to the payment of the commission. Counsel insist that as no memorandum in writing had been signed by Marrietta H. Keenan that there was no binding obligation upon her part to take the property and that although she was willing and anxious to take it, and duly tendered the purchase price, yet defendant in error was not entitled to his commission.

It is not necessary for us to consider the relative rights of Marrietta H. Keenan and plaintiff in error as to whether or not she could insist upon her purchase and compel plaintiff in error to fulfill her contract, although upon that question we have little doubt as the contract between plaintiff in error and defendant in error provided that Heade should sell the land.

Plaintiff in error was to make a sale of the land at a certain price and in a certain time. He did so, and went with the purchaser to plaintiff in error, who tendered the money and demanded the deed in accordance with her contract with Heade. It was no fault of the purchaser, or of plaintiff in error, that the contract was not completed. The contract between plaintiff in error and the purchaser through the agent was not void but only

voidable (*Jefferson* v. *Dallas et al*, 20 O. S., 68). The purchaser did not see fit to avoid the contract but claimed its fulfillment, and, by so doing, made the obligation of plaintiff in error to pay defendant in error his commission absolute.

In the 44 Lawyers' Reports Annotated, in the note on page 594, it is said:

"It has been held that there is no meritorious distinction between the case of an agent undertaking to sell and one undertaking to find a purchaser, upon the ground that the agent in undertaking to sell must not alone find a purchaser but must place the parties in such a position that the sale may be enforced between them by law, for the reason that the broker in either case is required to do no more than find a purchaser, and can not do the selling unless specifically authorized to do so by power of attorney, the undertaking to sell in such cases being no more than an engagement to find a purchaser who is ready and willing to buy (*McFarland* v. *Lillard*, 2 Ind. App., 160). To the same effect, *Treat* v. *DeCelis*, 41 Cal., 202; *Duffy* v. *Hobson*, 40 Cal., 240 (6 Am. Rep., 617); *Goss* v. *Broom*, 31 Minn., 484; *Reynolds* v. *Tompkins*, 23 W. Va., 229; *Lockwood* v. *Rose*, 125 Ind., 588."

The judgment of the court of common pleas is affirmed.

Troette & Baker, for plaintiff in error.

Robert T. Scott, for defendant in error

PROSECUTION FOR KEEPING A BUCKET SHOP.

Circuit Court of Cuyahoga County.

ROBERT E. GILL v. THE STATE OF OHIO.

Decided, December 9, 1907.

Criminal Law—Indictment Charging Keeping a Bucket Shop—Not Sufficient, When—Word "Margin" not Essential to—Nature of the Contracts must be Defined—Inquiry of Customers as to their Intentions—Gravamen of the Offense—Evidence—Charge of Court—Error—Words and Phrases—Section 6934a-1.

1. An indictment charging one with keeping a bucket shop, which follows the language of the statute, but does not aver that the place was kept for the purpose of permitting the entering into of unlawful contracts, and does not define the nature and character of the contracts alleged to have been permitted to be entered into, is not insufficient.
2. In such a case it is not error to charge that the keeper must show that the transactions admitted to have occurred were not prohibited by the statute.
3. Where "buy slips" and "confirmation slips" which recite that it is the intention of the customers to receive and pay for stock pretended to be bought are introduced in evidence, it is not error to charge that such slips are not conclusive as against testimony of the customers and the conduct of the keeper given in evidence; nor is it error to charge under such evidence, that the fact that the defendant inquired of his customers as to their intentions, would not shield him from responsibility.
4. The gravamen of the offense of keeping a bucket shop, as defined in Section 6934*a*-1, Revised Statutes, is in keeping a place wherein is conducted or permitted the *pretended* buying and selling of stock, etc., on margin *or otherwise*, without intention on the part of the customers to receive or deliver the stocks.
5. It is not prejudicial error in a bucket shop case to neglect to explain to the jury the meaning of the word "margin," where there is no request that its meaning be defined.

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

Error to the court of common pleas.

Plaintiff in error was convicted of keeping a bucket shop, under an indictment charging him with so doing, as follows:

"That Robert E. Gill, late of the county aforesaid, on the 1st day of January, in the year of our Lord one thousand nine hundred and four, at the county aforesaid, and on divers other days and times from said last named date to the day of the finding of this indictment, in the county aforesaid, did unlawfully keep a bucket shop and place wherein was conducted and permitted the pretended buying and selling of shares of stocks and bonds of corporations, petroleum, cotton, grain and produce on margins, without any intention of receiving and paying for the property so pretended to be bought, or of delivering the same so pretended to be sold, as aforesaid, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Ohio."

The statute under which said indictment was drawn, in the particulars here involved, is worded as follows:

"Section 6934*a*-1. That it shall be unlawful for any * * * person to keep or cause to be kept within this state any bucket shop, office or other place wherein is conducted or permitted the pretended buying or selling of the shares of stocks or bonds of any corporation (a) either on margins or otherwise, without any intention of receiving and paying for the property so bought, or of delivering the property so sold; or wherein is conducted or permitted the pretended buying or selling of such property, (b) on margins, or (c) where the party buying any of such property, or offering to buy the same does not intend actually to receive the same if purchased, or to deliver the same if sold."

The division of the statute into sub-heads under the letters (a), (b) and (c), is for convenience in discussing objections to the charge, hereafter mentioned.

Numerous reasons are assigned by counsel for plaintiff in error why the conviction in this case should not stand. We shall take them up in their order.

1. It is said that the indictment is insufficient because it does not aver that the place was kept for the purpose of permitting the entering into of unlawful contracts and does not define the nature and character of the contracts alleged to have been permitted to be entered into.

Having passed upon a similiar indictment in the case of *Wirth* v. *State of Ohio*, at the fall term, 1906, in Lorain county,

and having held the same sufficient, we do not consider it necessary to enter into a discussion of this point and hold it not well taken.

2. It is said that the verdict is not supported by sufficient evidence.

We think the record clearly shows that Gill kept a place for the purpose of permitting, and in which he permitted, the pretended buying of stocks on margins without the intention on the part of his customers of receiving or paying for said stocks if the price of the same went up, and without any intention on his part in that event of delivering stocks so pretended to be sold by him to said customers. An exhaustive resume of the evidence by the assistant prosecuting attorney, in his brief filed in this case, makes it unnecessary for us to say more on this subject than that we find he has correctly stated the facts from the record and drawn the proper conclusions therefrom.

3. We find no error in giving the state's three requests to charge.

The first, that "the keeper must know that the transaction is not prohibited by the statute," is as applicable in a bucket shop case as in the unlawful selling of liquor to a minor.

The second request of the state will be considered in connection with objections to the general charge as given by the trial judge.

The third request was properly given. The "buy slips" and "confirmation slips" in which the customers and the keeper undertook to give an apparent legal aspect to the transactions, were not conclusive, as the statements of said customers before the jury and the conduct of the keeper, as shown in evidence, clearly showed. To have refused this request and to have left any impression with the jury that they *were* conclusive would have been, in effect, to have legalized this scheme and subterfuge and to have directed a verdict for the accused.

4. Defendant's eighteenth request to charge was properly refused, for reasons that will appear when we come to consider the charge as given.

5. There are four specific objections to the charge as given;

the most important of these requires a careful analysis of the statute quoted.

I. It is said that distinct offenses are defined in this statute, the first found in the paragraph marked (a) which requires, it is claimed, that the pretended sales or purchases must be upon margin or otherwise without intention, on the part of either keeper or customer, to deliver or receive, and another under paragraph marked (c) where the pretended sales or purchases need not be upon margin, but must be with the intention on the part of the customer only, not to receive the stock, the intention of the keeper not being an element of the offense.

It will appear from an examination of the indictment that it was drawn under the first paragraph (a), and it is claimed that the court erred in reading to the jury the balance of the statute (b) and (c), thus intimating that they might convict though the sales were not "on margin," and regardless of the intention of the keeper.

To use the words of counsel for plaintiff in error on this subject:

"This was particularly prejudicial because the portion above quoted (b and c) is that part of the statute which penalizes the act when the *party buying* does not intend to receive *regardless of the intention of the keeper*, and also includes that part of the statute which penalizes the buying and selling regardless of whether the purchases are made on margin or otherwise."

In line with this objection is the criticism that the court neglected throughout the charge to state that the sales must be "on margin."

In the view we take of this statute, as a whole, these points are not well taken.

We do not think there are different offenses defined in this statute, but adopting counsel's theory that there are two distinct offenses specified, and paraphrasing the statute to test the theory, we read it as follows: (a) It is unlawful for any person to keep a bucket shop, office or other place wherein is conducted or permitted the pretended buying or selling of

stocks, that is to say, the buying or selling of stocks, either on margin or otherwise, without any intention on the part of the person buying of receiving and paying for the property so bought or without any intention on the part of the person selling, of delivering the property so sold.

(b) It is unlawful for any person to keep a bucket shop, office or other place, wherein is conducted or permitted the pretended buying or selling of stocks, that is to say, when the party buying any of such property, or offering to buy the same, does not intend actually to receive the same if purchased, or when the party selling any of such property, or offering to sell the same, does not intend actually to deliver the same, if sold.

Confessedly, so to read the statute would be to make it tautological, were there no distinction to be made between the phrase in the first paragraph, "*without* any intention" and the corresponding phrase in the second paragraph "when the party does *not* intend." One allows proof of a negative and the other of an affirmative; one requires proof that there was *no* intention to deliver or receive, the other requires proof that there *was* an intention *not* to receive.

The distinction is too refined and strained, it is true, to have much merit, but the argument leads to the conclusion that the *statute itself* is tautological and is another of those clumsily worded laws which so frequently afford opportunity for the lawyer's best efforts and vex and confuse the courts, requiring construction, but in themselves offering little light to those whose duty it is to construe them, when called upon so to do. As to the proposition that either clause requires that proof must be made that the sales were "on margins," we find no difficulty. The first paragraph speaks of the buying or selling of stocks on margin *or otherwise*. The last paragraph says nothing about margins. The indictment alleges that the buying and selling was "on margin," and the proof was to that effect. The failure of the trial court to dwell upon the margin feature was not prejudicial to the accused. The gravamen of the charge was the *pretended* buying and selling, without intention to receive or deliver.

It is as though one were accused of unlawfully selling intoxicating liquor, to-wit, whiskey, under a statute making it unlawful to sell intoxicating liquor; proof that he sold whiskey and a charge as to intoxicating liquor, with no reference in it to the kind specified, to-wit, whiskey.

No prejudice would result from such a charge.

So, too, as to the intention of the keeper. If he kept a place wherein he *conducted* or *permitted* the pretended buying or selling of stocks, whether he or his customers did not intend to deliver or receive the stocks so pretended to be bought or sold, the keeper would be guilty.

II. We think that the charge that "the fact that the defendant did or did not inquire of his customers, if such you find the fact to be, as to their intention, does not shield him from responsibility," was neither erroneous nor misleading. Taken in connection with the balance of the charge, and in the light of the evidence adduced, it was proper. His inquiries, if he made any, were admissible, as tending to show good faith on his part, and if he made none, as tending to show disregard of the law, but the mere fact that he *made* such inquiries would not *shield* him from prosecution, if other evidence in the case showed him guilty, and if he made *no* inquiries, that fact would be no shield.

III. What the court said in the general charge as to the inconclusiveness of the written contracts, we have already ruled upon in our consideration of the state's third request to charge.

IV. It is claimed that the word "margins" is nowhere in the charge defined, and that inasmuch as it is a technical one and essential, and included in the indictment, that it should have been defined.

Three reasons occur why no prejudice resulted from this omission, if it may be called such, on the part of the trial judge.

As already shown, the word "margin" was not essential to the indictment; its meaning is defined in the dictionaries and it is of common use and well understood, and finally there was no request by the accused that its meaning should be defined by the trial judge.

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

T. J. Ross and *W. H. Boyd,* for plaintiff in error.

Ohio, and *P. L. A. Lieghley,* Assistant Prosecuting Attorney *S. V. McMahon,* Prosecuting Attorney Cuyahoga County, Cuyahoga County, Ohio, for defendant in error.

DISPOSAL BY WIFE OF HUSBAND'S PROPERTY BY WILL.

Circuit Court of Columbiana County.

EDWIN THOMAS ET AL, EXECUTORS, v. SARAH ANN HOBSON ET AL.

Decided, April Term, 1907.

Wills—Husband Devises Residue of his Estate to Wife with Right of Disposition—Wife Makes Will Disposing of said Residue—Wife Dies First—Wife's Will Inoperative—Husband Held to have Died Intestate as to said Residue—Ordered Distributed to Heirs at Law.

Testator provided by his will, "I will and direct that my wife, Dorothy Hoyle, shall be allowed to dispose of all the rest, residue and remainder of all my estate and effects (not hereinbefore disposed of) by will or otherwise as she deems just and prudent, previous to her decease, to take effect after her death." Three years afterwards the wife made a will disposing of the residue of her husband's property not specially disposed of by him, stating in her will that the disposition was made in accordance with the will of her husband. The wife died twelve years before her husband. *Held:* The wife had no power to dispose of the residue of the estate of her husband; that he died intestate as to such residue and that his heirs at law took the same by descent.

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

Appeal from Columbiana Common Pleas Court.

This action is by the executors of the wills of John Hoyle and Dorothy Hoyle, deceased, and is for the purpose of obtaining the direction and judgment of the court under Section 6202, Revised Statutes, respecting the distribution of the estates of the decedents.

John Hoyle made his last will and testament on the 3d day of June, 1886. The second, ninth and tenth items of the will, which are in controversy, are as follows:

"2d. I will and bequeath to my beloved wife, Dorothy Hoyle, during her natural life all the property that I own or possess at the time of my decease, real, personal or mixed, and at her death to be disposed of as hereinafter named.

"9th. At the death of my wife, Dorothy, I will and direct that one-half of what remains of all my property or that which has not yet been disposed of, as hereinbefore named, shall be equally and ratably divided amongst my brothers' and sisters' children share and share alike.

"10th. I will and direct that my wife, Dorothy Hoyle, shall be allowed to dispose of all the rest, residue and remainder of all my estate and effects (not hereinbefore disposed of) by will or otherwise as she deems just and prudent previous to her decease, to take effect after her death."

On the 15th day of August, 1889, more than three years after John Hoyle made his will, his wife, Dorothy, made her will and in that will she recites before making disposition that she executed the will for the purpose of disposing of a certain portion of the estate of her husband, John Hoyle, which by his will he had left for her to dispose of as she thought best and which then remained undisposed of, as a reference to his will would show. She then by this will made a disposition of that portion of the estate of her husband.

Dorothy Hoyle died on the 19th day of February, 1892. John Hoyle died on the 22d day of March, 1904. Both of the wills were probated after the death of John Hoyle.

The claim of defendant, Sarah Ann Hobson, and other devisees and legatees of Dorothy Hoyle under her will, is that by virtue of the tenth clause of the will of John Hoyle she, Dorothy, had the right to dispose of all the estate of her husband by will, not specifically disposed of by him in his will; while the claim of the heirs of John Hoyle is that the wife had no power to dispose of any of the estate of her husband by will; and that John Hoyle died intestate as to the portion not disposed of in his will.

It must be conceded that under our statute, Section 5914, that no disposition of property can be made by will except the party has an interest therein; therefore, if John was the absolute owner of the property at the time Dorothy made her will and at her

death, then her will was wholly inoperative as to such property. John might possibly dispose of the property by will and give his wife by apt words the power of appointment if she should not survive him, but that it is not done in this case. She undertook by her will to dispose of property that belonged to him, was in his possession, and under his control. This could not be done. If John had devised and bequeathed the property by his will to such persons as she should direct by her will, the case might be different, but there is no disposition of the property in controversy, except by the will of Dorothy.

In the case of *Condit* v. *DeHart et al,* 62 New Jersey Law, 78 (40 Atlantic Reporter, 776—Supreme Court of New Jersey, July 19, 1898), it is held:

"*Wills—Power of Appointment—Execution.* D, by his will, devised his residuary estate to his son H. By a codicil he afterwards authorized his said son to dispose, by his will, of said residuary estate, and then devised and bequeathed the same to such person or persons as his son should designate and appoint by his will as those to whom he desired it to go. H died before the testator, leaving a will in which, after reciting the power of appointment contained in the codicil to his father's will. he designated his wife, A, as the person to whom the estate should go. *Held:* That, while the power of appointment could not be executed by H during the donor's lifetime, and therefore his will was not a good execution of it (because he could not, by his will, make a valid disposition of property, which was wholly and absolutely in the ownership and control of another), yet the devise contained in the codicil to the testator's will, to such person or persons as H should designate in his will, operated to pass the estate and the will of the latter could be referred to for the purpose of ascertaining the personality of the testator's devisee."

To the same effect is the case of *Piffard's Appeal,* 111 N. Y., 410 (18 North Eastern Reporter, 718), the syllabus of which case is as follows:

"The will of P gave to his daughter, S, one-fifth of all his real and personal estate. By a codicil he directed that S should have power by her will, 'heretofore or hereafter' executed, to dispose of the share devised and bequeathed to her, and to that end he directed that such share should be paid over by his ex-

ecutors to the executors or trustees named in her will in case of her death during his lifetime, but in case she survived, then that such share should be paid over to her. S died before the testator leaving a will. *Held:* That while the testator gave a power of appointment, which as a power the donee could not execute during the donor's lifetime, yet the further language of the codicil showed the testator's intent to be, in case of the happening of the contingency specified, to devise and bequeath by force of his own will the daughter's one-fifth to such person or persons and in such shares and proportions as she had directed in the disposition of her own property; that the will of the daughter could be referred to to define and make certain the persons to whom and the proportions in which the one-fifth should pass; and that the executors of the will of P were properly required to pay over that share to the executors of the will of S for the purposes of distribution."

It is further said that if the power of appointment failed that the will of the wife became part of the will of the husband by incorporation.

In order to incorporate the will of the wife into that of the husband's, by reference, three things were necessary:

"1st. The will itself must refer to such paper to be incorporated as being in existence at the time of the execution of the will and in such a way as to reasonably identify such paper in the will and in such way as to show testator's intention to incorporate such instrument in his will and to make it a part thereof.

"2d. Such document must in fact be in existence at the time of the execution of the will.

"3d. Such instrument must correspond to the description thereof in the will and must be shown to be the instrument therein referred to." (Page on Wills, Section 164.)

None of these requisites exist in this case.

The finding and decree of the court is that the heirs of John Hoyle are entitled to that portion of the property sought to be devised and bequeathed by the will of Dorothy Hoyle; and this being the same holding as made by the court of common pleas, the same entry will be made as in that court.

C. S. Speaker and *G. T. Farrel*, for plaintiffs.

J. C. Boone, J. G. Moore, George Duncan and *George E. Davidson*, for defendants.

AGREEMENT FOR SALE AND PURCHASE OF STOCK.

Circuit Court of Hamilton County.

JOHN W. HERRON, ADMINISTRATOR OF JACOB R. STEWART ET AL., v. GEO. F. STEWART AND W. T. S. JOHNSON.*

Decided, January 8, 1907.

Contracts—Option to Employes to Purchase Stock—Executory Character of Agreement—Mutuality—Consideration—Uncertainty as to Time for Payment—Reasonable Time will be Fixed.

There was a manifest intention on the part of those entering into the contract here involved that it should be mutually obligatory and enforcible, and it is not lacking in either mutuality or in consideration; and the law will cure the uncertainty as to time by annexing a reasonable time.

This case was begun in the probate court, where Mr. Herron set up as administrator of the estate of Jacob R. Stewart, that the deceased died intestate, leaving as his sole heirs, next of kin and distributees, Carrie E. Stewart, his widow, George F. Stewart, Gertrude Stewart Titus and Mary L. Hazleton, his children; that intestate at the time of his death was in possession of 360 shares of capital stock in the Bradford Machine Tool Company, of the par value of $100 each, which stock stood in decedent's name on the company's books, and the certificate representing the same came into possession of the administrators; the estate had been practically settled except as to said stock; that George F. Stewart and W. T. S. Johnson (plaintiffs in error) claimed an interest in these shares under a contract entered into with them and Lewis N. Gatch by deceased, the alleged contract and certain endorsements thereon being set forth in the petition; that Gatch having assigned his interest in the shares to George F. Stewart and Johnson, was not made a party to the suit; that the widow and daughters had made demand on the administrator to disregard and disaffirm the contract and distribute the shares

* Affirmed; reported (*Stewart et al* v. *Herron, Admr., et al*, 77 Ohio State, ———).

in question to the distributees of the estate, stating also the reasons assigned by them for making such demand; and the administrator alleging ignorance of the true course he should adopt, prayed that the parties in interest be required to appear and answer, and for a decree determining their rights and the duties of the administrator in the premises.

Further provisions of the agreement were:

1. The purchase price of said stock shall be its par value of one hundred dollars ($100) per share.

2. Said stock shall remain in the name of said J. R. Stewart until it is fully paid for as herein provided, etc.

3. All dividends declared on said stock shall be paid to said J. R. Stewart until it is paid in full. Enough of said dividends shall be retained by him to make four per cent. on the balance of said purchase price unpaid at the time said dividends are respectively declared, and the balance thereof applied by him on said purchase price; and as soon as said stock is fully paid for, either through dividends or otherwise, it shall be delivered to said purchasers. In case the dividend declared any year shall be less than four per cent. no interest shall run on said purchase price in excess of the dividend declared, and if none be declared there shall be no interest.

4. Should said purchasers desire to make payments on said purchase price in addition to the dividends from time to time declared on said stock, they shall have the option of doing so.

There was no express promise by the purchasers to pay for said stock, and no time named in the contract itself within which it was to be performed.

The younger Stewart and Johnson filed a joint answer, and Mrs. Stewart, the widow, and Mrs. Titus and Mrs. Hazleton, the daughters, filed separate answers, which all practically admitted the facts stated in the petition.

The probate court held that the contract was voidable for uncertainty and indefiniteness, but on appeal to the common pleas it was held to be valid. The circuit court divided, but reversed the common pleas. The minority opinion by Judge Jelke has recently been affirmed by the Supreme Court. It is subjoined:

JELKE, J.

The parties evidently thought they were making a contract, a bi-lateral agreement, something of business significance, and intended that it would be mutually obligatory and enforceable. It does not read like a one-sided undertaking of benevolence. There is no "charity" about it.

Has that which they reduced to writing and acted upon, the essentials of a legal contract? Neither George Stewart nor Johnson are bound to stay or pay. When everything was executory there was no mutuality.

As a business proposition what was Stewart, Sr., driving at? He wanted these young men to continue in the company's employ. If they did so continue, he recognized that their services were worth to the company and to him, its largest shareholder, something over and above their respective salaries. When they had entered upon the employment and under this contract, at the end of the first day's work had they done something to and for Stewart, Sr., which he recognized as of value and which would be to him a price paid by these young men wherefore they could have the right to exercise these options? It seems to me they had.

With rare subtility this writing was framed to secure in an accumulating degree that which Stewart, Sr., wanted, *i. e.*, the loyalty and zeal of these young men. The longer they stayed, the harder they worked, the more successful their efforts, the more strongly were they cemented to the company and to him, and if they must leave the more potent the inducement to buy.

These are the things which operated upon the mind of Stewart, Sr., and at the end of the first day's work he had received an installment on account of the consideration for the options.

It is not for us to weigh this consideration if we find from the writing it was to the mind of Stewart, Sr., the moving consideration.

I incline to the opinion that the executed consideration supporting the Johnson and Stewart shares will likewise serve as to the Gatch shares, but on this point I am willing to yield to my colleagues.

As to the uncertainty of time the law will "annex" a "reasonable time."

Herron, Gatch, Herron & James and *John W. Warrington*, for plaintiffs in error.

Maxwell & Ramsey, for defendants in error.

VACATION OF ORDER OF ARREST.

Circuit Court of Cuyahoga County.

COSIMO CATALANO v. SALVATORE AMATO.

Decided, December 9, 1907.

Arrest—Ruling on Motion to Vacate Order of—Becomes Res Adjudicata, When.

A motion to vacate an order of arrest before judgment, having been once heard and refused, is *res adjudicata*.

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

Error to the court of common pleas.

The defendant in this case was arrested on an order of arrest before judgment issued out of the common pleas court, on the affidavit of the plaintiff, on February 7, 1907.

On April 4, 1907, the defendant filed his motion to, vacate said order of arrest, basing his motion upon the instituting of proceedings by plaintiff to replevin the goods sued for in this action. This motion was overruled.

On April 23, 1907, the defendant made application for leave to file another motion to vacate the order of arrest, in which he says:

"Defendant asks for leave to make the above motion and to be heard on the same on the ground that the motion to vacate the order of arrest before judgment and release and discharge bail, which by this court has been dismissed, was a motion in which it was not sought to, and no attempt was made to traverse or deny any of the facts or allegations constituting the grounds of arrest in plaintiff's said alias affidavit for order of arrest, but that in said motion defendant set up that plaintiff was

barred and estopped from bringing the above cause of action by virtue of an alleged election between two inconsistent remedies."

This application was granted and on April 30, 1907, the defendant filed his second motion, basing it upon the untruthfulness of the affidavit for the order of arrest.

This motion was heard and granted and the defendant discharged, to all of which plaintiff excepted, and has brought said order here for review upon transcript and bill of exceptions.

In this court it is claimed that said order complained of is erroneous for three reasons, first, because a former motion to vacate the order of arrest having been overruled, the matter was *res adjudicata,* not open for review except by motion for new trial or proper proceedings in error; second, because the defendant being out on bail, he had no right to file the motion, and third, because the judgment was against the weight of the evidence.

We do not find it necessary to consider the last two assignments of error, for we think that the first point is well taken and that the trial court erred in entertaining the second motion.

The proceedings here had were for the attachment of the body of the defendant and are analogous to proceedings in attachment of a debtor's goods and must be subject to the same rules.

Such proceedings, though ancillary to the main case, are conclusive upon the parties the same as other final orders. *Gardner* v. *White*, 23 O. S., 192; *Young* v. *Gerdee*, 42 O. S., 102; *Strauss* v. *Corch*, 47 O. S. 115.

Such being the case there appears no good reason why the rule laid down in the case of *Mengert, Trustee,* v. *Brinkerhoff, Sr.*, 67 O. S., 472, should not be applied. That rule is as follows:

"A defendant in an action is required to plead all the defenses he has, and in a subsequent action he will be concluded as to all such defenses, even though he failed to plead some of them in the former action."

This conclusion is in accord with the views expressed by Von Fleet, in his work on Former Adjudication, see pages 96 and 99.

Justice Brewer, when on the Supreme Court of Kansas, expressed an opinion that motions might sometimes be renewed upon leave of court. The case referred to is *Adams* v. *Lockwood,* 30 Kansas, 373, the syllabus of which is as follows:

"After a motion has been heard and overruled, the moving party has no right to file a second motion for the same relief upon grounds existing at the time the prior motion was made and decided. It can only be done upon leave of the court, which should rarely be granted."

If there is any such discretion in the trial judge, clearly it was abused in this case, for this second motion is based entirely upon a denial of the allegations in the affidavit for arrest that the debt was fraudulently contracted. There can be no excuse for failure to set up such ground in the first motion, for there was nothing new about it or beyond his knowledge from the beginning.

The case of *Wingo* v. *Hooper,* 98 N. C., 482, is squarely in point. In that case it was held:

"A motion to vacate an order of arrest, having been once heard and refused, is *res adjudicata.*"

So it seems that we are not without authorities sustaining the principle here announced, though we are aware that the courts of New York are not in strict accord with our conclusions.

For error in granting the second motion to vacate the order of arrest, said judgment is reversed and vacated and the cause is remanded with instructions to overrule said motion.

Klein & Harris, for plaintiff in error.

Hobday & Quigley, for defendant in error.

LIABILITY OF MANUFACTURERS AND WHOLESALE DEALERS FOR DOW LAW TAX.

Circuit Court of Henry County.

THE CHRIST DIEHL BREWING COMPANY OF DEFIANCE, OHIO, v. FERNANDO J. BECK, AUDITOR OF HENRY COUNTY, OHIO AND HENRY L. VEY, COUNTY TREASURER OF HENRY COUNTY, OHIO.

Decided, October Term, 1907.

Taxation—Sales of Beer by a Brewing Company from Cold Storage Elsewhere than at the Brewery—Creates Liability for Dow Tax, When—Construction of the Phrase "Trafficking in Intoxicating Liquors"—Effect of Taking Blanket Orders with Subsequent Deliveries When Desired by Those Ordering—Sale Complete, When —Injunction—Section 4364-9.

A brewing company manufacturing and selling beer at wholesale, which maintains a cold storage house in a location separate from its manufactory, and from which cold storage house daily deliveries of beer are made to customers on orders previously taken by a soliciting agent, thereby becomes a trafficker in intoxicating liquors within the meaning of Revised Statutes, 4364-9, and is subject to the Dow tax provided for by that act. *Diehl Brewing Co.* v. *Spencer*, 9 C. C.—N. S., 577, not followed.

HURIN, J.; HAYNES, J., and WILDMAN, J. (sitting in place of Norris and Donnelly, JJ.), concur.

This action was brought to enjoin the collection of certain taxes and assessments levied for the years 1902, 1903 and 1904 under and by virtue of Section 4364-9 *et seq.*, Revised Statutes of Ohio, and commonly known as the Dow tax. These taxes were placed upon the tax duplicate by the auditor of Henry county, Ohio, upon receiving satisfactory information that the plaintiff was engaged in the business of trafficking in intoxicating liquors in the villages of Holgate and Deshler in said county. The case is before us on appeal and was heard upon an agreed statement of facts. The facts essential to an understanding of the case are as follows:

The plaintiff is a brewing company engaged in manufacturing and selling beer at wholesale in Defiance, Defiance county, Ohio.

It had during the years 1902, 1903 and 1904 a cold storage house at Holgate and one at Deshler, both in Henry county.

Its method of doing business in Holgate and Deshler was to send its soliciting agent to those places periodically—perhaps once a month or oftener. This agent took orders from saloon keepers for the amount of beer which they would need during the next period of thirty days or until he would next make his round. These orders were sent to the main office of the brewing company at Defiance for approval.

From its brewery in Defiance the brewing company would then ship in carload lots to Holgate and Deshler an amount of beer sufficient for the demand in those places. The beer so shipped was consigned to itself, the Christ Diehl Brewing Co., and was received by its agents in Holgate and Deshler and stored in its cold storage houses in those towns and none of it was in any way designated or set apart for any particular customer.

Each morning and evening the agent of the brewing company at Holgate and at Deshler would make the round of the saloons in his town; inquire of each saloon keeper how much beer he would need for the day or part of a day; enter that amount with the price thereof on a book which he carried with him; make a duplicate entry on the book kept by the saloon keeper; and afterwards would deliver by wagon to the saloon keeper the amount and kind of beer so ascertained to be needed, taking such amount of beer from the general stock on hand in the cold storage house, and continue to so do until the amount previously ordered by any customer had been delivered to him.

The price of the beer was at all times fixed by the brewing company at Defiance or by the soliciting agent. As a rule the agents at Holgate and Deshler collected no money, though they occasionally did so and especially from customers who were considered financially unsound. The collections of money for the beer so delivered were usually made by the soliciting agent at his next call.

It is also agreed that all of the beer so delivered from said cold storage houses was intoxicating liquor, and was not sold upon prescription issued in good faith by reputable physicians

in active practice or for exclusively known mechanical, pharmaceutical or sacramental purposes, but was sold by plaintiff to its said customers to be retailed by them as an intoxicating liquor in the usual retail trade.

The question before us is: Was the business thus engaged in by plaintiff in Holgate and Deshler a *trafficking* in intoxicating liquor within the meaning of Section 4364-9 and the following sections of the statute? If it was not, plaintiff is entitled to the injunction prayed for. If it was such a business, the injunction was wrongfully granted and must be dissolved. The statute, Section 4364-16, defines the term "trafficking in intoxicating liquors" as follows:

"The phrase, 'trafficking in intoxicating liquors,' as used in this act, means the buying or procuring and selling of intoxicating liquors otherwise than upon prescription issued in good faith by reputable physicians in active practice, or for exclusively known mechanical, pharmaceutical or sacramental purposes, but such phrase does not include the manufacture of intoxicating liquors from the raw material and the sale thereof at the manufactory, by the manufacturer of the same in quantities of one gallon or more at any one time."

It is evident that the whole question involved in this case depends on the one word "sale" and its definition.

When and where under the facts agreed upon in this case, did the *"sale"* take place?

Was the sale completed by the soliciting agent when he took the order for the supply of beer to each saloon for the coming month? or

Was it completed when the order for beer was accepted and confirmed by the home office in Defiance? or

Was it completed when the beer for all the Holgate and Deshler customers was shipped in bulk to the cold storage houses in those towns? or

Was it completed when the beer was delivered by the agent of the brewing company from the cold storage houses to the saloons? or

Was it only completed when, after delivery, the soliciting agent again called, collected the money for the beer previously delivered, and solicited a new order?

We have been cited to many authorities, decisions of courts in this state and in others, constructing the statutes involved in this case and similar statutes in other states.

Some of these it will be profitable for us to comment on and consider in their bearing on this case, always remembering, however, that there is no peculiar law applicable to cases of this kind except the constitutional and statutory law, and that the case must ultimately be decided upon the broad principles applicable to all contracts of bargain and sale.

In the case of *Senior* v. *Ratterman*, 44 O. S., 661, it was held that—

"Section 18 of the schedule to the Constitution, which provides that 'no license to traffic in intoxicating liquors shall hereafter be granted in this state; but the General Assembly may, by law, provide against evils resulting therefrom,' applies as well to the wholesale as to the retail traffic in intoxicating liquors."

The statute then under consideration is the same one involved in the case at bar. It distinguishes between the obligations of a manufacturer of such liquors and all other dealers, but the court held that this distinction did not, by force of the Constitution, extend to other wholesalers as distinguished from retailers.

Just why the Legislature should have seen fit in its wisdom to impose a tax upon the small retailer of an article, while it permits the manufacturer of that same article to make and sell it in car load lots without any tax whatever, is not apparent to the judicial mind; but such is the statute and, the Supreme Court having upheld the constitutionality of the statute, we are not at liberty to discuss that feature of it, and it is not material to this case.

The question before us is not whether a brewery may or may not sell beer, from its brewery, without taxation—that right is granted by the statute—but whether it may sell elsewhere than at its brewery, and whether a sale made as in the case at bar is a sale elsewhere than at the brewery.

The cases of *Hanson* v. *Luce, Treasurer*, and *Monaghan* v. *Luce, Treasurer*, reported together, 50 O. S., 440, are strongly

relied on by the plaintiff to sustain its claim of exemption from taxation, and those cases are very closely similar to the case at bar.

In both those cases, saloon keepers, having paid the Dow tax on their saloons, built cold storage houses for the storage of beer and then proceeded to engage in the wholesale sale of beer as well as the retail. Both employed agents who, as in the case at bar, took orders for beer, and these orders were supplied from the respective cold storage houses of plaintiffs, but only in wholesale lots. The sales were made to all who wished to buy but no beer was sold at the cold storage house.

The Supreme Court held in those cases that such sales were permissible without incurring liability for additional taxes.

In both of those cases the cold storage houses were closely connected with the saloon on which the Dow taxes had been paid. In one case, the cold storage house was in the rear of the saloon, only four and a half feet distant from it and connected with the saloon by a covered way—practically the same building. In the other case, the cold storage house was on the opposite side of the street from the saloon but only 155 feet distant from it.

This fact may have something to do with the decision of the case; but it appears from the opinion that it was decided altogether on the conceded fact that "no beer was sold at said cooler."

From the opinion by the court, we quote as follows:

"It thus appears that beer was neither bought nor sold at the cooler, but that all the business of buying and selling was done at the saloon and that the cooler was a mere place of storage and not a place of business and that no traffic whatever was carried on at the cooler; no buying, no selling.

"It is difficult of comprehension how the business of trafficking in an article can be said to be carried on at a place where such article is neither bought, sold nor bartered.

"The traffic contemplated by the statute consists in the purchase and sale or barter of the liquors named therein and the place of the traffic is the place where such purchase, sale or barter is had, and not the place where the liquors are stored for cooling or safe keeping.

"The sales of beer made by the driver of the beer wagon, must

be referred to the place where his employer carried on the traffic and not to the place of storage."

I have quoted thus extensively from the opinion in those cases because it seems to disclose both the theory on which the decision was rendered and to emphasize both the similarity and the dissimilarity of those cases with the case at bar.

If it is true in the case at bar, as was conceded in those cases, that there was no traffic or sale at the cold storage houses, then those cases are conclusive in the present instance. But that is the very point that is to be determined in this case. There it was conceded that no beer was sold at the cooler. Here it is contended that beer *was* sold from the cooler, or cold storage house. This is the vital point in this case.

The case of *Jung Brewing Co.* v. *Talbot, Treas.,* 59 O. S., 511, is also an interesting case. In that case it appeared that the brewing company, located in Cincinnati, maintained a cold storage house in Urbana, Champaign county, "where beer, shipped from the brewery, was received and kept on hand ready for sale and delivery to customers in the latter city, from time to time as they might order. The sales were not made directly at the storage rooms, but were made by agents and employes of the plaintiff who drove wagons for that purpose which were supplied with beer in the keg from the storage room." The court held that the business conducted in that manner was taxable and on page 516 of the opinion the court say:

"If customers had made their purchases or received the property at the building (meaning the cold storage building) it would undoubtedly have been a place of traffic. Instead of conducting the business in that way the agents who had charge of the building and contents obtained orders from the customers which they filled by hauling the beer from the building to the customers. That was merely a matter of convenience to the purchaser or inducement to buy. The building where the property sold was situated and from which it was delivered was, for every practical purpose, the place where the business was carried on. The substantial distinction between this case and the cases of *Hanson* v. *Luce,* and *Monaghan* v. *Luce,* 50 O. S., 440, is that in the latter case the storage room was used in connection with, and as part of the wholesale and retail traffic carried on by the proprietor

at his saloon where all the business was done. and for which he had paid the tax. In such a case, it was held he was not subject to a separate tax on account of the use made of the storage room."

Here we find a close similarity to the case at bar and the court holds that though "agents who have charge of the building and contents obtained orders from the customers which they filled by hauling the beer from the building to the customers, that was merely a matter of convenience to the customer or inducement to buy; the building where the property sold was situated and from which it was delivered was, for every practical purpose, the place where the business was carried on."

But plaintiff in the case at bar insists that the manner of sale in this case, the fact that a blanket order had previously been taken and that the daily orders delivered from the cold storage houses were merely designations of what was immediately needed, takes it out of the rule thus laid down.

A case perhaps still more nearly identical with this case is that of *Village of Bellefontaine* v. *Vassaux*, 55 O. S., 323. There a brewery company at Sidney owned a cold storage house at Bellefontaine. There was evidence tending to show that customers in Bellefontaine ordered beer of the brewing company at Sidney, which thereupon shipped it to the purchaser at Bellefontaine, but in care of its own agent, who stored the beer in the cold storage house and delivered it to the purchaser only when paid for. In that case there was an attempt to show that the beer for each purchaser was set apart by itself in the storage house in a rack labeled with the initial of the purchaser's name but there was no attempt to show a separation between the beer ordered by two men with names of the same initial letter. The court held that such evidence justified a conviction of the charge of selling intoxicating liquor in violation of law.

The case is especially important because of the discussion in the opinion of the question as to what constitutes a sale, and to that question it is necessary continually to return; for on it this case must depend. What then is a sale and when is it complete?

Blackstone (2d Com., page 446) says it is "a transmutation

of property from one man to another in consideration of some price."

Kent calls it "a contract for the transfer of property from one person to another for a valuable consideration." 2 Kent's Com., 468.

Benjamin on Sales, Section 1, declares that, "It may be defined to be a transfer of the absolute or general property in a thing for a price in money."

Mechem on Sales defines it as, "The transfer, in pursuance of a valid agreement, from one party called the seller to another called the buyer, of the general or absolute title to a specific chattel, for a price, or a consideration estimated in money," and says further that the sale takes place only when the title passes.

In all of these definitions except that of Kent a transfer of title or property is held to be anecessary element of a sale; and in Kent's definition it is the contract for the transfer which constitutes a sale.

But in all of these authorities it is held that it is not the mere contract to sell that makes a valid sale. There must be something more—an actual setting apart, not necessarily a delivery, though usually a delivery, of the thing bargained for. Until such setting apart or delivery takes place the thing contracted for remains the property of the seller, although the buyer may recover damages for the failure to perform the contract by a delivery. This delivery may be constructive, as when it is made to a common carrier for transfer to the purchaser, but even there there must be some setting apart of the thing to be delivered.

And this conclusion was followed by the Suppreme Court in *The Village of Bellefontaine* v. *Vassaux, supra,* the court holding that "as a general rule, a sale of personal property is not completed when anything remains to be done to identify the thing sold or discriminate it from other like things."

This rule has been held to be varied by particular customs under certain conditions, but is the general rule applicable in all cases, where no special custom is found to the contrary.

Applying these principles to the case at bar, when could the buyer first point to any particular keg of beer and say "that

is mine." Not when he gave the order to the traveling salesman; not when that order was approved at the home office of the brewing company; not when the beer for all the customers in Holgate or Deshler had been shipped and stored together in the cold storage houses in those towns. Up to this point no title had passed. Any creditor of the brewing company could have seized the beer and held it by attachment as the property of the brewing company. But when the agent of the brewing company took that beer from this cold storage house, setting apart some of it for one customer and some for another and, from the cold storage house, began the delivery of their portions to the respective purchasers, then the brewing company lost its title and the purchaser gained it whether payment had been made or not. Then the sale was complete.

Does it follow, as claimed by the plaintiff, that in such event the final delivery, being at the purchaser's saloon, was not at the cold storage house and therefore the business can not be taxed? We think not. As in the case of *Jung Brewing Co.* v. *Talbot, Treas.*, the court held that the business to be taxed was not done on the wagon but at the place from which the wagon was loaded and the beer delivered, so here, the beer was delivered from the cold storage house and as was said in that case, "The building where the property sold was situated and from which it was delivered was for every practical purpose the place where the business was carried on."

But the plaintiff distinguishes that case from this, because there the agent who managed the cold storage house also solicited orders and sold the beer, while here the orders were all previously taken by another agent and only beer already ordered was delivered. It would be difficult to distinguish these two cases and the Bellefontaine case upon any principle known to us.

The distinction is, we think, without force. True, the order had previously been given, but the execution of it, the completion of the actual sale, was carried out only from the cold storage house and by the agent in charge thereof. Until such delivery, there was no completed sale; no setting apart of any particular beer; no transfer of any title to any particular kegs or barrels of beer. The business was conducted from the cold storage

house and only completed by the agent in charge of that house. We can not believe that there is any substantial distinction which would take this case out of the rule laid down in the Jung Brewing case and in the Bellefontaine case. If there was no completed sale by the soliciting agent, and none at the home office, then the only other places where a sale could have been completed was either at the cold storage house or from the delivery wagon at the door of the saloon. The Jung Brewing case negatives the latter construction and this is in accord with the universal commercial law. There remains only the one possible place of sale and that is at the cold storage house.

We have reached this conclusion after a most careful consideration of the authorities. In doing so we have been somewhat embarrassed by an able opinion, recently published, rendered by a former judge of this same circuit, an opinion concurred in by all the judges then members of this court, for all of whom we have the highest personal and professional regard and whose opinions are always worthy of the highest consideration. The plaintiff in that case is the plaintiff in this case. The facts in the two cases are substantially identical. But the conclusion reached by the court as then constituted was directly opposite to that at which we have arrived.

We have read the opinion in that case with great care, but have been unable to agree with the conclusions there reached.

It may not be amiss to consider in conclusion the effect of a contrary view. Under that holding the brewing company—merely because it is a manufacturer—might establish in each county in the state and in each town in each county, a depot of supplies. Its agents might there conduct what is in all essential respects a wholesale business and without taxation—a privilege denied to all other wholesalers of beer.

From these depots, beer might be delivered continuously to all retail customers and new orders continuously taken, provided only that formal blanket orders have previously been taken and approved by the home office and the price subsequently collected by some one other than the manager of the depot of supplies—the cold storage house.

The brewing company might thus by a simple subterfuge get around the law and conduct a limitless number of subsiduary

wholesale houses without taxation—just what the law prohibits in all others.

We do not think that such an interpretation of the law is consistent either with the decisions of our Supreme Court or with the spirit of the law or even with its letter.

The finding of the court will therefore be in favor of the defendants; the injunction dissolved. Judgment against plaintiff for costs; execution awarded and the cause remanded for execution.

B. F. Enos and *Donovan & Warden*, for plaintiff.

T. A. Conway, for defendants.

PROSECUTION FOR CRUELTY TO ANIMALS.

Circuit Court of Cuyahoga County.

GEORGE W. WOOD v. THE STATE OF OHIO.

Decided, December 9, 1907.

Criminal Law—Prosecution under Section 6951 for Cruelty to Animals—Plea in Bar—Based on Conviction of Cruelty to Another Animal—Criminal Liability of Principal—Where Wrongful Act is Done by Agent—Offenses against Public Policy—Prima Facie Case.

1. Where the owner of several teams, engaged with different drivers on the same work, is prosecuted and convicted of cruelty to a mule that was being worked with sore shoulders, such conviction can not be set up as a plea in bar to a second prosecution for cruelty on the same day to another mule, which was working in another team and with a different driver.
2. A *prima facie* case of criminal liability is made against a principal, when it is shown that an act which is made an offense under the statutes was done by his agent in the course of his employment and with the apparent authority of the principal.

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

Error to the court of common pleas.

Wood was prosecuted before a justice of the peace for a violation of Section 6951, Revised Statutes, punishing those guilty of cruelty to animals, the charge being that—

"On the 4th day of April, 1907, in the city of Cleveland, in the county of Cuyahoga, and state of Ohio, one George W. Wood, did unlawfully and willfully torture a certain animal, to-wit, one brown mare mule, by then and there causing Robert Magruder to work and drive said brown mare mule, said brown mare mule then and there having her right shoulder and chest sore, caused by the rubbing of the collar and padding against said sore shoulder and chest of said brown mare mule, causing said brown mare mule much pain and suffering."

Upon the trial Wood was convicted and sentenced to pay a fine. To reverse this conviction he prosecuted error to the court of common pleas, where the judgment of the justice was affirmed; to reverse which, the present proceeding is brought. Wood set up as a defense, first, a plea in bar, and in support of it offered evidence showing that he was prosecuted and convicted for cruelty to a brown gelding mule, the offense having been committed on the same day that he was charged in this prosecution with having been guilty of cruelty to the brown mare mule.

The evidence on this plea showed that Wood was part owner of several teams of mules, all working on one job of excavation, being handled and driven by different drivers. The mare for cruelty to which this prosecution was instituted was working in a team driven by Magruder. The gelding, for cruelty to which he had already been punished, was working in a different team, driven by a different driver, but the work was all being done, as already stated, on the said job and under the same superintendent or manager.

It is urged that the cruelty to the mare was a part of the same act as the cruelty to the gelding, for the reasons already stated. This plea in bar was not sustained by the justice, nor should it have been. The two acts, cruelty to the gelding, and cruelty to the mare, were two distinct and separate acts, done by different agents of the plaintiff in error. As well might it be said that if a saloonkeeper were prosecuted for selling liquor, in violation of law, on the first day of the week, and it should turn out that sales were made by two different bartenders in the saloon to two different people at the same time, that the saloonkeeper had committed but one offense, because both sales were in the same saloon and at the same time. This would border

so closely upon the absurd that we suppose no one would make the claim that a conviction for one of these sales would be a bar to a prosecution for the other. The fact that each of the two mules were working on the same job, so long as they were not in the same team, but were being handled by different drivers, surely does not make the cruelty to the one the same act as the cruelty to the other, and it is the act which was done by the agent of Wood in the prosecution for cruelty to the mare that was on trial in this case; that act being a different one from the act of cruelty to the gelding, and each being an act in violation of the statute, which constituted an offense punishable under the statute.

Suppose the cruelty to the gelding, for which he had already been punished, was of the mildest form to justify conviction under the statute, consequently such as to justify only the infliction of the mildest penalty provided by the statute; and supposing that the affidavit for cruelty to the gelding had been made by A, and the accused had plead guilty, and this mildest penalty inflicted, and the affidavit for cruelty to the mare had been made by B, and the cruelty to the mare had been such as to justify the infliction of the severest penalty allowed by law; it would be manifestly a miscarriage of justice to allow the prosecution for cruelty to the mare to be barred by what had been done in reference to cruelty to the gelding.

The court having overruled the plea in bar the case proceeded to trial, resulting in the conviction of Wood. It is urged that upon the facts of the case Wood should not have been convicted, because it is not shown that he had personal knowledge of the condition of this mare at the time when the cruelty is said to have been inflicted. The evidence shows that he was in the city of Cleveland; that he was having this work done; that he had a driver of the team in which this mare worked, and that he was working her in such wise as to clearly constitute cruelty to her under the statute.

In the case of *Anderson* v. *State*, 22 Ohio State, at page 305, the court discusses the question of the criminal liability of a principal where the wrongful act is done by an agent. In that case the statute under consideration provided that "it shall

be unlawful for any person or persons, by agent or otherwise, to sell intoxicating liquors," etc.

The claim was made that the agent violated the instructions of his principal, and the court held that if the agent had violated the statute without the knowledge of his principal, and in violation of his instructions given in good faith, the principal would not be criminally liable, and attention is called to the language of the statute "by agent or otherwise," which language was used to show expressly and unequivocally that the act was intended to embrace every means that the person charged might employ in effecting the illegal sale. So that that case alone would not be authority for the proposition that the act of the agent is necessarily to be held to be the act of the principal.

In the case of *Meyer* v. *The State*, 54 O. S., 242, it is held:

"That the manager of a mercantile corporation is subject to a fine under the provisions of 'the act to provide against the adulteration of food and drugs,' when the adulterated article is sold or offered for sale by an agent of such corporation acting within the scope of his authority."

Applying that principle to the case at bar it would seem that the principal here would be *prima facie* liable for the act of his agent. That he might defend upon the ground that the agent was acting in violation of his orders, or by showing that he had no knowledge of what was being done, and that he could not by the exercise of reasonable diligence have known of the acts of the driver.

This is held in the case of *Muhlhauser* v. *State*, 1 C. C.—N. S., 273. In that case Mrs. Muhlhauser was prosecuted for cruelty to animals which were in charge of her agent on a farm in Lake county. She resided in the city of Cleveland. The evidence tended to show that her agent had been guilty of cruelty to the animals on the farm, in failing to provide them with wholesome water and suitable pasture and other food. The court held, upon the showing on the part of Mrs. Muhlhauser, that she had no knowledge of this cruelty; that she resided at a distance of some twenty-five or thirty miles away, and that as she had given proper instructions for the care of the animals in good

faith, it made a complete defense for her; but there is no intimation that a *prima facie* case was not made against her by showing the cruelty on the part of her agent.

In Section 746 of Meacham on Agency, it is said:

"As a general rule, he (the principal) can not be held criminally liable for the act of his agent, committed without his knowledge or consent. There is, however, a class of cases, as has been seen, where, by statutory enactment, the doing of a certain act otherwise perhaps innocent or indifferent, or at the most not criminal, is expressly prohibited under a penalty. Of this class are many of the statutes in the nature of police regulations which impose penalties for their violation, often irrespective of the question of the intent to violate them; the purpose being to require a degree of diligence for the protection of the public which will render violation exceedingly improbable, if not impossible. * * * It is the duty of the principal to see to it that such statutes are not violated by his agents in the course of their employment. * * * Instances of these principles may be found in the case of the publication of libels; the smuggling of goods; * * * the sale of unwholesome or adulterated food; the erection or continuance of nuisances; the transportation of forbidden goods; the transaction of business without a license and the like. Frequent illustrations are also found in the statutes regulating the traffic in intoxicating liquors; * * * a baker has been held liable to a criminal charge for selling adulterated bread, although the adulteration was put in by his servant, and although he did not know that it was used in improper quantities; the directors of a gas company have been held liable to an indictment for a nuisance created by their superintendent, acting under a general authority to manage the works, though they were personally ignorant of the particular plan adopted, and although it was a departure from the original and understood method, which they supposed him to be following.

"When the criminal act is committed by a known agent, this is *prima facie* evidence of the principal's authority, but he may rebut the presumption by showing that the act was not in fact authorized or assented to by him."

In the case of *Commonwealth* v. *Nichols*, 10 Metcalf, 259, it is said in the syllabus:

"Sale by servant, in the shop of the master, is only *prima facie* evidence of such sale by the master as would subject him

to the penalty for violating the statute forbidding the sale of spirituous liquors without a license."

The case of *Rex* v. *Dixon,* 4th Campbell, page 12, is the case referred to in Meacham on Agency, hereinbefore quoted, and the syllabus reads:

"A baker who sells bread containing alum in a shape which renders it noxious, is guilty of an indictable offense, if he ordered the alum to be introduced into the bread, although he gave directions for mixing it up in a manner which would have rendered it harmless."

This is a very old English case, but it is cited, apparently with approval, by Meacham, and the cases to which attention has been called in this opinion seem to us to justify the holding that where the act is done by the agent in the course of his employment and with the apparent authority of the principal, a *prima facie* case is made out against the principal. We reach the conclusion, therefore, that was reached by the court of common pleas, and its judgment is affirmed.

Carpenter, Young & Stocker, for plaintiff in error.

B. J. Sawyer, for defendant in error.

APPLICATION OF USURY LAW.

Circuit Court of Lucas County.

GEORGE B. BOONE v. PETER L. ANDREWS ET AL.

Decided, June 27, 1907.

Interest and Usury—Pleading—Burden and Sufficiency of Proof—Usury Law Not Applicable to Contract for Hazarding Money in Business —Advancements for Joint Venture not Usurious although Profits are Liquidated.

1. Where usury is pleaded as a defense to a written instrument in contradiction to the terms of such instrument, the burden is on the party so asserting it, and the plea must be supported by clear and satisfactory evidence.
2. Where one person hazards, in a business to be conducted by himself and others jointly, or by such others for his benefit, money which is by agreement subjected to the risks of the business, the law as to usury does not apply.
3. An agreement whereby the first party thereto advances sums of money to be used by the second parties in conducting a business of making usurious loans and purchasing time certificates of wage earners, the profits and losses of such business to be divided and borne equally by such parties, is not usurious and is not made so by subsequent amendment whereby the first party promises to accept a stated per cent. on the moneys so advanced, as liquidated profits, or in lieu of profits. The original agreement as to apportionment of losses remained unchanged.

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

Appeal from Lucas Common Pleas Court.

This case involves the construction of a written contract entered into by and between the plaintiff, George B. Boone, upon the one part, and Peter L. Andrews and his wife, Clara L. Andrews, on the other part, together with certain amendments to said contract and an oral arrangement subsequently entered into, all read in the light of the circumstances and the acts of the parties thereunder. Briefly stated, in the year 1899 Peter L. Andrews and his wife were engaged in the business of loaning money, at large rates of interest, and buying the time of wage

earners, upon which business they were realizing large sums of money and profits. On February 28 of that year the principal contract involved in this case was entered into. The writing before me which embodies this contract and the subsequent amendments, except the oral arrangement to which I have already referred, reads, with said amendments, as follows:

"TOLEDO, OHIO, February —, 1899.

"This memorandum of agreement, entered into this twenty-eighth day of February, 1899, by and between Geo. B. Boone, of the first part, and Peter L. Andrews and Clara L. Andrews of the second part, witnesseth:

"The first party agrees to advance to the second parties the sum of four thousand dollars ($4,000), if he shall deem it necessary or advisable, and as much more as he may deem advisable, said sum to be used by said second parties in their business as money lenders and purchasers of time orders, said moneys so advanced to be and remain at all times the money of the first party.

"Said second parties agree to take said money and keep it invested as aforesaid for said first party, and if any of said money shall be lost, the second parties agree to pay to said first party one-half of the amount lost, and a loan which is not paid, or the interest not paid for two months, shall be deemed and treated as a loss, but all so-called losses and interest shall be returned, one-half to first party and one-half to second party, when collected; and said second parties agree to pay to said first party the one-half of said losses determined as aforesaid at the time of each monthly settlement provided for herein.

"The first party agrees to allow to the second parties as compensation for their services herein the one-half of whatever is made as interest or profits on the use of said money and the additional sum of twenty-five dollars ($25) per month in full payment of every and all expenses.

"It is further agreed that said second parties shall make a full statement and such showing as the first party may require not later than the first of each month, beginning with the month of April, 1899, and at such other times as first party may request, and shall pay to said first party on said first of each month, one-half the interest or profits for the preceding month, and the one-half of the losses ascertained as aforesaid, less the twenty-five dollars allowed as expenses.

"It is further agreed that all losses that may arise on loans made prior to March 1, 1899, shall be paid by the second parties.

"It is further agreed that the amount of money advanced by first party on this agreement shall be evidenced by notes given by second parties to first party.

"This agreement may be terminated at any time at the option of the first party.

"(Signed) George B. Boone; Clara L. Andrews, P. L. Andrews."

"In consideration of the payment by said second parties to the first party on the first of each month of an amount of money equal to 3 per cent. of the amount invested by said first party under above agreement at date of such payment, the first party agrees to release all claim to any share in the profits of said business for the month immediately preceding such payment.

"(Signed) George B. Boone; Clara L. Audrews, Peter L. Andrews."

"4-1, 1899. TOLEDO, OHIO, March 1, 1904.

"The first party agrees to waive all claim to profits under the foregoing agreement for one year from this date, in consideration that said second parties pay to said first party such an amount as they reasonably can on the first of each month, and first party agrees to surrender to said second parties notes of the second parties or either of them, held by the first party, in the order of their dates, commencing with the oldest note, to the amount of the payments made hereunder. Said payments shall aggregate six thousand dollars for the year.

"(Signed George B. Boone; Clara L. Andrews, P. L. Andrews."

"TOLEDO, OHIO, November 1, 1905.

"The first party agrees to waive all claim to profits under the foregoing original agreement as long as the following payments shall be made to him by the second parties, viz: The second parties shall pay to the first party on the first of each month after date an amount of money equal to 6 per cent. on the money invested in the business mentioned in said agreement at the time of such payment, and also such further sum on the first of each month, so that the aggregate of such payments for any one year after date, excluding said interest payments, shall not be less than $1,800 and said last mentioned payments shall be credited upon the amount invested in said business by first party.

"In case of default by said second parties in either or any

of said payments, then this agreement shall terminate and the said original agreement shall become and be in full force.

"(Signed) George B. Boone; Clara L. Andrews, P. L. Andrews."

The contention of the plaintiff, George B. Boone, is, that this arrangement between him and Mr. Andrews and wife constituted one of three things: First, a partnership; second, a joint venture of money and skill, or third, a trusteeship or agency; and that whichever one of these three alternative constructions be adopted, the plaintiff is entitled to an accounting from the defendants, Andrews, for the moneys placed in their hands by him under the terms of the contract.

On the other hand, it is insisted by the defendants, Andrews, that the arrangement was merely a loan of $4,000 at or about the time of the entering into this arrangement and of various sums at subsequent dates without any hazard to Boone as to the return of the money so loaned, except perhaps such hazard as may attach to any loan, as to the personal responsibility of the borrower, and that Boone was to receive as consideration for the use of this money, usurious interest. It is further contended by these defendants that Boone has been repaid the entire amount of such loans or advances, with interest at the legal rate, far in excess of that to which he is entitled.

The plaintiff has brought an action not only for an accounting, but for the appointment of a receiver and for an injunction to restrain the transfer or other disposition of any of the assets of the claimed partnership or trust, now in the hands of the defendants, Andrews. The court below appointed a receiver, who took into his possession the property claimed by the plaintiff to belong to the alleged partnership, or trustees, or agents, and also a referee to try the issues of fact and law involved in the controversy. The referee reported adversely to the claims of the plaintiff; the receivership, upon motion, was terminated and the receiver discharged and a temporary injunction which had been allowed was dissolved, and, on final decree, the court enjoined the plaintiff from attempting to collect certain notes which had been given him by the defendants, Andrews, under the terms

of said contract. From these various orders, so far as they were embodied in the final decree, plaintiff appealed to this court and the case has been submitted to us upon the pleadings, upon all the evdience taken before the referee and some supplementary evidence orally heard by this court.

It is not of very much consequence, in our judgment, by what name we denominate the condition which arose upon the execution of this contract of February 28, 1899. It is of importance to ascertain the true intent and spirit of that contract as determining just what was the arrangement in contemplation of the parties when the paper was signed. It appears that some years prior to this date the parties had been engaged in a joint business, though they may not have called it a partnership; but it is not disputed by the defendants here through their counsel that they were at this prior time engaged in business together; and while ws are not informed with precision as to the date when that earlier arrangement began, it appears that in June or July, 1898—if we are to rely upon the testimony of Mr. Boone in this regard—there was a termination of that arrangement, when one Rowland seems to have taken the place of Mr. Boone in the business conducted by Mr. Andrews and wife. Some sort of a settlement was made with Mr. Boone at that time and he was partly paid an agreed indebtedness then existing in his favor. The residue, however, of a considerable indebtedness was unpaid at the time of the execution of the contract of February 28, 1899.

Much stress is laid by counsel for the defendants upon the fact that there is no mention, in terms, of a partnership, nor is the word "partner" used in this contract which is the particular subject of contention and construction; and in the opinion of the referee, or perhaps in his report, some emphasis is placed upon the fact that there had been no talk, so far as appeared by the evidence, of a partnership, so denominated. Our search of the evidence discloses the statement made by Mr. Boone, in cross-examination, I think, that he did not recall that in the conversations between him and Mr. or Mrs. Andrews anything was said about a "partnership." It is urged upon us with much earnestness and some plausibility, perhaps, that as Mr. Boone

was a lawyer and familiar with the law pertaining to partnerships, if he had designed to enter into the relation of partner with these defendants, that fact would have been expressed with clearness in the contract, which was written by him. A further examination, however, of this somewhat voluminous record discloses among numerous exhibits an earlier writing, signed by these same parties and written by Boone, which seems to have been made the basis of the original arrangement between them, not the one under which operations were conducted after February 28, 1899, but in the period which terminated with June or July, 1898. This contract is known as Exhibit 24 and is attached to the other evidence offered to the referee. It is brief and I will read it:

"This memorandum of agreement entered into between Geo. B. Boone of the first part and Peter L .Andrews and Clara L. Andrews of the second part, witnesseth: The first party agrees to advance to the second parties so much money as he may deem advisable, said money to be invested in loans and time certificates, by the second parties. The second parties agree to give to the first party as evidence of said sums of money so advanced their promissory notes, said notes to be payable at any time either of the parties hereto shall so elect. The second parties further agree to keep said money invested in loans and time certificates. also to furnish to said first party a monthly statement of the amount of such loans and time certificates, and to pay to said first party his proportion of the profits shown by said statements. It is further agreed by the parties hereto that the first and second parties shall bear in equal proportions the gain and the loss on the investments of the second parties. It is further agreed that the title to said investments shall be and remain in the first party but shall be made in the name of Clara L. Andrews, trustee, or other proper party.

"(Signed) Geo. B. Boone; Clara L. Andrews, Peter L. Andrews."

The similarity of several of the phrases used in this contract to those adopted in the contract of February, 1899, can not be overlooked. In one part of the testimony of Mr. Boone he is asked what form he used in the drawing of the contract of February 28, 1899. It is in the lnie of cross-examination, where-

in counsel were seeking to emphasize their claim that he would have been likely to adopt the term "partnership" if the contract had been intended to embody an agreement to enter into such a relation. In answer to one of these inquiries—the inquiry I have referred to—as to what form, if any, he adopted, he said, substantially—I have not his precise words before me at the moment—that he had the contract which they had used before, or under which they had carried on business before, the implication being that he had used that, not perhaps entirely as a form from which to draw a new contract, but as suggestive of some of the phrases in it—and that it was clearly suggestive of some of these phrases, we have no doubt. This earlier contract bears no date, but it was made at any rate some time prior to June or July, 1898, when, according to the testimony of Mr. Boone, the first arrangement terminated. It was, perhaps, not far from the the date when Mr. Boone leased certain property on South Erie street to Andrews, or to Andrews and wife, to enable them to carry on the business in which he was at that time engaged with them or into which he at that time entered, and this was, I think, three or four years prior to 1898.

This contract, Exhibit 24, provides that the title to the investments shall be in the first party, that is, Mr. Boone, although the investments should be made in the name of Clara L. Andrews, as trustee, or some other proper party. For some reason, Mr. Boone did not care, apparently, to have his name used in connection with the business; whether he did not wish to become liable in connection with it, or whether he did not care to have his name associated with it because of its effect in some other way, it is not necessary to inquire. Three is no hint that it was a usurious contract; there is nothing in the contract to indicate it; there is nothing tending to show anything of the kind; there is no claim by counsel in behalf of Mr. or Mrs. Andrews that there was any usurious contract made at the beginning of that earlier arrangement. The contract provides expressly that there shall be, not only a community of profits, but a community of losses. They are to share alike and equally in the losses as well as the profits, and, in our judg-

ment, this transaction can have amounted to nothing more and nothing less than a partnership, under well-settled rules—I am speaking now, of course, of this earlier arrangement, evidenced by the testimony of witnesses and by Exhibit 24. The same exhibit uses various other phrases, identical or almost identical, with those embodied in the contract of February 28, 1899, and one of them, of much importance, perhaps, or demand of much importance in the contract of 1899, is found embodied in the contract of the earlier date, as follows: "The second parties agree to give to the first party as evidence of said sums of money so advanced their promissory notes." * * * It was not then deemed inconsistent with the sharing of losses that the defendants, Andrews, should give their promissory notes to Boone. In the contract of February 28, 1899, we have the phrase:

"It is further agreed that the amount of money advanced by first party on this agreement shall be evidenced by notes given by second parties to first party."

In the later contract, it is not stated when those notes should be made payable, whether or not they should be negotiable or what should be their other terms, but in the earlier contract the stipulation was, that they were to be payable "at any time either of the parties hereto shall so elect."

We are inclined to think, or, at least it is my judgment, that the construction of the contract of February 28, 1899, would amount to the same result as that which is embodied and expressed in the earlier contract; that is to say, when the contract provides that the amount of money advanced shall be evidenced by notes given by the second parties to the first party, as no time of payment is given, it is left open to future arrangement between them as to when they shall be made payable. That is perhaps not precisely the arrangement which was made in the earlier contract, but it is near enough to it, so far as the purposes of this case are concerned. The important thing—and which I repeat for the purpose of emphasis—is that in the earlier contract which is unquestionably a contract in which the parties were to share losses, and under which Mr. Boone might never receive back the moneys loaned or advaneed by him, it was

not deemed inconsistent with that arrangement that notes should be given as evidence of the amount which he so advanced or placed in the hands of Mr. Andrews and his wife. If that was true when that arrangement or contract was made, we may fairly infer that it was the intent of the parties in the second contract that they were to divide the profits and losses, if that contract in other respects will reasonably bear that interpretation.

The contract of February 28, 1899, does not expressly say that the first and second parties shall bear in equal proportion the gain and the losses, but it is provided that:

"Said second parties agree to take said money and keep it invested as aforesaid for said first party, and if any of said money shall be lost, the second parties agree to pay to said first party one-half of the amount lost." * * *

I tarry there for a moment. By the terms of the notes the second parties would obligate themselves to pay back the entire amount of money received; but here is a provision that if any part of it be lost, they shall pay to the first party one-half of the amount so lost, the implication being, as we think, that they would not be required to pay back the other one-half—in other words, that as between Mr. Andrews and his wife on the one side and Mr. Boone on the other, there would be an equal division of such loss; that is to say, that they would make good to him the money which he had let them have, though lost, to the extent of one-half of it. If all the money should be lost in the venture—a contingency which, unquestionably, they did not contemplate—they would be required to give to Mr. Boone one-half of the amount.

There is a further provision in the contract, however, which I will read: "and a loan which is not paid, or the interest not paid for two months, shall be deemed and treated as a loss, but all so-called losses" (and I invite attention to the phrase "so-called") "and interest shall be returned, one-half to the first party and one-half to the second party, when collected;" * * *. In other words, at the time of the monthly settlements, as subsequently provided, if there was a default as to either principal or interest, it would be treated, provisionally as a "loss," and,

if subsequently collected, then the matter would be corrected in a subsequent accounting. It has been argued to us with very much earnestness that the fact that notes were given is the controlling fact; that the money was to be repaid to Boone at all events, that is, the principal, and that they were talking about a loss of interest only when they spoke about a default for two months and then of the payment by the second parties to the first party of only one-half of the amounts as to which there have been such defaults and which they call "*so-called* losses." But one trouble with this claimed construction is, that a *loan which is not paid* or the interest not paid for two months shall be deemed and treated as a loss. It is not simply the interest, They evidently had in contemplation a possible loss of some portion of the investment and it would be difficult to see how they could shut their eyes to such a possibility, in view of the kind of business that was being conducted.

Now these circumstances, and perhaps some others to which I might refer, aid us in the construction of this contract and weigh more forcibly with us than could have done the use of the term "partner" or "partnership" in this contract or does the drawing of a subsequent contract in which one Sherer was a partaker, in which there was an express provision for a partnership. That is a circumstance bearing upon the likelihood of Mr. Boone's drawing a contract with the intent to enter into a relation analogous to that of partner with Mr. and Mrs. Andrews, and omitting all reference, in terms, to a partnership; but it is not more cogent than the making of another contract at a prior date in which a partnership was created with a like omission in terms. A like omission occurs in another contract, which I will not stop to read, attached to these papers and marked Exhibit 23, an agreement which was entered into in 1896, between Mr. Boone on the one side and Mr. and Mrs. Andrews on the other, and in another writing drafted by Mr. Boone in March, 1904, known as Exhibit 25, in which Mr. Boone tendered a sort of readjustment of the affairs created by the facts I have already recited. While he is evidently claiming the relationship to be that equivalent to a partnership, he nowhere refers to it as such,

in terms. This may not be an important item of evidence, but it is one of the circumstances to be considered in its bearing upon the probabilities of the one construction or the other as to the intent of these parties.

We have considered another question of equal importance, indeed possibly of vital importance to the case, and that is, whether, assuming that the contract of February 28, 1899, was not a mere usurious loan, but was one which would be sustained as establishing either a trust or a partnership, the status so created may not have been terminated by the written contract of April 1, 1899, which reads as follows:

"In consideration of the payment by said second parties to the first party on the first of each month of an amount of money equal to 3 per cent. of the amount invested by said fiirst party under above agreement at date of such payment, the first party agrees to release all claim to any share in the profits of said business for the month immediately preceding such payment.

"(Signed) Geo. B .Boone; Clara L. Andrews, Peter L. Andrews.

"April 1, 1899."

If there was a termination of a relation which the law would protect and if the parties entered into a new contract for the retention of moneys theretofore placed by Boone in the hands of Mr. Andrews and his wife, with an agreement that they should be returned absolutely and that Mr. Boone should receive as compensation for their use 3 per cent. a month, that would be such a contract as would not be protected. It would be treated as one for usurious interest and the law would allow Mr. Boone, under such circumstances, on all the moneys which he permitted to remain in the hands of Mr. and Mrs. Andrews, interest at the rate of 6 per cent. per annum and no more.

Let us analyze this amendment, which has been called the first addendum to the original contract.

It is not stated that Mr. Boone makes a certain promise, in consideration of a promise on the part of Mr. and Mrs. Andrews; it does not say—to be more specific—that, in consideration of a promise on the part of the second parties that they will pay,

the first of each month, 3 per cent. or an amount equal to 3 per cent. on the amount invested; the first party will receive such per cent. in lieu of all profits on the money. It is not recited that what Mr. Boone agrees to do is in consideration of any promise whatever by Mr. or Mrs. Andrews, but it is only in consideration of payment that he will receive such payments, we take it, as liquidated profits, and there is no agreement on their part that the liquidated profits shall amount to 3 per cent. In other words, it is a contract all in favor of Mr. and Mrs. Andrews, and there was no occasion for their signing it. They did sign it and, contemporaneously with it, paid him $120, which was 3 per cent on $4,000 which had been theretofore advanced, but we think no implication arises of a promise on their part that they will continue to do that. It seems to be a sort of a promise on his part that, as the months go by, if they will pay him 3 per cent upon the total amount of money which they shall at such times in their hands, he will componud with them.

But what was it that he really released? What is that he says he will release? Why, he says he will release all claim to any share in the profits of said business for the month immediately preceding said payment. He does not say that he will forego the return of the principal or that he will forego that part of the principal to which he is entitled under the arrangement originally made, to-wit, the principal, less one-half the reduction or impairment by loss. It may be contended that in arriving at the profit which he was to receive in each month, account was to be taken of one-half of the losses, that is, the provisional losses—the so-called losses, or losses arrived at by ascertaining what default had been made in principal or interest—and that such losses were to be taken into account before determining what should be his profit and that he was to receive 3 per cent. in lieu of such profit. And I am not sure but that contention would be right; in fact, I am inclined to think we may carry along that same idea of provisional profits and provisional losses in the monthly settlements under the contract made April 1, 1899, as under the one made February 28. But, under that view, there is no provision that they shall be released from their

agreement to make good to him in their subsequent settlements whatever has been treated as a loss, but which has turned out not to be so.

Now, in the year 1902 at some time there was an oral arrangement by which the parties agreed upon 2 per cent. interest instead of 3 per cent. as expressed in the contract of April 1, 1899, and, for a time, settlements were made upon that basis as the settlements had been made on the basis of 3 per cent. Those payments seem finally to have stopped, and, on March 1, 1904, they signed another addendum to the contract, reading: "The first party agrees to waive all claims to profits under the foregoing agreement for one year from this date." He seems to have become worried about his getting anything more out of the contract, or as to what he may get out of it, and he agrees to forego all profits for a year "in consideration that said second parties pay to said first party such an amount as they reasonably can on the first of each month, and the first party agrees to surrender to said second parties notes of the second parties or either of them, held by the first party in the order of their dates, commencing with the oldest note, to the amount of the payments made hereunder. Said payments shall aggregate $6,000 for the year." This was signed by the parties. This is an agreement that he will relinquish profits if they do what he stipulates there shall be a consideration for such an agreement. It is not contended that in the period of one year from March 1, 1904, they did make payments aggregating $6,000 upon these claims, so that there was no satisfaction, if this was an accord. It was not accord in the sense that it was to be a settlement of the entire claims of Mr. Boone, but it was to be relinquishment of his profits if they would make payments upon the principal to the aggregate amount of $6,000 in that year. On November 1, 1905, the final amendment was made to the contract, in which it is said:

"The first party agrees to waive all claims to profits under the foregoing original agreement as long as the following payments shall be made to him by the second parties; viz.: The second parties shall pay to the first party on the first of each month after date an amount of money equal to 6 per cent. on the money

invested in the business mentioned in said agreement at the time of such payment, and also such further sum on the first of each month, so that the aggregate of such payments for any one year after date, excluding said inetrest payments, shall not be less than $1,800, and said last mentioned peyments shall be credited upon the amount invested in said business by first party. In case of default by second parties in either or any of said payments, then their agreement shall terminate and the said original agreement shall become and be in full force."

This is also signed by all the parties, and the words: "and said last-mentioned payments shall be credited upon the amount invested in said business," should be, to some extent, emphazised in arriving at the understanding which the parties had as to the transaction at that comparatively late date.

I will not attempt to review many of the authorities cited by counsel, but our conclusion is, that the contention of plaintiff that if the money is in any sense placed or invested in the business of Mr. Andrews and his wife, so as to hazard it in the business, then no matter what per cent. is agreed upon as a basis for compensation for the use and hazard of such money, the usuary laws will not apply, is well founded. We think that that contention is supported by the authorities. We need not travel very far away from the authorities of our own state. The decision in the case of *Cunningham* v. *Green,* 23 Ohio St., 296, 298, holds:

"The statute (Rev Stat., 3179), limiting the rate of interest does not apply to an agreement of copartnership, which provides for allowing a partner, who is to bear his share of the loss, interest on the money he invests in the firm."

If this is true as to a partnership, it is equally true as to money placed in the hands of another as an agent or trustee. There can be no escape from the conclusion that the principle which will apply to the one situation applies to the other; whether it be a relation of trust which is created, or a partnership, or a joint venture, by whatever name we may call it—for there is no magic in words—the principle is precisely the same.

The decision, *Second Nat. Bank* v. *Bank,* 13 C. C., 561, is, perhaps, not in all respects applicable, because that was a case

in which the rights of creditors were involved, and sometimes courts will hold parties to obligations as partners, when, *inter se*, they might not be such. We have here a contest between the parties who entered into the arrangement which, on the one side is claimed to have constituted a partnership and on the other side is claimed to have created the relation of debtor and creditor. The case cited, *Cunningham* v. *Green*, *supra*, however, the syllabus of which I have just read, is a case between partners, and the decision of the court is clear, and, as we believe, is the undoubted law, that where one person hazards in a business to be conducted by himself and another, jointly, or conducted by that other for his benefit, money which may be returned to him but which is subject to the risks of the business, then the law as to usury does not apply.

There remains, however, the consideration of an argument which must not be forgotten, and that is, that whatever may be the proper construction of this contract, if we are to treat it as meaning what it says, the law will not protect parties from the consequences of illegal contracts, no matter what form they may make their arrangements assume. In other words, we have the claim asserted, not only in argument but also in the answer of the defendants, Andrews, that this was a mere colorable contract and that it was placed in an ingenious form or phraseology to avoid the consequences of the law as to usury. This is an affirmative claim on the part of defendants and the burden rests upon them to substantiate it. We have no decision in Ohio as to the amount or degree of proof required to sustain such a claim as this. In Jones, Mortgages, Section 643, we have this language:

"The burden of proof that the mortgage is usurious is upon the mortgagor."

This is a work on mortgages and the statement of course relates to mortgages but is equally applicable to other instruments.

"He is impeaching his own obligation formally executed under seal, and must establish the facts to constitute usury beyond a reasonable doubt. An even balance of testimony is not suffi-

cient; there must be a clear preponderance. It is a defense not favored in equity; and especially when the consequence is to forfeit the whole debt, the defense is considered unconscientious. When the penalty is a forfeiture of the illegal interest, or of all the interest, even although the defense is not considered unconscientious, the rule of evidence, that the defense must be clearly made out, is applied both at law and equity."

In our state there is no forfeiture of a debt or of all the interest, but there is a forfeiture of the illegal interest, so that the language used by Mr. Jones, if applicable at all to mere demands on notes or loans, has application here.

In the case of *White* v. *Benjamin,* 138 N. Y., 623, the court held:

"Where usury is pleaded as a defense to an obligation to pay money, as the presumption is against such a violation of law, the defendant must establish it by clear and satisfactory evidence; all the facts constituting the usury must be proved with reasonable certainty; they can not be established by mere surmise and conjecture, or by inferences entirely uncertain."

Perhaps this decision is robbed of some of its force by the fact that the law of New York is not precisely the same as in our state as to the result of usurious contracts; but still the suggestion made, that the parties will not be presumed to have intended to do something contrary to law, is just as applicable to the laws of Ohio as of New York or any other state. It is true that no such penalty attached as to make it a crime, either felony or misdemeanor, but it is an illegal contract so that it becomes invalid and the whole contract as to the usury is so tainted that the law will not permit it; it is considered contrary to the policy of the state, and I see no reason why, upon general principles, it may not be said that a party would hardly be presumed to violate such a law or settled policy of the state.

In the case of *Morris* v. *Taylor,* 22 N. J. Eq., 438, it was held:

"To support the defense of usury, the evidence must be clear and cogent."

In the case of *Conover* v. *Van Mater,* 18 N. J. Eq., 481, it was held:

"The burden of proof is on the party setting up the defense of usury. He must establish the facts necessary to constitute it, beyond reasonable doubt, and by a clear preponderance of testimony."

In Ohio, we have had the rule pretty well established, that, in impeaching instruments solemnly entered into by parties to evidence their arrangements, the proof must be clear. We have it in the case that engrafts a parol trust upon an absolute deed and in the case of reformation of a written instrument. In these and some other instances to which I might refer, the courts have established the rule that the proof must be clear and convincing. The parties are permitted to rely upon the obligations which they have deliberately placed upon paper, and not only will there be no presumption of something different from and antagonistic to, that which they have so written, but the proofs must be reasonably clear to establish the claim of a party that something different was intended. Upon this question we have not a word that I recall from Mr. or Mrs. Andrews, to the effect that it was arranged that this contract should take the form which it was made to take in order to avoid the statute as to usury. It is true, Mr. Andrews says that he was borrowing money from Boone, that Boone was merely loaning it, and he endeavors to make it appear that there was no such arrangement as that which was embodied in the contract. Mr. Boone, on the other hand, claims that the contract was one, as he understood it, of partnership; that he was to share in the losses as well as in the profits, and he repudiates entirely the idea that it was a mere loan. Mrs. Andrews, to a certain extent, corroborates her husband, but there is much in the testimony of both that makes us think, not, perhaps, that they were deliberately fabricating a story, but that their recollection at least, is unreliable as to the transactions on or about February 28 and March 1, 1899. It is their claim that after that written contract was presented to Mr. Andrews, Mr. Andrews signed it, although, as he asserted, it was not in accordance with the arrangement which had been entered into between him and Boone. Yet he says that before he signed it Mr. Boone handed over $4,000 to Mrs. Andrews and then allowed the contract to go

unsigned until April 1, 1899. He makes no reasonable or adequate explanation of the fact that he finally signed a contract which he says was not in accordance with the verbal arrangement which had been made. He says that after he and his wife had signed the addendum which bore the date of April 1, 1899, then Boone said he might as well sign the contract of February 28, and almost without argument or objection, he then signed it. There is no adequate explanation of this fact.

There is another pregnant circumstance testified to by Mr. Boone and hardly contradicted by Mrs. Andrews or by her husband, which is not explainable upon any hypothesis that Mr. Boone was intending merely to loan these various sums of money and to receive pretended profits, but really usurious interest, and that fact is this: That, upon the suggestion of Mrs. Andrews, as he was a partner in the business, owning a part of the furniture which was used in it, he readily assented to pay and paid over $40 as the owner of one-half of such furniture. He is corroborated in his statement by the testimony of Mr. Sherer, that Mr. and Mrs. Andrews admitted that Mr. Boone had paid for one-half of the furniture. If he was merely loaning the money, it is hard to explain why he should be asked to pay for any part of the furniture which belonged to them and was used in the business.

One suggestion made by the referee below is worthy of notice. He says, in substance, that no accounts were made of losses from month to month. A sufficient answer to that is, that we have no evidence that there were losses which necessitated the making of such showing from month to month. On the other hand, Mrs. Andrews, who was a sort of bookkeeper for her husband, or for the concern, did make repeated statements as to the condition of the business and amounts of loans, and the testimony clearly indicates that even if there were losses, there were no net losses—there were net profits. The moneys were loaned, according to the evidence, at 10 per cent. a month, so that after taking an account of any losses by reason of bad debts, after taking account of any expenditures for the business and after paying over to Mr. Boone his 3 per cent., or 2 per

cent., as the case might be, as liquidated profits there still remained a large profit to the defendants, Andrews.

I do not know that it is worth while to dwell further upon the diverse aspects of this controversy. Doubtless I have omitted the consideration of many items which, in courtesy to the attorneys and to the court below, might be mentioned; but sufficient at least has been said to indicate the strong conviction of this court that the plaintiff should succeed in his claims as asserted in his petition. We think that the evidence does not support the claim of the defendants that the parties to this instrument intended it to amount only to a loan. We think that the evidence does not sustain the other contention of the defendants, that the contract was a shift or device, a mere colorable contract, to avoid the consequences of the statute against usury. Perhaps if the defendants could maintain their claims in this regard, they might defeat the action of the plaintiff, and yet it is difficult for us not to say that the defense of usury does not come with the utmost grace from parties whose main business seems to have been the taking of usurious interest upon contracts. Our view of the whole controversy is, that the prayer of the plaintiff's petition should be granted. The judgment will be for the plaintiff. We have not attempted to make an accounting; we understand that the parties can either agree upon that and embody the result in the journal entry or, if they are unable to agree, a reference may be had.

J. A. Barber, for plaintiff.

Clarence Brown, D. C. Mitchell and *L. T. Williams,* for defendants.

ASSIGNMENT OF LIFE INSURANCE POLICY.

Circuit Court of Lucas County.

THE MECHANICS BANKING COMPANY v. THE EQUITABLE LIFE ASSURANCE SOCIETY ET AL.

Decided, October 5, 1907.

Life Insurance—Assignment of Policy without Delivery—Subsequent Assignment with Possession—Conflicting Claims of Assignees to the Proceeds—Priority—Collateral.

The proceeds of a policy of life insurance are payable to the extent of his claim to an assignee of the policy without delivery, in preference to a subsequent assignee in whose possession the policy was placed.

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

This is a petition in error, brought by the Mechanics Banking Company, to reverse the judgment of the court of common pleas. The case arises from, substantially, this state of facts:

George W. Dean took out a policy of insurance on his life, on the tontine savings fund plan, in the Equitable Life Assurance Society. He had not held it a great while before he wanted some money, and thereupon proceeded to borrow from Horace N. Gilbert, his brother-in-law, two thousand dollars, to secure which loan he executed a third mortgage upon certain real estate which he had, and also assigned to the brother-in-law this policy of insurance, as collateral security for the amount of his loan. Subsequently a prior mortgage upon the real estate was foreclosed, and the third mortgage did not receive anything, and the only claim which Gilbert had remaining for his security was the assignment of the insurance policy.

Subsequent to the time of the assignment of the policy to Gilbert, Dean, who still had the policy in his possession and had not actually delivered it to his brother-in-law, went to the plaintiff banking company in Fostoria and borrowed $600 on the same tontine policy, and made an assignment of the policy and delivered possession of it to the bank. The twenty years which the policy had to run expired in the meantime, the amount of the policy became due and has been paid, and this

is a suit brought for the purpose of deciding who shall have the preference out of this fund. The bank claims that it should have payment of its money first, and the balance should go to Gilbert. Gilbert claims that he is entitled first to the amount of his claim by virtue of the foregoing facts.

The point that is made and relied upon largely by counsel for the banking company, is that there was no delivery of possession of this policy of insurance to the brother-in-law at any time, and they claim that in justice and equity and as a fair rule of law, that the policy of insurance, having been left in possession of Dean and by him transferred to the bank, that it therefore acquired the superior right. The court below held in favor of the brother-in-law.

Counsel for plaintiff in error have cited some cases which he claims bear in his favor upon this question. On the other hand, counsel for defendant in error have cited a large number of authorities which they insist tend to support their claim. Without discussing those cases, or citing them, we simply say this: That it seems to us that, in an assignment of this kind, the assignee stands in the shoes of the man who makes the assignment, and we think that the brother-in-law, to the extent of his claim, by this assignment stood in the shoes of Dean and is entitled to be first paid out of the moneys. There is, of course, apparently some force in the argument which is made in which counsel for the banking company claim relief—that, because there was no delivery of actual possession of this policy of insurance to the brother-in-law, therefore the banking company who took the policy of insurance from Dean would be entitled to a preference, but we think that is not good law; in our opinion, it is not in accordance with the principles that properly govern that class of assignments. The bank, when it took this claim of Dean, took the interest that he had, and was bound to know the extent of his interest. If he misled them or misrepresented the facts to them, that was their lookout; it was not a matter that bound the person who already had an assignment. We think this should be so; we think that under the authorities cited by the defendant in error that the large weight of authority, if not almost the entire weight of authority, is in favor of the position that I have stated—in favor of the position claimed by

the brother-in-law—and those authorities can be gathered from the written briefs filed by the respective parties. We, therefore, come to the conclusion that the judgment of the court below should be affirmed.

Stephens & Losee, for plaintiff in error.

Doyle & Lewis, for defendant in error.

ALLOWANCE OF EXPENSES TO SHERIFFS.

Circuit Court of Mahoning County.

STATE, EX REL FRANK L. DENORMANDIE, v. COMMISSIONERS OF MAHONING COUNTY.

Decided, October Term, 1907.

Construction of 98 O. L., 96, Providing Additional Compensation for Maintaining Horses and Vehicles.

In Section 1296-29 (98 O. L., 96), which makes an allowance to sheriffs for "all expense of maintaining horses and vehicles necessary to the proper administration of the duties of his office," the word "maintaining" is used in its ordinary meaning, and only expenses incurred in supporting, sustaining and supplying horses with the neccessaries of life and in keeping them and their vehicles in good condition, can be allowed; it does not mean that a sheriff may purchase at the county expense the necessary horses and vehicles.

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

The relator, sheriff of this county, asks this court to issue a writ of mandamus to compel the commissioners to approve his bills of expense in purchasing two buggies and a double set of harness alleged to be necessary in the performance of the duties of his office, and to pay the same out of the county funds; claiming that they are required to do so by the provisions of act 98 O. L., 89, 96, Section 19; Revised Statutes, 126-29.

That section provides that—

"The county commissioners shall, in addition to the compensation and salary herein provided, make allowances quarterly to every sheriff for keeping and feeding prisoners under Section 1235 of the Revised Statutes, and shall allow his actual and necessary expenses incurred or expended in pursuing or transporting persons accused or convicted of crimes and offenses,

* * * and all expense of maintaining horses and vehicles necessary to the proper administration of the duties of his office. Every sheriff shall file under oath with the quarterly report herein provided for, a full, accurate and itemized account of all his actual and necessary expenses, mentioned in this section, before the same shall be allowed by the county commissioners."

The whole question depends upon the construction of the words "all expense of maintaining," as used in this section; and counsel for the relator contends that they mean, and should be construed to mean, all money expended in the purchase of such horses and vehicles.

For this construction he relies largely upon the opinion of Attorney-General Ellis rendered upon this question, and published in 4 O. L. R., 669, which is as follows:

"In my opinion the word 'maintaining' as used in this section should be so construed as to authorize the county commissioners to furnish at the county expense the necessary horses and vehicles for the use of the sheriff in the discharge of his duties, or, if the sheriff owns a sufficient number of horses and vehicles, to allow the expense of maintaining them."

We do not quarrel with the idea that such word *should* be so construed, if possible, at least in some instances, as a sheriff's compensation now, by the statute is made to depend upon the population of his county; but that is not the question before the court. The question here is, can such word legally be so construed—legally bear such a construction in determining the sense in which the Legislature used and intended it?

As we view it, there is nothing in the section which indicates an intention on the part of the Legislature in the use of the word "maintaining," of using it in, or giving to it, any other than its ordinary meaning. On the contrary every word in the section indicates otherwise.

There is no provision in it for the allowance of expenses in the purchase of any articles by name, but feed; and all other intended articles can be ascertained only by implication. Public officers can be allowed only such compensation, or fees, as are provided for in express terms, or by necessary implication from the terms used, and the words "expense of maintaining," as applied to horses and vehicles, can not, by implication, include, or refer to, the expense of their purchase. If the Legislature

intended to have county commissioners supply sheriffs with horses, vehicles and harness, or to allow them the expense necessarily incurred in their purchase, it certainly would have so provided in unambiguous terms. Simple words only were needed to make such a provision.

What, then, is the definition—the ordinary meaning—of the word "maintaining," especially when applied to animals and vehicles?

All lexicographers define maintenance as "maintaining; supporting; upholding; keeping up; sustenance; supply of the necessaries of life; subsistence;" and the word maintain, "to hold or keep up in any particular state or condition; to support; to sustain; to keep up." So that the meaning of the word "maintaining" as used in this sectiion in reference to horses and vehicles, means supporting; sustaining; keeping up; supplying with the necessaries of life; and the Legislature therefore in this provision only meant and intended that sheriffs should be allowed the necessary expenses incurred in supporting, sustaining and supplying their horses with the necessaries of life, and in keeping their vehicles in good condition, and not in the purchase of them.

The opinion of the Attorney-General is peculiar, in that it seems to put a double and inconsistent meaning to the word "maintaining": first, that it should be construed to mean that the commissioners should furnish the necessary horses and vehicles; and second, but if the sheriff owns a sufficient number of horses and vehicles the commissioners should only pay the expenses of maintaining them. So that if two horses were necessary to the discharge of the duties of his office, and the sheriff bought two for such purpose, he could not be allowed the expenses of the purchase, under such construction, if he then owned two horses.

We are not able to see how such a double construction can be placed upon the word in question as used in this section.

As we view the question, we can not grant the relief asked for and the demurrer is sustained and the proceeding is dismissed at the costs of the relator.

E. H. Moore, for plaintiff.

W. R. Graham, Prosecuting Attorney, for defendants.

FORM OF COUNTY COMMISSIONERS' ANNUAL REPORT.

Circuit Court of Pike County.

STATE, EX REL THE NEWS PUBLISHING COMPANY, V. THE BOARD OF COUNTY COMMISSIONERS OF PIKE COUNTY, OHIO; AND STATE, EX REL J. W. JOHNSON, V. SAME.

Decided, January, 1908.

County Commissioners—Annual Reports of—Construction of the Phrase "Itemized as to Amount"—Turnpike Directors' Reports—Mandamus—Sections 917 and 4898.

The provision of Section 917, as amended, requiring county commissioners to file an annual report "itemized as to amount," does not necessitate the statement of expenditures with the explicitness of an account, but permits the entering of itemized bills as one transaction, and payments to the same person for a single purpose as one item without separation of dates and amounts.

Relators filed their separate petitions in the Circuit Court of Pike County, Ohio, alleging that the board of commissioners of Pike county had failed and refused to file a detailed report of their financial transactions for the year ending August 31, 1907, itemized as to amount, for what purpose and to whom paid, as they are required to do by statute; that the report already filed by them was so condensed as to defeat the object of the statute requiring such report.

The commissioners answered, setting up four defenses, viz.:

1. That relators had no legal capacity to sue, not being officers, but private individuals.

2. That there was a defect of parties defendant, because the board of turnpike directors were not made parties defendant.

3. A denial of the material allegations of the petitions, consisting of legal conclusions merely.

4. Alleging that they had already fully complied with the law, and had filed the required report, and that in making same

they had followed the form prescribed by the bureau of inspection and supervision of public offices.

To this answer was attached a copy of the report of said commissioners; also a copy of their report as turnpike directors; also a copy of the form prescribed by said bureau of inspection, July 25, 1905.

The case was heard upon demurrer to this answer.

JONES, J.; CHERRINGTON, J., concurs; WALTERS, J., dissents in part in a separate opinion.

The relator seeks a peremtory writ of mandamus to compel the defendant to publish a fuller and more complete report of their financial transactions during the year preceding the third Monday of September, 1907. He states that he is the owner and publisher of a newspaper, and by proper allegations in his petition, establishes his right to publish the report in question.

Defendants answer, the answer containing four defenses. The fourth defense attaches a copy of the report to the pleading.

Without stating specific reasons therefor, the court will content itself by saying that the demurrer to the first, second and third defenses respectively, is sustained.

The fourth defense, having the copy of the report attached, however, is considered upon its merits, the sole question being whether the commissioners have complied with the law in publishing their report.

Objections have been urged by counsel for the relator, because the report has grouped under various heads and sub-heads the amounts, thereby showing for what purpose they were expended. We think that, by this means, the report is a substantial compliance with the statute, and that a reference to such heads and sub-heads will sufficiently show the purpose of the several expenditures. Especial objection is made, for instance, to the items under the sub-heads "allowance to counsel" and "allowance to justices and mayors," etc. The item "allowance" so used, is information to the effect that they were statutory allowances, and more specific terms were not absolutely necessary. Other items appear showing various amounts were paid out

under the head of "insurance." We do not think it necessary that the report show upon what property the insurance was effected; neither under the head "boarding in county jail," do we think it necessary to state explicitly what prisoners were fed. In such and other similar items the report shows substantially the purpose of the expenditures, and that is all the statute requires.

Upon the question, however, of what constitutes "a detailed report in writing, itemized as to amount, to whom paid, and for what purpose," the members of this court are not in full accord. It is contended by counsel for relator that, under a proper construction of Section 917, Revised Statutes, that the amounts shown to have been paid out must be itemized and that instead of the aggregate sum allowed and paid out, the report should show upon its face the several distinct items composing the aggregate sum. For example under the heading of "stationery and supplies for county officers," various expenditures appear showing an aggregate sum paid out to Barrett Bros., for the use of the probate judge, and others paid out for the use of the other county officials. It is insisted that the report show the various items of stationery and supplies; that the statute now requires this to be done with the explicitness of an account. This is but one instance of the character of the report. An inspection of the report shows, that if these aggregate sums found throughout were so itemized, the report would be greatly lengthened.

The majority of the court are unable to concur in this view. Neither does the strict reading of Section 917, Revised Statutes, nor a proper construction of that section require the minute itemizing of each bill passed on, allowed and paid out, when paid to a single person. In the first place Section 917 merely requires a report of the "*financial transactions*" of the commissioners. Section 850, Revised Statutes, provides for the keeping of a record by the county commissioners of their proceedings, which record shall be received as evidence in every court in the state. By that section the "financial transactions" mentioned in Section 917, are entered on that journal. And in

the instance mentioned, where the board audits the itemized bill of Barrett Bros., for stationery and supplies furnished the probate judge, and allows the bill in the aggregate, the act is but one "transaction," and the allowance of the aggregate sum is all that is necessary to be placed on its journal.

Again, the strict reading of Section 917, Revised Statutes, does not require the *amount* to be itemized if paid to a single person. The word "itemized" modifies the word "report," just preceding. The statute requires the report to be itemized in three particulars—amount, to whom paid, and, for what purpose. In other words the natural reading of this section requires the report to be itemized: first, as to amount paid; second, to whom paid; third, for what purpose.

In construing this statute before its amendment, as to what constitutes a "detailed report," Judge Bradbury, in *State, ex rel,* v. *Commissioners,* 56 Ohio St., p. 646, uses this pregnant language:

"It is, of course, within the power of the General Assembly to require such minuteness as this in the report made by the commissioners, but unless the language chosen by that body imperatively demands such construction, the section should not, in our opinion, be so construed."

Judge Newby, in construction of this feature of the section in Fayette county, held the same view, for he says:

"I do not think this contention well founded, provided the aggregate amount was paid for a single purpose, for the statute goes no farther than to require that the name of the person receiving the money, the amount paid, and the purpose for which paid be stated, and does not require the dates and amounts of several payments to one person for a single purpose to be given, but permits the several payments to be stated in the aggregate, because by such a statement, the public are advised as to the amount paid, the name of the person to whom paid, and the purpose for which paid, and the detail contended for is not necessary to serve any purpose of the statute."

Attached to the commissioners' report is the turnpike directors' report of receipts and expenses made in conformity to Section 4898.

We all agree that the latter section governs the preparation of such turnpike directors' report, and that the particularity of statement required by Section 917, Revised Statutes, does not apply thereto. This section was not amended, as was Section 917, and the construction adopted by the Supreme Court in *State, ex rel,* v. *Commissioners,* 56 Ohio St., 631, applies thereto.

Finding that there has been a substantial compliance with the statutes, the demurrer to the fourth defense will be overruled, the prayer for a peremptory writ of mandamus refused, and the petition dismissed.

WALTERS, J.

I differ from my associates as to the construction or, rather, meaning of the language employed in Section 917, as amended.

It seems to me the added words placed in this section by the amendment need no construction; that when it says the commissioners shall make a detailed report of their financial transactions "itemized as to amount," there is excluded by this language from the report any lump sum, which has contained therein several items. That the amount shall be itemized—"itemized as to amount." If this is not what these words mean, then the statute has not been changed at all from its former language before amendment, and a detailed report as provided in the old statute is all that is necessary now; but if that detailed report is to be "itemized as to amount," it excludes from the report any amount as a lump sum, which contains more than one item.

The Legislature can provide that all these items shall be set out, as the Supreme Court in 56 Ohio St., say, but unless it does so in such clear and unmistakable language, that a court, without judicially legislating, find and decide that it does mean such detail and itemizing, it will not so construe it; but if the language employed is so clear and plain that it needs no construction, and means what the words clearly interpret, this effect should be given to such language.

Dougherty & Moore, for relators.

Chas. M. Caldwell and *Eylar & Douglass,* contra.

STREET IMPROVEMENT WITH WOOD BLOCKS.

Circuit Court of Hamilton County.

STATE, EX REL ANNA G. DOLLE, A TAX-PAYER, ETC., v. CHARLES A. MILLER ET AL. *

Decided, December 28, 1907.

Specifications for Street Improvement—Preparation of Wood Blocks—Bevier Patent not Infringed—Requirements as to the Quality of Oil Used—Practicability of Specifications—Bids and Bidding.

1. The specifications as to wood blocks to be used in the street improvement involved in this case are not an infringement of the Bevier patent, but refer to a different process for the preservation of wood, which is not new.
2. The court finds that the pure coal tar creosote oil required by the specifications may be obtained in the market, notwithstanding testimony of experts to the contrary, and bidders were therefore not shut out of the competition by reason of being unable to obtain oil of that character and quality.

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

Plaintiff in her action seeks to enjoin the board of public service of the city of Cincinnati from entering into a contract with the Kirchner Construction Company for the improvement of McMillan street with wood blocks as set forth in the specifications under said contract.

The grounds upon which said injunction is sought are:

First. That the specifications so far as they relate to wood blocks are so devised and prepared as to exclude any and all real competition therefor, the preparation of the same being covered by letters patent issued to the United States Wood Preserving Company and owned and controlled by it.

Second. That the specifications provided that the oil used in the treatment of the wood blocks shall be pure coal tar creosote distilled from illuminating gas tar or coke oven tar and shall contain no oil derived from water gas tar, oil gas tar or other tar;

* Affirming *State, ex rel Dolle*, v. *Miller et al*, 5 O. L. R., 260.

and that the specific gravity thereof at 68 degrees Fahrenheit shall not be less than 1.10 and that when distilled in a retort with a thermometer suspended one inch above the oil up to 600 degrees Fahrenheit it shall not lose more than 35 per cent. in quanity and that the specific gravity of the residue shall not be less than 1.125; and that the said specifications further provide that the oil must be clear; that is, that there must be no substances in suspension, and that it must be absolutely soluble in benzoil so that it will readily penetrate the wood; that the requirements of the specifications in this regard can not be fully and accurately complied with; that oil such as is mentioned in the specifications can not be obtained and for this reason prevented persons and firms from bidding and thus shut out competition.

As to the first claim, we are of opinion that the specification relative to the wood blocks is not an infringement of the Bevier patent as claimed by plaintiff. The process contained in the Bevier patent as compared with that mentioned in the specifications is not the same. The vaporizing and the moistening of the wood, the impregnation with the creosote-resin mixture and the pressure to which the blocks are subject, together with the quantity of the creosote injected are entirely different; besides the preservation of wood in this manner is no new thing.

As to the second claim, to-wit, that a pure coal tar creosote oil such as is mentioned in the specifications can not be obtained, we are of opinion is not tenable. The weight of evidence upon this point is with the defendants. While the testimony of the experts tended to sustain plaintiff in this regard, yet the evidence of the defendants by practical distillers of this article satisfies the court that such an oil with the specific gravity and all the requirements contained in the specifications not only can be obtained but is now being distilled and on the market. This therefore would indicate that the specifications can be complied with in this regard. They do not admit of fraud being practiced or that persons were prevented from bidding owing to the impossibility of compliance with said specifications.

For these reasons the injunction prayed for will not be granted.

The motion of the plaintiff to strike the appearance and answer of the United States Wood Preserving Company from the files will be sustained.

Walter C. Taylor, for plaintiff.

Cabell & Kohl and *George H. Kattenhorn,* contra.

QUALIFYING THE POWER OF PRIVATE CORPORATIONS.

Circuit Court of Lucas County.

JAMES A. STEWART v. J. N. GARDNER ET AL.

Decided, 1907.

Constitutional Law—Denial in Section 3231-1 of the Inalienable Right to Contract as Applied to Corporations—Legislative Power over Corporations—Injunction—Laborers' and Mechanics' Liens—Municipal and Private Corporations on the same Plane.

1. The inalienable right to acquire property involves the right to make contracts with reference to property, and that right appertains not only to individuals but to private corporations and to municipalities; and applying the holdings of the Supreme Court (55 O. S., 423, and 67 O. S., 197) the Legislature is as destitute of power to alienate or qualify the right of a private corporation to contract as it is to alienate or qualify the rights of individuals in the same respect.
2. Section 3231-1, Revised Statutes, relating to liens for labor and material furnished certain public works, under the principles enunciated in the cases cited, is unconstitutional.

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

This is a proceeding in error to reverse the judgment of the court of common pleas. The issues arise upon the claims of James A. Stewart and P. F. Sullivan, a cross-petitioner, of alleged liens against the property of the Cincinnati, Toledo & Detroit Short Line Railway Co., for services rendered to principal contractors. Certain work was to be done for the company, and J. N. Gardner, at first, and subsequently the Gardner Company, were the principal contractors. The services of Stewart were rendered to the one and those of Sullivan to the other con-

tractor. The claims of the plaintiff and the cross-petitioner, P. F. Sullivan, are based upon Section 3231-1, Revised Statutes. It provides, in substance, and so far as it is necessary to recite any of its provisions, that:

"Any person who shall have performed common or mechanical labor upon, or furnished supplies to, any railroad, * * * turnpike, plank road, canal or on any public structure being erected, or on any abutment, pier, culvert, or foundation for same, or for any side-track, embankment, excavation or any public work, protection, ballasting, delivering or placing ties, or track-laying, * * * shall have a * * * lien on the whole of the property on which said work is done," etc.

Whether the labor is performed for, or the supplies and material furnished to, the company itself or to any contractor or sub-contractor. The court below held this section to be unconstitutional, and, in so holding, disposed of the claims of the plaintiff and the cross-petitioner named. It is hardly worth while to enter upon what might be a very interesting discussion of the various provisions embodied in this section, in view of the adjudication already had in our court of last resort as to statutes so analogous as to be, in our judgment, determinative of the question involved here. The sole issue presented for our determination involves directly the constitutionality of this section. There is a decided conflict in the authorities as to the legislative power to qualify the right of individuals or corporations to enter into contracts. The case relied upon by counsel for the defendant in error and followed by the court below, is *Palmer* v. *Tingle,* 55 Ohio St., 423. The court in that case held:

"1. The inalienable right of enjoying liberty and acquiring property, guaranteed by the first section of the Bill of Rights of the Constitution, embraces the right to be free in the enjoyment of our faculties, subject only to such restraints, as are necessary for the common welfare.

"2. Liberty to acquire property by contract, can be restrained by the General Assembly only so far as such restraint is for the common welfare and equal protection and benefit of the people, and such restraining statute must be of such a character that a court may see that it is for such general welfare,

protection and benefit. The judgment of the General Assembly in such cases is not conclusive.

"3. While a valid statute regulating contracts is, by its own force, read into, and made a part of, such contracts, it is otherwise as to invalid statutes.

"4. The act of April 13, 1894, 91 O. L., 135 (Revised Statute 3184), in so far as it gives a lien on the property of the owner to sub-contractors, laborers and those who furnish machinery, material or tile to the contractor, is unconstitutional and void. All to whom the contractor becomes indebted in the performance of his contract, are bound by the terms of the contract between him and the owner."

This would seem to dispose of the question of the validity of the section under consideration so far as the view entertained by our Supreme Court is concerned, except for the contention of plaintiff in error, that the decision of the Supreme Court in the case just cited does not reach so far as to apply the rule enunciated to corporations. It is earnestly, and with much force, urged that that legislative power which gives life to the corporation and has power to take it away, may at any time by legislative enactment restrict the powers of the corporation so by the legislative act created. Indeed, it is asserted in general terms that a corporation has no inalienable right to contract; and it might, by force of the same reasoning, be insisted that a corporation has no inalienable right at all; that all its rights are subject to be divested by acts of the Legislature; that it can not claim even the right to exist; and that it must, at any time, at the legislative behest, surrender its life. The act which the Supreme Court held to be invalid was, it is true, an act which did not, in terms, especially relate to corporations, and one of the cases under consideration by the Supreme Court affects only the rights of individuals. The other case had for one of its parties a corporation, but it was not the power of that corporation to contract that was being considered.

In the act now under consideration we have a provision which relates especially to corporations, although not necessarily entirely so. It evidently refers mainly to structures and improvements made by railway companies, but it also relates to public structures of all kinds. Incidentally, some consideration has

been given, in argument, to the provision in this section for its enforcement—for the foreclosure of the lien or for the collection of the debt sought to be secured by the lien; and no attorney in the case contends for any validity to the section so far as its remedial part is concerned, or, rather, as to the enforcement of its remedy. It is provided, in substance, that the entire operation of the railway—if it be a railway—no matter what its length, no matter what the extent of its business, may be tied up by injunction until the claim of the lienholder, no matter how small or insignificant, shall have been adjusted and paid. This is "government by injunction" with a vengeance, and, as I say, no attorney in the case contends that a provision such as that will stand under the law. But, it is urged that this part of the statute may be eliminated from it without emasculating the statute—that the statute so far as concerns the establishing of a lien may still exist and the lienholder may have recourse to a court of equity in proper proceedings for its enforcement.

The decision of our Supreme Court, *supra,* has been subjected to sharp criticism, and the reasoning, so far as we are apprised, does not appear to have been followed, to any extent, outside of Ohio. It is urged upon us that we should not enlarge this decision—go any farther along the line which has been followed by our Supreme Court. The reasoning of the judge who announced the opinion upon which the decision is based may not bear critical investigation. If the decision stood alone, in view of our notions of this class of legislation, it is altogether likely that we might adopt the suggestion of counsel, and, following the Supreme Court no farther than was necessary, hold that, while under our Bill of Rights men have an inalienable right to contract, artificial persons have not. But this case does not stand alone as an expression of the views of our court of last resort, and notwithstanding the high authority of the Supreme Court of the United States, and the Circuit Court of Appeals, whose decisions have been cited to us as in conflict, to some extent, with the case of *Palmer* v. *Tingle, supra,* we feel bound to follow the authority of the Supreme Court of Ohio as to Ohio statutes, and the application of the Bill of Rights embodied in our Ohio Constitution. It is not a question affecting the validity

of an act of Congress, nor is it one in which a question has been presented of claimed violation of the Federal Constitution, but the case relates solely to the Ohio jurisdiction; and in such cases, we have uniformly held the decisions of our own Supreme Court to be binding upon us, leaving that court to revise and reverse its own conclusions at any time when it may deem that it has gone wrong.

In the case of *Cleveland* v. *Construction Co.*, 67 Ohio St., 197, the Supreme Court has, in effect, refused to adopt the contention of counsel for plaintiff in error here—that the principle of an inalienable right to contract, even if applied to individuals, will not apply to corporations. I read a part of the syllabus:

"1. The act of April 16, 1900, 94 O. L., 357 (Section 4364-62*a* *et seq.*, Revised Statutes), entitled: An act to provide for limiting the hours of daily service of laborers, workmen and mechanics employed upon public work, or of work done for the state of Ohio, or any political subdivision thereof, providing for the insertion of certain stipulations in contracts of public works; imposing penalties for violations of the provisions of this act, and providing for the enforcement thereof, is in conflict with Sections 1 and 19 of Article I of the Constitution of Ohio because it violates and abridges the right of parties to contract as to the number of hours of labor that shall constitute a day's work, and invades and violates the right, both of liberty and property, in that it denies to municipalities and to contractors and sub-contractors the right to agree with their employes upon the terms and conditions of their contracts. Said act is therefore unconstitutional and void."

It is held, also, that the act is not a valid exercise of the police power, thereby disposing of one of the questions urged upon us and based largely upon the case of *Branin* v. *Railway*, 31 Vt., 214. It will be noted that here we have a municipality which is not only a political subdivision of the state, but is also a corporation having certain property and business rights, a corporation representing a large number of individuals, just as a private corporation does, and, when we leave out of consideration its governmental powers, standing towards its citizens very much as a private corporation stands towards its shareholders.

In the entire argument of the questions in *Cleveland* v. *Con-*

struction Co., supra, it seems to have been assumed that the Legislature had no power to restrict the right of private corporations as to contracts or as to fixing the hours of labor of their employes; but the question under consideration was mainly whether the Legislature could enact legislation restricting the right of municipalities so to contract or fix the hours of labor. The Legislature had attempted to fix a limit to the hours of labor, just as in previous enactments it had fixed the rate of interest beyond which contracting parties were not permitted to go. It has seemed to the members of the present court who have considered this question, a matter of some difficulty to distinguish between that spirit of paternalism by which the legislative body of a state attempts to protect the ignorant or improvident against the adroitness and skill of the educated or experienced in the matter of usury laws, and the kind of legislation which we are here considering in which the Legislature has sought to protect workmen who may be ignorant of the laws of business and not accustomed to making contracts, as against the shrewdness and skill of employers. But the Supreme Court has attempted to draw such a distinction and has held that, even in the case of municipal bodies, a legislative provision that they shall not make contracts with employes for work days of more than eight hours, is invalid because of its attempted restriction of the power of the contracting parties, including the municipalities themselves, to enter into such contracts.

On page 231, Judge Crew, who announces the opinion of the court, quotes approvingly this language from the case of *People* v. *Coler*, 166 N. Y., 1 (59 N. E. Rep., 716):

"The city is a corporation possessing all the powers of corporations generally, and can not be deprived of its property without its consent or due process of law any more than a private corporation can."

And on page 215 he quotes from the case of *Atkins* v. *Randolph,* 31 Vt., 226, 237, this language:

"It is true, as was urged in argument by the learned counsel for plaintiffs, that in some respects the Legislature has a power in respect to municipal corporations that they have not in re-

spect to private corporations or individuals. They may alter or abolish municipal corporations at pleasure, but, yet, not so as to defeat the pecuniary rights of individuals, as against such corporations, or as depending upon their existence. The Legislature have the same power in respect to private corporations, when that power is reserved in the law creating them. So far as a municipal corporation is endowed by law with the power of contracting, and, as such, is made capable of acquiring, holding and disposing of property, and subject to the liabilities incident to the exercise of such power and capacity, thus being invested with legal rights as to property and contracts, and made subject to legal liabilities in respect thereto, to be ascertained and enforced by suit in the ordinary judicial forums, upon the same principles and by the same means as in case of a private corporation, such municipal corporation must stand on the same ground of exemptions from legislative control and interference as a private corporation. As to third persons who seek to enforce pecuniary liabilities against towns, arising upon contract, such towns are merely private corporations or individuals, and in this respect, they are not affected by the purely municipal public and political features that appertain to their corporate existence in virtue of, and in reference to which alone, they are subject to the absolute control of legislation."

Judge Crew cites to the same effect the case of *People* v. *Detroit,* 28 Mich., 228, and adds:

"This distinction as to the powers delegated to municipal corporations was clearly recognized and commented upon by this court in the case of *Western College* v. *Cleveland,* 12 Ohio St., 375."

I need not follow his elaboration of this distinction, which has become quite familiar to the bench and bar of this state, the distinction between governmental powers and the proprietary and business powers of a municipality. This language which I have selected because of its manifest treatment of municipal corporations as upon the same plane as private corporations, and its treatment of private corporations in the same paragraph as upon the same plane as individuals, so far as regards the legislative lack of right to alienate or qualify the power of such individuals or private corporations or municipalities to contract. In the case of *Cleveland* v. *Construction Co., supra,* Judge Crew cites, as bearing more or less directly upon the questions in it

considered, numerous cases, and among them *State* v. *Iron Co.*, 51 Ohio St., 632; see, also, memorandum note reported in 33 Bull., 6, which shows it to be a case involving the right of a private corporation to enter into contracts and the lack of power in the Legislature to interfere with the exercise of that power.

In the case of *Palmer* v. *Tingle, supra,* Judge Burket, in his opinion, on pages 441-442, refers to this same unreported case of *State* v. *Iron Co., supra,* as follows:

"Many other like cases of restraint as to contracts are to be found in our statutes, but all of them, in so far as they are valid, depend for their validity upon the same principle. It was the infringement of the liberty of contract that induced this court in *State* v. *Lake Erie Iron Co.*, unreported, to hold the statute unconstitutional which required corporations to pay their employes at least twice in each month."

We have, then, the very definite expression by our Supreme Court that the inalienable right to acquire property involves the right to make contracts with reference to property, and that that right pertains not only to individuals but also to private corporations and to municipalities. The federal courts and the courts of many of the states, with very forcible reasoning, have adopted the contrary view. We feel bound, however, to follow the decisions of our own Supreme Court.

I wish to add, before dismissing the case entirely from our thought, that the statute which is involved in the present inquiry is no more a statute affecting corporations exclusively, or their right to contract, than was the statute considered by the court in *Palmer* v. *Tingle, supra.* That was an act as to liens generally, acquired by persons contracting with sub-contractors, and so is this, although it may pertain to certain kinds of structures and improvements not contemplated by the act with regard to which the Supreme Court has adjudicated this question. So far as their affecting corporations and individuals alike is concerned, the two statutes are practically upon the same footing.

The judgment of the court below is affirmed.

Malcolm McAvoy and *A. S. Brumback,* for plaintiff in error.

L. W. Morgan. for defendant in error.

L. P. Conway, for P. F. Sullivan, cross-petitioner.

CONDEMNATION BY MUNICIPALITY.

[Circuit Court of Hamilton County.]

THE CITY OF CINCINNATI v. PHILIP MORTON.

Decided, May 18, 1907.

Eminent Domain—Property Taken for Park Purposes—Separate Parcels Involved—Fixing the Assessment Therefor—Section 1536-109.

In condemnation proceedings involving a number of separate pieces of property, it is not error to single out one parcel and hear the testimony and fix the damages as to that parcel before proceeding with the inquiry as to the remaining parcels, provided the whole inquiry is before the same jury.

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

We see no objection to the procedure had in the trial court allowing the jury to hear the testimony as to the value of one piece of property separate from the others, and then assessing the compensation for the same to the owner before proceeding to ascertain the value of another piece.

Condemnation proceedings must be brought before a single jury, which was done in this case; and when the jury was impanneled it was sworn but once to make the whole inquiry and assessment.

Section 1536-109 provides that "the assessment shall be in writing, signed by the jury, and shall be so made that the amount payable to the owners of each lot or parcel of land may be ascertained."

As disclosed by the record herein, we think the action of the court below is in conformity with this section, and can not be complained of by the city.

Judgment affirmed.

City Solicitors, for plaintiff in error.

H. L. Gordon and *Albert H. Morrill,* for defendant in error.

SALES C. O. D. OF INTOXICATING LIQUORS IN DRY TERRITORY.

Circuit Court of Harrison County.

WILLIAM MULLEN v. THE STATE OF OHIO.

Decided, December Term, 1907.

Sales—Of Intoxicating Liquors C. O. D.—Sale Complete, When—Delivery to the Carrier Constitutes Actual Receipt by the Purchaser—Agency of the Carrier—Collection on Delivery Constitutes Retention only of Vendor's Lien—Contracts, Complete and Executory—Criminal Law.

When a purchaser living in a local option district orders, in writing by mail, from a person lawfully engaged in the liquor business outside of such district, a package of liquor to be sent to him for his own use by express C. O. D. to a station within the prescribed district, and such purchaser received such package, pays the price for the same and the charges for the return of the money to the express company for the seller, the sale is complete upon the delivery of the package to the express company by the seller and he does not violate the law in the prescribed district.

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

William Mullen was indicted, convicted and sentenced for selling intoxicating liquors in Green township, a local option township in this county, and error is prosecuted in this court. He was tried upon an agreed statement of facts which sets forth that he was lawfully engaged in the liquor business at Amsterdam in Jefferson county, this state. That a man by the name of Howard Dunn, residing in Green township, sent an order by mail to Mullen to send him a case of lager beer by express to Burton station, which was in Green township, and on the line of the Cleveland & Alliance Railroad. The order set forth that when the beer arrived at Burton he would pay for it to the express company when delivered to him, and also pay the expressage on the beer and the charges of the company for sending the money, the price of the beer, to Mullen. In a word, it was a clear C. O. D. order on the part of Dunn. The beer was

shipped by Mullen in accordance with the order; Dunn received it, paying the express company the price of the beer and the charges for returning the money to Mullen, which was paid over to him by the express company. Mullen at the time of expressing the beer to Dunn knew that Green township was a local option township; but the beer was ordered by Dunn in good faith for his own private use; and there was no combination upon the part of Mullen and Dunn to violate the local option law of Green township, differing in that respect from the case of *State* v. *O'Neil,* 58 Vermont, 82 (56 American Reports, 557), reference to which is made in the case of *O'Neil* v. *Vermont,* 144 U. S., Reports, 323.

By the statement of facts the question is fairly and squarely made whether or not a person under such circumstances, lawfully engaged in the liquor business, may send liquor upon an order received in writing at his place of business into a local option district by express C. O. D.

The answer necessarily turns upon the determination of the question as to where the sale was made. Was it at Amsterdam, Jefferson county, or in Green township, Harrison county? Dunn having in his order designated the common carrier by which the beer was to be shipped, there could be no question but what the liquor was his at the time of such delivery at Amsterdam, unless the fact that it was to be shipped C. O. D. changes the rule.

Norris v. *State,* 25 O. S., 217. The third paragraph of the syllabus of that case is as follows:

"3. Where A, by false pretenses contained in a letter sent by mail, procures the owner of goods to deliver them to a designated common carrier in one county, consigned to the writer in another county, the offense of obtaining goods by false pretenses is complete in the former county, and the offense must be prosecuted therein."

In Benjamin on Sales, Section 181, page 163, the author says:

"It is well settled that the delivery of goods to a common carrier, *a fortiori* to one specially designated by the purchaser, for conveyance to him or to a place designated by him, consti-

tutes an actual receipt by the purchaser. In such cases the carrier is, in contemplation of law, the bailee of the person to whom, not by whom, the goods are sent, the latter in employing the carrier being considered as an agent of the former for that purpose (a)."

It is difficult to see how the order of the purchaser that the goods should be sent C. O. D. would in any manner change the rule. He had directed his agent to whom the goods should be delivered at the place of consignment and the mere fact that he had elected to send the purchase price back by that agent to the seller, when it had delivered the goods to him, would not seem to affect the general rule in any way.

It is said that the goods are not the goods of the purchaser until manually delivered to him. Not by any means. The goods are his upon delivery to the carrier. The seller simply has a technical claim upon the goods to insure the payment of the purchase price.

As held in *Commonwealth* v. *Fleming*, 130 Pennsylvania State, 139:

"4. An order from a seller to a carrier to collect on delivery is a mere provision for retention of the seller's lien; if accepted it creates a contract between the seller and the carrier, on breach of which by the latter, the seller may recover the price from him; but it does not make payment by the vendee a condition precedent to delivery, so that the seller may reclaim goods delivered by the carrier without payment."

The carrier is the agent of the purchaser throughout. He had designated it as such; it was to receive the goods and deliver them to him; it was to receive the purchase price and carry the same back to the seller, for all of which services the purchaser was to pay the charges. There is nothing unlawful in this service, even if it should be held the carrier was the agent of both parties. It would in no sense be such a double agency as to make it improper. No such diversity of interest whatever as to make it antagonistic.

That in such cases the sale is fully completed when the liquor is delivered to the common carrier, subject only to the technical

lien of the seller that it must not be delivered by the carrier to the purchaser until the purchase price is paid, is in accordance with the general tenor of the decisions in the different states.

In the 17th Volume of the American & English Encyclopedia of Law (2d Edition), page 300, it is said:

"3. [*Where Goods Are Shipped C. O. D.*] A somewhat different question is presented when the sales are made C. O. D. There is much diversity of opinion as to whether sales of this character are to be deemed absolute sales on the part of the vendor with a provision for withholding delivery until actual payment, so as to preserve the lien for the price, or only as executory contracts of sale not completed until actual delivery into the hands of the buyer. In a number of decisions it has been held that for the purpose of determining whether the seller has violated the liquor laws in force where the buyer lives, a sale C. O. D. is not complete until delivery, acceptance, and payment of the price by the person ordering the liquors. At least so far as cases dealing with intoxicating liquors are concerned. However, the weight of authority is against the foregoing view, and it is generally held that where intoxicating liquors are ordered to be shipped C. O. D. the sale is completed when the liquor is delivered to the carrier."

The text is fortified by decisions from a large number of states. See also Vol. 3 of Supplement, 762, where a large number of other authorities are referred to.

In Black on Intoxicating Liquors, 434, it is said:

"2. A licensed dealer who receives, at his place of business, an order for liquor from a place in which he has no license, and fills it by selecting the liquor from his stock and delivering it to an express company or other carrier to be carried to the purchaser, does not violate the license law, although the carrier agrees to collect and return the price; for the sale is made at the place where the goods are separated from the general stock and delivered to the carrier, such delivery being delivery to consignee."

This author also refers to a large number of authorities in support of the text.

But is the question an open one in this state? The case of *The Treasurer of Athens County* v. *Luchs*, which went to the

Supreme Court and which was decided without report, seems to be decisive of this case.

In that case Luchs was engaged in the sale of intoxicating liquors at Marietta and shipped all kinds of liquors upon express orders C. O. D. almost weekly, sometimes twice a week, to Broadwell, Lathrop and Amesville in Athens county. To such an extent were these shipments, that there could be no question, from the record which we have examined, that he was keeping places for the sale of intoxicating liquors at these various express offices, if the sales were made in Athens county. The auditor of Athens county put Luchs upon the tax duplicate for the payment of the Dow tax; suit was instituted in the common pleas court by the treasurer of Athens county to recover the amount so placed on the tax duplicate. Luchs defended solely upon the ground that the sales were made at his place of business in Marietta, Washington county. The court of common pleas decided in favor of Luchs, and the case was taken to the circuit court upon error, where the common pleas court was affirmed, and error was thereupon prosecuted in the Supreme Court, where the circuit court was affirmed. We have examined the briefs in circuit and supreme courts and no other question was made but one; that although the orders were to send the liquor C. O. D. yet the sales were made in Washington county. We do not see that any other defense could have been made, for if Luchs was engaged in the sale of intoxicating liquors in Athens county as we have said he was, if the liquors were sold in that county, then under Section 4369-9 he would be required to pay the tax in Athens county.

Judgment of common pleas court is reversed and the accused is discharged.

R. H. Minteer, for plaintiff in error.

E. S. McNamee, for defendant in error.

DECEPTION AS TO THE CHARACTER OF A FIRE INSURANCE POLICY.

Circuit Court of Stark County.

THOMAS F. WILLIAMS v. RECEIVER OF AETNA FIRE ASSOCIATION.

Decided, 1907.

Fire Insurance—Giving of a Mutual Policy the Appearance of a Standard Cash Policy—Fraudulently Inducing the Acceptance of a Mutual Policy—Insured not Estopped from Denying Liability for Assessments by Accepting Policy, When—Concealed Contracts of Contingent Liability—Section 3653.

A mutual fire insurance company issuing a policy without the word "mutual" conspicuously printed therein, as provided by Section 3653, Revised Statutes, and inducing its acceptance by falsely and fraudulently representing that there would be no contingent liability thereon, acts unlawfully and commits a fraud upon persons induced thereby to enter into an agreement with the company. Hence when the insured informed the agent that he would not accept a policy in a mutual company, or in a company where there was such contingent liability for future assessments, and there was sent him through said agent a paper writing, in form and appearance like unto a standard cash policy of insurance, which was received by him after paying the sum specified therein as the cash premium, and placed with other like papers without critical inspection, where it remained until he received notice to pay an assessment thereunder, several months later, he did not enter into an undertaking to accept such policy, nor is he estopped from denying liability thereunder.

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

Error to Stark County Common Pleas Court.

This proceeding in error is prosecuted to reverse a judgment rendered against the plaintiff in error in the court of common pleas of this county. The case was submitted to the court, without the intervention of a jury, and after hearing the testimony, a judgment was rendered against plaintiff in error, which is now sought to be reversed .

The record discloses that the plaintiff in error was solicited by the agent of the defendant in error to take insurance in the de-

fendant company. It is claimed on his behalf that he distinctly refused to take any insurance in any mutual association, or any company in which there was a contingent liability for future assessments. This agent then represented that the Aetna Fire Association was a strictly cash company; that it issued a policy for a sum named therein as premium, and that there was no contingent liability for future assessments.

The record further shows that the plaintiff in error informed the agent of the company that he would not accept a policy in a mutual company, or a company wherein there was such contingent liability for future assessment. This, in substance, is the record of what transpired between the agent of the company and the plaintiff in error at the time he agreed that a policy of the kind that was represented to him might be issued, and that he would accept and pay for the same.

The record further shows that some time thereafter there was sent to him through said agent, a paper writing in form and appearance like unto a standard cash policy of insurance, which was received by him, the sum specified therein as the cash premium was thereupon paid by him, and he placed the same with his other papers in the desk, without giving it a critical and minute examination.

The record further shows that within a year, upon a notice of assessment being sent to him, he appealed to the agent soliciting the insurance, and was informed that he, the agent, as well as the plaintiff in error, had been deceived in respect to the character of the instrument or policy so delivered to him, and that he, the agent, had canceled said policy, and thereupon the plaintiff in error substituted other insurance for the insurance that was supposed to be covered by the policy in question.

It is now claimed by the plaintiff in error that the inducements, representations and statements of the agent of the company were false and fraudulent in respect to the kind and character of policy which the company issued.

It is further claimed that the company was not authorized, under its charter, to issue a policy such as was issued to the plaintiff in error herein; that by failing to comply with the statute, Revised Statute 3653, in having printed conspicuously

upon the policy the word "mutual," or having the word "mutual" printed in the policy, the act of issuing such contracts of insurance and inducing their acceptance, was unlawful, and a fraud upon persons induced thereby to enter into an engagment with this company; that by omitting the word "mutual," and by permitting these representations to be held out, persons were induced to accept contracts of insurance that they otherwise would not have accepted.

On the other hand, it is contended that the plaintiff in error accepted this instrument with an opportunity to investigate; retained the same for so long a time that he is now estopped from denying liability thereunder; and that is concluded by the recitals contained in the same.

With the conclusions of the trial court in this case we are not in accord. We think, first, that the plaintiff in error negotiated with the agent for a cash policy, and the record distinctly shows that he engaged to enter into a contract wherein he would become insured in a company issuing a policy, the premium on which was for a fixed sum, and under which there would be no contingent liability. So that he never entered into any engagement or undertaking to receive and accept a policy of the kind or character that was thereafter delivered to him.

This brings us to the second consideration: Does the mere fact of accepting a policy or instrument of this kind, and retaining it for the time indicated in this record, estop him now from denying that he was a member of said company, or that he had accepted and thereby impliedly was bound to pay such sums as might be assessed thereafter under and by virtue of its provisions?

We think there is enough shown in this record, calculated and intended to mislead, that this company can not now say that the plaintiff in error was estopped.

It is conceded that the defendant here did not sign the constitution and by-laws of this company, but it is claimed, under authority of *Richards* v. *Lipp Co.*, 69 Ohio St., 359, that having accepted the policy and held the same for a considerable length of time he can not avail himself of this defense, and that would

be true if he accepted the policy with knowledge of its true character and the provisions contained therein, or accepted it under such conditions that he would be required as a matter of law to know its contents; but if he was deceived by the representations of the agent as to the kind and character of the policy that was to be issued to him, and these false representations were followed by the delivery of the policy, which upon its face is calculated to deceive and defraud the purchaser of insurance and induce him to believe that it is to all intents and purposes the contract of insurance that he has agreed to purchase, then a very different question arises. Must he be required under any and all circumstances fully to advise himself of each and every covenant in the written contract presented to him, or may he be permitted to rely upon the representations of the agent of the company and those portions of the written policy made prominent and conspicuous therein in such a form as would be, and as we believe were in fact made, for the purpose of deceiving.

This policy purports on its face to insure the defendant's property for one year from its date for a sum fixed and certain. True, it is recited, also, that the other conditions and covenants written therein shall obtain, but that is true of every standard policy written for cash premiums and without any contingent liability for further assessments, so that there was nothing extraordinary to call his attention to the fact that the policy was not the character of contract he had made with the agent. In fact, no more clever method could have been devised for misleading the average business man and preventing him from reading the entire policy than by the adoption of what is known as the standard policy, with the sole exception of writing into it a contract of contingent liability, and to our minds it sufficiently excuses the defendant from searching through all the labyrinth of covenants to discover the contingent obligation hidden therein, and this case, by no means, measures up with the doctrine of estoppel in Ohio, for the very first requisite of such estoppel is either actual knowledge on the part of the individual sought to be estopped, or such conduct and negligence on his part as would preclude him from claiming that he had no such knowledge; and

again it is true that such negligence must not be induced by the fraud or representations of the other contracting party, and if so, it will be of no avail.

True, it is contended that the rights of third persons have intervened. This record fails to disclose, as we take it, that there was anyone who became a member of this association, who incurred any rights, or who are entitled to recover in consequence of their reliance upon this plaintiff in error's being a member of said association, or of holding this policy the length of time which he did hold it, and in consequence thereof became a creditor or obtained any rights against this company.

Neither does the record show, as we have examined it, that any one became a member of this association after the date of the delivery of this policy to the plaintiff in error. If they became members of this association before, then they could not rely upon the plaintiff in error, nor could the rights of any third persons have intervened.

We think that to hold the plaintiff in error herein, must be upon the ground of estoppel—and the petition is based upon that ground—that the plaintiff in error received and accepted this policy of insurance and became bound by its terms; that there must have been rights which accrued in favor of persons in consequence of the conduct of the plaintiff in error, which we think this record does not show; that the plaintiff in error must, with knowledge, or with such facts as now in good faith preclude him from denying that he had knowledge of the contents of said instrument, have accepted the same, and thereafter retained the same for so long a time that he can not now be heard to say that he was deceived thereby. We do not think that the evidence in this case contains or has probative force enough to meet these conditions; and, as it appeals to us, we think the judgment of the court of common pleas was manifestly against the weight of the evidence, and was contrary to the evidence and to the law of the case.

Upon this ground it is the judgment of this court that a new trial should have been granted, and that there was error in the court in overruling the same. The judgment of the court of

common pleas will be reversed on the ground indicated, and the cause remanded for further proceedings according to law. Exceptions will be noted on behalf of the defendant in error.

Webber & Turner, for plaintiff in error.

Shields & Pomerene, contra.

APPEAL FROM APPOINTMENT OF A RECEIVER.

[Circuit Court of Knox County.]

HERBERT F. WILLIAMS v. C. N. WYANT.

Decided, October 12, 1906.

Final Order—Appointment of a Receiver Does not Determine Ultimate Rights, When—Error May Lie when Appeal will not—Statutes Governing Appeals and Proceedings in Error—Sections 5226, 6707, 6709 and 572—Jurisdiction—Costs.

An order appointing a receiver, but going no further in the way of determining ultimate rights, is not such a final order as will give a court jurisdiction on appeal, even though regularly made and all the forms of law observed in perfecting the appeal.

By THE COURT.

This case was submitted to us on a motion to dismiss the appeal herein. The ground of the motion is that the order of the court of common please appointing the receiver, and the order appealed from herein is not such an order as can be reviewed by appeal in the circuit court, and because this court has no jurisdiction of such proceedings on appeal. It is contended on behalf of the plaintiff that an appeal will not lie from an order appointing a receiver in an action pending in the court of common pleas, where no other or different order is made in the case; that an order appointing a receiver alone is not such a final order as will give the court jurisdiction by appeal even though regularly made, and all the forms of law are observed in perfecting that appeal. An examination of the statutes governing appeals and proceedings in error is therefore necessary, for while

a party may be entitled to prosecute error from a final order affecting a substantial right of a party made in the case, yet an appeal may not be sustained even though error would lie. Section 5226, or so much thereof as is necessary for an understanding of this matter, is as follows:

"In addition to the cases and matters specifically provided for, 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." * * *

Section 6709:

"A judgment rendered, or *final order* made by any court of common pleas or a judge thereof, may be reversed, vacated or modified by the circuit court." * * *

Section 6707:

"An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding * * * is a final order which may be vacated, modified or reversed as provided in this title."

It will be observed that the definition of a final order under Section 5226 is different from a final order as defined by Sections 6707 and 6709. The latter by express provision of the statute being enlarged over the provisions of Section 5226. That this is the case, we beg to call attention to the case of *Railroad Co.* v. *Varnum*, 10 O. S., 622, the syllabus of which is as follows:

"An order appointing a receiver to receive the revenues, etc., of a railroad and bring the same into court, subject to its order, etc., and without any application of the funds except to certain costs accruing, is not a final order from which an *appeal* can be taken to the district court."

We now call attention to the case of *Railroad Company* v. *Sloane*, 31 O. S., page 1:

"Proceedings in relation to the appointment and removal of receivers are special proceedings under Section 512 of the code, and an order affecting a substantial right made in such proceeding is a final order within the meaning of said section."

And the court, on page 9, says:

"The claim of counsel for defendant in error that no order is final within the meaning of Section 572 of the code, and reviewable on error that is not appealable from the court of common pleas to the district court is without foundation. Hence the case cited of *Railroad Company* v. *Varnum,* 10 O. S., 622, is not relevant to the question under consideration. That case merely decides that an order appointing a receiver is not a final order from which an *appeal* can be taken to the district court."

And on page 10:

"If the order," in speaking about a final order which may be vacated, modified or reversed, "affects a substantial right and is made in a special proceeding, it is final within the meaning of the section and may be reviewed for errors of law appearing on the record."

But this, as we take it, is to review by a proceeding in error, and this is the question the court was discussing as is seen by page 8, where they proceed to say that the question before the court is whether the order so made is reviewable or not on *error.*

Again, the right to appeal is governed by express statute, and unless the statute expressly authorizes the appeal it will not lie. See 48 O. S., 38; 66 O. S., 57.

Our courts in defining a final order have used this language:

"It is said that if it be admitted that an order is not appealable unless it is in its nature final, still the decision in question is such a final order, as it determines and disposes of the whole merits of a branch of the case which is separate and distinct from the other parts of the case."

And that is the definition given of a final order in *Teaff* v. *Hewitt,* 1 O. S., 511, at 520. In the case of *Jay* v. *Squire,* 7 N. P., 345, it is decided:

"The action of the court or judge in granting a receivership, does not determine the ultimate rights of the parties, or even affect them, except so far as it preserves and retains control of the property to answer to the rights of the parties as they may be finally determined."

Our attention is called to the authority of Alderson on Receivers, at Section 90, but we think that this authority does not change the principle that underlies this matter, or is decisive of this motion.

Holding to these views, it is the judgment of this court that the motion of the plaintiff to dismiss this appeal should be granted. The motion is sustained and the appeal is dismissed, but as this holding of the court is to the effect that this court did not obtain jurisdiction in this matter by this appeal, no judgment for costs is rendered. Exceptions noted.

Herrlinger & Southworth and *Frank V. Owen,* for plaintiff in error.

Waight & Moore, for defendant in error.

COVENANT TO RELEASE PART OF PROPERTY FROM MORTGAGE.

Circuit Court of Cuyahoga County.

M. M. BROWN v. THE CLEVELAND TRUST COMPANY.

Decided, January, 1908.

Mortgage—Covenant for Release of Part of Property—Not Available after Default—Limitations on Right to Release.

A stipulation in a mortgage that the mortgagee will release part of the mortgaged premises from the lien of the mortgage, upon payment of an agreed sum, is not available to the mortgagor after proceedings have been begun to foreclose the mortgage.

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

Error to the court of common pleas.

The sole question presented by the agreed statement of facts in this case, is whether a covenant in a mortgage that the mortgagee shall release a portion of the mortgaged premises from the lien of the mortgage at the request of the mortgagor, upon payment of a stipulated amount, is available to the mortgagor after

his default and after foreclosure of the mortgage has been begun.

The adjudicated cases upon this subject seem to agree that such stipulations are inserted in mortgages for the purpose of facilitating the sale of the mortgaged premises in parcels, and that it would be inequitable to refuse the benefit of the provision to one who, relying thereon, had purchased before foreclosure was begun. But as to the mortgagor, it has been held that the covenants of the mortgage are mutual and that it would be inequitable to permit the mortgagor to redeem part of the mortgaged premises under the release agreement, while he was in default and unwilling or unable to keep his agreement as to the payment of the balance due on the mortgage and had compelled the mortgagee to institute foreclosure proceedings. Some of the cases emphazise this conclusion by showing that it would be a fraud upon the mortgagee to put the mortgagor in position to select the most valuable lots for release, while in default, thus reducing the mortgage security.

A majority of the court is of this opinion.

Attention is called to the following cases supporting these conclusions: *Chrisman* v. *Hay,* 43 Fed. Rep., 552 (Iowa); *Reed* v. *Jones,* 133 Mass., 116; *Commercial Bank* v. *Hiller,* 106 Mich., 118.

On the other hand, it is claimed that if the right to a release is to be denied after foreclosure, the mortgage should so state.

The contrary is held in the case of *Vary* v. *Chatterton,* 50 Mich., 541, and the cases cited in support of this contention are all distinguishable.

The case of *Vawter* v. *Crafts,* 41 Minn., 14, involved the rights of a purchaser before foreclosure.

The same is true of *Clark* v. *Fontain,* 135 Mass., 464, and 144 Mass., 287; these cases do not overrule the previous case of *Reed* v. *Jones,* 133 Mass., 116.

The same may be inferred as the fact in the case of *Gammel* v. *Goode,* 103 Iowa, 301, though the statement of the case does not make this point plain. However that may be, the Supreme Court of Iowa later made its views clear in the case of *Baldwin* v. *Benedict,* 111 Iowa, 741, where it held:

"A mortgagor, entitled to pay part of the mortgage debt and to demand a release of a proportionate amount of the land during the pendency of the mortgage, can not avail himself of such right after default and after action has been commenced."

The case of *Amercian Net & Twine Co.* v. *Githens*, 57 N. J., Eq., 539, involved four independent owners who jointly mortgaged their lands. The facts are peculiar and are sufficiently distinguished in the opinion from the facts in the case of *Reed* v. *Jones, supra.*

However the law may be upon the general proposition discussed, we are all agreed that the provision in question in the mortgage now under consideration is so phrased as inferentially to limit the right of exercising the privilege thereby conferred "until the maturity of the bonds."

We hold that the equities of the matter are with the trust company and the judgment is affirmed.

Carr, Stearns & Chamberlain, for plaintiff in error.

Henderson, Quail & Siddall, for defendant in error.

DISCREDITING A WITNESS ONCE CONVICTED OF CRIME.

Circuit Court of Cuyahoga County.

LEE AUGUST v. CATHERINE FINNERTY, BY HER NEXT FRIEND, ETC.

Decided, February 3, 1908.

Damages—For Assault and Battery—Not Excessive, When—Contradictory Evidence—Effort to Discredit a Witness by Producing Record of Conviction—Objection to the Record Properly Sustained—Credibility not Affected by Offenses against City Ordinances.

1. In an action for damages for assault and battery in throwing the plaintiff down a flight of stairs, the jury are warranted in assessing punitive as well as compensatory damages and in also including a reasonable attorney's fee; and where the verdict was for $450, it will not be set aside as excessive.
2. It is only such a conviction as under the old law would have rendered a witness *incompetent* that can be introduced under the law as it is today to *discredit* him; and where for the purpose of discrediting a witness a record is offered of conviction of an offense which is not made a crime or misdemeanor under any statute of the state, and was in violation of a city ordinance only, it is not error to sustain an objection to its admission in evidence.

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

Error to the court of common pleas.

The plaintiff in error was defendant below and the defendant in error plaintiff below; the terms plaintiff and defendant, as used in this opinion, will refer to the parties as they were in the court below. The plaintiff, who was a minor, brought suit by her next friend, to recover damages from the defendant on account of an alleged assault and battery committed upon her, as the petition avers, on the 22d day of January, 1906; the answer was a general denial. In this state of the pleadings the case went to trial and the plaintiff recovered a judgment for $450. The defendant moved for a new trial, which motion was overruled and the present proceeding is brought to reverse such judgment; a bill of execptions is filed here containing all of the proceedings in the trial court.

The defendant claims that there was error in the proceedings, because the verdict upon which the judgment was entered was not supported by sufficient evidence. The record shows that the plaintiff and two other witnesses testified to an assault and battery committed upon her by which she was thrown down a pair of stairs and severly injured. If their testimony is to be believed the assault was committed, and was an outrageous one for which there could be no justification or reasonable excuse. The defendant and two other witnesses testified to the transaction and say that no assault whatever was made upon the plaintiff. In this state of the evidence, it was properly a question for the jury to determine what witnesses were to be believed and how far each witness was to be believed. From their verdict it appears that they believed the testimony of the plaintiff and the witnesses produced by her. We can not say that they were not justified in so believing; hence, the case can not be reversed upon the weight of the evidence.

It is further urged that the damages awarded are excessive. We do not feel that we should be justified in reversing the case upon this ground. Believing the testimony of the plaintiff and her witnesses, as the jury did, it was a proper case for the recovery of damages; not only compensatory, but punitive as well; and it being a proper case for the recovery of punitive damages, the jury had a right to include in its verdict reasonable attorney's fees. If the defendant committed the assault upon this plaintiff, who was a girl but sixteen years old at the time, he deserved punishment, and if the compensation should have been less than $450, certainly it should not have been so much less than that as to show that the jury gave too much for punitive damages.

There is, however, another question urged on the part of the defendant which has received a large amount of attention by the court. The question arose in this way: When the plaintiff was upon the stand, she was asked if she had ever been arrested, and she answered, yes. She was then asked if she had ever been convicted in the police court of this city, to which she answered, no. She was then asked this question: Isn't it a fact Katie, that you were charged with being a common prostitute? To

which she answered: No, sir. Later she was again asked: Weren't you convicted of the charge of being a common prostitute? To which she answered, No, sir. The defendant, when he came to offer evidence in his own behalf, offered a record of the police court of this city. That record reads as follows:

"City Cases of the City of Cleveland.
"Thursday, July 18, 1907.
"City of Cleveland v. Kittie Finnerty. Common Prostitute.
"Affidavit filed. Warrant issued. Defendant in court and pleads not guilty. Hearing had. Found guilty, and she is sentenced to thirty days workhouse imprisonment and fine of $25 and costs. On further consideration sentence is suspended six months." (Defendant's Exhibit B.)

And the defendant offered to show that the Kittie Finnerty named in this record was the plaintiff in the action. To the admission of this evidence objection was made by the plaintiff, and that objection was sustained. It is urged that this was error, the argument being: First, that the plaintiff having testified that she never was thus convicted would be discredited by showing this record. That this question had no bearing upon the case on trial is conceded. It was purely a collateral matter. It being a collateral matter the party asking the question was bound by the answer, unless the case comes within some exception to the general rule.

The fact that the witness sought to be discredited was a party to the suit in nowise affects the question of whether this record should have been admitted. If it was admissible at all, it was admissible without any question having been asked of the witness in cross-examination on this subject. Under the law as it formerly was in England and America, one who had been convicted of any *infamous* crime was *incompetent* to be a witness. Under the law as it now is in Ohio, he who would have been incompetent under the law as it formerly was, is liable to be discredited by evidence showing conviction of such a crime as would have rendered him incompetent under the law as it was. It is only the conviction of such crimes as would formerly have rendered the witness incompetent which can now be used to discredit the witness. As already said, that crime, the convic-

tion for which rendered the witness incompetent, must have been an *infamous* crime. The conviction here sought to be shown was for an offense made neither a crime nor a misdemeanor by any statute of the state of Ohio. The conviction must have been for the violation of some ordinance of the city of Cleveland, of which the court can not take judicial notice, and which in no event could be made what is denominated in law an *infamous* crime.

The fifth amendment to the Constitution of the United States provides:

"No person shall be held to answer for a capital, or otherwise *infamous* crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."

The 10th Section of Article I of the Constitution of the state of Ohio provides that:

"Except in cases of impeachment, and cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and in cases of petit larceny and other inferior offenses, no person shall be held to answer for a capital, or otherwise *infamous* crime, unless on presentment or indictment of a grand jury."

The conviction here sought to be shown was a conviction in the police court of the city of Cleveland. It was then a conviction upon which there had been no presentment by a grand jury. The crime then was clearly not an *infamous* crime, if it was a crime which could be tried without presentment by grand jury. This view is sustained by *Coble* v. *State*, 31 Ohio St., 100, the language of the second clause of the syllabus reading:

"The credibility of a witness can not be affected by showing his former conviction of an offense under a city ordinance against disorderly conduct. A conviction which may be shown to affect the credibility of a witness, under Section 139 of the criminal code (66 O. L., 308) is such only, as, independent of the section, would have rendered the convict *incompetent* to testify."

It is true that the case being considered was a criminal case,

which this case is not, and that the section of the statute being considered was a section which provides for evidence in criminal cases, but the reasoning upon which the court reaches the conclusion which is reached, applies as well to civil as to criminal cases.

In Section 201 of Rapalje on the Law of Witnesses, this language is used:

"Formerly, when convicts were not admitted as witnesses, proof of conviction of crime was altogether fatal, not only to the credibility, but also to the giving of any testimony whatever by the witnesses. Since the almost universal abolition of incompetency by reason of infamy, however, the fact that a witness has been convicted of a crime which would have excluded him at common law is allowed to be shown for the purpose of affecting his credit with the jury."

In the case of *Bakeman* v. *Rose,* 18 Wend., 146, it is said in the dissenting opinion of Senator Tracy:

"It has been pressed upon us with earnestness and eloquence, that the condition of a public prostitute, being the most debased and demoralized state of human being that can be imagined, necessarily presupposes the absence of all moral principle, and especially that of regard for truth; and it is therefore contended that a common reputation of public prostitution, necessarily includes a common reputation for falsehood. In addition it is urged, that the laws of many countries exclude the testimony of females in some cases entirely, and in all cases where any stain is attached to their character; * * *. In respect to these suggestions it is sufficient to say, that it is not within the power of this court to subvert the established rules of evidence, and substitute new rules in their place, even were they persuaded, which I am not, that they would be preferable; and if they had this power, it might not be a very discreet exertion of it to attempt to gauge crimes and graduate a standard of vice and immoralities. Loathsome, deplorable, and even detestable as is a condition of public prostitution, it is not the only vice 'of a great kindred'; theft, forgery, swindling, drunkenness, gambling, adultery, are also well allied; and if we undertake to determine that the reputation of one vice necessarily includes the reputation of another, it would be difficult to say when or where we could stop."

This reasoning seems to us to be sound and to apply as well to cases of conviction for prostitution as to cases where it is sought to impeach a witness by showing that she has the general reputation of being a prostitute.

We hold, therefore, that there was no error in the exclusion of this record, first, because it showed no conviction of any offense punishable by the laws of the state of Ohio; and, secondly, because it showed no conviction of an *infamous* crime, as that word is used in law; this, because there could be no prosecution under the Constitution of the United States or the state of Ohio for an *infamous* crime, except upon presentment of a grand jury.

Thirdly, only such conviction as could be shown under the old law as to render a witness incompetent can be shown under the law as it is now to discredit the witness.

The result is that we find no error in the record and the judgment of the court of common pleas is affirmed.

J. H. Sampliner, for plaintiff in error.

Hart, Canfield & Croke, for defendant in error.

IRREGULARITIES IN STREET IMPROVEMENT ASSESSMENTS.

Circuit Court of Lucas County.

FRED W. RIDENOUR v. THOMAS BIDDLE, TREASURER, ET AL.

Decided, June 8, 1907.

Streets—Reassessment for Improvement of—After Invalid Assessment has been Set Aside—Not Invalidated Because of Settlement as to Some of the Lots—Effect of Omission of Parcel from the Land Described—Presumption that Error was Prejudicial not Applicable to Street Improvement Proceedings—Informality must be Shown to be Prejudicial.

1. Where a street improvement assessment has been set aside after settlement has been made as to part of the lots and lands affected, a reassessment of the lots with respect to which there has been no settlement is not invalid because the lots covered by the settlement are omitted from the reassessment.

2. The fact that a parcel of land described in a special improvement ordinance is not specially assessed does not affect the validity of the assessment, provided such parcel is not specially benefited by the improvement.
3. The principle that in error proceedings when error is shown it is presumed to be prejudicial, does not apply to irregularities in apportioning improvement assessments; such cases are governed by the principle of liberal construction provided for in Revised Statutes, Section 2327 (1536-280).
4. An informality in an improvement assessment is not a sufficient ground for setting aside the whole assessment, unless it is shown that prejudice has resulted to the plaintiff by reason of such informality.

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

On May 15, 1899, the common council of the city of Toledo adopted an ordinance providing for the improvement of a part of Navarre avenue from Woodville street to the easterly city boundary. Navarre avenue was subsequently improved in accordance with this ordinance by paving the central thirty feet thereof. The assessment upon the property benefited was set aside by this court in accordance with the decision of the Supreme Court in *Ayers* v. *Toledo*, 72 Ohio St., 651, or, rather, the principles that seemed to be applied by the Supreme Court in the reversal, without report, of the decision of that case by this court, which decision is reported in 6 C. C.—N. S., 57. Thereupon the council took steps to have a reassessment upon certain of the property benefited, it appearing that as to a large part of the property the assessments had been paid, or settled or adjusted in such manner as that it was not necessary for the council to take any steps with reference to such parcels; in other words, there were some 114 parcels in all and but eight parcels remained unadjusted, and those are the eight represented by the plaintiff here. The council, on April 16, 1906, taking notice of this judgment setting aside the original assessment, and taking notice of the fact that the assessments as to all of these lots and parcels, excepting the eight, had been adjusted, ordered that there should be a reassessment of these eight parcels (quoting from the resolution): "As near as may be according to benefits and in proportion that the benefits received by said lots

and lands bear to the total benefits received by all the lots and lands bounding and abutting upon said improvement and as set forth in the resolution and ordinance providing for said improvement."

Assessors were appointed who made their report assessing a part of the cost of this improvement upon these eight parcels; and in their report they set forth, among other things, that they "find and report an estimated assessment upon the lots and lands set forth in said resolution adopted April 16, 1906; which estimated reassessment so reported herein is made on the lots or parcels of land to be charged therewith as nearly as may be, to the special benefits which result from said improvement to the said several lots or parcels of land so assessed, and is apportioned among the several lots or parcels of lands specially benefited by said improvement in the proportion that the special benefit to each lot or parcel of land benefited bears to the whole special benefits conferred by said improvement."

They then proceed to find the fair market value of these lots and set forth the amount of benefits. This report was confirmed by the council, and the assessments made in pursuance of this action—these reassessments by this committee—are attacked by the plaintiff here, and the attack is made upon several grounds, which I shall mention in their order.

The first ground is, that all of the 114 lots not having been reassessed, but only the eight lots of the plaintiff, the reassessments could not have been according to benefits, as required by original Section 2264, Revised Statutes, then in force—the statute under which the reassessments had been made.

We find no statute requiring that, upon a reassessment because of a former assessment having been set aside, such reassessment shall include the lots and lands with respect to which settlement has been made, and we can think of no reason why that should be done. Counsel in his brief quotes from the case of *Cornell* v. *Franklin County,* 67 Ohio St., 335, 339, as follows:

"To any extent that one man is compelled to pay in order to relieve others of a public burden properly resting upon them, his property is taken for private purposes, as plainly and as palably as it would be if appropriated to the payment of the debts or

the discharge of obligations which the persons thus relieved by his payments might owe to private parties."

That is undoubtedly true; but here, as I read from the report of these assessors, they took into consideration not only the benefits resulting to these eight parcels; they not only found that such lots were specially benefited to the extent of the assessments returned, but they found that no assessment exceeded a fair and just proportion of special benefits conferred upon the lot assessed; and they further say distinctly, that they apportion the whole cost of the improvement—that is to say, the whole amount which was to be assessed upon private property—"among the several lots or parcels of land specially benefited by said improvement in the proportion that the special benefit to each lot or parcel of land benefited bears to the whole special benefits conferred by the improvement."

In the absence of any showing that they did not do this, we must assume that their statement is correct; that they did proceed in this way, and that they took into consideration the benefits to the other lots not reassessed, the amount that should be apportioned to them had they not paid their share of the assessments, precisely in the same way and with the same effect of relieving these eight lots from the burden of assessments as if they had actually returned a new assessment against the omitted lots. We can not see how they could well have actually returned a new assessment against these other lots, in view of the fact that such lots had borne their shares and proportions of the expenses. We think that in this action the authorities complied with the requirements of the law.

It is pointed out as a second reason why this reassessment should be set aside, that a part of a certain tract of land, described in the improvement ordinance, was not assessed any part of the cost or expense of this improvement by either the original assessment or this reassessment, and counsel presents the case upon the assumption that because this parcel of land was described in the original improvement ordinance it must necessarily follow that it was one of the parcels of land benefited by the improvement, that it must share a portion of the burden of the improvement, and it not having done so that its share—some

part of it at least—must have fallen upon the eight lots owned by the plaintiff. While the statute required that the ordinance should set forth specially the lots and lands to be assessed, we do not understand that such designation by the ordinance determines, necessarily, that every one of the lots so set forth shall be assessed. In other words, if the committee commissioned to make the assessments should discover that some one or more of the parcels of land described in the ordinance are not in fact benefited by the improvement, we do not understand that they are required to return that there is some benefit, or to make some assessment upon these lots simply because they have been described in the improvement ordinance. For aught that appears, this small parcel of land to which our attention is called, which was omitted from the lands assessed, was not benefited by the improvement. It is a small parcel of land irregular in form, lying eighty rods distant from this paved street; and as we are shown, there are other streets intervening between this parcel and the improved street. It is doubtful if an assessment upon this parcel could be sustained had it been made.

There is a question discussed by counsel in this case respecting the presumption of prejudice, or no prejudice, resulting from error in proceedings of this character. I wish to defer what I have to say upon this subject until I have said something about the third ground of complaint, for that subject has to do with both the second and the third grounds—perhaps with all the grounds of complaint.

The third ground of complaint is, that no assessment was made to be paid by the city on account of the intersections.

In the case of *Burr* v. *Parker, post,* decided by this court in February, 1907, we had occasion to discuss, briefly, the statute on that subject. We are not required in that case to pass upon the question whether a part of the costs of such improvements should be assessed against the city on account of the intersections, in pursuance of Section 2275, Revised Statutes (repealed, 96 O. L., 96), for the reason that the parties had not, by their averments, put themselves in a position to fairly raise that question; but we called attention to the peculiar state of the law on the subject as apparently made applicable to the city of Toledo,

and expressed our doubts as to whether it was really intended that Toledo should be subject at the same time to the provisions of Sections 2274 and 2275, Revised Statutes (repealed, 96 O. L., 96). It is now urged on behalf of the plaintiffs that if these two sections are not reconcilable, Section 2275, Revised Statutes (repealed, 96 O. L., 96), having been enacted or amended after Section 2274, Revised Statutes (repealed, 96 O. L., 96), the former should prevail over the latter, and that therefore, in the city of Toledo, at the time of this improvement, some share of the expense of the improvement should be assessed against the city on account of intersections; in other words, the intersections should be treated as abutting property.

It appears that in this case the whole cost of the intersections was paid by the city. If, proceeding under Section 2275, Revised Statutes (repealed, 96 O. L., 96), the city had directed the assessing committee to assess the whole cost of the improvement including the costs of intersections upon all of the abutting property, including the intersections, it is not apparent that that would have lightened the burden of plaintiffs here; indeed it seems to be almost demonstrable that a heavier burden would have fallen upon the property owners than was laid upon them where the city proceeded, as it did, to deduct the whole cost of the intersections and pay it from the city fund. We still entertain doubts as to whether Section 2275, Revised Statutes (repealed, 96 O. L., 96), should be given effect; but, assuming that it should, it is not apparent that any prejudice resulted to the plaintiffs from the city's proceeding as it did instead of proceeding as counsel for plaintiffs contends it should have proceeded.

Upon this subject, counsel for the plaintiffs in his brief cites the cases of *State* v. *Aldridge*, 66 Ohio St., 598, and especially 604; *Cleveland Punch & Shear Wks. Co.* v. *Carbon Co.*, 75 Ohio St., 153, and especially 170, to the effect that in error proceedings, where error is shown, prejudice is presumed. That, of course, is the general rule, in cases of that character. He also cites the language of the court in the course of the opinion in the case of *Stephan* v. *Daniel*, 27 Ohio St., 527, the notation being at 536, to the effect that under Section 5848, Revised Stat-

utes, a remedy is given by injunction to restrain the collection of assessments or taxes unlawfully levied, and that in the application the plaintiff need not aver or show, as required under ordinary rules in equity, that great or irreparable injury is about to be done for which he has no adequate remedy at law, but he need only show that the tax which is about to be assessed or collected is illegal. But we do not think that the authority just mentioned, or those upon the subject of proceedings in error, quite meet the question. The authorities that we regard as more nearly in point are cited by counsel for the city, and to some of these I will call attention.

In the first place, it is provided in Section 2327, Revised Statutes (1536-280) that—

"Proceedings with respect to improvements shall be liberally construed by the councils and courts, to secure a speedy completion of the work, at reasonable cost, and the speedy collection of the assessment after the time has elapsed for its payment, and merely formal objections shall be disregarded; but the proceedings shall be strictly construed in favor of the owner of property assessed or injured, as to the limitations on assessment of private property, and compensation for damages sustained."

Now we do not regard the question made here as one involving limitation on assessments; it is not one involving compensation for damages sustained, nor is it one that goes to the jurisdiction of the city officials; so that we think it is a case in which the doctrine of liberal construction should be applied to the proceedings of the city and its officials. Their actions should not be modified or set aside even if there should be informality therein, unless some prejudice to the party complaining should be made manifest or at least probable.

In *Ayers* v. *Toledo, supra,* we expressed our views upon this subject, and we have done so in a number of cases, but our views are challenged, and we feel disposed to look further for authority than our own utterances. In the case of *Burr* v. *Parker, supra,* this was said:

"Now it may be, that, if it should be made to appear that some lots or lands that should have been assessed were omitted, that would render the assessment of the other lots and lands

invalid so that the court would be required to enjoin the assessment and a new assessment would have to be made including those lots and lands; but certainly, where one goes into a court of equity with a claim of that character, he should make it appear affirmatively that the lots and lands which he says should have been assessed derived some benefits from the improvement, so that they should have been assessed and so it should appear at least probable that upon a reassessment some assessment would be laid upon such lots and lands and probably thereby the assessment upon his lots and lands would be lessened."

And one clause of the syllabus in *Ayers* v. *Toledo, supra,* is:

"No presumption that an assessment is inequitable arises from the mere failure of the municipal council to make a record of the valuation of property charged therewith."

To be sure, as already said, this decision was reversed, but we do not understand that the doctrine stated in that clause of the syllabus was necessarily disapproved; and I shall undertake to show that it is the doctrine of the Supreme Court as set forth in a number of cases.

In the case of *Steese* v. *Oviatt,* 24 Ohio St., 248, it is said, page 253:

"Proceeding under the statute, the party complaining is not required to show a case of threatened irreparable injury, or the absence of a remedy by ordinary legal proceedings; but he must exhibit a case in which, upon the merits, he is entitled to the equitable relief demanded.

"In these cases, notwithstanding the irregularities complained of, the plaintiff's property was, under the statute, clearly subject to be charged to pay the expense of the respective improvements. The assessments were made by competent authority, and although irregularly made, it does not appear that any injustice was done."

In *Cincinnati* v. *Shoemaker,* 1 C. C.—N. S., 11, which was affirmed by the Supreme Court in *Cincinnati* v. *Shoemaker,* 68 Ohio St., 733, this language occurs, page 13:

"If the benefits conferred are equal to the assessment, there is nothing to move a court of equity to intervene by injunction."

In *Ridenour* v. *Saffin,* 1 Handy, 464, reading from page 245, the court say:

"We know it is said, that for aught that appears, the heaviest and most costly part of the work might have been done on that part of the road which was not required to be improved; but that would be to reverse the rule of presumption, which holds, in matters of public duty, that the acts of the public officer are rightly done. Where it is not shown by proof, either way, how the matter stands, it ought to be presumed that the law-making power has acted in the spirit of equality and justice."

In *Benham* v. *Cincinnati,* 4 C. C.—N. S., 36:

"Where, however, the assessing board has made a finding of benefits and has made the assessment on that basis, such finding and assessment are *prima facie* correct, and should not lightly be disturbed or inquired into in the absence of allegations of some of the grounds usually invoking equitable intervention."

In *Block* v. *Godfrey,* 5 C. C.—N. S., 318, quoting from page 319:

"We are of the opinion, therefore, that there having been no objection made by Mr. Hayes at the time this apportionment was made, but he having acquiesced in it, he is bound by it, and that the fact that some part of the assessment was not levied upon these other lots, in the absence of any evidence that there was any injustice therein, this apportionment of the whole cost of the improvement to lots 1 to 29, does not present any legal ground for invalidating the assessment or enjoining the levy." Affirmed, *Block* v. *Parker,* 71 Ohio St., 533.

Chicago, R. I. & P. Ry. v. *Chicago,* 139 Ill., 573, 580: In order to be entitled to relief plaintiff must show that his assessment would have been reduced by showing "that the street railway was specially benefited, and the extent of its benefits; but there can be no presumption in that respect in the absence of evidence."

In *Walters* v. *Lake,* 129 Ill., 23, 29, it was claimed that part of the cost of the improvement should be assessed against the city by reason of intersections; but it was said that—

"The commissioners have decided that there has been no public benefit to the town. The only course left for the objectors was to show upon the hearing that their lots were benefited less than the amount assessed against them."

Davies v. *Saginaw*, 87 Mich., 439, 451:

"The confirmation of that roll by the council, determined that the proportion of the aggregate benefit received by each parcel was equal to the burden imposed, and in the absence of fraud, oppression, or manifest mistake, such determinations are conclusive."

White v. *Tacoma*, 109 Fed. Rep., 32, 36:

"If it appears that an assessment has been levied by competent authority, and that it is fair, and not in excess of the benefits to accrue by reason of the improvements to be paid for, it will be sustained by the courts."

See, also, *Muchmore* v. *Miller*, 11 Bull., 160.

We are of the opinion that the plaintiffs have failed to show that they have been prejudiced by any informality that may have crept in here; they have failed to show that there is any equity or real merit in their complaint. On the other hand, it seems to us to be very apparent that the council has proceeded with care in the matter of this reassessment. The burden laid upon these lots is somewhat lighter than it was under the original assessment and no property seems to have been omitted that was really benefited, and, therefore, we think we should not set this assessment aside. The petition of the plaintiffs will be dismissed at their costs.

B. A. Hayes, for plaintiffs.

C. S. Northup and *O. W. Nelson*, contra.

CONTRIBUTORY NEGLIGENCE.

Circuit Court of Hamilton County.

THE C., L. & N. RAILWAY COMPANY ET AL v. ANTHONY J. BOKENKOTTER, ADMINISTRATOR.

Decided, June 29, 1907.

Negligence—In Crossing a Railway Track without Looking—Error in not Directing a Verdict.

Where one who is familiar with the location of railway tracks attempts to cross without looking for an approaching train, which might have been seen two thousand feet away, and is struck by it, he is guilty of contributory negligence, and it is error to refuse to direct the jury to return a verdict for the company.

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

There is error in the record of the trial below in that the court overruled the motions of the plaintiffs in error at the close of the testimony offered by the defendant in error to direct the jury to return a verdict in their behalf.

The testimony clearly shows the deceased to have been guilty of contributory negligence. He was employed as station agent at Hopkins avenue station. He crossed the south-bound track to the north-bound track, and in attempting to return did not look to see or pay any attention as to whether a train was approaching; and yet the track was straight for two thousand feet in the direction from which the train approached, and it could have been easily discerned.

Judgment reversed.

Wm. W. Ramsey, for the railroad company.

E. M. Ballard, contra.

PLEADING UNDER AN INDEMNITY INSURANCE POLICY.

Circuit Court of Lucas County.

ISAAC KANDAR v. AETNA INDEMNITY CO.

Decided, June 15, 1907.

Insurance Against Burglary or Theft—Action on Policy—Construction by Agent of Rules of the Company to Suit the Circumstances—Pleading—Defenses—Waiver of Part Performance—Knowledge of Agent as to the Facts—Incorrect Statement of Facts by the Agent in the Application—Estoppel against the Company—Section 3644.

1. Where the plaintiff, in an action on an insurance policy, has been released from performance of any of the conditions of the contract, he should aver such facts in his petition; but matters of a merely defensive nature need not be met earlier than at the filing of the reply.
2. Where the agent of the company, in filling out the application for a policy of insurance against loss by burglary or larceny, construes a certain question asked of the applicant to suit the circumstances of the particular case, he acts for the company, and the company can not escape liability on the policy on the ground of the incorrectness of a statement in the application, based on a contrary construction.

The authorities cited for the defendant in error were: Travelers Ins. Co. v. Myers, 62 Ohio St., 529; Union Central Life Ins. Co. v. Hook, 62 Ohio St., 256; Eureka Fire & M. Ins. Co. v. Baldwin, 62 Ohio St., 368; Northern Assur. Co. v. Building Assn., 183 U. S., 308; Gould v. Insurance Co., 90 Mich., 302; Quinlan v. Insurance Co., 133 N. Y., 356; Pete v. Woodmen of the World, 5 C. C.—N. S., 446; Hollis v. Insurance Co., 65 Iowa, 454; Barre v. Insurance Co., 76 Iowa, 609; Wadhams v. Insurance Co., 117 Mich., 514; Kirkman v. Insurance Co., 90 Iowa, 457; Carey v. Insurance Co., 84 Wis., 80; Walsh v. Insurance Co., 73 N. Y., 5; Insurance Co. v. Pyle, 44 Ohio St., 19.

Materiality or representations: Deming Invest. Co. v. Insurance Co., 16 Okla., 1.

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

Error to Lucas Common Pleas Court.

This is a proceeding in error to reverse the action of the court of common pleas in sustaining a demurrer to the amended reply of the plaintiff and rendering judgment for the defendant on the pleadings. The case below was one instituted by the plaintiff in error, Kandar, upon a policy of insurance issued by the defendant company to indemnify Kandar against loss by reason of burglary, theft or larceny of property of certain classes described in the policy. Among the claims asserted in the answer is one embodied in what is called the second defense. It is properly the first defense, because the matters treated of in the so-called first defense are merely admissions and denials of the averments in the petition. This so-called second defense asserts, in substance, that a certain misrepresentation was made by the insured in the application for the policy, or, what is equivalent thereto, perhaps, in a certain "schedule" containing a number of statements, not signed by the insured but attached to the policy itself. The policy purports to be issued in consideration of $12.50 premium "and of the statements in the schedule hereinafter contained, which statements the assured makes on the acceptance of this policy and warrants to be true." The particular statement embodied in the schedule and referred to as No. 6, reads:

"The assured has never suffered loss by burglary, theft or larceny either at the premises above described or elsewhere, nor received indemnity therefor except as herein stated."

There is a clause, No. 16, not in the schedule, but in the body of the policy, reading as follows:

"No agent has authority to change this policy or to waive any of its provisions, nor shall any notice to the agent or knowledge of his or any other person be held to effect a waiver or change in this contract or in any part of it."

Relying upon these provisions in the policy, the defendant in the so-called second defense, alleges that it was not true that the plaintiff had never before had any property stolen from

him, but, on the contrary, that some time in the year 1901, he had suffered loss by burglary, theft and larceny at his warehouse at the corner of Short and Huron streets, in the city of Toledo, Ohio, "at which time persons unknown to defendant broke into and entered the said warehouse of plaintiff, and then and there did steal," certain property mentioned. The property claimed by the plaintiff to have been stolen, and for the loss of which he sought this indemnity on the policy, was a certain diamond ring of the value, as claimed by the petition, of $450, which was stolen from some room in the residence of the plaintiff in the city of Toledo. The amended reply of the plaintiff, to which demurrer was interposed and sustained, is, so far as relates to this inquiry, as follows:

"For reply to the second defense in defendant's answer, plaintiff states that he did not read the questions contained in the application for policy of insurance mentioned in the petition, but that the questions were asked him by the agent of the defendant and that said agent inquired of plaintiff only as to any previous burglary, theft or larceny that plaintiff may have had in his residence, and said agent assured said plaintiff that it was only necessary for defendant to know as to whether or not any burglary, theft or larceny had been suffered by plaintiff in his residence, and plaintiff denies each and every allegation contained in said second defense conflicting with the foregoing allegation."

The defendant contends that this is no reply; that it does not legally meet the defense asserted; and it is suggested to the court also, by counsel for defendant in error, that this claim in the reply amounts to a waiver of the conditions of the policy, and that it should have been asserted, if proper at all, in the petition rather than in the reply. With this latter claim we are not in accord. It is not a waiver of some condition to be performed; not a waiver of some requirement on the part of the plaintiff, but it is a matter rather of claimed estoppel to assert the defense which is alleged in the answer. The answer asserts that the plaintiff is not entitled to the relief which he seeks, because of the incorrectness of a representation made to the company upon which it based its action in issuing this policy; and the plaintiff attempts to meet this claim by saying that the

defendant company had knowledge of these facts; that it did not need to rely upon any representations made by the plaintiff to it or to its agent; in other words, that the company had this knowledge, and the agent of the company having placed a construction upon what may possibly be an equivocal or ambiguous clause in its schedule attached to the policy, is estopped now to dispute that construction.

We think it altogether true that when a plaintiff is suing upon a policy, and is seeking to avoid the performing of some condition precedent, or subsequent, obligatory on him, he should assert the facts in his petition which release him from the performance of such obligation. As, for instance, concerning the requirements as to proofs of loss and payment of premium, if for any reason he has been released from such requirements, he should aver such fact in his petition, and he could not meet the obligation resting upon him so to plead by asserting that he had performed all the conditions precedent. A waiver of performance is not the same thing as performance. But he was not bound to anticipate here the assertion of this defense. The claim asserted by the defendant is purely defensive, and for that reason the plaintiff was not compelled to meet it at any earlier stage of the proceedings than the filing of his reply.

Section 3644, Revised Statutes, having reference to insurance companies other than life, provides that:

"A person who solicits insurance and procures the application therefor, shall be held to be the agent of the party, company or association thereafter issuing a policy upon such application or a renewal thereof, anything in the application or policy to the contrary notwithstanding."

In the policy before us there is no provision that the solicitor for the insurance shall not be deemed the agent of the company, or that he shall be deemed the agent of the insured; but it is perhaps not necessary to invoke the aid of the statute in behalf of the plaintiff here, in view of the facts that this question arises upon a demurrer which concedes the truth of the allegations properly made in the reply, and the reply nowhere says that the person placing this construction upon the schedule

was merely a soliciting agent, but the language is, that the questions were asked him by the agent of the defendant "and that said agent inquired of plaintiff only as to any previous burglary, theft or larceny that plaintiff may have had in his residence, and said agent assured said plaintiff that it was only necessary for defendant to know as to whether or not any burglary, theft or larceny had been suffered by the plaintiff in his residence;" and he further avers that "at the time of writing said application and policy of insurance defendant had full knowledge that plaintiff had suffered loss by theft and larceny at his place of business." We must then take it for granted that these statements were made by the agent of the company; that he had knowledge of the fact of a previous larceny of the plaintiff's property, and, possibly of the further fact that the company itself had such knowledge, as averred in the reply, treating all of these allegations as conceded by the demurrer to be true. But in view of the probability that in the drafting of this pleading, counsel meant no more than this, that the company had constructive knowledge, or that knowledge which they were bound to have by reason of the communication of facts to their agent, or knowledge possessed by the agent, it is well enough to consider what is the law applicable to such condition.

Reliance is placed by counsel for defendant upon two cases, *Union Cent. Life Ins. Co.* v. *Hook*, 62 Ohio St., 256, and *Travelers' Ins. Co.* v. *Myers*, 62 Ohio St., 529. One of these is a life insurance case, and the other an insurance against liability to employes who sustain bodily injury while on the pay roll of the insured. In the case of *Union Cent. Life Ins. Co.* v. *Hook, supra*, page 256 of this report, it was held, as stated in the first syllabus:

"In an action to recover on a written contract for life insurance and upon an alleged subsequent verbal modification of the same, statements and representations made by the agent who solicited the policy prior to, and contemporaneous with, the issue of the policy, are inadmissible to vary, in any respect, the terms of the written policy. In the absence of proof of fraud or mistake, such statements and representations are merged in the written contract."

The verbal representation which was relied upon in the Hook case was one which it was claimed extended the policy one year and waived the payment of an annual premium. These were changes which, under the terms of the policy, could not properly be made by an agent of the company, nor could they be proven by parol; but Judge Davis, who rendered the opinion in the case, says, on page 265:

"We do not decide that there might not be an estoppel by conduct, notwithstanding such an agreement. But that case does not arise here."

The other case, *Travelers' Ins. Co.* v. *Myers, supra,* provides, as we read in the third syllabus:

"When such policy contains a stipulation that 'no agent has authority to waive or alter anything in this policy contained,' and the same is accepted by the insured, it is both notice to, and an agreement by, the insured that an agent has no authority to waive or alter anything contained in the policy."

We take this to mean that the agent has no authority to change the contract, but that is not inconsistent with the view that the company may, under certain circumstances, be estopped by its own conduct, from asserting some matters of defense. The question is, whether the matter which we have here is one which might be covered by that principle. Counsel for the plaintiff in error urge as a proper construction of the policy that the term "elsewhere" as found in the schedule, is to be construed as meaning other premises on which the insured has resided, or something equivalent to that, and considerable support is found for this contention in some of the cases, notably *State* v. *Clark,* 52 N. J. Law, 291.

It is insisted that the case falls within the principle wherein the courts have held, that when certain articles or certain places are enumerated and then some general word is used following the conjunction "or," this general term is to be treated as *ejusdem generis;* that is to say, of the same kind or class, as the articles, or places just mentioned. Here the statement is, in substance, that the assured has not suffered loss by burglary,

theft or larceny either at the premises above described or "elsewhere"; and it is very earnestly urged that the word "elsewhere" does not mean anything more than some other premises in their general nature like those already described. Perhaps in the construction of this phrase, however, we should consider the purpose of this stipulation. What was the object of the insurance company in asking for such information? We think it altogether likely that the company designed to ascertain whether the person seeking insurance was careless as to the protection of his property—one who would be likely to leave it unguarded, or put it in such place or places that it might tempt others to larceny or burglary—and perhaps with that thought, it might not make very much difference whether the prior theft was one from the residence or whether it was one from the warehouse.

It may safely be said that the most that can be claimed by either of the parties to the controversy is, that the phrase is somewhat ambiguous; that it is not free from doubt as to its construction. Now, if that be so, a second inquiry becomes altogether pertinent: What is the effect of the phrase or, rather, the construction put upon it by the agent of the company at the time when the question is asked and the answer given? And the further question as a corollary to that: If the agent of the company placed a construction upon it, making the answer given an honest one, is the company bound by it so as to be thereafter estopped from asserting as a defense to an action on the policy that a false representation had been made in this regard? We are not without authorities upon questions somewhat analogous. We have found reference to a mass of litigation along the same lines in *Clemans* v. *Supreme Assembly,* 131 N. Y., 485 (30 N. E. Rep., 496) *et seq.* On page 35 is a reference to a case, *Texas Mut. L. Ins. Co.* v. *Davidge,* 51 Tex., 244:

"The knowledge of the agent of the misrepresentations upon which the insurance was procured must be pleaded in reply, if it is intended to rely thereon to defeat the defense based on such misrepresentations."

That is precisely the course that was taken by the plaintiff in error here.

"If the insurer's agent after being informed fully as to the facts, incorrectly states them in the application, the insurer is estopped to take advantage of the error to avoid liability on the policy." *North American Fire Ins. Co.* v. *Throop,* 22 Mich., 146.

Numerous other cases are cited in a somewhat extensive paragraph, which include some cases in New York. On the same page is this:

"If the statements in the application relied upon as breaches of warranty are inserted by the agent of the insurer, without collusion or fraud on the part of the insured, the insurer is estopped to set up their error or falsity." *Baker* v. *Insurance Co.,* 64 N. Y., 648, and other cases.

I invite attention to these merely because of their treatment of this sort of a claim as a claim of estoppel, which is recognized by Judge Davis as already quoted in *Union Cent. Life Ins. Co.* v. *Hook, supra,* as not inconsistent with the conclusion arrived at in that case.

On page 37 is cited the case of *Key* v. *Insurance Co.,* 77 Iowa, 174:

"An insurance company whose agent himself prepared an application with knowledge of the fact that the insured had only a title bond for his land, which was not paid for, can not defeat an action on the policy on the ground that the application improperly states that the insured was the sole and undisputed owner of the property, and that it was unincumbered, where this was signed by the insured after making a full statement of facts, in accordance with the agent's theory of his title."

There was a case where the agent seems to have put a construction upon the facts which was adopted by both the agent and the insured, and the insured made the application and signed it. And again, on page 38, citation is made of the case of *Equitable Life Ins. Co.* v. *Hazlewood,* 75 Tex., 338 (12 S. W. Rep., 621):

"A former rejection of the insured on his application to a legion of honor is not a breach of a warranty that he had never applied for insurance in any other company, when the agent told him that a legion of honor was not an insurance company."

Just as here, where he claims the agent told him that this clause "elsewhere" had reference only to other residences occupied by him, and not to a warehouse. The case of *Continental Life Ins. Co.* v. *Chamberlain*, 132 U. S., 304, is also mentioned. I have the case before me, but I will not stop to read from it. The annotation in *Clemans* v. *Supreme Assembly, supra,* page 38, is as follows:

"Where the agent writes in the application that the applicant has no other insurance, although the applicant told him that he had certificates of membership in co-operative companies, which the agent said were not considered insurance by him, is bound by the agent's interpretation, and estopped from asserting the contrary."

That case seems to be pretty close to the case at bar, and, being a decision of the Supreme Court of the United States, is, of course, entitled to the highest respect. It was the unanimous expression of that court.

In our own state we have, among other cases, that of *Insurance Co.* v. *Williams*, 39 Ohio St., 584. This was not a life insurance case, so as to be affected by the express provisions of the section in our statutes as to life insurance companies, but it was embraced in a class of insurance other than life insurance. The syllabus of the case is as follows:

"A soliciting agent, procuring for an insurance company risks and applications on which policies are issued, who fills up the application, is in so doing the agent of the company, and not of the insured; and if the agent make a mistake in wrongly stating facts which were correctly given him by the insured in preparing the application, the company is bound by, and responsible for, such mistake."

Judge Follett quotes, on page 588 of his opinion, from the case of *Combs* v. *Insurance Co.*, 43 Mo., 148, 149, which is the language of the Supreme Court of that state:

"The authority of the soliciting agent of an insurance company to take applications for insurance carries with it the legal implication of authority to fill up the application, and do all those things which may be needful in perfecting it."

And then Judge Follett adds:

"That was a case sought to be defeated on the ground of false representations and warranties in the application. Here the agent wrote the application, and was given a correct description and told to write it in the application, and by mistake did not do it."

He refers also to the case of *Rowley* v. *Insurance Co.*, 36 N. Y., 550, in which that court say, page 589:

"An agent, authorized to take applications for insurance, should be deemed to be acting within the scope of his authority, where he fills up the blank application of insurance; and if, by his fault or negligence, it contains a material mis-statement not authorized by the instructions of the party who signs it, the wrong should be imputed to the company, and not to the insured."

Numerous other authorities are cited from the state of New York showing that the result of the adjudications in that state is not inconsistent with the conclusion of the court in *Insurance Co.* v. *Williams, supra*, and the application of the principle of estoppel.

Judge Follett also cites *Union Mut. Life Ins. Co.* v. *Wilkinson*, 13 Wall., 223, where the Supreme Court say:

"Hence, when these agents in soliciting insurance, undertake to prepare the application of the insured, * * * they will be regarded, in doing so, as the agents of the insurance companies, and not of the insured."

Other cases are cited, including the case of *Massachusetts Life Ins. Co.* v. *Eshelman*, 30 Ohio St., 647, in which our own Supreme Court Commission held:

"A sub-agent of a life insurance company appointed to represent it in a particular branch of its business, becomes, in reference thereto, the direct representative of the company, and notice of a fact to him will operate as notice to the company, and it will be bound by acts done by him in respect to that branch of its business intrusted to him."

Then Judge Follett concludes with this paragraph:

"As showing this to be the policy of our law, we now have a statute going much beyond this case, passed March 5, 1879, and is now Section 3644, Revised Statutes, reading: 'A person who solicits insurance and procures the application therefor, shall held to be the agent of the party hereafter issuing a policy upon such application or a renewal thereof, anything in the application or policy to the contrary notwithstanding.' "

That section, as cited by Judge Follett, has undergone slight changes in arriving at the condition in which we find it embodied in our present revision. The changes are immaterial so far as this answer is concerned. As suggested by my associate, Judge Parker, the Supreme Court in this case of *Insurance Co.* v. *Williams, supra,* is basing its conclusion not upon Section 3644, Revised Statutes, which was passed after the rights of the parties had accrued, but Judge Follett cites the section merely as showing the tendency of our legislation. In reference to this section of the statute, it is manifest that the Legislature had some purpose in enacting that the soliciting agent should be deemed, under such circumstances, the agent of the company, although so far as the terms of the legislation go there is nothing further. The purpose of the section is its application as fixing the rights and liabilities of the insured and the insurer. It must be, that the Legislature in enacting that the soliciting agent under certain circumstances, shall be deemed the agent of the company, intends that he shall have power to bind the company as its agent to some extent, and we think that the statute was passed in recognition of the general practice of agents of receiving the statements of claimed facts from persons whom they were seeking to insure and embodying them in applications for insurance or in such schedules perhaps as we find here, attached to this policy.

I find that our own court has had occasion to look somewhat into this question and to pass upon the principle in the case of *Phoenix Mut. Fire Ins. Co.* v. *Bowersox,* 6 C. C., 1. I read the fifth paragraph of the syllabus:

"Where the agent of an insurance company, in taking an application for insurance against loss by fire, himself writes out the answers of the applicant to interrogatories propounded in

behalf of the company, he acts in that regard as the agent of the company; and if any mistake occurs in writing out such answers, such as an excessive estimate of value, based on the truthful statements of the assured, without fault on the part of the assured, the latter is not prejudiced thereby."

The members of the court at the time this decision was rendered, in 1901, were Judges Haynes, Bentley and Scribner, and the opinion is *per curiam*, all of the judges indorsing not only the judgment which was rendered, but the entire phraseology of the opinion. I will not stop to read from this opinion, but will say only that it fully sustains the proposition in the syllabus which I have already read. It is suggested to me, and before leaving the discussion of the subject I will say that the provision in our present revision, Section 3644, Revised Statutes, has application to all insurance companies other than life. When originally enacted as a part of the Holland law it had reference to fire insurance companies only, but it is now embodied in the chapter pertaining to insurance companies other than life, and in another part of the same chapter we find provision for insurance companies of the class represented by the defendant in this suit; that is, insurance against losses by crimes such as burglary, theft, larceny, etc. The case of *Phoenix Fire Ins. Co.* v. *Bowersox, supra,* received consideration by another court higher than the circuit court; it was carried to the Supreme Court and the entry on the docket of the Supreme Court shows that it was dismissed March 21, 1893, so that the last judicial determination of the matter, so far as that case is concerned, is embodied in the decision as quoted. There is an earlier case in Ohio to which reference might be made: *Hartford Protec. Ins. Co.* v. *Harmer,* 2 Ohio St., 452, in which it was held, in the sixth paragraph of the syllabus:

"If a representation is untrue as to incumbrances, but not fraudulently made, and the agent of the company knows the true state of facts, and writes the statement as made from his own knowledge, and fails to state it truly, such misrepresentation will not avoid the policy, and this is true, although the statement is signed by the agent of the insured."

In the so-called second defense in this answer there is perhaps a substantial averment of fraud on the part of the plaintiff; that is, an allegation that he knew the statements to be false; but that part of the answer is denied by the reply. The plaintiff does not mention it specifically, but he denies all matters antagonistic to, or inconsistent with, the statements made in the reply including the statement that the defendant's agent and the defendant had full knowledge of all the facts. We think that there is enough in the reply, to carry to the mind of any reader an understanding that the plaintiff is asserting that the defendant company was not misled by any language in this schedule negativing a previous larceny in his residence or elsewhere, and that plaintiff made the statement in good faith.

Our judgment is, that the demurrer should have been overruled, and that the court, in sustaining it, committed error; that the court also erred in dismissing plaintiff's case upon the pleadings. For these errors the judgment of the court will be reversed and the cause remanded, with instructions to overrule the demurrer, and for such further proceedings as may be required.

Chittenden & Chittenden, for plaintiff in error.

Southard & Southard, for defendant in error.

UNFORTUNATE SITUATION OF A ROAD CONTRACTOR.

Circuit Court of Huron County.

GUY S. NORTH v. COMMISSIONERS OF HURON COUNTY.

Decided, March Term, 1907.

Invalid Contract for Improvement of a Road—No Record of Commissioners' Meeting—No Auditor's Certificate—No Authority to Order an Accounting for Work Done—Recovery of Property Impracticable—Implied Contracts.

A contract between county commissioners and one who undertakes to pike a county highway is invalid, where no record of the meeting of the commissioners was made, and no auditor's certificate was filed or recorded as required by Section 2834*b*, Revised Statutes; such a contract can not be enforced against the county; nor can an equitable accounting be granted for the labor and materials expended in improving the road.

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

Error to Huron Common Pleas Court.

This case presents another phase of the questions which have arisen between public bodies and individuals, growing out of, and providing for, the making of improvements without following legal requirements.

Guy S. North sued the county commissioners of Huron county in the court below, and, upon a demurrer by the defendant board to his petition, it was held insufficient and judgment rendered accordingly, the plaintiff not caring to plead further.

The petition alleges in substance that North had been employed by the board of Huron county commissioners to grade and level the Hunt's Corners road and to place crushed stone thereon, the contract being a sort of a tripartite one, the township trustees joining in it and subsequently paying for their proportion of the agreed price.

The petition discloses the fact that no record of the meeting of the commissioners had been made as required by law, and that the contract was otherwise invalid by reason of the non-filing and recording of the auditor's certificate, for which pro-

vision is made in Section 2834*b*, Revised Statutes. The petition alleges that the omission of this certificate was an oversight. It alleges the doing of the work and the furnishing of the material by North.

The improvement is one where it would seem impossible for a person to make it and subsequently remove the material placed upon the road-bed to any advantage to himself or without destruction of the highway, or injury to it. It is not like the case of the possible removal of a structure, such as a bridge or any other tangible and severable property, the restoration of which to the person furnishing it may, under some circumstances, be made by a court of equity.

We have had quite a careful adjudication in this state of analogous questions. Without stopping to read them, reference may be made especially to the case of *Wellston* v. *Morgan,* 65 Ohio St., 219, where it was held that no implied contract would arise under similar circumstances. In *Buchanan Bridge Co.* v. *Campbell,* 60 Ohio St., 406, it was held that there could be no recovery by a person furnishing an improvement, for the value thereof as upon an implied contract.

The case of *Comstock* v. *Nelsonville,* 61 Ohio St., 288, held, in reference to a contract with a municipality where the provisions of a similar statute had been violated—original Section 2702, Revised Statutes (1536-205)—that in the absence of such certificate, when required, no liability arises against the municipality, even though the contractor has fully performed his contract.

The question has been presented in various ways—sometimes by suits to enjoin public authorities from carrying out the contract to pay the purchase price; sometimes by mandamus in an effort to compel payment of the price, and as in *Buchanan Bridge Co.* v. *Campbell, supra,* in an effort, after other means had failed, to obtain payment by the person who had furnished the property, by suit for the value of the property furnished, as upon an implied contract.

A case was presented to me in Sandusky county in which the county commissioners had paid for a bridge, without legal authority, the required certificate not having been filed, and suit was instituted by the prosecuting attorney of the county to re-

cover, in behalf of the county, the price so unlawfully paid. In that case the defendants' answer alleged that the contract had been performed and the price had been paid to them under the supposition that the certificate of the auditor was on file and that, as stated in the answer of one or more of the defendants, the commissioners had represented to the persons furnishing the structure that the proper certificate was on file.

There was nothing to indicate that it was impracticable to restore both parties substantially to the status which they had occupied before entering into the contract. The case, to which I refer for such relevancy as it may have to the case at bar, is *State* v. *Fronizer*, 3 N. P.—N. S., 303, and I refer also to the cases there cited and considered, one of which is the federal decision, *Lee* v. *Monroe County*, 114 Fed. Rep., 744, decided by the United States Circuit Court of Appeals, wherein the person or company which had furnished a bridge was permitted to sue for and recover the bridge, with the value of its use during the time that it was in the possession of the public.

Upon the authorities and principles considered and discussed in *State* v. *Fronzier, supra*, I held that the demurrers to the answers of the bridge company and certain agents ought not to be sustained and I overruled the same. That case has not been disturbed. Whether it will be, of course, I have no means of knowing; but up to the present time I am entirely satisfied that the principles are properly enunciated. [The case has, since the rendition of this opinion, been affirmed by the circuit court in *State* v. *Fronizer*, 8 C. C.—N. S., 216.] Do these principles apply to the case at bar?

The plaintiff, recognizing the difficulties confronting him, has instituted a suit here, not for the recovery of property, an endeavor which, indeed, would seem to be futile by reason of the character of the improvement—nor for the value of the improvement to the public—but he has filed a petition in equity, seeking equitable relief; in other words, he seeks an accounting, asking the court substantially to determine how much loss he has sustained by reason of the mistake which he has committed in entering into this contract. My associate, in announcing an opinion as to another case a few moments ago, said that, so far

as he was concerned, he was very glad that the court had been unable to discover any error prejudicial to the plaintiff in error, in the case being decided. I think I may say for all the members of this court that if we could find error in the holding of the court below in the case at bar, we should very gladly do it. It is a matter of profound regret that the difficulty which has arisen and which the plaintiff in error has encountered seems insurmountable.

As I have said, the plaintiff seeks relief in the way of an accounting for loss which he has sustained by his own mistake. It is not alleged that that contract was entered into by mutual mistake of the parties thereto. It is very doubtful whether, even if it were alleged in the petition that it was a mutual mistake of plaintiff and the commissioners as to the omission of this certificate, it would make the case very much stronger for the plaintiff. The commissioners are not the persons against whom a recovery is sought except in a formal way; they are the trustees of the public; they are public officials representing the people. It is true they are a *quasi*-corporate body capable of suing and being sued. The property with regard to which the claims are made is not theirs; that is, not theirs in any personal or individual way; they have no private interest in it except that small private interest which every citizen of the county may have. Is this kind of a case against the consequences of which equity will relieve? It is not a case where there is an effort being made to rescind a contract and where, before permitting the rescission, a court of equity will compel restitution by both parties or by neither. There is no averment or suggestion that the county commissioners are not willing to restore. It is a matter in which the nature of the property is such that there can be no restoration.

If the plaintiff, without any contract, had gone upon the highway and graded it and placed stone thereon, and endeavored to improve it under a mistake of the law on his part, believing that if he improved a public highway he would be entitled to receive his pay for it, it would hardly be contended that that would present a case wherein he could recover from the county, through its officials, damages for loss sustained by him, or that

he could obtain from a court of equity a decree in his favor for an accounting.

After all, he seems to be basing his claim and the right to a recovery substantially upon an implied contract, in the absence of a valid, express one, and that the Supreme Court has held in *Buchanan Bridge Co.* v. *Campbell, supra,* he can not do.

The case is a hard one, and the court has been strongly tempted to make a decree that the plaintiff may have an accounting for what he has expended and the value of his services, and a judgment for such sum as is necessary to make him whole; not to give him profit, such as might be involved in the measure of his right under a legal contract.

But we have concluded on the whole that the court below could not well have done otherwise, under the authorities and the decisions of our own Supreme Court, than to make the ruling and render the judgment which was made and rendered, and having arrived at that conclusion, there is nothing for us to do but to permit the judgment below to stand. We do it in the hope that if the case shall go higher, the Supreme Court will find some ground for reversing the judgment of this court, or of suggesting some other way by which Mr. North may recover the value of his services.

It does not appear that there has been anything in the way of corruption on the part of either of the parties to this attempted contract. It seems to be an honest claim on the one hand, and a willingness on the other to pay. The commissioners perhaps feel that they might make themselves personally liable or that they might be departing from their sworn duties if they, having knowledge now of the legal rules applicable to the claimed contract, should attempt to carry out its provisions by making a payment of the purchase price. The judgment of the court below will be affirmed.

B. B. Wickham, for plaintiff in error.

L. W. Wickham, for defendant in error.

AVERMENTS AS TO NEGLIGENCE.

Circuit Court of Hamilton County.

THE CINCINNATI TRACTION COMPANY v. AMASA JOHNSON.

Decided, January 4, 1908.

Pleading—Where it is Claimed Motorman was Aware of Plaintiff's Peril —Negligence—Error—Charge of Court.

Where there is no averment that the motorman of the car which caused the injury knew or should have known of the plaintiff's peril, a charge of court is erroneous which makes the defendant company liable for the resulting injury, if the jury find from the evidence that the motorman might have stopped the car after he became aware, or by the exercise of reasonable care might have become aware, of the danger to which plaintiff was exposed.

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

The court charged the jury as follows:

"If you should find that the plaintiff did place himself in a position of danger through some remote negligence of his own, and yet notwithstanding this the motorman in charge of the car became aware of his danger in time to stop the car by using the means at hand, and failed to do so, then the plaintiff may recover notwithstanding the negligence of the plaintiff; but it is for you to say gentlemen whether this exception applies to this case."

No such negligence was charged in the petition, and hence the instruction was erroneous and prejudicial. *Drown* v. *Traction Co.*, 76 O. S.

There is indeed no real negligence stated in such pleading. The only allegation on that subject is as follows:

"The agents of the defendant in charge of said car carelessly and negligently turned on the electricity in such quantity that defendant's car was driven against plaintiff's wagon with such force that plaintiff was violently thrown from his wagon upon the curbing of the street."

The defect in the pleading consists in the omission of any averment that the agents of the defendant in charge of the car knew, or by the exercise of ordinary care would have known, at the

time the electricity was so turned on, that the plaintiff's wagon was upon or so near the track that it would be struck.

Judgment reversed and cause remanded for further proceedings according to law.

Kittredge & Wilby, for plaintiff in error.

Charles T. Dumont and *Coppock & Hertenstein,* contra.

EFFECT OF VERDICT OF GUILTY OF LOWER CRIME THAN CHARGED.

Circuit Court of Lucas County.

GEORGE GRIGGS v. STATE OF OHIO. *

Decided, June 8, 1907.

Criminal Law—Indictment for Shooting at with Intent to Wound—Verdict of Guilty of Assault and Battery—Effect of Finding on a Charge not Presented—Surplusage in Verdict.

A verdict finding an accused guilty of "assault and battery," under an indictment that charged only "shooting at with intent to wound," is not equivalent to an acquittal; and the accused is not entitled, under such a verdict, to an arrest of judgment or a discharge.

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

Error to Lucas Common Pleas Court.

This is an error case brought to reverse the judgment of the court of common pleas in the trial of George Griggs, upon the charge of shooting at a person with intent to wound. No bill of exceptions is brought up showing the proceedings upon the trial of the case, which resulted in a verdict finding the defendant, Griggs, guilty of assault and battery only.

On September 5, 1907, an application which had been made for a new trial on behalf of the defendant, Griggs, was withdrawn, and on the same day the cause came on to be heard upon the motion of defendant in arrest of judgment, which motion the court overruled and exception was taken. On the same day a motion was made for the discharge of defendant, which also was overruled by the court, to which ruling the defendant excepted. Thereupon the court sentenced the defendant, and this

*Leave to file a petition in error in this case was refused by the Supreme Court.

proceeding in error was instituted for the reversal of that judgment.

The contention of the plaintiff in error is, substantially, that the charge of shooting at a person with intent to wound does not involve, as a lesser offense, the crime of assault and battery, of which offense the jury found the defendant guilty. Numerous authorities are cited to sustain the contention of the plaintiff in error.

It has been held in other states, several of them, that to shoot at a person is not to commit a battery upon him. It may be an assault, and it is not contended here that it does not amount to that misdemeanor; but it is urged that the verdict was irregular and not permissible under the indictment, in that it found the defendant guilty of the additional offense of battery. Under our statute we have no crime technically named as "assault and battery." We have a penalty imposed for an assault of another in a menacing manner or with threats, for beating, etc., but the phrase "assault and battery" is not used in the statute and that line between "assault" and "assault and battery" is not always very clearly drawn in the adjudications.

We are all inclined to the view that as the defendant did not seek a new trial, and did not attempt any reformation of the verdict by exception to its form when it was received, or request that the jury be sent back for further consideration of the case, the contention of defendant that the verdict amounts to an acquittal of the entire charge embodied in the indictment, so as to justify his discharge, can not be maintained. We do not think that the objection to the form of the verdict, if it be informal, is such as will work an entire failure of the prosecution. Whether the court committed any error in receiving the verdict or whether the defendant would have been entitled to a new trial if he had pressed the motion which he withdrew, we are not called upon to say; but before entirely disposing of the case by affirmance of the judgment below we may properly refer to two decisions by our own Supreme Court, which are perhaps to some extent in conflict with decisions cited by counsel for plaintiff in error, rendered by the courts of other states.

In the case of *Stewart* v. *State,* 5 Ohio, 241, the Supreme Court held that where an indictment charging a crime of a

higher grade necessarily included a crime of a lower grade, the jury might acquit the defendant of the greater charge and find him guilty of the less offense, and that under the act of 1831 a party indicted for an assault with intent to kill could be found guilty of assault and battery. In that case, the indictment was for assault with intent to kill and murder. Upon the trial defendant's counsel moved the court to instruct the jury, "if they were of opinion that the facts of the case would not warrant them in finding the defendant guilty of an assault with intent to kill and murder, as charged in the indictment, yet that it was competent and lawful for the jury to find the defendant guilty of assault and battery alone." This charge the court refused to give. The prosecuting attorney asked the court to instruct the jury "that if they did not find the defendant guilty of the assault with intent to kill and murder, they must find him not guilty of the whole charge"; and this instruction the court gave to the jury, to all of which the defendant excepted. The indictment contained but one count. The jury found the defendant guilty of the assault with intent to murder, and he was sentenced to three years imprisonment in the penitentiary, to reverse which a writ of error was brought.

Judge Lane delivered the opinion of the court as follows:

"It is assigned for error, that the court refused to charge the jury, that in an indictment for an assault with an intent to kill, they might find him guilty of simple assault and battery, without any such intention; and in charging that in this case, if the jury found him guilty at all, it must be guilty of the whole accusation.

"A doubt has been raised, whether the bill of exceptions is taken to the refusal to charge, as well as to the actual charge; but a majority of the court believe that it is, although somewhat informal, sufficiently applicable to both.

"We are all of opinion that the charge was erroneous. That a jury may find a verdict of guilty for part, and acquit for the residue; that where an accusation for a crime of a higher nature includes an offense of a lower degree, the jury may acquit him for the graver offense, and return him guilty of the least atrocious. The cases and examples are collected in 1 Ch. Cr. Law, 638, and there is no foundation in this country for the distinction made in England on this point, between felonies and misdemeanors; for here an indictment for the higher offense rather adds to, than subtracts from, his privileges.

"Still, we can not say that the defendant might not be prejudiced by this instruction, and therefore, the judgment must be reversed."

It is manifest that no particular distinction was drawn or sought to be drawn in that case, between assault and assault and battery. The Supreme Court seem to have deemed the difference between the forms immaterial, perhaps because of there being no distinction in the statute or in the amount of the penalty. In our present statute the penalty is precisely the same whether the offense be technically described as "assault," or whether it be called "assault and battery." Whether it be an assault with threats or in a menacing manner, whatever the kind of offense it be, so far as its details are concerned, if it come under the general definitions in the section of the law describing an assault alone or what we now call "assault and battery," the penalty is the same. Of course the trial judge would take into account the circumstances and the nature of the offense committed by the defendant in the imposition of the penalty on him and it is not likely that a court, having all the circumstances before him, would be affected very largely in determining the length of imprisonment or the amount of fine by the phraseology in the description of the offense of which the person is guilty, where he must be guilty under a particular section for which a particular penalty is imposed.

In the case of *Hanson* v. *State,* 43 Ohio St., 376, it was held that an indictment for assault with intent to rob would support a conviction for assault and battery, and that it was error in the trial court to refuse so to charge.

The Supreme Court in arriving at this conclusion cited from prior adjudications in Ohio, including *Stewart* v. *State, supra,* and to my mind this decision is conclusive of the whole inquiry.

Counsel in oral argument criticise the decision in *Stewart* v. *State, supra,* and say that in some case from another state it is said that the Supreme Court relied upon certain adjudications in coming to that conclusion, but there is nothing in the case itself which shows that the Supreme Court relied upon the adjudications so mentioned. The reference by the Supreme Court is to 1 Chitty, Criminal Law, and some reliance was

undoubtedly placed upon that. It is urged that the Supreme Court was not sustained by the authority cited, but we are not very much concerned with that. The decision of the Supreme Court upon the question was pertinent to that which we have at bar, and we adopt it for our guidance, even if they seem to have departed from adjudications in other states. The decisions of the court of last resort in the state of Ohio are deemed to be the law for the lower courts until subsequently departed from by the Supreme Court, or until their effect is destroyed by legislation.

In *State* v. *Bradley*, 6 La. Ann., 555, we have this holding:

"If the jury, in rendering their verdict, decide the whole issue, and then add other immaterial things, the verdict is not thereby vitiated. The immaterial things so added will be regarded as surplusage."

Now if it be true that the indictment here charges only "assault" in the phrase "shot at" and does not charge "battery," then the finding of the jury as to battery may be deemed a finding as to an issue not tendered to them—as to some other crime—just as if they had gone out of their way and found the defendant guilty of horse stealing, arson, or anything else, in addition to that with which he was charged in the indictment. This quotation is given on page 560 in this Louisiana case:

"Lord Coke lays down the rule, that "if the jury give a verdict of the whole issue, and more, etc., that which is more is surplusage, and shall not stay judgment, for *utile per inutile non vitiatur.*"

Our opinion of the whole matter is that the finding of this verdict was not equivalent to an acquittal, and that whatever rights the defendant may have had, if any, as to a reformation of the verdict or as to a new trial, he was not entitled to an arrest of judgment or a discharge. We think that the court was entirely right, the motion for a new trial having been withdrawn, in overruling the motions which were made and in imposing the sentence.

The judgment of the court below will be affirmed.

C. K. Friedman, for plaintiff in error.

L. W. Wachenheimer, contra.

NOTICE AS TO ASSESSMENT BY A BENEFICIAL SOCIETY.

Circuit Court of Lucas County.

BERTRAND G. JUDGE v. MASONIC MUTUAL BENEFIT ASSOCIATION.

Decided, March 22, 1907.

Mutual Benefit Societies—Notice of Assessment—Proof of Mailing—Manner of Directing—Presumption that Letter was Delivered—Burden of Proof—Preponderance of Proof—Charge of Court—Prejudicial Error—Evidence.

1. A fraternial beneficial association having been apprised of a change of address of an insured can not predicate a forfeiture upon failure to pay an assessment, if by reason of its failure to record such change the requisite notice, mailed to the former address, was not in fact received by the member.
2. Proof of the mailing of a letter, properly stamped and addressed, affords *prima facie* evidence of its receipt by the person to whom directed; and this applies notwithstanding the address of the addressee may have been lately changed, as in this case, the well known accuracy, knowledge, facilities and practice of the post office department in such matters raising a presumption of delivery; but this being a rebuttable presumption, which may be met by evidence of equal weight or countervailing force, a preponderance of proof that it was not received is not necessary to overcome the presumption of delivery.
3. A judgment will be reversed where the charge improperly requires the burden of proof upon an issue, especially where the evidence is close and conflicting, and not so clear and conclusive as to enable the reviewing court to say prejudice did not result therefrom.

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

Error to Lucas Common Pleas Court.

Bertrand G. Judge, as the beneficiary under a certificate of insurance issued by the Mutual Benefit Association for Masons' Wives, in which his wife was insured for his benefit, upon her death brought an action in the court of common pleas against the Masonic Mutual Benefit Association, of Toledo, Ohio, which he alleged had assumed the obligations of the association issuing the certificate, to recover the amount of the insurance.

The issues in the case can be definitely and succinctly stated by adopting the statement of the trial judge in his charge to the jury, and that statement is as follows:

"The plaintiff, Bertrand G. Judge, has brought this action to recover the sum of $1,000 and interest thereon from November 1, 1904, which he claims is due him upon a contract entered into between the defendant, the Masonic Mutual Benefit Association, and his wife, Jessie Georgia Judge, since deceased.

"Before calling attention to the issues or questions of fact you must decide from the preponderance of the evidence, I desire to first state those material facts about which there is no controversy, and which you will, therefore, consider as established. These facts are as follows: On or about June 24, 1902, the defendant entered into a contract with the said Jessie Georgia Judge, whereby she became a member of said association. And whereby, in consideration of the payment by her, at the time and in the manner provided by its constitution and rules, of all assessments thereafter called and made upon its members, it promised and agreed to pay to the said Bertrand G. Judge at some time after her death the sum of $1,000."

I supplement that statement at this point by the statement that the certificate issued by the Mutual Benefit Association for Masons' Wives, which was a voluntary or unincorporated association, bears date February 19, 1900, and afterward the Masonic Mutual Association was incorporated, and, by a resolution adopted on May 21, 1902, the Masonic Mutual Benefit Association assumed the risks or the obligations of the other association, and by a letter to members dated June 24, 1902, it stated that it had done so, giving members the privilege of coming in under that arrangement, which Jessie Georgia Judge appears to have done. I proceed with the statement of the trial judge:

"The constitution and rules of the defendant, among other things, provided that assessments upon its members should be called or made by the board of directors as the same were deemed necessary, payable on or before the fifteenth day of the month in which they were made; that notice thereof stating the time payable and amount due should be given each member by mail directed to his last recorded address, and that the amount of each assessment should be determined by the age of the mem-

ber who was assessed at the time of the assessment, as shown by a table in which the sum of seventy-eight cents is given as the amount of one assessment that could be made against a member at the age of twenty-eight years.

"It was further provided that if any member should fail to pay an assessment for fifteen days after notice thereof, he should cease to be a member of the defendant and forfeit all claims to the benefits thereof, as well as all moneys previously paid, and that the mailing of a notice of the making of an assessment, stating therein the time payable and amount due, directed to the last recorded address of a member, should constitute the notice required by the constitution and rules of the defendant to be given such member."

The court then instructed the jury that these rules and regulations to which he had called their attention were parts of the contract entered into between the said defendant and the said Jessie Georgia Judge, and that by them both parties thereto were bound.

At this point I remark that the certificate issued to Jessie Georgia Judge set forth that it was issued in consideration of certain statements, agreements and warranties made by her, and the truth thereof, "together with the rules, regulations and by-laws of said association now in force or that shall hereafter be adopted by said association, all of which are hereby made a part of this agreement"; and the rules and regulations of the Masonic Mutual Benefit Association provided, as the judge has stated, that the notice of assessments might be given by mailing the same to the last recorded address of a member (which seems to mean the last recorded by the association in its books provided for that purpose), whereas the certificate before referred to contained the provision following:

"It is further understood and agreed that the mailing of a notice of an assessment at Toledo, Ohio, by the secretary of the association at the last address furnished the secretary by said member shall constitute a legal notice of such an assessment."

We are of the opinion that the charge of the court to the effect that the rules and regulations of the Masonic Mutual Benefit Association became a part of the contract between Jessie Georgia

Judge and that association upon her acceptance of their proposal to assume the risks and obligations of the other association, was a correct charge; so that in so far as the rule respecting the mailing of notice contained in the certificate may have been modified by the constitution and rules of the other association, such alteration would amount to a modification of the contract, and would be binding upon the holder of the certificate. The judge proceeds to state:

"All assessments levied by said defendant against said Mrs. Judge prior to December 23, 1903, were paid. While it is denied by the plaintiff, yet it is established by the uncontroverted evidence that on said December 23, 1903, the defendant, through its board of directors, levied two assessments against its members, payable on or before January 15, 1904. It is conceded that at said time Mrs. Judge was twenty-eight years of age; that the amount of each assessment that was and could be made against her was the sum of seventy-eight cents. In other words, I instruct you that on December 23, 1903, the defendant duly and legally levied two assessments against the said Mrs. Judge, amounting in the aggregate to the sum of $1.56, which were payable on or before January 15, 1904. Neither of these assessments were ever paid, and on June 23, 1904, Mrs. Judge died.

"On February 23, 1905, the plaintiff duly made proof to the defendant of the death of his wife and demanded payment of the said sum of $1,000, but the defendant refused to comply therewith. Thereupon this action was brought to recover said sum of money from the defendant, and the plaintiff based his right thereto upon two grounds: First, that no notice of the assessment levied December 23, 1903, was ever given his wife by the defendant, as required by its constitution and rules; and, second, that on November 23, 1903, he paid the assessments made that month upon Mrs. Judge, and that at that time he requested the secretary of the defendant to change the address of his wife from 408 Segur avenue to 1538 Western avenue, Toledo, Ohio; that said officer should have but did not record said address, and that by reason thereof she never received any notice from the defendant that it had made two assessments against her amounting to $1.56 and payable on or before January 15, 1904.

"On the other hand the defendant claims that it did cause a notice of said assessment, stating therein the time payable and amount due, to be mailed to her, postage prepaid, directed to her last recorded address, and the defendant denies that it was

ever requested or notified to make any change therein. It has been established by the uncontroverted evidence that the last recorded address of the said Mrs. Judge was 408 Segur avenue, Toledo, Ohio, and that on and for some time after November 23, 1903, she lived at 1538 Western avenue in this city."

I may add that the evidence shows that she moved from Segur avenue to Western avenue about October 1, 1903.

It will be observed that the crucial question in this case was whether notice, as required by the contract between Mrs. Judge and the association, had been given her of the assessments levied on December 23, 1903, payable on or before January 15, 1904. The defense of the company was based on the non-payment of those assessments, the plaintiff on the other hand contending that the obligation to pay had never arisen, or at least that no forfeiture could be predicated upon the non-payment for the reason that the requisite notice had not been given.

The case was tried to a jury, which returned a verdict in favor of the defendant. Motion for a new trial having been overruled and judgment entered upon the verdict, the plaintiff prosecutes error to this court, and the principle error complained of and the one that has been most earnestly debated before us and most fully considered by us, is that respecting alleged errors in the charge of the court on the subject of the burden of proof.

As I have said, we are of the opinion that the charge of the trial judge to the effect that the rules and regulations of the defendant became a part of the contract, was correct; but it does not follow that under any and all circumstances a notice mailed to the last recorded address would be sufficient; for, if a failure to record the last address correctly was the fault of the company, and if, because of such fault, the notice was not received by the insured, then the company could not predicate a forfeiture upon the strict compliance by it with the letter of this rule. In other words, it would be the duty of the company, upon notification and request, to record the address correctly, so that the last recorded address would be the true address—*i. e.*, that of which the company had been notified—and it would

devolve upon the company to mail its notice to that address, and that duty would be the same even though it failed to record that address, precisely as if it had properly recorded it. And the rule should be so construed that "the last recorded address" would mean the last address which should have been recorded by the company in the performance of its duties.

The question of fact as to whether the company had been notified of this change of address was submitted to the jury. There was a conflict of evidence upon it. I need not take time to recite what the evidence was. It is sufficient to say that there was a conflict, and that it was not made so clear and certain by the evidence that the contention of either party was right and should prevail, that the court could act thereon as upon a question of law.

If the company had sent the notice to the correct address, either that recorded or that which should have been recorded, then the insured would be in default on failing to pay the assessments, whether she received the notice or not. On the other hand, if the notice was not mailed and addressed in compliance with the rule, then the insured would not be in default unless she actually received the notice; but if she actually received the notice, then it is a matter of no consequence whether the notice had been actually addressed correctly or not. It will be seen that in the one event the mere mailing of the notice would be sufficient to put her in default; in the other event it would be necessary to show that she actually received the notice.

The testimony as to whether she had received the notice was conflicting. Now upon this conflict the judge charged the jury on the law of the case as follows:

"The burden is upon the defendant to prove by the preponderance of the evidence that on or about January 1, 1904, the defendant caused a notice of the two assessments in question, stating therein that they were payable on or before January 15, 1904, and that the amount due was the sum of $1.56, to be given the said Jessie Georgia Judge, by mail, directed to her last recorded address. If you do not so find from a preponderance of the evidence, your verdict will be in favor of the plaintiff. If you do so find from a preponderance of the evidence, then the burden is upon the plaintiff to prove by a preponderance of

the evidence that on or about November 23, he paid certain assessments made against his wife, and then requested the secretary of the defendant to change her address to 1538 Western avenue, Toledo, Ohio. If you do not so find from a preponderance of the evidence, but do find from a preponderance of the evidence that notice of said two assessments was given Mrs. Judge in the manner and form I have stated, then your verdict will be in favor of the defendant."

The charge thus far was correct; that is to say, the correct recorded address being at one time 408 Segur avenue, if the insured moved from there so that her address was changed it would devolve upon her to apprise the company of that fact, so as to lay upon the company the duty of changing the address; and we think it would devolve upon the plaintiff to establish by a preponderance of the evidence his contention upon that issue. The charge then proceeds:

"If you find from a preponderance of the evidence that the plaintiff, on or about said November 23, did request the secretary of the defendant to change the address of the said Mrs. Judge, as I have stated, and further find from a preponderance of the evidence that on or about January 1, 1904, the defendant caused a notice of said two assessments to be given her in the manner and form I have indicated, you will then determine from a preponderance of the evidence whether said notice was received by her. If you find from a preponderance of the evidence that on or about January 1, 1904, a notice of said two assessments, stating therein the time, the sum, where payable and the amount due, were mailed, postage prepaid, directed to said Mrs. Judge at 408 Segur avenue, Toledo, Ohio, and that at said time it was the custom of the post office department of the United States Government, in this city, to deliver mail addressed to said Mrs. Judge at 1538 Western avenue, Toledo, Ohio, I instruct you that the presumption would arise that such notice was so delivered, and the burden would then devolve upon the plaintiff to remove that presumption by a preponderance of evidence. In other words, the burden would then be upon the plaintiff to prove by a preponderance of the evidence that said notice was not so delivered."

We think that under the authorities that charge was correct in part and in part incorrect. In other words, we think it was

correct to charge that if at that time mail addressed to Mrs. Judge at 408 Segur avenue was customarily delivered to her—that is to say, if, in the usual course of the post office department's business, by reason of knowledge they had of her true address, or from any cause, it was customarily delivered at her true address, 1538 Western avenue, precisely as if it had been directed to 1538 Western avenue—then from that a presumption would arise that the notice had been received by her. This so-called presumption is a rebuttable presumption. It is not at all conclusive. It is rather an inference of fact. It is sometimes stated in the authorities in this way: that the mailing of a letter, properly addressed and stamped, affords *prima facie* evidence that it was delivered to the person to whom addressed. We know that our postal facilities are so efficient, and the practices of the department are so uniformly accurate, that this is a more reasonable presumption or inference at this day than it was when it was established as the law of England, many years ago.

It is stated in 22 Am. & Eng. Enc. Law (2d Ed.), 1252, that—

"The rule was announced in England at an early date that if a letter is sent by post, properly addressed, a presumption of its receipt by the addressee arises; and this rule is now well settled in the United States. The presumption is based on the known and regular course of business of the post office department."

A great many authorities are cited in support of this proposition. We do not understand that this branch of the proposition, or this particular part of the charge, is complained of, but what is complained of is the last part of this paragraph, to-wit:

"And the burden would then devolve upon the plaintiff to remove that presumption by a preponderance of evidence. In other words, the burden would then be upon the plaintiff to prove by a preponderance of the evidence that said notice was not so delivered."

This proposition is repeated in a somewhat different form further along in the charge as follows:

"If you find from a preponderance of the evidence that on or about January 1, 1904, a notice of said two assessments in the form and manner I have indicated was deposited in the mail, postage prepaid, addressed to said Mrs. Judge at 408 Segur avenue, Toledo, Ohio, and that at said time it was the custom of the post office department of the United States government in this city to deliver mail thus addressed to Mrs. Judge at 1538 Western avenue, Toledo, Ohio, your verdict will be in favor of the defendant, unless you further find from a preponderance of the evidence that said notice was not so delivered."

In this paragraph it is not stated that upon proof of such mailing and such custom the burden of proof would then be upon the plaintiff to prove by a preponderance of evidence that the notice was not so delivered, but the effect of placing upon her the burden of establishing this fact by a preponderance of evidence appears to be precisely the same.

We are cited by counsel for plaintiff in error to a number of authorities bearing upon this question, to some of which I shall now call attention. In the case of *Huntley* v. *Whittier*, 105 Mass., 391, a case upon a contract to recover the price of a velocipede, wherein the chief issue was as to whether the defendant had received notice of completion of the order, Justice Gray says:

"The depositing of a letter in the post office, addressed to a merchant at his place of business, is *prima facie* evidence that he received it in the ordinary course of the mails; and where there is no other evidence, the jury should be so instructed. * * *

"The presumption so arising is not a conclusive presumption of law, but a mere inference of fact, founded upon the probability that the officers of the government will do their duty, in the usual course of business; and, when it is opposed by evidence that the letter was never received, it must be weighed, with all the other circumstances of the case, by the jury, in determining the question whether the letter was actually received or not; and the burden of proving its receipt remains throughout upon the party who asserts it."

In the case of *Home Ins. Co.* v. *Marple,* 1 Ind. App., 411 (27 N. E. Rep., 633), this is said in the syllabus:

"We are of the opinion, where actual notice is required, evidence of the mailing of a letter containing such notice, properly

addressed and stamped, is *prima facie* proof of the receipt of the notice, and if its receipt is not denied, the court may instruct the jury to so find. But if its receipt is disputed, the question should be submitted to the jury to determine from all the evidence, both positive and circumstantial, whether the notice was in fact received or not. If the evidence is undisputed upon the essential fact and but one inference may be properly drawn from it, the court may so instruct the jury, and to that extent control the verdict; but if the evidence is conflicting, or of such a character that different inferences might be drawn from it, the question must be submitted to the jury without interference on the part of the court except to instruct generally upon the law of the case."

Other authorities are cited in the brief in support of the proposition that notwithstanding this presumption, or this *prima facie* case made out by proof of the mailing of the letter or notice, the burden of proof to establish the fact rests upon the party asserting that the notice was received—the party who is bound under the issues to establish by a preponderance of evidence at least that the notice was received. There is a late case by our Supreme Court that seems to have escaped the attention of counsel that bears directly upon this question. The case of *Klunk* v. *Railway,* 74 Ohio St., 125. I read from the syllabus:

"On the trial of an action against a railroad company, brought by a locomotive fireman for a personal injury received by him in consequence of a defect in the water gauge glass attached to the locomotive upon which he was employed, an instruction that to overcome the effect of the *prima facie* evidence of negligence arising from proof of such defect 'the defendant company is required to satisfy the jury by a preponderance of the evidence that it was not negligent,' is erroneous.

"In such action the burden of proving, by a preponderance of the evidence, the particular negligence alleged, is at all times upon the plaintiff, and while proof of facts sufficient under the statute (Section 3365-21), to create a *prima facie* presumption of negligence against the defendant casts upon it the burden of producing evidence of equal weight or countervailing force, in order to control or destroy such presumption, yet proof of such facts does not impose upon the defendant the burden of establishing affirmatively, by a preponderance of the evidence, that it was not negligent.

"The rule is, that he who affirms must prove, and when the

whole of the evidence upon the issue involved leaves the case in equipoise, the party affirming must fail."

This last proposition is a reiteration of the statement of the law made in the case of *Lexington Fire, L. & M. Ins. Co.* v. *Paver,* 16 Ohio, 324:

"In cases where the testimony upon any particular issue leaves it doubtful whether the affirmative of that issue is sustained, it is a safe and proper course for the jury to find against the party holding the affirmative."

In the course of the opinion in *Klunk* v. *Railway, supra,* Judge Crew takes this question up and discusses it very fully, citing authorities; and since it may all be found there, it is not worth while for this court to carry the same matter into this opinion. I can not forbear, however, reading a part of the opinion, though I do not know that that which I shall read is more pertinent or forceful than that which I shall leave unread. He calls attention, at page 133, to a decision by Judge Deemer, of the Supreme Court of Iowa, in the case of *Gibbs* v. *Bank,* 123 Iowa, 736, 742, in which that judge states the rule as follows:

"When a *prima facie* case is made out by presumption or otherwise, in order to destroy its effect and shift the burden of producing further evidence, the party denying it must produce evidence tending to negative the claim asserted to a point where, if no more testimony is given, his adversary can not win by a preponderance of the evidence. * * * It is clearly a misnomer of terms to say that the burden of proof swings like a pendulum from one side to the other during the progress of a trial. All that is meant is, that the duty of introducing evidence to meet a *prima facie* case shifts back and forth."

He also notices *Scott* v. *Wood,* 81 Cal., 398, in which Hayne, C., commenting upon an instruction given by the trial court in that case, touching the quantum of evidence necessary to rebut a *prima facie* case, says, page 134:

"We think that the court erred in telling the jury that the defendant was required to have a preponderance of testimony upon the question mentioned. The term 'burden of proof' is used in different senses. Sometimes it is used to signify the

burden of making or meeting a *prima facie* case, and sometimes the burden of producing a preponderance of evidence. These burdens are often on the same party. But this is not necessarily or always the case. And it is by no means safe to infer that because a party has the burden of meeting a *prima facie* case, therefore he must have a preponderance of evidence. It may be sufficient for him to produce just enough evidence to counterbalance the evidence adduced against him."

Continuing, Judge Crew says:

"Perhaps one of the best statements to be found of the rule now under consideration, is that given by Chief Justice Shaw in *Powers* v. *Russell*, 30 Mass., 76, as follows: 'It may be useful to say a word upon the subject of the burden of proof. It was stated here that the plaintiff had made out a *prima facie* case, and, therefore, the burden of proof was shifted and placed upon the defendant. In a certain sense this is true. Where the party having the burden of proof establishes a *prima facie* case, and no proof to the contrary is offered, he will prevail. Therefore, the other party, if he would avoid the effect of such *prima facie* case, must produce evidence, of equal or greater weight, to balance and control it, or he will fail. Still the proof upon both sides applies to the affirmative or negative of one and the same issue, or proposition of fact; and the party whose case requires the proof of that fact, has all along the burden of proof. It does not shift, though the weight in either scale may at times preponderate.'"

Further quotations are made from authorities giving these rules different language, but it all amounts to the same thing as applied to this case.

When the case was made out (as we may assume for the purposes of this discussion that it was) of the mailing of this letter, addressed in such a way as that in the usual course it would probably reach the person to whom it was addressed, and therefore a *prima facie* case was made out of the receipt of the letter or the notice by her, it then devolved upon the plaintiff in the case to overcome this *prima facie* case or to meet it by sufficient evidence, so that it could not be said that the presumption, or the *prima facie* case, prevailed; or, in the language of the syllabus in *Klunk* v. *Railway, supra*, the burden was cast upon the plaint-

iff of "producing evidence of equal weight or countervailing force in order to control or destroy such presumption." Yet the burden was not imposed by the law—as it was by the charge of the court—upon the plaintiff, of establishing affirmatively by a preponderance of evidence that the notice had not been received. If the evidence produced was sufficient to destroy the effect of this presumption, still—by the law—the burden rested upon the defendant all the time from the beginning to the end of the trial, to establish affirmatively by a preponderance of evidence that the notice was received, and if the problem seemed to the jury to be left by the evidence so evenly balanced that they could not say affirmatively either that the notice had been received or that it had not been received, it was the duty of the jury to find against the defendant in error on that issue; and the jury should have been so instructed.

In a close case, as this appears to have been, this error in the charge may have been the thing that resulted in the defeat of the plaintiff upon this issue. At all events, the evidence is not so clear and conclusive against the plaintiff upon this issue that we are able to say he was not prejudiced by this error. The rule upon this subject is stated in the case of *McNutt* v. *Kaufman,* 26 Ohio St., 127, in the syllabus, as follows:

"A misdirection of the jury, as to the burden of proof, is error for which the judgment will be reversed at the instance of the party prejudiced thereby.

"A reviewing court having found such error to exist, will not look into the testimony for the purpose of ascertaining whether the verdict is sustained by the weight of the evidence."

Because of this error in the charge, the judgment of the court below will be reversed.

F. E. Rheinfrank and *G. A. Ohlinger,* for plaintiff in error.

King & Tracy, C. T. Johnson and *C. H. Lemmon,* contra.

HOURS OF CONTINUOUS SERVICE BY RAILWAY TRAINMEN.

Circuit Court of Richland County.

BALTIMORE & OHIO RAILWAY v. MAGGIE M. COLLINS, ADMINISTRATRIX.

Decided, 1907.

Railways—Construction of Section 3365-14—Limiting Hours of Continuous Service by Railway Trainmen—Action for Wrongful Death—Charge of Court—Designating One Issue as the Real Issue not Prejudicial Error, When—Evidence.

1. The fact that railway trainmen have been on duty for more than fifteen consecutive hours does not amount to a violation by the company of Section 3365-14, unless it appears that the company permitted or required them to undertake the run without at least eight hours rest subsequent to their last preceding run, and not then unless the jury find from the evidence that the last preceding run occupied more than fifteen consecutive hours.
2. In an action for wrongful death it is error to permit evidence to go to the jury which embodies an admission by the decedent of his own negligence.
3. The designation in the charge to the jury of one issue in the case as the real issue is not prejudicial to a defendant, but might be a subject of complaint by a plaintiff who had presented several issues upon which he might be entitled to recover.

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

The defendant in error filed her petition in the court of common pleas of this county, alleging that she was the administratrix of the estate of James W. Collins; that he met his death while in the employ of the Baltimore & Ohio Railroad Company on the morning of December 28, 1904, near Sherwood in the state of Ohio; that the death of said James W. Collins was caused through the negligence of the defendant company in that it permitted and required a certain conductor, Grimes, and his crew to be on duty for more than fifteen consecutive hours, to-wit, forty-eight hours, without relief and without at least eight hours

rest, in violation of Section 3365-14, Revised Statutes; that the defendant below had full knowledge that said Grimes and his crew, at and prior to the time of said collision, had been on duty at least thirty-six hours without rest or sleep or relief; and that in consequence of the extreme cold and by reason of said Grimes and his crew being tired, weary and exhausted in consequence of said continuous duty and service, and loss of sleep and rest, they were incompetent to perform properly the duties devolving upon them, and that, while in that condition, the conductor, Grimes, negligently and carelessly opened the switch and permitted the same to remain open; that the train upon which the deceased was employed was wrecked and his death was caused; and that the company had full knowledge of the violation of said statute, and of the condition of said Grimes, and she prays a recovery.

The answer of the company is, in substance, a general denial with the plea of contributory negligence. On a verdict being returned in favor of the defendant in error and judgment rendered thereon, this proceeding to reverse said judgment was instituted.

Numerous errors are presented for our consideration as to the admission of evidence. The only error of substance that we discover in this record on the admission of evidence is found in the bill of exceptions on page 74. The witness, W. A. Miller, was introduced on behalf of the plaintiff, and testified that he was a member of the crew of the relief train which was sent out on the night of the accident. He was inquired of as to whether he had seen Grimes after that, and he answered, "Yes, sir." This was after the accident occurred. He was then asked: "What did you hear him say?" This was objected to and overruled, the court permitted the answer: "Well, all I heard him say was, 'I don't know how I come to leave that switch open.'" Here was a declaration permitted to go to the jury as having been made by the conductor, Grimes, of an admission that he had left the switch open which caused the accident. We think that this was prejudicial error.

In respect to the charge of the court, it is claimed that this violates the rule in the case of *Baltimore & Ohio Ry.* v. *Lockwood,* 72 Ohio St., 586, but we think the court clearly defined the

issues in this case, as shown on pages 157 and 158 of the bill of exceptions. The fact that he designated one issue in this case as the real issue is of no prejudice to the plaintiff in error. The defendant in error might complain, if there were several issues upon which she might be entitled to recover and the court singled out one issue and designated it as the real issue. She might complain, but the defendant company has no ground to complain as to this action of the court.

The defendant company requested the court to charge the jury as follows:

"'Any company operating a railroad over thirty miles in length in whole or in part within the state, shall not permit or require any conductor, engineer, fireman or any trainman on any train, who has worked in his respective capacity for fifteen consecutive hours, again to be required to go on duty or perform any work until he has had at least eight hours rest, except in cases of detention caused by accident, unavoidable or otherwise.'

"The above statute does not apply to this case, no difference how long the time occupied by Grimes in his run from Deshler to Garrett, unless the defendant company had either permitted or required Grimes to undertake this run without at least eight hours rest subsequent to the next preceding run, and not then unless the jury find from the evidence that such next preceding run occupied more than fifteen consecutive hours of time."

We think that this request states the law governing this case and should have been given. This court, however, on page 160, instead of giving this charge, gives the following erroneous instruction to the jury:

"If the train on which which Grimes was conductor was delayed at Sherwood by reason of an accident occurring to its engine, the statute which I have read to you has no application to the facts in this case, unless you find that the defendant, knowing that said Grimes has been on duty for more than fifteen consecutive hours, could have reasonably provided in the due and proper operation of its trains other servants competent to relieve said Grimes and his crew."

This charge is erroneous in that it instructs the jury that if said Grimes had been on duty more than fifteen consecutive

hours, notwithstanding his train was delayed by accident, yet if the company could have reasonably provided, in the proper operation of its trains, other servants competent to relieve said Grimes and his crew."

This charge is erroneous in that it instructs the jury that if said Grimes had been on duty more than fifteen consecutive hours notwithstanding that his train was delayed by accident, yet if the company could have reasonably provided, in the proper operation of its trains, other servants competent to relieve Grimes, and failed to do so, it would be guilty of negligence. We think this is clearly erroneous and unwarranted by the section of the statute under consideration.

The court also, on page 159, places as we think a wrong construction of said section of the statute, for he in effect instructs the jury that more than fifteen hours service on a continuous trip, without eight hours rest, would be a violation of this statute. This we think, is clearly erroneous and prejudicial.

For the errors indicated in the admission of testimony and for the misdirection of the court to the jury as indicated, the judgment of the court of common pleas will be reversed, the cause remanded for a new trial and further proceedings according to law.

Cummings, McBride & Wolfe, for plaintiff in error.

Skiles, Green & Skiles, contra.

CAUSES OF ACTION AND THEIR PROPER STATEMENT.

Circuit Court of Lucas County.

TOLEDO GAS-LIGHT & COKE CO. v. TOLEDO.

Decided, June 27, 1907.

Contracts—Pleading in an Action for Recovery on—Separation and Numbering of Different Causes of Action—When Separate Causes Become Merged.

1. The numbering of paragraphs in a pleading is not approved for the reason that it leaves room for doubt and uncertainty as to whether it is intended to simply number the paragraphs or to number the causes of action.
2. The different breaches of a contract are separate causes of action if sued on when occurring, but if no action is brought until after the term of the entire contract, the different breaches become one cause of action, and it is error to require plaintiff to separately state and number the different breaches as separate causes.

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

Action was brought by the Toledo Gas-Light & Coke Company, in the court of common pleas of this county, to recover on account of gas furnished to the city for the lighting of streets and public places through a series of years beginning with 1866 and ending with 1877. It is alleged that this gas was furnished under certain contracts with the city, presumably in the form of resolutions or ordinances, and that covering this period there were several contracts—one for ten years, one for one year and one for five years; and that by the terms of these contracts the bills were payable by the city semi-annually. The gas company had a right to receive at the hands of the city for each period of six months the assessments upon certain property levied for the purpose of paying this expense, and it appears from the pleadings that it devolved upon the city to collect these assessments and pay the moneys over to the gas-light and coke company on demand. There was a petition filed, to which a motion was interposed to require the plaintiff to separately state and number its causes of action. These matters that I have stated

were all set forth in this petition, and in addition thereto it was alleged therein "that on or about the first day of October, 1882, this said defendant and this plaintiff by their duly authorized officers made a computation of the amount due the said plaintiff at that time upon the bills rendered from the first day of January, 1866, up to the said time, and agreed that the amount due the said plaintiff from the said defendant at that time was $40,243.01"; and it was also averred in the petition that the gas was furnished; that bills were rendered (the dates and amounts being set forth in the petition) and that payments were made from time to time (and the dates and amounts of these payments are set forth), and that they continued from year to year until November 13, 1899, and there is a prayer for an accounting and for judgment.

The motion to require the plaintiff to separately state and number the causes of action was sustained. The order of the court that such amendment should be made was not complied with promptly—the matter ran along for some time—but finally, before the action was dismissed, an amended petition was filed. In that the plaintiff has undertaken to set forth four causes of action. There are four separate statements of what are evidently intended to be causes of action, and these statements are numbered consecutively from one to four. We think the form of separately stating and numbering adopted by the pleader is not to be approved, because it leaves room for doubt and uncertainty as to whether the parties mean to simply number the paragraphs or to number causes of action. While the numbering of paragraphs is not approved, yet it is sometimes practiced. We think that where parties intend to state and number causes of action separately, they should state and number them distinctly; as, for instance, "The First Cause of Action; The Second Cause of Action," etc. However, it seems to be understood by all concerned that each of these various paragraphs is intended for a separate and distinct cause of action.

The first cause of action is based upon an alleged contract entered into by the parties on December 30, extending over a period of ten years from January 1, 1866. It sets forth the rate at which gas was to be furnished, the amount of gas fur-

nished, the payments made, and closes with the averment that the sum of $25,050 is due under the aforesaid contract.

The second cause of action is a like statement of facts, based upon a contract entered into for the period of one year on January 1, 1876, and a balance of $4,000 is claimed under this contract.

The third cause of action is based upon another contract, which is said to be for a period of five years from January 1, 1887.

We are inclined to think, from comparing this cause of action with the statement of the same matter in the original petition, that counsel has made a mistake in the date—that it was intended to be 1877. We are not certain about that, however; the mistake may be in the original rather than in this; the dates do not correspond. The balance claimed under this contract is $20,030.

The fourth cause of action is founded upon an alleged accounting and agreement of the parties on October 1, 1882, as to the amount due, and a promise of the defendant to pay the amount so agreed upon as due, and this agreement and computation is said to have covered the period from January 1, 1866, to January 1, 1882, so that it covers the same matters as stated in the first cause of action, and also those in the second cause of action, and if the date in the third cause of action should be "1877" instead of "1887," it covers that also. If the date is correctly stated in the amended petition, that period is not covered by the alleged agreed statement of account.

This amended petition was stricken from the files and the action dismissed by the court, on the ground that the plaintiff had not complied with the order of the court to separately state and number the causes of action. The contention on behalf of the defendant, which seems to have been sustained by the court, is, that a cause of action arose in favor of the plaintiff, if at all, at each period when an amount became due under either of these contracts and upon the non-payment of such amount; that, therefore, under the contract providing for a period of ten years, with payments to be made every six months, there would be twenty causes of action, if full payment was not made at

each period when a payment became due, and so on of the other claims under the contract set forth in the second and third causes of action.

The plaintiff in error contends that it complied with the order of the court when it set forth in its amended petition four causes of action. Counsel have filed briefs, but have not cited many authorities upon the question of what constitutes a cause of action under circumstances like these that I have stated. In the brief for plaintiff in error we are cited to one authority, a decision of this court, and that was probably deemed sufficient for the purpose of the hearing in this court. The authority seems to be in point and sustains the contention of the plaintiff in error. It is the case of *Bowman* v. *Fuher*, 11 C. C., 231. In addition to this we have examined a large number of authorities, some of which I will cite: Bliss, Code Pleading, Section 118; Kinkade, Code Pleading, Section 19; Pomeroy, Remedies & Rem. Rights, Section 460—and there are several other sections upon the subject, some preceding and some following this; *Monarch Cycle Mfg. Co.* v. *Wheel Co.*, 105 Fed. Rep., 324; 4 Enc. Pl. & Pr., 941; *Whitaker* v. *Hawley*, 30 Kan., 317, 327, 328. I shall read only what is stated in that opinion at the pages cited. The statement of facts is somewhat lengthy and complicated, but the principle involved is made very plain in what I shall read:

"The defendants claim, in the language of the Court of Appeals of New York, that 'in respect to contracts, express or implied, each contract affords one and only one cause of action. The case of a contract containing several stipulations, to be performed at different times, is no exception, although an action may be maintained upon each stipulation as it is broken, before the time for the performance of the others.' (Citing *Secor* v. *Sturgis*, 16 N. Y., 558, and what I have just read is quoted from that case.)

"The defendants cite several other cases as tending to sustain this doctrine, among which are the following: *Barton County* v. *Plumb*, 20 Kan., 147; *Bond* v. *Sewing Mach. Co.*, 23 Kan., 119; *Madden* v. *Smith*, 28 Kan., 798; *Bendernagle* v. *Cocks*, 19 Wend., 207; *Stein* v. *Steamboat Prairie Rose*, 17 Ohio St., 471-475.

"The plaintiff denies the authority of some of these cases, and denies the applicability of all of them. He cites on his side the following, among other cases: *Badger* v. *Titcomb,* 32 Mass. (15 Pick.), 409; *Shaw* v. *Beers,* 25 Ala., 449; *Stifel* v. *Lynch,* 7 Mo. App., 326; *McIntosh* v. *Lown,* 49 Barb., 550; *Perry* v. *Dickerson,* 85 N. Y., 345.

"We suppose that the doctrine enunciated in the case of *Secor* v. *Sturgis, ante,* is generally correct; and, generally, that a breach or any number of breaches of a single contract can furnish, at one time, only one single cause of action. Of course where a contract contains several stipulations to be performed at different times, a cause of action may arise upon the breach of any one of such stipulations, and an action may be maintained at once upon such breach without prejudice to future actions upon subsequent breaches; but if no action is in fact commenced until after other breaches have occurred, then all the various breaches of the several stipulations will constitute only one comprehensive breach of the general contract, only one comprehensive cause of action on the entire contract. All of the various causes of action founded upon the several breaches in such case will be merged into one comprehensive cause of action. At each successive breach of a contract the cause of action on such contract will be enlarged, and no new cause of action will be created. The law abhors a multiplicity of suits, and for this reason, among others, courts generally construe all existing breaches of a single contract as constituting in the aggregate only one general breach of one general contract, one comprehensive infringement of one comprehensive primary right —the right to have the contract fulfilled in its entirety. According to the great weight of authority, such a breach in the aggregate constitutes only one cause of action. (Citing Pomeroy, Remedies & Rem. Rights, Section 552 to 561, and case therefore cited.)

"Hence, if the three items upon which the plaintiff now claims a right to recover are founded upon the aforesaid contract between the parties, then of course such items are a part of one general cause of action, of which the plaintiff's previous cause of action for rent was another part, and the plaintiff can not recover in this action."

It will be observed that the plea of *res judicata* was interposed and was sustained by the application of this principle.

That, we think, is the law applicable to this case, and it follows that the court of common pleas erred in holding that the plaintiff had not complied with the order to separately state

and number the causes of action. The question chiefly debated by counsel, *i. e.*, as to whether valid causes of action are well stated, it not presented by this record; the only question presented by the record is, whether the court erred in dismissing the action upon the ground stated.

King & Tracy, for plaintiff in error.

C. S. Northup and *O. W. Nelson*, contra.

REGULATIONS AS TO SMOKE.

Circuit Court of Hamilton County.

CITY OF CINCINNATI v. CORNELIUS A. BURKHARDT, PRESIDENT AND GENERAL MANAGER OF THE GIBSON HOUSE HOTEL.*

Decided, February 15, 1908.

Municipal Corporations—Regulation of the Emission of Smoke by Ordinance—Reasonableness of the Provisions—Nuisance—Presumption—Who may be Prosecuted—Criminal Law.

1. It is within the power of a municipality to provide by ordinance for the regulation of the emission of smoke.
2. The test as to the validity of such an ordinance is its reasonableness; and unless it is shown to be clearly unreasonable, it should not be declared void.
3. In a prosecution for violation of an ordinance regulating the emission of smoke, the proper defendant is the corporation permitting the emission, or the employe causing it.

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

A statement of the case may be found in 6 N. P.—N. S., 17. It involves the construction of a municipal ordinance to regulate the emission of smoke.

The prescribing of a certain scale for measuring the density of smoke, and declaring any thing in excess of that scale to be a public nuisance, is the same thing as declaring smoke to be a public injury and annoyance, to prevent which the Legislature

* For a contrary holding as to the validity of this ordinance, see *Cincinnati* v. *Burkhardt*, 6 N. P.—N. S., 17.

has given the power to council. Section 7, Subdivision 3, municipal code.

If upon its face, or after investigation, it clearly appears to be not a nuisance nor an annoyance nor an injury to the public, the ordinance is unreasonable and void; but if it appears that different minds may reasonably arrive at different conclusions the council has not exceeded its power in adopting the ordinance in question. *Langel* v. *City of Bushnell*, 197 Ill., 20; *Bowers* v. *City of Indianapolis*, 81 N. E., 1097.

We are of the opinion that the ordinary mind would be in doubt whether the prohibition is unreasonable, the difficulty lying in the manner of fixing and declaring the density of the smoke prohibited; but it will be presumed, in the absence of proof to the contrary, that council duly investigated the subject and adopted this particular scale upon the ground of accuracy and precision; and unless it is clearly unreasonable or in restraint of trade the ordinance should not be declared void. *White* v. *Kent*, 11 O. S., 550.

The defendant, Burkhardt, is charged, as president and general manager of the Gibson House hotel, with unlawfully permitting the emission and escape of smoke. It is admitted in the record that he is president and general manager of the A. G. Corre Hotel Co., which runs the Gibson House, and was at the time complained of. But it does not appear that he personally permitted or had anything to do with the nuisance of the smoke.

Under the ordinance the corporation permitting the emission of smoke, or the employe causing it, should have been prosecuted.

Judgment affirmed.

Benton S. Oppenheimer, for plaintiff in error.

E. W. Strong and *J. J. Muir*, contra.

FRAUDULENT MARKING OF VOTING LIST.

Circuit Court of Cuyahoga County.

MICHAEL F. RYAN v. THE STATE OF OHIO.

Decided, February 17, 1908.

Elections—Indictment for Marking Voting List at Primary—Method of Proof—Publications During Trial Charging Bribery of Jurors—Not Prejudicial, When—And not Ground for a New Trial—Disqualified Jurors Included in the Panel—Objection Thereto Waived, When—Receiving the Verdict—Recital of the Transcript as to Polling of Jury—Declaration by Prosecutor as to Conduct of Defendant not Misconduct, When—Section 7061.

1. The publication during the progress of a trial in a criminal case, in a paper of large circulation in the municipality where the trial is being held, of articles in which it is charged that attempts have been made to bribe the jury, together with pictures of certain jurors alleged to have been offered bribes, and the appearance of copies of the papers containing these publications in the court room, does not afford ground for the granting of a motion to discharge the jury because of such publications and the prejudice created against the defendant thereby, where there is no evidence offered that the papers containing the objectionable matter came into the hands of any of the jurors or were read by them.
2. Neither does the fact that these or any other publications, calculated to prejudice the case of the defendant in the minds of the jury, were made and extensively read by others than the jury during the progress of the trial constitute ground for the granting of a motion for a new trial.
3. The fact that one of the jurors who sat during the trial was disdisqualified, for the reason that his name was not drawn from the jury wheel and he was not regularly summoned, does not afford ground for a new trial, where it appears that the fact of the disqualification was known to counsel for the defendant at the time the jury was impanneled and no objection was made.
4. While service on the grand jury which returned the indictment constitutes ground for challenge where the same person appears in the petit jury panel, failure to make inquiry as to such service or to exercise the right of challenge constitutes a waiver of the objection, and under such circumstances service on both the grand and petit juries by the same person does not afford ground for a new trial.

5. In a criminal case it is proper for the judge rather than the clerk to call the jury; and where it does not affirmatively appear that only eleven men were called, and no objection was made to the call at the time, and the transcript of journal entries recites that "the jury returned their verdict into court and were properly inquired of," it must be assumed that the entire twelve men were called.
6. The proof offered, that a certain mark opposite certain names on the certified list of voters at a primary election was made by the defendant, in this case, was sufficient to establish that fact beyond a reasonable doubt; and the use of these marks as a standard, from comparison with which an expert testified that other marks made opposite other names were made by the same hand, was a legal method of proof and established the fact claimed beyond a reasonable doubt.
7. Where the prosecuting attorney was challenged by counsel for the defendant to state to the jury why he had not tried the case long before, and in his reply the prosecutor declared the reason was the defendant absconded and could not be found by the police, the declaration does not if true amount to misconduct and the trial is not vitiated thereby.

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

Error to the court of common pleas.

Michael F. Ryan was indicted, tried and convicted under Section 7061, Revised Statutes, which reads:

"Whoever shall, from the time any ballots are cast or voted until the time has expired for using the same as evidence in any contest of election willfully and with fraudulent intent, inscribe, write, or cause to be inscribed or written, in or upon any poll-book, tally-sheeet, or list, lawfully made or kept at any election in, or upon any book or paper purporting to be such, or upon any election returns, or upon any book or paper containing the same, the name of any person not entitled to vote at such election, or not voting thereat, or any fictitious name, or within the same time shall wrongfully change, alter, erase, or tamper with any name, word, or figure contained in such poll-book, tally-sheet, list, book, or paper; or falsify, mark, or write on such poll-book, tally-sheet, list, or paper in any manner whatsoever, such act or acts being done with intent to defeat, hinder, or prevent a fair expression of the will of the people at such election, shall be imprisoned in the penitentiary not more than three years nor less than one year."

The charge in the second count of the indictment under which count and no other the jury returned a verdict of guilty, is that Michael F. Ryan on the 7th day of September, 1905, at a primary election of the Republican party held in pursuance of the statute, in precinct A of ward 20 in the city of Cleveland, in Cuyahoga county, Ohio, which election was held for the selection of candidates for county and municipal offices to be filled at an election to be held on the 7th day of November, 1905, in said city and county; that at this primary election said Michael F. Ryan acted as a judge of election; that he was duly and legally authorized and empowered to so act; that in said city, registration of voters was required by law; that while so acting as such judge, he did then and there unlawfully and feloniously mark the duplicate certified list of registered electors of said precinct by placing a "V" distinctly in the column under the words "voted at primaries," and in a line with the names of some forty-three electors, which names are given in this count of the indictment, which said names appeared in said duplicate certified list of registered electors. This count of the indictment charges that said persons did not vote at said primary election, that such marking was done with the intent then and there to cause it to appear that the persons, before whose names this mark was made, had voted at said election, there being in the ballot box of said precinct forty-three ballots so marked as to indicate the persons for whom they were cast in excess of those lawfully cast at said election, this with intent to defeat and hinder a fair expression of the will of the people at such primary election. One Percy A. Secor was jointly indicted with said Ryan, he being charged as having acted as a clerk at said primary, and with doing the same things charged against Ryan.

To this indictment a demurrer was filed by Ryan, which was overruled by the court and this is assigned as error. The indictment is not copied in this opinion, but no reason was given, either in oral argument or in brief of counsel, why the indictment was not sufficient, nor has the court, after careful consideration, been able to discover any reason why this demurrer should have been sustained.

It is further alleged that error was committed in the progress of the trial by reason of the overruling of a motion made by counsel for Ryan, that the jury be discharged by reason of the publication of certain articles in regard to the jurors, which articles were published while the trial was in progress, in the Cleveland *Press,* a daily newspaper, shown to have a very large circulation in the city of Cleveland, where the trial was being conducted. The attention of counsel for the defendant was called to one of these articles by the trial judge, and it was shown that articles of a similar character to that to which attention was first called were published in at least two different editions of said *Press* during the progress of the trial. These several articles had headings in very large type, the several letters being at least one inch long and the heading making two lines extending at the top of the page, across six columns of the page and reading: "Attempt made to bribe jurymen in Ryan case."

Immediately under this there is printed in large type extending across two columns the words, "Prosecutor McMahon and Judge Babcock put in possession of the facts and indictments may follow. Gamblers haunt court room where the election fraud case is on trial. Jurymen called out of bed and offered money to vote a certain way."

Below these words are cuts purporting to be likenesses of three of the jurors, with the name of each. These cuts extend across two columns of the paper printed one above the other each being the likeness of a man's face, and each occupying about two inches perpendicular space, then in large letters the words "men offered bribes," followed by the names of six of the jurors. Following this is an article stating that one juror was visited at his home Sunday night by a man who said there was money for any juror who would vote right; that another was called out of bed at 10 o'clock Monday night and asked if he would consider a proposition to vote a certain way. This article is made up of statements of a similar character and covers a double column space of some ten or twelve inches perpendicular; the same article or practically the same, together with the same pictures was printed in another edition of the same paper on the same

day, under the heading: "Drop case is demand," the letters being about an inch and a half in length.

Upon hearing of these publications counsel for the defense filed a motion for the discharge of the jury, based upon the fact of these publications, and in support of the motion filed the affidavit of J. P. Dawley, Esq., one of the attorneys for the defendant, in which he alleges the publication of the articles already spoken of in this opinion, annexing as exhibits copies of the papers containing the publications; that said newspaper has a very wide circulation throughout the city of Cleveland and in Cuyahoga county and elsewhere; that it is extensively sold by newsboys upon the public streets of the city of Cleveland, and around and in the vicinity of the court house where said trial was progressing; that his attention was called to it by the court, who had one of the papers in his possession, and that several were being circulated and commented on in the court room where said case was being tried.

The affidavit further states that said paper goes into the homes of those who are serving upon the jury in the court, as well as into the homes generally of the people of Cleveland; that several of the jurymen sitting in the case on trial reside in the city of Cleveland, and are general readers of the daily papers. He further says the case has attracted great and universal interest in the community, and that, in his opinion, these newspaper articles can not but be prejudicial to the interests of the defendant. No other evidence was introduced for or against the motion.

As has already been said, this motion was overruled, and this action of the court is alleged as error.

That these articles are of such a character as to tend to prejudice whoever should read them, whether jurymen or not, against Ryan, does not admit of a doubt; that the headings and pictures were intended to and would attract attention to them can not be doubted. It follows of course that their publication was naturally calculated to interfere with the due administration of justice, because of the danger that they might be read by jurors and their minds be biased thereby. But in the absence of any evidence that any one of the papers fell into the hands of and was read by any juror, other than is contained in the affidavit re-

ferred to, we are not prepared to say that the motion to discharge the jury should have been sustained.

Our attention has been called to but one case in which it has been held sufficient ground for a new trial, that newspaper publications, calculated to affect the judgment of the jury, were made and circulated about the place of trial during its progress, without also directly showing the reading of the same or comment thereon by some juror. *Meyer* v. *Cadwallader*, 49 Fed. Rep., 32, was a case in the Circuit Court of the United States, Eastern District of Pennsylvania, in which it was shown only that the objectionable publications were made in leading journals and scattered broadcast throughout the community where the trial was in progress. The court held this to be a sufficient showing that the articles had been read by the jury.

Judge Acheson uses this language in the opinion at page 36:

"It is idle to say that there is no direct evidence to show that the jury read these articles. They appeared in the daily issues of leading journals and were scattered broadcast over the community. The jury separated at the close of each session of the court, and it is incredible that going out into the community they did not see and read the newspaper publications."

This case is cited in the opinion in the case of *Street Railway Company* v. *Grenell*, 90 Ill. App., 30. At page 47, the court, after quoting the words hereinbefore quoted from the opinion of Judge Acheson, says, "But in the present case it is not necessary to resort to the presumption indulged in by the court in the case cited," the opinion then goes on to show that the newspapers were traced into the hands of jurors, and that at least two of the jurors read one of the articles.

Authorities are numerous to the effect that the reading by jurors of newspaper articles prejudicial to one of the parties is ground for new trial, but we do not feel justified in indulging in the presumption which Judge Acheson seems to have indulged, in that the objectionable articles were read by the jurors, or any of them. We feel it our duty rather to presume that the jurors were mindful of their duties and that they did not, in violation of such duties, read the newspaper publications

about the case while it was on trial before them. We think it should not be said there was misconduct on their part simply because a popular newspaper gave them the opportunity for misconduct. There was no error, therefore, in overruling this motion.

On the motion for new trial it was shown that certain other publications of the same newspaper were made during the progress of the trial, equally prejudicial to the defendant, and circulated in the same way. We do not find that the action of the court, in overruling the motion for a new trial on this ground was in contravention of any provision of Section 7350, Revised Statutes, which provides for what causes a new trial may be granted. The first ground named is for "Irregularity in the proceedings of the court, jury, prosecuting attorney, or the witness" for the state, or for any order of the court or abuse of discretion by which the defendant was prevented from having a fair trial." The second is for "misconduct of the jury, or of the prosecuting attorney, or of the witnesses for the state." What has already been said applies as well to the action of the court on the motion for new trial on the ground now being considered, as to its action in refusing to discharge the jury on the former motion.

It is further urged that a new trial should have been granted because it was shown, on the motion for new trial, that one M. J. Oviatt, who was one of the jury before whom the case was tried, was not regularly summoned as a juror, nor was his name drawn from the jury box as provided by law. The further fact is shown, too, that one of the attorneys representing the prisoner and who took part in impanneling the jury had full knowledge of all the facts relating to Oviatt's disqualification. Indeed, this attorney had shortly before the impanneling of the jury tried a case in the same court where Oviatt sat as a juror, and had made a motion for a new trial on the ground that Oviatt had not been summoned as a juror nor his name been drawn from the box. It is true at the time when this jury was being impanneled the attorney overlooked the fact that he knew of this disqualification of Oviatt, but he states in his affidavit that he really knew all about it, and it was simply a matter of forget-

fulness for the moment which prevented his calling attention to it at the time. Knowledge on the part of the attorney is to be treated as knowledge on the part of his client in a matter of this sort. It is only where there is want of knowledge that the court will hear a party complaining of such disqualification. In the case of *McGill* v. *The State,* 34 Ohio St., 228, this language is used by the court in its opinion on page 235:

"The rule is clearly settled by the cases cited below, that the disqualification of a juror sitting at the trial of a cause, either civil or criminal, which the exercise of due diligence would have disclosed, is not sufficient ground for setting aside the verdict and granting a new trial. * * * The party moving for a new trial on such ground must show that he exercised such care and diligence before the juror was sworn, or he will be held to have waived all objections to his competency, which the employment of reasonable diligence would have shown to be well founded."

The court was right in refusing to grant a new trial on this ground.

Another complaint made is that one Colson, who was impanneled as a juror in this case, was a member of the grand jury which found the indictment upon which the prisoner was being tried. Colson was examined by the prosecuting attorney as to his qualifications; no question was asked of him by counsel for the prisoner, nor was any question asked of him by anybody as to whether he was a member of the grand jury which found the indictment. He was asked if he had talked with anybody about the case, and he answered, "Not for a year." He was asked if he talked with anyone a year ago about it, and he answered, "I presume I did." He was asked if he remembered that conversation, and he said that he didn't. He said that he did not know Mike Ryan, and that he did not know whether the talk which he had concerned the guilt or innocence of Ryan. He was then asked the question: "Do you remember definitely that you did have a conversation about this case a year ago?" To which he answered, "No, sir; I may have talked about it at that time, but would not say that I did." He was further asked if he had formed or expressed an opinion concerning the case, and he answered. "I have not; no, sir."

As has been said these questions were all asked by the prosecuting attorney. The fact is that the indictment was found something more than a year before the trial was had, and it is by no means impossible, and perhaps not improbable that the juror had forgotten this particular case. His answers indicated that he had some indefinite recollection about the case, but that it was *wholly* indefinite.

It is urged that since he was a member of the grand jury which returned the indictment he must have at that time formed an opinion as to the guilt or innocence of the prisoner. This is not necessarily so. A grand jury consists of fifteen men, and it is provided by Section 7206, Revised Statutes, that "at least twelve of the grand jurors must agree in the finding of an indictment," so that there may have been at the time this indictment was found three of the grand jurors who had formed no opinion either way, as to whether there was evidence sufficient to warrant the indictment. For aught that appears Colson may have served upon the grand jury and have been one of three who never made up his mind or formed any judgment as to the guilt or innocence of the party indicted. The statute makes the fact that one was a member of the grand jury which found the indictment a ground of challenge of such person as a juror upon the trial, but where no challange is made and no question put upon the examination of the juror touching his qualifications, in this regard it is too late to raise this objection, after the trial and verdict. In the case of *Beck* v. *The State*, 20th Ohio St., 228, it is said in the opinion at page 230:

"The objection taken, after trial, to the juror is thus declared by statute to be a ground of challenge only, and as such it may be waived. The court below was justified in regarding the failure to interrogate the juror or to make inquiry into the subject-matter in this cause for challenge before the jury was sworn, as a waiver of the same."

We find no error then in the action of the court in this regard.

Another complaint made is that there was irregularity in the manner in which the verdict was received by the court. The facts in this regard are, as appears from the affidavit of Gertrude Kelley, a stenographer: That she was present at the

time the jury returned its verdict, and that a true transcript of the proceedings connected therewith is attached to her affidavit. It will be noticed that she does not say that a *full* transcript is attached, but that what is attached is *true*. The transcript to which she refers shows that the court proceeded to call the roll of jurymen, and then she gives a list of eleven names only, with the word "here" following each of the names. Later it appears from her said transcript that the court inquired in these words: "Gentlemen of the jury, is this your verdict?" That the answer was: "It is." The court: "So say you all, gentlemen?" Answer: "Yes, sir."

Counsel for the prisoner then asked for the polling of the jury, and there follows an inquiry made of the same eleven men whose names appear as having been called by the court.

It is said, first, that the court should not have called the jury; that this is required to be done by the clerk. This is a mistake. In criminal cases the statute does not provide that the clerk shall call the jury. But, it is said, that only eleven men were called. This does not affirmatively appear, although it does appear affirmatively that eleven names were called. No objection appears to have been made by anybody that the full number was not called. The transcript of the journal entries shows that on the 26th day of December, 1906: "The jury duly impanneled and sworn having heard all of the evidence adduced by the respective parties, the arguments of counsel and the charge of the court, retired to their room in the custody of the court constable, and after due deliberation they do, upon their oath, find, return and say, as follows:" Then follows the verdict, and then these words: "Thereupon the court discharges the jury from the further consideration of this case." In the absence of any suggestion made at the time of the calling of the names of the jurors, that but eleven names had been called, and but eleven were especially inquired of by the court, we can not reach the conclusion that the statement in the transcript of journal entries, that the jury which was impanneled returned their verdict into court and were properly inquired of, is incorrect, and so we find no error in the action of the court in refusing a new trial on this ground.

Another objection to the record arises on the evidence. The charge, it will be remembered, was that the prisoner while acting as a judge at a primary election made a mark opposite certain names, thereby indicating that the parties whose names were thus marked had voted at this election; whereas in truth and in fact they did not so vote. This was said to be established by showing that Ryan had charge of one of the books containing a certified list of electors, and that Secor, who was jointly indicted with him, was acting as a clerk in the same booth at the same election, and had charge of another of these certified lists. These books were introduced in evidence, and we think it was shown clearly that Ryan made the mark opposite the name of several voters who actually voted at the election; that Secor made the mark opposite the name of one voter at least who voted at the election. These marks which were so established, were used as standards of comparison by an expert witness, who was placed upon the stand, and he assuming the marks, which we have said we think it was clearly established, were made by Ryan as a standard, gave it as his opinion that Ryan made the mark, which is spoken of in the indictment as a "v" opposite the names of a considerable number who did not vote. It must be conceded that ordinarily a mark made by one with a pen or pencil is much less satisfactory as a standard of comparison than written words. But, an examination of these marks, which are peculiar, tends very strongly to corroborate the opinion expressed by the expert witness. The marks shown to have been made by the prisoner differ materially from that shown to have been made by Secor. The mark made by the latter has an angle at the bottom much more acute than those shown to have been made by Ryan. Not only so but the upstroke on the Secor mark is much longer than on the Ryan mark. The court in its charge to the jury said to them that the marks used as a standard of Ryan's mark must be established beyond a reasonable doubt. We are not surprised that the jury found it was so established. The court said to the jury that the fact that the disputed marks were made by the same man who made those used as the standard must be established beyond a reasonable doubt. We are not surprised that the jury found they were.

There was no error in admitting the evidence of the expert, nor is the evidence such as to justify a reversal on the ground that it was not shown by sufficient evidence that the disputed marks were made by him who made the marks established as a standard.

Another complaint made is that there was misconduct on the part of the prosecuting attorney in his closing argument to the jury. It appears that one of the counsel for the prisoner in his argument used this language, pointing his finger at the prosecuting attorney and speaking of this case:

"Why was it not tried before? Let the prosecutor tell us why the case was not tried. Mr. McMahon did not want to try it; he was forced against his will to try it. Term after term has gone by, yet the prosecutor failed to try it. We challenge you to tell this jury, when you come to argue to them, why you have not tried this case before."

The prosecutor in his argument following the one just quoted from, made on the part of the defendant, said:

"He (Meals) asked, why wasn't this case tried before? You challenged me and I am going to tell you: Because Mike Ryan absconded from this county when we wanted to try him, last April or last May, and ran away from the police and got out of town. You ask me, and I told you why."

To this language used by the prosecuting attorney the prisoner's counsel objected at the time. There was no misconduct on the part of the prosecuting attorney in making this answer if it was true to the challenge made to him by counsel for the prisoner. Indeed, it would have been an extraordinary thing if he had allowed to go unanswered the statement that it was because he did not want to try the prisoner that he had not been tried, if the fact was as the prosecuting attorney stated it to be. Other language used by the prosecuting attorney is complained of, but was not such as to constitute misconduct. Many other complaints are made by the prisoner of the record in this case. All of them have been examined, but we do not feel that it would be profitable to enter into a discussion of any more of

them. We find no error in any part of the record, and the judgment of the court of common pleas is affirmed.

Dawley & Meals, for plaintiff in error.

S. V. McMahon, Prosecuting Attorney, and *W. A. Carey,* Assistant Prosecuting Attorney, for defendant in error.

PARTITION FENCES.

Circuit Court of Portage County.

JOHN H. NICHOLS v. H. J. TURNER ET AL.

Decided, October Term, 1907.

Construction of the New Law—Relating to Partition Fences—Enclosed and Unenclosed Lands now under the Same Rule—Section 4239 as Amended—Constitutional Law.

Under the act of April 18, 1904, owners of adjoining lands are required to build and maintain in good repair all partition fences between them in equal shares, unless otherwise agreed upon between them in writing, although such lands may not be enclosed with fences.

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

This action is upon appeal and is for the purpose of obtaining an injunction to restrain the Turners and the board of township trustees from requiring plaintiff to build and maintain a partition fence between the lands of plaintiff and defendants Turners.

The evidence shows that at one time there was a partition fence between these lands, now owned by plaintiff and the Turners, but that it had gone into decay and is now entirely worthless as a fence; that the land of plaintiff is practically unenclosed; that no stock of any consequence has been kept upon the farm for several years; that while a tenant has been upon the farm, yet he had only a horse, a cow or two, and a couple of hogs, which were kept in an enclosure about the house.

The evidence further shows that about ten years ago plaintiff gave notice to the then owner of the Turner farm, under

Section 4241, Revised Statutes, that he would remove his part of the fence between their farms, as he had no further use for it, he intending to abandon all fences upon his farm.

There is no claim but what the proceedings before the township board of trustees was in all particulars regular.

Under these circumstances plaintiff claims that he should not be required to build and keep in repair any part of the fence between his farm and that of Turners for three reasons:

First. That his land is unenclosed.

Second. That he gave due notice that he would remove his part of the partition fence, and would not longer continue to keep any part of it in repair.

Third. The act under which the proceeding was had before the township trustees is unconstitutional.

As to the first and second claims, it will be observed that the act of April 18th, 1904 (97 Vol. Ohio Laws, page 138), made a radical change in the fence laws of the state. Previously the law provided (Revised Statutes, Section 4240) that:

"The owner or lessees for one or more years of lands enclosed with fences should keep up and maintain in good repair all partition fences between their own and the next adjoining enclosures in equal shares so long as both parties continue to occupy and improve the same."

By Section 4241 it was provided:

"When the enclosures of two or more persons are divided by a partition fence of any kind and either of the parties think proper to vacate his part of such enclosure, or to make a lane or passage between such adjoining enclosures, such person may remove his share or part of such partition fence, on giving six months notice in writing of such intention to the party owning or occupying the adjoining enclosure, or his agent if such party is a non-resident of the county."

By the act of April 18th, 1904, both of these sections are repealed and, so far as the question here involved, Section 4239, as amended, took their place.

That section now provides:

"That the owners of adjoining lands shall build, keep up and maintain in good repair all partition fences between them

in equal shares, unless otherwise agreed upon between them, which agreement must be in writing and witnessed by two persons."

The evident intent and purpose of the Legislature by the new law was to require all owners of adjoining lands, whether enclosed or not, to make and maintain one-half of the fences between them. This is especially apparent from the fact that the law now applies to the owners of the land alone—lessees being eliminated, and the further fact that in order to be relieved from the requirements of the statute there must be an agreement in writing, signed by the adjacent owners in the presence of two witnesses, so that there may not be any misunderstanding as to the liability of the parties. Further, the repeal of Section 4241, taking away the power of either party to remove his part of the fence is important as tending to show that enclosure or non-enclosure should thereafter not have any effect and that thereafter there should be no "devils" lanes. Whether this material change in the law is salutary or not it is not for us to inquire. Its tendency no doubt will be to keep down controversies and litigation between neighbors, as they will now know precisely what their exact rights and liabilities are. The changing of the law so that it applies to all owners will have very little effect, as there is now very little unimproved land in this state, and no doubt that had some effect in prompting the change

As to the third claim of plaintiff, we do not see how the change in any manner affects the statute as to its constitutionality, and as the fence law, substantially the same in its provisions, has been incorporated in our law for nearly eighty years and has been before our Supreme Court time and time again without any question being made as to its constitutionality, and further, as the counsel for plaintiff does not show us in what respect it is unconstitutional, we leave that matter without further comment.

Judgment for defendants dismissing the petition of plaintiff at his costs.

Nichols & Cole, for plaintiff.

Maxsom & Wolcott, contra.

MORTGAGE EXECUTED UNDER PARENTAL DURESS.

Circuit Court of Cuyahoga County.

MABEL LANE v. THE RESERVE TRUST COMPANY.

Decided, November 6, 1907.

Duress—Where Exerted by Parents upon a Child—Burden of Proving Good Faith—Mortgage—Presumption—Banks and Banking—Fraud—Acknowledgment—Deed—Parol Evidence.

1. A petition for cancellation of a real estate mortgage on the ground of parental duress exerted soon after plaintiff attained her majority, whereof the defendant mortgagee had knowledge or will be held to have had knowledge, is not open to demurrer.
2. While a mortgagee in such a transaction will not be held to the ascertainment of bad faith at his peril, it is incumbent upon him to make reasonable inquiry when the known facts suggest that an improper advantage is being taken of a fiduciary relation; and the convenience of banking houses in transacting business with persons thus related is subordinate to the protection of the property rights of persons in actual or *quasi* wardship from the greed of their protectors.

HENRY, J.; MARVIN, J., concurs; WINCH, J., dissents in a separate opinion.

Error to the Court of Common Pleas.

The plaintiff has appealed from final judgment, rendered upon demurrer sustained to her second amended petition, wherein she prays cancellation of her real estate mortgage to the defendant, given under alleged parental duress, while she still lived with her parents, soon after she attained her majority, and to secure a loan to her father. She alleges defendant's actual knowledge of these facts, save that as to the undue influence she says defendant knew or by the exercise of ordinary care would have known it. The parents were originally parties defendant, but were dismissed by the court below as improperly joined.

Under the principles laid down in *Berkmeyer* v. *Kellerman*, 32 O. S., 253, the petition here would be sufficient as against the parents, had the mortgage been given to them. At page

252, the opinion by Johnson, J., quotes approvingly from *Cocking* v. *Pratt* (1 Ves. Sr., 400), that "the court will always look with a jealous eye upon a transaction between parent and child just come of age, and interpose if any advantage is taken." The fourth paragraph of the syllabus indicates moreover that the burden of proving the good faith of such transactions is upon him who is alleged to have profited unjustly from the fiduciary relation established.

But in *Jenkins* v. *Pye,* 12 Pet., 241, it is held that a conveyance from child to parent is not *prima facie* fraudulent; whence it evidently follows that the burden of proof is on him who charges the fraud.

In this forum we are of course bound by the English rule, so far as it is sanctioned by our state Supreme Court, in preference to the so-called American rule enunciated by the United States Supreme Court. Applying, therefore, the principles of *Berkmeyer* v. *Kellerman, supra,* to the case in hand, what duty, if any, rested upon the bank, knowing that it was lending money to the father upon the security of the child's property, and that a court, viewing the transaction with a jealous eye, would call upon the father to vindicate its good faith? Manifestly the bank's duty was to use reasonable care to ascertain whether or not the father was acting *bona fide,* and whether or not the child was actuated only by her own free will.

The petition, however, alleges that by the exercise of such care the defendant would have discovered the undue parental influence under which the mortgage was executed, acknowledged and delivered. It is, therefore, chargeable with such knowledge as it would thus have acquired, and stands in no better position than the father himself.

It is no answer to this conclusion to say that the notary's certificate of acknowledgment can not be varied by parol evidence; for the deed and acknowledgment are alike assailed directly for fraud. Nor is it an answer to say that the requirements of business should be held to relieve banks from the hazard and burden of such a rule. It can not be true that banks will be greatly prejudiced by having to make reasonable inquiry as to the fact of undue influence in cases where they

know that a fiduciary relation exists, and that the proposed transaction can stand only upon the footing of utmost good faith.

We do not hold that third parties acting in such a transaction must ascertain bad faith at their peril, but only that they must make reasonable inquiry when the known facts suggest improper advantage taken of a fiduciary relation. The practice of English banks, in having the person reposing confidence exhibit competent independent advice that he is free from undue influence before allowing a gift to his fiduciary to be consummated through the medium of a bank loan or the like, may not always be essential to the validity of gifts of this sort; but though the authorities do not go that far, the practice is manifestly a salutary one. The protection of the property rights of persons in actual or *quasi* wardship from the greed of their protectors is plainly paramount in importance to the mere convenience of banking houses in transacting business with persons thus related.

The principles herein approved were applied in a very similar and exceedingly well considered American case, *Noble's Admr.* v. *Moses Bros.*, 81 Ala., 530, reversing the previous conclusions of the court in the same case as reported in 74 Ala., 604. While that decision is perhaps not in accord with the current of American authority, we deem it to be the necessary corollary of the holding in *Berkmeyer* v. *Kellerman, supra.*

A majority of the court, therefore, our Brother Winch dissenting, hold that the judgment of the court of common pleas must be and the same is reversed, and the cause remanded.

Matthews & Orgill, for plaintiff in error.

Howland & Niman, for defendant in error.

WINCH, J. (dissenting).

I dissent in this case because I believe that the petition does not sufficiently charge the defendant with knowledge of the imposition and fraud alleged to have been practiced upon the plaintiff by her father.

Without resort to presumptions of law, the most the defendant is alleged to know is the relationship of the plaintiff to her

father and that she was making a gift of her property to him. This she had a right to do and from certain authorities, two of which I shall mention, I believe that the presumption is in favor of the validity of such gifts.

One of the cases referred to is *Jenkins* v. *Pye*, 12 Peters, 240, and part of the syllabus or head note, reads as follows:

"The complainants, as the ground to invalidate a deed, made by a daughter, of twenty-three years of age, to her father, by which she conveyed the estate of her deceased mother, to her father (he having a life estate as tenant by courtesy in the same), asserted, that such a deed ought upon considerations of public policy growing out of the relations of the parties, to be deemed void. We do not deem it necessary to travel over all the English authorities which have been cited; we have looked into the leading cases, and can not discover anything to warrant the broad and unqualified doctrine asserted; all of the cases are accompanied with some ingredient showing undue influence exercised by the parent, operating on the fears or hopes of the child; and sufficient to show reasonable grounds to presume, that the act was not perfectly free and voluntary on the part of the child; and in some cases, although there may be circumstances tending in some degree to show undue influence, yet if the agreement appears reasonable, it has been considered enough to outweigh slight circumstances, so as not to affect the validity of the deed. It becomes less necessary for the court to go into a critical examination of the English chancery doctrine on this subject; for, should the cases be found to countenance it, we should not be disposed to adopt or sanction the broad principle, that the deed of a child to a parent is to be deemed, *prima facie,* void.

"To consider a parent disqualified to take a volutary deed from his child, without consideration, on account of their relationship, is opening a principle at war with all filial, as well as parental, duty and affection; and acting on the presumption that a parent, instead of wishing to promote the interest and welfare, would be seeking to overreach and to defraud his child. Whereas the presumption ought to be, in the absence of all proof tending to a contrary conclusion, that the advancement of the interest of the child was the object in view; and to presume the existence of circumstances conducing to that result; such a presumption harmonizes with the moral obligations of a parent to provide for his child; and is founded upon the same benign principle that governs cases of purchases made by parents, in

the name of a child; the natural and reasonable presumption in all transactions of this kind is, that a benefit was intended the child, because in the discharge of moral and parental duty."

The opinion bears out all that is stated in the head note.

This case is quoted as "the leading case" on the subject in the case of *Towson* v. *Moore*, 173 U. S., 17, where it is also stated that Mr. Justice Story, who sat in the Jenkins case, in the last edition of his Commentaries on Equity Jurisprudence, stated the doctrine as follows:

"The natural and just influence which a parent has over a child renders it peculiarly important for courts of justice to watch over and protect the interests of the latter; and therefore all contracts and conveyances, whereby benefits are secured by children to their parents are objects of jealousy, and if they are not entered into with scrupulous good faith, and are not reasonable under the circumstances, they will be set aside, unless third persons have acquired an interest under them; especially where the original purposes for which they have been obtained are perverted, or used as a mere cover. *But we are not to indulge undue suspicions of jealousy, or to make unfavorable presumptions as a matter of course in cases of this sort.*"

If the courts are not "to make unfavorable presumptions as a matter of course in cases of this kind," why should the bank be required to?

No answer to this question can be deduced from the statement found in the syllabus of the Towson case that, "in the case of a child's gift of its property to a parent, the circumstances attending the transaction should be vigilantly and carefully scrutinized by the court, in order to ascertain whether there has been undue influence in procuring it," for that scrutiny is called forth by proper allegations of undue influence; a petition relying upon any presumption would be demurrable and invoke no scrutiny as to facts not presented by it.

So, here, the bank was not called upon to scrutinize this transaction, for there was nothing in it suggesting undue influence, if we are warranted in applying the presumptions suggested by the cases from which I have quoted.

POLICE COURT PROSECUTIONS UNDER THE NEW STATUTE.

Circuit Court of Lucas County.

STATE, EX REL CHARLES S. NORTHUP, v. DAVID T. DAVIES, JR., AUDITOR; AND STATE, EX REL LYMAN W. WACHENHEIMER, PROSECUTING ATTORNEY, v. JOHN W. KERR ET AL.

Decided, June 15, 1907.

City Solicitor and Prosecuting Attorney of the Police Court—Effect of Appointment of an Assistant Prosecutor—Fees—Mandamus—Sections 1536-663 and 1536-844.

The appointment of an assistant prosecuting attorney for the police court does not have the effect of terminating the tenure of the city solicitor to the office of prosecuting attorney of the police court. The city solicitor continues to be *ex-officio* police court prosecutor, and the county auditor may be compelled by mandamus to recognize such solicitor's claim to the compensation to which he is entitled by virtue of the statute.

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

These are two suits, one, the title of which is first given, instituted in this court and the other brought into this court by appeal. The first mentioned is a proceeding in mandamus to compel the auditor to recognize the claims of the relator to certain compensation to which he asserts he is entitled as solicitor of the city of Toledo, and, by virtue of that office, prosecuting attorney of the police court. The other action, appealed to this court, is a suit for an injunction to restrain the allowance and payment of the same compensation. Both actions involve the construction of a section of the municipal code, in our latest revision of the statutes designated as Section 1536-663. In the mandamus suit a demurrer has been filed to the second defense in the answer of the defendant Davies, auditor. In the injunction suit a motion has been filed by the defendant, Northup, to strike matter from the amended petition which was filed in this court after appeal of the action. The decision of the demurrer in the one case substantially disposes, upon principle, of the decision

of the motion in the other, and, indeed, no question is presented except that to which I have already referred, the question of the proper construction of Section 1536-663.

The case, by reason of much public discussion, has assumed undue importance. No question of so-called "graft" is involved, and it is of very little consequence to the public whether the compensation which is sought is payable, by a proper construction of the statute, to the city solicitor or to some assistant solicitor who, for some period is, by virtue of this statute, authorized to act as prosecuting attorney in the police court. Our construction of the statute will, in its ultimate result, neither add to nor take from the county treasury one dollar, so far as the application of this compensation is concerned. The statute provides for the election of a city solicitor for the term of two years, and that his tenure of office shall continue until the election and qualification of his successor. He is required to be a practitioner of law in the courts of Ohio; his powers and duties are such as are provided in certain other sections numbered and such as are provided in the act to which I have already referred and all other acts or parts of acts having uniform operation throughout the state and not inconsistent with this act; he is required to do certain duties for the city, and finally, in one of the paragraphs of the section, we have this provision:

"The solicitor shall also be prosecuting attorney of the police court, and shall receive for his service such compensation as council may prescribe, and such additional compensation as the county commissioners shall allow; provided, that where council allows an assistant or assistants to the solicitor, said solicitor may designate an assistant or assistants to act as prosecuting attorney or attorneys of the police court. The duties of the solicitor as prosecuting attorney of the police court shall be such as are provided in Section 1813 of the Revised Statutes; such as are provided in this act, and in all other acts or parts of acts applying to all cities of the state and not inconsistent herewith. In case of the inability or absence of the solicitor or any of his assistants to act as prosecuting attorney of the police court, the provisions of Section 1815 of the Revised Statutes shall apply."

Sections 1813 and 1815, Revised Statutes, mentioned in this section are now known in the latest revision as Sections 1536-

844, 1536-846. It is manifest that the framers of Section 1536-663 took cognizance of the existence of the other two sections mentioned and the application of those sections goes only so far as to provide what shall be the duties of the solicitor as prosecuting attorney of the police court; but there is no suggestion that the compensation shall be such as is provided in the other two sections mentioned, or that the compensation shall be governed by any rules specified in those two sections. The two sections so referred to—Sections 1813 and 1815, Revised Statutes (now Sections 1536-844, 1536-846)—had, I think, been in existence many years, with perhaps some amendments, and were in force at the time when this more recent statute (1536-663), was enacted. We will not search for inconsistencies in the two sections. I am not inclined to think that there are any, so far as this matter of compensation is concerned; but, if there be such, by any construction, the latter enactment will, of course, govern.

Now what is the construction of Section 1536-663? The attorney for the prosecuting attorney and the auditor insist that upon the appointment or designation by the city solicitor of any of his assistants to act as prosecuting attorneys of the police court, his right so to act ceases, and the right to compensation also fails. We are not disposed to adopt this contention. I will spend no time in any elaborate discussion of the paragraph which I have read, but will touch only such salient features as seem to us to make clear its proper interpretation. The statute provides, not that the solicitor shall *act* as prosecuting attorney of the police court, but that he shall *be* prosecuting attorney of the police court. By virtue of his office as solicitor, he is also prosecuting attorney of the police court, and in the same sentence in which the statute makes this provision we have the provision for compensation. The clause is:

"And shall receive for this service such compensation as council may prescribe, and such additional compensation as the county commissioners shall allow."

Emphasis is placed by the assistant county attorney, who represents the prosecuting attorney here and the auditor, upon

the clause in the paragraph beginning with the word "provided," and his idea seems to be, that by this proviso an entire change in the status of the solicitor is made or may be made. The language is: "Provided that where council allows an assistant or assistants to the solicitor, said solicitor may designate an assistant or assistants to act," not to *be,* but to *act* as prosecuting attorneys of the police court. And there is no provision that thereupon the city solicitor shall lose his power or his status as prosecuting attorney of the police court. He is still prosecuting attorney of the police court, so far as any language of this section provides. There is nothing in the section anywhere which says that his office, his official status, as prosecutor shall terminate, when he designates someone else to act. There is no provision here as to the length of tenure of such assistant or assistants; there is no provision that the appointing power—the solicitor himself—shall not also have the power to terminate the period during which such assistant or assistants shall so act, and we are inclined to the view that all of this power is lodged in the city solicitor and remains with him during the time that he is such city solicitor. The statute has practically conferred upon the city solicitor the functions and duties known as those pertaining to the office of prosecuting attorney of the police court.

Again it is to be noted in this section that no provision is made by the section, in terms, for the payment of any compensation to such assistant or assistants. The compensation has already been provided for in the clause preceding the proviso giving to the solicitor power to designate some one to act as assistant, or to act in his stead, temporarily or otherwise, as he may determine. We find nothing in the section as to compensation after the beginning of this so-called proviso, and it seems to us that if the Legislature had intended that his right to compensation should cease immediately upon the appointment of anyone to act as prosecuting attorney in the police court, the Legislature would have so said. It would have been very easy to give expression to such an intent as that; but nothing of the kind has been done.

Again in the last sentence of the section we have the provision

that "in case of the inability or absence of the solicitor or any of his assistants to act as prosecuting attorney of the police court, the provisions of Section 1815 (1536-846) shall apply." The intimation is clearly given by this sentence that the solicitor or any of his assistants designated by him may act as prosecuting attorney of the police court. They may be disabled or they may be absent, but if they are able to act and are present, then they have the power to act. He, as solicitor, has power to continue to act, because he is the prosecuting attorney of the police court, and his assistants have power to act because he has designated them to act; but, in case of the inability or absence of the solicitor, or any of his assistants, then the provisions of the other section apply; to-wit, that when there is a temporary inability or absence of such prosecuting attorney or a vacancy in the office by resignation, death or otherwise, the judge of the police court, or, if there be more than one judge of said court, then the judges thereof shall appoint some competent member of the bar to perform the duties of the office, such appointee to act until the removal of the inability or the return of such prosecuting attorney, and in case of vacancy until his successor shall be elected at the next annual municipal election and has been duly qualified. Said appointee must qualify in the same manner, and has the same power and authority to discharge the same duties, and is subject to the same liabilities, and receives the same salary as the officer whom said appointee succeeds; but in case of inability or temporary absence of such prosecutor the judge may deduct such amount from the salary of such prosecuting attorney. It is not provided that the court shall deduct such compensation or salary from any supposed compensation awarded by this other section (Section 1536-663), to some person who acts temporarily as prosecuting attorney; but it is to be deducted from the salary which is awarded to the officer who holds the office.

There are other expressions in some of these sections that may afford aid to the construction, but I will not prolong this opinion by any special reference to them. It suffices to say that it is the unanimous judgment of the court that the contention of the city solicitor, Mr. Northup, as to the proper construction

of Section 1536-663, should be sustained; and, holding that view, the demurrer to the second defense in Davies' answer in the mandamus suit and the motion to strike matter from the amended petition filed in this court in the injunction suit should be sustained and it will be so ordered.

L. W. Wachenheimer and *B. W. Johnson,* for plaintiff.

J. B. Manton and *James Austin,* contra.

QUESTIONS RELATING TO SEWER ASSESSMENTS.

Circuit Court of Montgomery County.

JOHN W. KING v. THE CITY OF DAYTON.*

Decided, June 16, 1907.

Ordinances—For Sewer Improvements—Notice to the Property Owner—Law Governing Assessment—Pumping Station may be Included in Cost—Benefits—Surface Drainage and Storm Water—Jurisdiction for Reduction of Assessment.

1. A sewer district is not changed by a reference in the resolution of necessity to a part of the territory only, leaving the remainder for future description and improvement.
2. Where the sewer is adequate and so located that it may be utilized in the future, the lands must be regarded as specially benefited, notwithstanding the property is not so improved as to make sewer connections available.
3. A pumping station is a necessary part of a sewer equipment and its cost may be included in the assessment.
4. There is no jurisdiction in a court of equity to reduce a sewer assessment which is not grossly excessive.

DUSTIN, J.; WILSON, J., and SULLIVAN, J., concur.

The sewer districts were never changed. The reference in the resolution of the necessity and the ordinance, etc., to those parts of the district covered by the plan of improvement, as "sewer districts Nos. 6 and 7" was an error of description simply and did not constitute a repealing or amending clause. The ordinance

* Affirming *King* v. *City of Dayton,* 5 N. P.—N. S., 369.

itself was not inconsistent with the sewer district plan already established. It simply covered a part of the territory, leaving the remainder for further disposition. It is competent, however, to assess the whole district for the construction of the main sewer. According to the statute the assessment can not be made in any other way. Should a new main sewer ever be constructed west of Western avenue, the property east of it in the same district will have to help pay for it.

If the notice was misleading and plaintiff did not have his day in court at the time, he has it now and may present his objections.

It is not necessary that property be improved so as to make sewer connections immediately available. If the sewer is adequate and so located that it may be utilized in the future, the lands are specially benefited. The presumption is that the present plan will be perfected so as to include convenient laterals as the city grows. The assessment for the main sewer can be but once and must be now in order to provide prompt payment for its construction.

Conceding that the law in force at the time of the passage of the resolution of necessity applies as to the time of collection. etc., wherein has the plaintiff been prejudiced? The few days difference in interest would be too small for the consideration of a court of equity. Besides, it was an error for which there is a remedy at law.

There was no excess in the amount assessed for the main sewer. The pumping station was a necessary part of the equipment.

The increased cost necessary to make it large enough for the storm water for the entire district should be collected therefrom, because the present surface drainage for that part which is west of Western avenue is but temporary and must inevitably be wiped out by the improvements as they are constructed.

The assessments must be grossly excessive in order to come within our jurisdiction for reduction. We do not find them so. Decree for defendants.

William G. Frizell and *R. G. Corwin,* for plaintiff.

Thomas B. Herrman, City Solicitor, and *Philo G. Burnham,* Assistant Solicitor, contra.

INSANITY OF DEFENDANT IN A DIVORCE ACTION.

Circuit Court of Cuyahoga County.

MARY KERLICK v. THOMAS KERLICK.

Decided, May 11, 1906.

Divorce and Alimony—Property Rights where the Defendant is Insane—Adjudication may Proceed—Trustee for Defendant—Appeal—Sections 5706, 4956 and 5000.

1. Property rights of parties to a divorce proceeding may be adjudicated, notwithstanding the defendant is insane. Whether present insanity is a bar to divorce is not decided.
2. In the absence of any special provision in the chapter of the Revised Statutes on divorce with regard to procedure as to an insane party, the general statutes apply; and the appointment of a trustee for an insane defendant in a divorce proceeding is proper.

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

Error to Cuyahoga Common Pleas Court.

Klein & Harris, for plaintiff in error, cited: Clowry v. Clowry, 16 C. C., 302; Rhude v. Rhude, 33 Bull., 273; Casler v. Bowen, 39 Bull., 4; 14 Cyc., 628, and cases noted under 71; Harrigan v. Harrigan, 135 Cal., 397; Rathbun v. Rathbun, 40 How. Pr. (N. Y.), 328; Stratford v. Stratford, 92 N. C., 297; Mansfield v. Mansfield, 13 Mass., 412; Douglass v. Douglass, 31 Iowa, 421; Mordaunt v. Mordaunt, 41 L. J. Rep. (N. S.), 42; 2 Nelson, Div. & Sep., 669; 2 Bishop, Div. & Sep., Sections 518, 522.

Plaintiff brought her action against the defendant praying for divorce, custody of children, alimony, and that she be decreed to be the sole owner of certain real estate which she claims to have paid for herself, although the record title thereto is in the plaintiff and defendant jointly. Extreme cruelty and gross neglect of duty are alleged as the grounds for divorce.

The petition further alleges:

"Defendant is now an inmate of the Cleveland hospital for the insane, duly committed by the Probate Court of Cuyahoga

County, and is hopelessly insane beyond hope of recovery. All of the grounds of divorce above set forth arose prior to the insanity of the defendant and while he was in good health and of sound mind."

Service was had by delivering copies of the summons and of the petition to the defendant, and like copies for him to Dr. A. B. Howard, suprintendent of the state hospital, in which the defendant is detained.

Thereupon the court of common pleas appointed a trustee for the defendant in the suit, finding that his legal guardian had an interest in the controversy adverse to defendant; and the trustee so appointed, answered, admitting the marriage, birth of children and insanity of the defendant, as alleged in the petition, but denying all other allegations therein.

At a subsequent term, the trial court made the following order in the cause:

"This cause having been duly advanced, came on this day for hearing, whereupon the court without final hearing dismissed the petition of the plaintiff at her costs, for which judgment is rendered against her."

Notice of appeal was given, bond fixed and given, and the case brought into this court under favor of Section 5706, Revised Statutes, which reads as follows:

"No appeal shall be allowed from any judgment or order of the court of common pleas under this chapter, except from an order dismissing the petition without final hearing, or from a final order or judgment granting or refusing alimony, or in cases under Section 5705 (injunction against intemperate husband from squandering property); when judgment is rendered for both divorce and alimony, the appeal shall apply only to so much of the judgment as relates to the alimony; and when an appeal is taken by the wife, she shall not be required to give bond."

In this court a motion is made to dismiss the appeal, but said motion is overruled, as it is clear that the case is applicable as to the property rights of the parties, and we do not now decide whether or not, as to the divorce, an order was made dismissing the petition without final hearing, within the intendment of

the statute, so as to require this court to hear and determine whether a divorce should be granted to the plaintiff.

Further objection is made to this court's hearing the case, based upon the defendant's insanity.

So far as that objection amounts to a demurrer to the petition, it is overruled, for we know no good reason why the property rights of the parties should not be adjudicated, even though the defendant is insane. Whether the present insanity is a bar to divorce, we do not now decide.

But it is said that this case should not be tried, because there is no provision in the chapter on divorce, authorizing the appointment of a trustee who may make a defense for the defendant, which his insanity precludes him from making for himself.

In the case of *Johnson* v. *Pomeroy*, 31 Ohio St., 247, at page 248, it is said:

"An insane person may be sued and jurisdiction over his person acquired by the like process as if he were sane. But when it is made to appear to the court that a party to the suit is insane, it is made the duty of the court by statute (S. & C. 385, Sec. 7) to appoint a trustee to prosecute or defend the suit for and on behalf of such insane party."

The statute referred to is known as Section 5000, Revised Statutes, and is found in the revision and consolidation of the laws relating to civil procedure, enacted May 14, 1878 (75 O. L., 597, 606), but was originally enacted March 14, 1853 (51 O. L., 473, Sec. 7), and then read: "Whenever, in any suit in court now pending, or which may hereafter be instituted, it shall manifestly appear to the court that any person who is party to such suit is an idiot, lunatic or insane person," the court may appoint a trustee.

This act was passed three days after the Legislature had adopted the original code of civil precedure (51 O. L., 57), and the act concerning divorce and alimony (51 O. L., 377), both of which were also carried into the revision and consolidation of the laws relating to civil procedure, above referred to.

The code provided for "one form of action which shall be called a civil action," and the provisions regarding divorce

constituted a "special proceeding," so designated in the revision (75 O. L., 726), and so held by the Supreme Court. *State* v. *Cook,* 66 Ohio St., 566, 573.

Section 604 of the code of 1853 (51 O. L., 161) provided:

"Until the Legislature shall otherwise provide, this code shall not affect * * * proceedings under statutes relating to dower, divorce, or alimony; * * * but such proceedings may be prosecuted under the code, whenever it is applicable."

This section dropped out in the revision, and in its place appears Section 4956, Revised Statutes, which reads:

"Where in part three of this revision special provision is made as to service, pleadings, competency of witnesses, or in any other respect, inconsistent with the general provisions in this title, the special provisions shall govern, unless it appear that the provisions are cumulative."

Considering this history of the statutes, we have concluded that as there is no special provision in the chapter on divorce with regard to the procedure as to an insane party the general statutes on the subject apply, and that a trustee was properly appointed for the insane defendant.

The motion to dismiss the petition is, for the reasons stated, overruled, and the case is assigned for trial upon May 7, 1906, immediately upon our return from the circuit.

Klein & Harris, for plaintiff in error.

Mathews & Orgill, contra.

MOMENTARY FORGETFULNESS IN A PLACE OF DANGER.

Circuit Court of Hamilton County.

J. Q. MARTIN, ADMINISTRATOR, v. CINCINNATI TRACTION CO.

Decided, February 15, 1908.

Negligence—Street Car Conductor Knocked from Car—At a Point of Known Danger—Roof Projected Almost to Line of Car—Unfortunate Warning Caused Accident—Assumed Risk—Pleading—Cause Arrested from Jury.

Where a street car conductor, in response to the warning "Look out," projects his head beyond the line of the car and is struck by a projecting roof and killed, the question of contributory negligence between him and the superior who gave the warning would be one for the jury; but in the absence of any averment that the conductor did not know of the projecting roof, and the evidence indicating that he must have known of it if he exercised ordinary care, it was not error for the court to take the case from the jury on the ground of assumed risk.

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

The negligence charged in the petition is as follows:

"Said building or shed was negligently and carelessly constructed and maintained by said defendant in this, that the roof of said building or shed was so negligently and carelessly constructed that said roof extended or projected over the building or shed to the danger of the lives of those who were ordered, and of the intestate, to take cars into the barn or car shops of the defendant over the tracks adjoining said building or shed, all of which was known to the defendant. That on said day while said building or shed was so maintained plaintiff's intestate was directed and ordered by the defendant to take, as a conductor, a disabled car to the Chester Park shops, * * * and while placing said car where directed by the defendant, and without fault or negligence on his part, * * * was crushed between a Cincinnati traction car and the extended or projecting roof."

The testimony shows that the car would pass the projecting roof, and could be operated in safety by the employes, if they remained within the outer lines of the car; and that both the motorman and the deceased conductor were looking forward

when the car barn boss, who was directing them where to place the car hallooed "look out," and "he put his head out."

The sudden call of the boss to "look out" seems to have been the only occasion for the conductor putting his head out beyond the line of the car. In his effort to obey the warning and ascertain the cause of it, he momentarily forgot the existence of the obstruction and looked out on the side of the car where the boss was standing on the running board. Under such circumstances he was not guilty of contributory negligence, nor was the conduct of the boss negligent; but if it was, there is no such charge in the petition.

It may be observed, however, that the conductor was probably dangerously near the obstruction when the warning was given, as there appears no other reason for it. In that event the question of contributory negligence would be one for the jury, but in neither event could the court determine the question as matter of law. If the negligence of the defendant in constructing the projecting roof be admitted (and we are not prepared to say that it would be), then the only ground upon which the court was justified in arresting the case from the jury was the assumed risk.

While the plaintiff avers in his petition that the defendant knew of the dangerous condition of the place where the work was done, he fails to aver that it was unknown to his intestate. The evidence also showed that it was obvious and must have been known to the intestate, if he exercised ordinary car. It appears therefore from the pleadings as well as the evidence that he assumed the risk. *Coal & Car Co.* v. *Norman*, 49 O. S., 598; *The Pennsylvania Co.* v. *McCurdy*, 66 O. S., 118.

The evidence of the plaintiff presented one of those unfortunate cases for which the law affords no relief, and the court properly instructed the jury to return a verdict for the defendant.

Judgment affirmed.

C. L. Swain and *Thos. L. Michie*, for plaintiff in error.

Outcalt & Hickenlooper, for defendant in error.

FATAL IRREGULARITIES IN A COURT HOUSE CONTRACT.

Circuit Court of Richland County.

THE STATE OF OHIO, FOR THE USE AND BENEFIT OF RICHLAND COUNTY, BY C. H. HUSTON, PROSECUTING ATTORNEY, v. F. H. WILLIAMS ET AL.

Decided, January, 1908.

Contracts—Bond for the Faithful Performance thereof—Action on Bond—Pleading—Necessity of Compliance with Section 799—Procedure Where Contractor Fails to Complete the Work—Provisions as to County Contracts not for the Benefit of the Sovereign Power only—When a Judgment Should be Affirmed.

1. A judgment should be affirmed, if among the defenses interposed there was any one that was valid, or if there is any other sufficient reason under the law for sustaining the judgment.
2. There can be no recovery in an action against a contractor and his sureties for damages by reason of failure to complete a contract entered into with county commissioners, where there is no averment that the contract relied on was one of binding force and effect.
3. It is also necessary to aver compliance with Section 799, Revised Statutes, by alleging endorsement of the contract by the prosecuting attorney and performance of all the other pre-requisites to a complete and valid contract.
4. These pre-requisites are not for the benefit and protection of the sovereign power alone, but they are of the essence of the contract, which without them becomes null and void.

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

This proceeding in error is prosecuted to reverse the judgment of the court of common pleas. The plaintiff in error was plaintiff in the case below and defendants in error were defendants therein. To the amended petition filed by plaintiff the defendants each filed general demurrers.

In the court of common pleas these general demurrers were overruled, and thereupon defendants filed joint and several answers containing fifteen separate defenses. To each of these defenses except the first the plaintiff filed demurrers, and the de-

murrers were sustained to each excepting the third and fifth.

The case was heard by the common pleas court, a jury being waived, and a judgment rendered in favor of the defendants. A motion for a new trial was filed, overruled and exceptions taken, and this proceeding is now brought in this court to reverse the judgment of the common pleas court.

We may say at the outset that the judgment of the court of common pleas must be affirmed, if there is a single valid defense made in this case, or if, under the law, there is any other sufficient reason for sustaining the judgment.

The Supreme Court, in the 23d O. S., at 626, thus lays down the rule as to the verdict of a jury:

"Where the jury, by their verdict, 'find the issues joined in the cause' in favor of one of the parties, this is to be taken as a verdict finding each of the issues therein for such party. In such case, if the issues are such that a finding of either of them in favor of the successful party entitles him to the judgment rendered, the judgment will not be reversed for error in the instruction of the court relating exclusively to the others."

In the 60 O. S., page 69, the Supreme Court lays down the rule:

"Where two issues are presented in the pleadings for the determination of the jury, and there is a verdict finding the issues for the defendant, and such finding, on either issue, entitles him to a general judgment in his favor, and that judgment is rendered on the verdict, such judgment will not be reversed for error in the instructions of the court to the jury relating exclusively to one of the issues."

The Supreme Court, in the recent case of *Ben Dickerson* v. *The State of Ohio,* held that the reviewing court was entitled to look into the record and, if the judgment which was in review was right for any reason, it was the duty of the reviewing court to affirm the same.

The amended petition that was filed in the court below was based upon a bond which the defendants, Williams and Beaver, as principals, and Esswein, Shinnick and Carter, as sureties, had executed and delivered to the board of county commissioners of Richland county, in the sum of $15,000.

The condition of the bond was that—"F. H. Williams and H. H. Beaver have this day submitted to the board of county commissioners a proposal for labor and materials for remodeling the court house at Mansfield, Ohio, as set forth in the proposal hereunto attached. Now, should the said F. H. Williams and H. H. Beaver, within ten days after receiving notice to that effect, enter into a contract to complete said work, and after entering into a contract faithfully to carry out all the conditions, implied and stated, in said contract, a full understanding of which is hereby acknowledged, and leave the building and premises free from all liens and claims whatsoever, chargable to said county commissioners, then this obligation to be void and of no effect; otherwise to remain in full force and virtue in law."

The petition proceeds, after giving a copy of the bond and reciting its conditions, and says that the board of county commissioners theretofore accepted the proposal of Williams and Beaver and *entered into a contract* in writing with the said Williams and Beaver to remodel the court house of Richland county. The petition further avers that Williams and Beaver failed, neglected and refused to complete the remodeling of the court house, according to the terms of said contract, wholly abandoning said contract and refusing to complete the same. They further allege that the commissioners of Richland county complied with all the terms of their contract on their part to be performed.

It will be noted that, by the averments of this petition, the plaintiff does not allege that Williams and Beaver entered into "a valid or binding contract," that they entered into "a contract agreeable to the statute in such cases made and provided," that they entered into "a contract according to law," or that they "duly entered into a contract." So that there is a total lack of averments in this petition that the "*contract,*" which was so claimed to have been entered into between Williams and Beaver and the commissioners was of any binding force and effect whatever.

The Supreme Court, in the 65 O. S., at page 219, thus states the rule:

"To state a good cause of action against a municipality in matters *ex contractu*, the petition must declare upon a contract, agreement, obligation or appropriation made and entered into *according to statute.*"

So that, at the outset of this case, so far as there is any averment in this petition, it totally fails to state that the "contract," or alleged contract, that it is claimed was entered into between Williams and Beaver, was of legal and binding effect.

We are also of the opinion that it would be necessary for the plaintiff in this case to set forth the facts showing a compliance with the statute, such as is required by Section 799, Revised Statutes, alleging the endorsement by the prosecuting attorney and all the other pre-requisites to a complete and valid contract.

It is elementary, and as Judge Davis states the rule in 74 O. S., 92, "there is no proposition of law more firmly settled in this state than that sureties are not liable beyond the letter of their contract." These sureties, defendants in this case, could not be bound beyond the strict letter of their contract. Their obligation was that, if said Williams and Beaver, after entering into the contract, would faithfully fulfill and carry out all the conditions stated in the contract, then the obligation was to be void and of no effect; otherwise to remain in full force and virtue in law. We are clearly of the opinion that this presupposed an entry into, on the part of the principals, of a valid, legal and binding contract.

But it appears from the petition itself, and also from the record in the case, that Williams and Beaver either wholly abandoned or failed to complete their contract according to the terms of the contract that they had entered into. The contract which it is claimed they had entered into with the commissioners provided that, after a certain certificate was made by the architect and after written notice given to the contractors, the commissioners were at liberty to enter upon the premises and complete the same. And the petition avers that said certificate was furnished and the county commissioners proceeded, under the terms and provisions of said contract and in

accordance with the specifications and supplemental specifications, details and plans, and with due diligence, to complete said uncompleted contract for the remodeling of the said court house. And then the petition closes with the averment that they have completed the uncompleted contract in so far as they had power to do so and have paid for the completion of the work.

Section 799 of the Revised Statutes provides, in respect to public buildings and bridges, in contracts of this character—

"If said contractor or contractors fail or refuse to proceed with the work specified in his or their contract or contracts, the commissioners shall have power to declare *such contract or contracts annulled and shall proceed to make another contract or contracts for the completion of such work, in accordance with the provisions of this chapter.*"

Now, the provisions of this chapter provide that there shall be competitive bidding in all cases where the amount is over $1,000. It is unnecessary to quote at length the statutes governing this provision.

As we have called attention, this petition affirmatively states that they proceeded to complete the uncompleted contract in so far as they had power to do so, but there is not a single averment that they attempted to comply with the law in a single respect, so far as letting the contract by bids, having the subsequent contracts endorsed by the prosecuting attorney, or having the certificate of the auditor that the money was in the treasury therefor. It does appear in the record in this case that they did attempt to let the contract by competitive bidding and that one Whissler made a bid which was, as shown by the record, above the amount the auditor certified was in the fund to the credit of the building fund for that purpose. The record shows that they rejected the bid on the ground that it was illegal to accept the same, and then, in total disregard of the law, as we find in the record, they entered into separate contracts, without any competitive bidding, without having the contracts endorsed by the prosecuting attorney, or without, it seems to us, complying with any of the provisions which are provided for the safeguarding of the public funds. So that, so far as the sureties are concerned, this petition is fatally defective; and,

so far as the record goes, we think it shows affirmatively that, at the time of the default of the principals, Williams and Beaver, the county commissioners wholly failed to observe the law in respect to buildings of this kind.

In respect to the principals, Williams and Beaver, if no valid contract was entered into between them and the commissioners, they could not be held to complete the contract, and there would be no default on their part if, before its completion, they had abandoned, failed or refused to complete the same. If the parties to this contract were bound to complete said contract, it would present the anomalous position that they could be compelled to give their time, labor and effort to supply the county with a remodeled court house, and the commissioners at the end refuse to pay, or a tax-payer enjoin the payments, and these parties be without remedy.

But it is urged on our attention and claimed earnestly in argument that these provisions are for the benefit of the sovereign power, and that the parties to the contract can not take advantage of the failure to comply with the law. For the failure to have a contract endorsed by the prosecuting attorney, the statute says that the contract shall be *null* and *void*, and for failure to comply with the other provisions, certifying the money, etc., the statutes provide it shall be *null* and *void*, and you can not add to or take from the clear and expressive language of the statute.

If anything were needed to interpret the meaning of these words, we call attention to a case in the 60 O. S., at page 425, where the court, speaking through Judge Burket, uses the following language:

"No notice of the proposed letting was published, no record of the contract was entered in the minutes of the commissioners by the auditor, no plans or specifications were ever made, approved and deposited with the auditor, no contract was ever submitted by the commissioners to the prosecuting attorney for his approval, and none was ever approved by him. These omissions are fatal to the validity of the contract and, by force of the above cited sections of the statute, *the contract is totally void and imposes no obligation on either party to it.* The statutes are notice to the world as to the extent of the powers of the com-

missioners, and the bridge company is bound by that notice. It knew, or was bound to know, that the commissioners had no power to thus enter into a contract, and that a contract thus attempted to be entered into would be *null* and *void*, and *would not bind either party.*"

As we view it there was no valid contract between the commissioners and Williams and Beaver and none is alleged in this petition and, therefore, there could be no recovery.

Upon the issues made by the answer in this action, we think that the judgment of the court upon the third and fifth defenses was sustained by the proof in this case, and the judgment of the court of common pleas was right and is affirmed. Exceptions will be noted and the cause will be remanded to the court of common pleas for execution.

Brucker & Cummings, Skiles, Green & Skiles and *C. H. Huston*, for plaintiff in error.

Douglass & Workman, Sater & Seymour, John J. Adams and *George Crane*, for defendants in error.

REQUIREMENTS FOR STEAM ENGINEERS' LICENSES.

Circuit Court of Cuyahoga County.

E. R. THEOBALD v. THE STATE OF OHIO; W. S. JUDD v. THE STATE OF OHIO, AND FRANK STUPENS v. THE STATE OF OHIO.

Decided, January Term, 1908.

Licenses as Applied to Occupations—Amended Law Requiring Examinations of Steam Engineers of Certain Classes not Unconstitutional —Examiners not Autocrats with Unlimited Discretion—Requirements as to Qualifications Sufficiently Definite—Quite as Much so as Those Applying to the Professions of Law, Medicine, or Teaching—Provisions as to Existing Licenses not Objectionable—Sections 4364-89l and 4364-98q.

The present statutes relating to examination and licensing of steam engineers of certain classes is not in contravention of the state constitution, in that the chief examiner is clothed with legislative powers with reference to the qualifications that shall be required

of those to whom licenses may be issued; or because of exemption of engineers holding licenses from examination during the remainder of the year the license had to run; or because in some quarters the law, contrary to its express provisions, has been construed to permit engineers holding licenses to obtain a renewal of their licenses without examination.

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

Error to the court of common pleas.

These cases all involve the same question and a decision of one disposes of all. Theobald was prosecuted before a justice of the peace, and each of the others in the police court of the city of Cleveland; each was charged with having unlawfully operated and caused to be operated a stationary steam boiler and engine, in violation of the statutes of Ohio; each was found guilty and the judgment in each case was affirmed on error in the court of common pleas. Each did operate an engine and boiler in violation of the provisions of Section 4364-89*b*, Revised Statutes, which reads:

"That it shall be unlawful for any person to operate a stationary steam boiler or engine in the state of Ohio, of more than thirty (30) horse-power, except boilers and engines under the jurisdiction of the United States, and locomotive boilers and engines, without having been duly licensed so to do as herein provided," etc.

It is urged that the statute under which these convictions were had is in contravention of the provisions of the Constitution. Section 4364-98*q*, provides:

"Any person who desires to act as a steam engineer shall make application to the district examiner of steam engines for a license so to act, upon a blank furnished by the examiner, and shall successfully pass an examination upon the following subjects: the construction and operation of steam boilers, steam engines and steam pumps, and also hydraulics, under such rules and regulations as may be adopted by the chief examiner, which rules and regulations, and standard of examination, shall be uniform throughout the state. If, upon such examination, the applicant is found proficient in said subjects, a license shall be granted him to have charge of and operate stationary steam boilers and engines of the horse power named in this act. Such license shall continue in force for one year from the date the

same is issued, provided, however, the district examiner may, upon written charges, after notice and hearing, revoke the license of any person guilty of fraud in passing the examination, or who has become insane or who is addicted to the liquor or drug habit to such a degree as to render him unfit to discharge the duties of steam engineer."

Prior to the enactment of the present statute, to-wit, on the 1st day of March, 1900, an act was passed by the General Assembly on this same subject. That act, like the present one, provided for examinations of those desiring to operate steam engines, and one of its provisions was (Section 6):

"Any person who desires to act as a steam engineer, shall make application to any district examiner of steam engineers for a license so to act, upon a blank furnished by the examiner, and if, upon examination, the applicant is found trustworthy and competent, a license shall be granted him, to have charge of, or to operate any steam plant. Such license shall continue in force for one year, unless after proper hearing it is sooner revoked for intoxication or other sufficient cause, the said license to be renewed yearly."

The act last spoken of was declared by the Supreme Court to be unconstitutional in the case of *Harmon* v. *The State*, 66 Ohio St. Rep., 249. In the opinion in that case it is pointed out that by the section last quoted the examiner is made the exclusive judge as to whether an applicant is trustworthy and competent. No standard is furnished by the General Assembly as to qualification, and no specifications as to wherein the applicant shall be trustworthy and competent, but all is left to the opinion, finding and caprice of the examiner. He is an autocrat with unlimited discretion, without rules prescribing the qualifications of applicants for license, only so that he finds them trustworthy and competent.

The present act differs from the former in that it is provided by the present act that the Governor of the state with and by the advice and consent of the Senate, shall appoint one chief examiner of steam engineers, and said chief examiner, with the approval of the Governor, shall appoint eight district examiners.

The same provision is found in the old act in this regard, but in the present statute there is found what is not found in the old, that the rules and regulations under which examinations shall be held shall be uniform throughout the state, and that these rules and regulations shall be adopted by the chief examiner. Now it is said that practically the objections to the old statute exist as against the new.

The court said, in the case referred to, that a district examiner could in fact make the law for his district, limited only by his will as to what shall constitute the standard of the qualification of engineers, and that this was granting legislative authority to this examiner.

Under the provisions of the present statute, as has already been shown, the rules and regulations for the examination are fixed by the chief examiner, and are to be uniform throughout the state, and that seems to us clearly to make him not a legislative but an administrative officer, with power only to execute the statutes enacted by the General Assembly.

It is said that no standard of qualifications is fixed, except that upon examination the applicant must be found proficient in the subjects upon which he is to be examined. In the former act no subjects for examination were mentioned. Here the statute fixes just what subjects the applicant is to be examined in. How the Legislature could have more definitely fixed what the examiners shall do is not easy to understand. If a percentage of answers had been fixed or a percentage of qualifications had been fixed by the statute, it would still have been with the examiner to say what degree of qualification was indicated by any per cent. of marking. An inspection of the statutes in relation to the examination to be given to those desiring other employments may not be found unprofitable.

Section 559, Revised Statutes, provides for the examination of those desiring to practice law in Ohio, and reads:

"When a person applies to said court (the Supreme Court) for admission to the bar, he shall be examined by the court or two of the judges touching his fitness and qualifications, and if on such examination the court or judges are satisfied that he is of good moral character and has a competent knowledge of

the law and sufficient general learning, an oath of office shall be administered to him," etc.

The Supreme Court is permitted to fix and has fixed rules for the educational requirements of those who may be admitted to the examination, but so far as we know it has never been said that this was granting legislative authority to the court.

It is provided in reference to physicians by Section 4403, Revised Statutes, that a board of examiners shall be appointed and that this board shall formulate rules to govern its action.

In Section 4403*c* it is provided in reference to physicians that:

"All examinations shall be conducted under the rules formulated by the board. Each applicant shall be examined in anatomy, physiology, pathology, chemistry, materia medica, and therapeutics, the principles and practice of medicine, surgery, obstetrics, and such other subjects as the board may require. The applicant shall be examined in the materia medica and therapeutics and the principles and practice of medicine, of the school of medicine in which he desires to practice, by the member or members of the board representing such school.

"If an applicant passes an examination satisfactory to the board, and has paid the fee as hereinafter provided, it shall issue its certificate to that effect," etc. Notwithstanding these provisions it has nowhere been suggested, so far as we know that legislative authority was deligated to the board of examining physicians.

The provisions of the law in reference to the examination of teachers for our public schools (Section 4070, Revised Statutes) are that the board of examiners shall make all needful rules and regulations for the proper discharge of its duties and the conduct of its work, subject to statutory provisions and the approval of the state commissioner of common schools.

Section 4071*a* provides that the questions for all county teachers examinations throughout the state shall be prepared and printed under the direction of the state commissioner of common schools. We have never heard it suggested that this was delegating legislative powers to the commissioner of schools. And, under Section 4074, it is provided that the teachers in elementary schools shall be examined on the subjects of orthogra-

phy, arithmetic, reading, writing, English grammar and composition, geography, history of the United States, including civil government, physiology, including narcotics, literature, and that the applicant possesses an adequate knowledge of the theory and practice of teaching.

There is nothing suggested in any of these statutes to the several provisions of which attention has been called that undertakes to fix a standard in any other way than to say that the applicant must show sufficient knowledge upon the several subjects of examination.

Surely there is no good reason why one desiring to operate a steam engine should have a standard of qualification fixed more definitely than one who desires to teach school, or practice medicine or law. The statute under consideration is not subject to the criticism in this regard that the statute considered in the case of *Harmon* v. *State, supra*, was subject to.

It is said however that Section 10 of the act now being considered, which is Section 4364-89*u* of the Revised Statutes, is clearly in contravention of the Constitution. That section reads in part:

"Provided that all persons holding license issued to them under the act of the General Assembly of the state of Ohio, passed March 1, 1900, shall not be required to submit to a further examination during the period covered by such license first issued. But such former license shall evidence the qualifications of such person to operate the kind of steam plant, and for the period as therein designated, unless such license is sooner revoked for cause."

Attention is called to Section 7 of the act now under consideration, being Section 4364-89*r*, Revised Statutes, which reads:

"Any person to whom a license is issued under the provisions of this act shall upon application at the expiration of one year from the date thereof be entitled to a renewal thereof for one year, unless the district examiner of his district for the cause or causes set out in Section 6 of this act, upon notice and hearing, should refuse such renewal."

Now as to Section 10 (4364-89*u*), it may be said, first, that even though this section were held to be unconstitutional, the

persons provided for in this section are simply those who at the time the present statute went into effect were holding licenses issued under the former act, and since no such license could extend beyond one year from the time of its issuing, it can not be supposed that this small period of time for which some were permitted to operate engines after the present act became operative, was an inducing cause for the enactment of the provisions in respect to the examination of those who desired to become engineers. Further than that this act, extending the privilege to those who were already licensed under the former act for the short time they would be permitted to operate, is of too small consequence for the courts to say that it is in contravention of the Constitution.

In any event this has long ceased to be a practical question, for the present statute went into operation on the 1st of May, 1902, and all those permitted upder the provisions of Section 10 to operate engines have long since lost that privilege. It will be noticed by Section 7, hereinbefore quoted, that it is only those who have obtained a license under the present act, who are entitled to a renewal, without further examination. Those spoken of in Section 10 of the present act are not entitled to such renewal. It is those who have obtained a *license* under the present act who may have a renewal.

It is said in argument that the general construction which has been given to this statute by engineers and examiners is that those who were permitted by this Section 10 to continue their occupation until the expiration of the time for which their several licenses were issued, were entitled to have such licenses renewed without examination. Whoever has given it this construction has done so in violation of a provision of law expressed in language as plain as any language can well make it, and it behooves all engineers to take notice now that they were not entitled to a renewal of their licenses granted under the former act, and it behooves the examiners to take notice that they are not authorized to issue any such renewals. The language of the statute, is so plain that "a wayfaring man though a fool need not err therein."

The judgment of the court of common pleas in each of these several cases is affirmed.

Ford, Snyder & Tilden, for plaintiffs in error.

Gage & Wilbur, for defendant in error.

INJURY FROM PROJECTING ARM FROM CAR.

Circuit Court of Hamilton County.

CINCINNATI, GEORGETOWN & PORTSMOUTH RAILWAY CO. v. AUGUSTUS BURKHARDT ET AL.

Decided, February 15, 1908.

Negligence—Pleading—Amendment—Charge of Court—Speed and Construction of Car—Knowledge of Plaintiff as to Danger.

1. In an action for injuries to the arm of plaintiff while it was projected from a window of the car in which he was a passenger, the averment that while he "was sitting in said car with his arm on the window sill, it was thrown out of the window by a sudden jerk or movement of the car," states a good cause of action, when taken in connection with allegations as to the dangerous construction of parallel tracks and the proximity of the cars to each other.
2. In the absence of allegations or evidence as to improper construction or rate of speed of the car, it is error to instruct the jury with reference to those matters.
3. The proper test as to knowledge of danger under such circumstances is not that possessed by plaintiff, but that of persons of ordinary care and prudence when placed under like circumstances.

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

The first error urged by the plaintiff in error is that the verdict is against the weight of the evidence; but upon an examination of the record we can not so hold.

We do not think there was any error in the court in allowing the plaintiff to amend his petition by inserting the words therein, "while plaintiff was sitting in said car with his arm upon the window sill, it was thrown out of the window by a sudden jerk or movement of the car." In other words, by this amendment the plaintiff states that his arm was not "intentionally and need-

lessly projected out of the window of the car." The amended petition, therefore, alleges a good cause of action.

The negligence complained of is that "by reason of the dangerous construction of the tracks of the company" at the point where the accident occurred, "and the dangerous proximity of the cars to each other" at that point, the arm of the defendant in error was injured without any fault on his part, the same being projected "unintentionally and needlessly out of the window of the car."

This was the issue, and the case was tried upon that theory. This being so, it was error for the court to charge the jury relative to the operation of the cars at an improper rate of speed, or as to the construction of the cars, as there was no evidence upon these points to show improper speed or faulty construction.

We think charge No. 1 is too broad and includes in it matters not set up in the petition or claimed by the evidence.

Charge No. 2 is erroneous in that the "knowledge of the plaintiff" is not the test, but the knowledge possessed by a person of ordinary care and prudence under the same circumstances.

Charge No. 6 is opposed to the rule laid down in *Railway Co.* v. *Hancock*, 75 O. S., page 88. We see no objection to charges 4 and 5.

For above reasons the judgment below is reversed.

Frank F. Dinsmore, for plaintiff in error.

Murray Seasongood and *Harry C. Busch*, contra.

POWER TO REMOVE INFIRMARY SUPERINTENDENT.

Circuit Court of Richland County.

O. J. ZEIGLER v. B. FRANK PALMER.*

Decided, September Term, 1905.

Office and Officer—County Infirmary Suprintendent an Agent only—Appointment of, a Matter of Contract—Removal of, may be Effected, When—Section 962 as Amended.

1. A superintendent of a county infirmary is not a public officer, but a mere agent of the infirmary directors, who are a body corporate to contract and be contracted with; and into any contract by an infirmary board for the employment of a superintendent there is written as one of its terms that he shall not be removed during the term of his employment, except for cause.
2. Injunction is the proper remedy to prevent interference with a county infirmary superintendent in the performance of the duties of his position or the enjoyment thereof.

Kerr & LaDow cited for the defendant: Reemelin v. Mosby, 47 Ohio St., 570; State v. Craig, 69 Ohio St., 236; State v. Wilson, 29 Ohio St., 347; State v. Brennan, 49 Ohio St., 33; 19 Am. & Eng. Enc. Law (1st Ed.), 382, 668, *et seq.*; United States v. Hartwell, 73 U. S. (6 Wall.), 385; State v. Jennings, 57 Ohio St., 415; State v. Halliday, 61 Ohio St., 171; Walker v. Dunham, 17 Ind., 483; Dean v. Healy, 66 Ga., 503; Opinion of the Justices, 3 Me., 481; State v. Putnam, 35 Iowa, 561; State v. Board of Pub. Works. 51 N. J. Law, 240; State v. Gardner, 43 Ala., 234; State v. McGonagle, 5 C. C.—N. S., 292; Bender v. Cushing, 14 Dec., 65; Franklin County v. Ranck, 9 C. C., 301; State v. Craig, 69 Ohio St., 236; Harding v. Eichinger, 57 Ohio St., 371; State v. Taylor, 12 Ohio St., 130.

TAGGART, J.; MCCARTY, J., concurs; DONAHUE, J., dissents in a separate opinion.

This case originated in the Court of Common Pleas of Richland County by the plaintiff, Zeigler, filing his petition and seeking an injunction against B. Frank Palmer, restraining him from

* Affirmed by the Supreme Court, 76 Ohio St., 210.

interfering with his duties and labors as superintendent of the county infirmary, alleging that said B. Frank Palmer was in possession of and remaining in said infirmary building, and that he obstructed the plaintiff in his work and duty and still threatens to obstruct him in the discharge of his duties in the future. A temporary injunction was granted and the case was heard, and on May 8, a perpetual injunction was granted in the case. The defendant, B. Frank Palmer, appeared and by consent of parties the case was heard in this court on the records in the contempt proceedings.

It is urged upon our attention that the defendant is and was the incumbent of the superintendency of the infirmary building of the infirmary of Richland county, Ohio, and under Section 962, Revised Statutes, no proceeding having been commenced against him, that he was entitled to remain and be in possession of the buildings and exercise the duties and enjoy the emoluments of the office of superintendent of the county infirmary; that notwithstanding the infirmary directors some time prior to April 1, had duly elected the plaintiff, O. J. Zeigler, to that position, and had notified the defendant that his term would expire on April 1, he pretended to remain in said building and exercise said duties.

It is now urged in behalf of the defendant that he was an officer, and the action should have been one of quo warranto. It is further urged in his favor that as he was an officer he could not be removed as such superintendent under the statutes unless charges were preferred and cause shown for such removal.

An examination of the statutes of Ohio and the history of the legislation in respect to superintendency of infirmaries leads a majority of this court to the conclusion that he was not an officer, but that he was simply an agent of the infirmary directors, who are a body corporate to contract and be contracted with; that an appointment or designation of a superintendent is not efficacious to accomplish anything either as creating an employment or designating an office, but under the statutes the infirmary directors must agree with a proposed incumbent as to the terms of employment, and he must accept the proposal so made.

Before the amendment to the statutes as suggested by counsel he was removable at pleasure, so that any contract that the infirmary directors in their corporate capacity might make with any proposed superintendent would have written in before this amendment that he was removable at the pleasure of the infirmary directors. In the opinion of the majority of the court, the amendment simply changed the statute so that into any contract of employment that might thereafter be made for any definite term there would be written, as one of its terms, the law of the state, that he should not be removed during said term of employment without cause, and the majority of the court are of the opinion that he having accepted employment, and by the terms of his employment the contract ceased and determined on April 1, and he had no longer any right to be and remain on said premises, or in any wise to interfere or obstruct the plaintiff who was then the incumbent and superintendent of the Richland county infirmary.

The judgment of the court will be, that the defendant be perpetually enjoined from interfering with the plaintiff in the enjoyment and duties of his office as superintendent, as prayed for.

Exceptions will be noted in favor of the defendant; twenty days for finding of facts; motion for new trial will be overruled; statutory time for bill of exceptions.

The case of *B. Frank Palmer* v. *O. J. Zeigler,* No. 866, presents the same questions and by consent of counsel was heard on the records as above stated. A majority of the court find against the contention of the plaintiff for the reason above stated.. His petition is dismissed at his costs; motion for new trial overruled and exceptions; twenty days for finding of fact, and statutory time for bill of exceptions.

DONAHUE, J.

By act of the Legislature passed April 12, 1876 (73 O. L., 235), it is provided that the board of directors (infirmary) shall appoint a superintendent who shall reside in some apartment of the infirmary or other building contiguous thereto, and shall receive such compensation for his services as the board shall

fix; he shall perform such duties as the board shall impose upon him and be governed in all respects by the rules and regulations of the board, and may be removed by them at pleasure. This legislation to my mind does not look to the entering into of a contract by the infirmary directors and superintendent, but simply provides that they shall have the power to appoint him and remove him at pleasure.

On April 26, 1898 (93 O. L., 262; Section 962, Revised Statutes), this section was amended by the General Assembly of Ohio, and it now reads as follows:

"The directors shall appoint a superintendent, who shall reside in some apartment of the infirmary or other building contiguous thereto, and shall receive such compensation for his services as they determine. He shall perform such duties as they may impose upon him, and may be governed in all respects by their rules and regulations, and he shall not be removed by them except for good and sufficient cause."

The language of this statute precludes the idea of any fixed term. The board has the absolute power to fix compensation, rules and regulations. It has no power to remove except for good and sufficient cause. If it be permitted infirmary directors to enter into a contract with the superintendent for a term, the provisions of this section may be absolutely and entirely avoided, and the change in legislation might as well not have been enacted.

The reasons moving the Legislature to amend this section are not important. It is clearly intended to serve some purpose, and that purpose undoubtedly is in the line of better service for all public eleemosynary institutions, and if a superintendent is to be constantly menaced by the power of the board of infirmary directors to remove him, he is not the free agent that he ought to be in the management of that important public charity. But I have no desire to go into speculations as to the reasons for the change; the change was made and it now reads that the superintendent shall not be removed except for good and sufficient cause.

This is not the only legislation of this character in Ohio; there has been a great deal of a similar character. The new municipal

code, 96 O. L., 75, Section 167 (1536-703), provides that no officer or employe in the department of public safety shall be removed or discharged except for cause, and this does not apply merely to the officers thereafter appointed, but the last paragraph of the same section provides than no officer, secretary, sergeant, patrolman, fireman or other employe serving in the police or fire departments of any city in the state at the time this act goes into effect, shall be removed or reduced in rank or pay except in accordance with the provisions of this act.

In the case of *State* v. *Sullivan,* 58 Ohio St., 504, the court, in dealing with a statute of this character, says:

"The power of removal from office, conferred upon a mayor, in these words, 'for neglect of duty or misconduct in office, the mayor of such city may remove any member of said board,' is a special authority, and must be strictly construed. Such power can not be exercised arbitrarily, but only upon complaint, and after hearing had in which the officer is afforded opportunity to refute the case made against him."

The evidence in these cases shows that no attempt was ever made to remove this superintendent for cause. The appointment was made upon the theory that his term of office had expired.

After the amendment of this Section 962, Revised Statutes, in 1898, and some time in 1899, the board of directors of this county did appoint B. Frank Palmer superintendent of the county infirmary. It is presumed that such appointment was made under favor and by authority of this section. It is true that there is an attempt to limit this appointment to a term of one year. Under the appointment he qualified, gave bond and took the oath of office. From time to time thereafter the evidence discloses that there was an attempt to make a further appointment of the same individual as superintendent of the county infirmary, and such a resolution was entered upon the record, but the evidence is uncontradicted that he paid no attention whatever to these appointments, and never qualified thereunder or furnished any new bond, and in no manner or form acquiesced therein. I am of the opinion that when he was appointed after the amendment of this section, he was appointed

until he should be removed by said board of directors for good and sufficient cause.

For these reasons I dissent from the opinion of the majority of the court in these two cases.

STREET IMPROVEMENT ASSESSMENTS FOR STREET INTERSECTIONS.

Circuit Court of Lucas County.

MARIE BURR ET AL v. PETER PARKER, TRUSTEE, ET AL.

Decided, February 16, 1907.

Assessments—Basis of, under Section 2275, with Reference to Intersections—Burden of Showing Benefit to Lot Omitted from Assessment—Benefits—Intersections.

1. One seeking to enjoin a street assessment, on the ground that lots or lands which should have been assessed have been omitted, should make it appear that the omitted lots or lands derived some benefits from the improvement and therefore should bear a share of the burden of the cost thereof, and that a proper assessment, including the omitted lots or lands, would probably reduce the assessment on his property of which he complains.
2. To bring a case within the purview of Section 2275, Revised Statutes (repealed, 96 O. L., 96), requiring the payment of a part of the cost of a street improvement by the city because of the treatment of street intersections as abutting property, it should be made to appear that such intersections as abutting property are benefited by the improvement, and it is not sufficient to show that the intersecting streets are benefited by the improvement.

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

This is an action brought to enjoin the collection of assessments levied upon lots and lands lying along Front street in East Toledo, for the costs of paving the street. The plaintiffs own certain of the lots so assessed, and the question that is presented for our consideration is, whether the assessment is invalid and should be enjoined because the city failed to include in the lots and lands to be assessed the intersections of the street made by the crossing of other streets over Front street. It is con-

ceded that these lands were not included and that no share of the cost or expense of improving Front street was assessed against the city because of these intersections. The whole cost of paving the intersections, however, were paid by the city. But it is contended by the plaintiffs that the statutes as they read at the time this improvement went forward, to-wit, Sections 2274 and 2275, Revised Statutes (repealed, 96 O. L., 96), required not only that the city of Toledo should pay for the cost of improving and paving the intersections, but that, in addition thereto, the intersections should be regarded as property abutting upon the improvement and the city should be further assessed for the benefits thereto from the improvements.

In looking into the statutes we find that in the year when this improvement was inaugurated, 1900, and when it was going forward, in 1902, and from that time forward until the adoption of what we are in the habit of calling the new municipal code, Section 2274 (repealed, 96 O. L., 96), required that in the city of Toledo the cost of intersections should be paid for by a general tax on all the property in the city, and Section 2275 (repealed, 96 O. L., 96) contained this provision with respect to the intersections:

"For the purposes of assessment, a city of the first grade and a city of the third grade of the first class shall in all cases be considered as a property owner as to intersections, and any other property belonging to the corporation abutting on the street or highway so improved; and the assessment chargeable to the corporation, together with at least one-fiftieth part of all costs and expenses, as provided for in Section 2273 (repealed, 96 O. L., 96), may be included in any bonds issued for the improvement, and be paid for by it in like manner as by other property owners;" * * *

Considering the history of legislation upon the subject of intersections, we find that formerly the cities of Cincinnati and Toledo were excepted from the operation of Section 2274, so that in those cities the cost of intersections was not to be paid for out of the general levy, and Section 2275 providing a different method for laying a share of the burden of the cost of street intersections upon the city by assessing the city on account

of intersections according to benefits thereto applied to Cincinnati alone; that Toledo, in 1889 (86 O. L., 119), was brought within the provisions of Section 2274, so that thereafter it paid the cost of improving intersections; and then on March 10, 1892, by a statute appearing in 79 O. L., 31, Section 2275, was made applicable to Toledo, and then and thereafter Toledo stood in a class by itself (if the construction is to be given to these statutes contended for by the plaintiffs here); that is to say, it was required to bear the burden of the cost of the intersections, and in adition thereto was to pay out of the general funds the amount of the benefits resulting to the intersections by the paving thereof. This was the rule applicable to Toledo—a system of double assessment, apparently, for practically the same thing or benefit.

We have undertaken to arrive at some solution of this question—some construction of these statutes—which would enable us to avoid this result of double assessments. We have not been able to do it by any course of reasoning that was entirely satisfactory to us, though we think it ought to be done if possible. In other words, we think that this legislation whereby Section 2275 was made applicable to Toledo, if not an absolute blunder, was at least ill-advised and inconsistent with the general policy of the state upon the subject. But we find by looking into this record that we are not called upon in this case to solve this problem.

Counsel for plaintiffs have proceeded upon the theory that the statute, Section 2275, requires that the benefits to the *intersecting streets* shall be taken into consideration and shall be assessed against the city; but the statute does not so provide; it does not say that the *intersecting streets* shall be considered as property owned by the city so that the benefits thereto shall be paid by the city, but it says that the city shall be considered as a property owner as to the *intersections*, and we know that the intersections consist of the territory bounded by the street lines as they cross. Now it may be, that, if it should be made to appear that some lots or lands that should have been assessed were omitted, such omission would render the assessment of the other lots and lands invalid so that the court would be required to enjoin the assessment and a new assessment would have to be

made including those lots and lands; but certainly, where one goes into a court of equity with a claim of that character, he should make it appear affirmatively that the lots and lands which he says should have been assessed derived some benefit from the improvement, so that they should have been assessed and so it should appear at least probable that upon a reassessment some assessment would be laid upon such lots and lands, and probably thereby the assessment upon his lots and lands would be lessened. But that does not appear in this case with respect to these intersections; there is no statement in the petition and nothing in the agreed statement of facts to the effect that these intersections derived any benefit from the improvement—certainly not any benefit over and above the amount which was paid in paying for the cost of the paving of the intersections. But there is no allegation and no agreed statement of fact that they received any benefit whatever from the improvement. The averment is:

"That for some time prior to the first day of January, 1902, and on and ever since said day, the said city of Toledo has been a property owner of the intersections of the following named streets"—naming the streets which cross Front street—"that said committee in the assessment made and reported by it to the council and by the council approved and confirmed, failed and omitted to assess any sum whatever upon the said intersections, or any of them, nor did the common council of said city by said ordinance passed on the third day of March, 1902, require the said city to pay any part of the cost of improving said Front street; that said Front street is the only throughfare leading from Millard avenue to the Cherry street bridge; that it is the only public way whereby teams and pedestrians traveling on any of said intersecting streets can reach the bridge over the Maumee river at Cherry street in said city; that the said improvement of Front street has been made and is of great benefit to all said intersecting streets, and to the said city of Toledo, the owner of said streets."

It may have been of great benefit to those streets, but the city can not be required to pay anything on that account. Upon any construction of this statute the city can only be required to pay in the event of a benefit to the intersections, and there is no averment that the intersections were benefited.

We hold, therefore, upon the case as presented, that no equity is shown, and the finding will be for the city. The petition will be dismissed.

F. J. Flagg and *B. A. Hayes,* for plaintiffs.

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

PROCEEDINGS FOR WIDENING, DEEPENING AND STRAIGTENING A DITCH.

Circuit Court of Wood County.

WOOD COUNTY COMMISSIONERS v. THOMAS SHINNEW ET AL.

Decided, April 27, 1907.

Drains and Ditches—Scope of Inquiry on Appeal in a Ditch Case—View by the Jury—Discretion of Court with Reference to—Charge of Court—Effect of Judge Entering Jury Room to Give Further Instructions—Sufficiency of Evidence as to Outlet of Ditch—Testimony of Landowners—Error—Sections 4447 *and* 4448.

1. The inquiry as to the sufficiency of the outlet of a drainage ditch is involved in an appeal from a finding in a proposed ditch improvement proceeding, on the ground that the proposed improvement was not conducive to the public health, convenience and welfare.
2. It is not error for a probate court to refuse to send the jury in a ditch improvement proceeding back for a second view of the proposed outlet, though opposing landowners were not satisfied with the first view.
3. In proceedings before the probate court in a ditch case, where the jury after retiring asked for further instructions, and the trial judge entered the jury room with counsel for both parties and delivered the instructions asked for without objection from either party, such action by the judge can not be successfully attacked in a reviewing court on the ground that it amounted to error or misconduct prejudicial to the rights of either party.
4. In a proceeding before the probate court for the improvement of a ditch, opposed by landowners on the ground of the insufficiency of the outlet, the jury having viewed the entire ditch and the outlet and having heard the evidence introduced at the trial is in a better position to say whether or not the outlet is sufficient than a reviewing court having before it only a transcript of the evidence produced at the trial, and the finding of the jury will not

be disturbed when not manifestly opposed to the evidence appearing in the record.

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

This case arises out of a proceeding instituted before the county commissioners for the widening, deepening and straightening of a certain ditch having its outlet in the Portage river. The improvement was ordered by the county commissioners, and an appeal was taken by Shinnew and others to the probate court on the ground that the contemplated improvement was not necessary or conducive to the public health, convenience and welfare. In the probate court the jury found against the appellants, who carried the case to the court of common pleas on error, and the court of common pleas reversed the judgment of the probate court, and thereupon error was prosecuted in this court to obtain a reversal of the judgment of the court of common pleas. The petition in error here recites the judgment in the court of common pleas, with some details preliminary thereto, and alleges as errors—

1. That the court of common pleas erred in its finding that the probate court should have granted a new trial in said cause.

2. Said common pleas court erred in its finding that the probate court was in error in refusing to send the jury in said cause to view the outlet of the proposed ditch improvement.

3. Said common pleas court erred in its finding that the probate court was in error in its charge to the jury.

4. Said common pleas court erred in remanding said cause to the probate court for a new trial.

5. Said common pleas court erred in not affirming the judgment of the probate court.

6. Said common pleas court erred in its findings and judgments for the plaintiffs in error, when they should have been given for the defendants in error; and for other errors manifest on the face of the record.

It becomes essential to ascertain, by an examination of the petition in error filed in the common pleas court, just the grounds upon which that court was authorized to take action, and the ground upon which the judgment of reversal must be assumed to be based.

I find that the grounds of alleged error asserted in the petition filed in the court of common pleas are three:

1. That the probate court erred in overruling the motion for a new trial.

2. That the court erred in rendering judgment for the defendants in error when it should have been given for the plaintiffs in error.

3. Said court erred in entering the jury room after the case had been submitted to the jury, and while the jury were deliberating thereon and communicated with the jury in the absence of said parties or their attorneys; and for other errors apparent upon an inspection of the record.

To dispose at the outset of some matters comparatively simple and easy of disposal, I will say as to this third assignment of error in the court of common pleas, that the fact referred to is disclosed by an agreed statement appended to the bill of exceptions taken in the probate court, which recites substantially that after the jury had retired for deliberation they asked the court for further instructions, whereupon the judge entered the jury room, closed the door and held some communication with the jury, and then reported to counsel that the jury wanted further instructions, and that he then said to them that he had given to them all the instruction upon the law which he was able to give, and that he had nothing more to say in addition to the charge which he had given them. Counsel suggested to the court that he ascertain upon what points the jury desired instructions, whereupon the court and attorneys for the plaintiffs and defendant entered the jury room and the court inquired of the jury upon what points they desired instructions. The jury then, through its foreman, said to the court that they were unable to determine whether they were to find the outlet for the ditch in question to be sufficient when the water was low in the bed of the river or when it was at high water, and the court thereupon instructed the jury that for the purpose of determining whether there was a sufficient outlet the jury was not to consider the river at extreme low water nor at extreme high water, whereupon one of the jurymen said to the court, "That means we should take it at its normal condition," to which the court replied, "No,

that is not what I meant, you are to take the Portage river as it is under all conditions, and determine whether or not it will afford a good and sufficient outlet for the proposed improvement. The river should be taken when under ordinary conditions." Whereupon the court and counsel retired, and the jury returned its verdict in favor of the defendant.

No specific reference to this incident is made in the motion in the probate court for a new trial; there is no claim of misconduct on the part of the court in entering the jury room, and from the statement which I have read it does not appear that any exception was taken at the time to the action of the court. In addition to these reasons for disregarding it, it might be said that we see nothing in the entire transaction that could be prejudicial to the defendant in error. The court had some communication with the jury. The agreed statement of counsel is that the jury wanted further instruction, and he said he had given them all the instructions upon the law which he was able to give and that he had nothing more to say in addition to the charge delivered. Assuredly there was nothing in all that hurtful to the parties complaining, and as to all of the remaining transaction recited in this agreed statement, counsel were present, representing both parties, and the court instructed the jury in their presence in answer to the inquiries of the jury as to the rule which should govern them, and no exception was taken to such instruction at the time, and exceptions taken to the charge previously given could not apply to the instructions given at this stage of the trial. We think then that the correctness or incorrectness of the conclusion arrived at by the court of common pleas should be determined by an examination of other grounds in the petition in error filed in the court of common pleas, to-wit: that the court below erred in overruling the motion for a new trial; second, in rendering judgment for the defendants in error, that is, for the board of county commissioners, when it should have been rendered for the plaintiffs in error, Mr. Shinnew and others.

At the outset of our examination of the proceedings of the probate court to ascertain whether or not the court of common pleas was justified in the reversal of the judgment of the pro-

bate court, we are met with the inquiry as to just what was pending in the probate court—what was appealed to that court from the decision of the county commissioners.

The statute provides in substance that the appeal is to be taken upon specific grounds which must be set up in the proceeding for the appeal, and in the case at bar but one ground was stated, to-wit: That the proposed improvement was not necessary or conducive to the public health, convenience or welfare. This, then, was the only matter pending in the probate court, and the question involved in the appeal so limited was the only question for the jury, impanneled in the probate court, to consider. Closely connected with this question is another, which has been dwelt upon in argument and is the principal question in controversy here, and that is as to whether the Portage river affords a sufficient outlet for the improvement contemplated by these proceedings. Revised Statutes 4447, provides for various kinds of improvements, including the kind defined in the petition before us, *i. e.*, for improvements by the location and construction, or by the straightening, widening, altering, boxing or tiling of a ditch or water-course. In the case at bar we have a proceeding merely for the widening, deepening and straightening of what seems to have been a previously established ditch or water-course. Revised Statutes 4448, contains the provision that the word "ditch" shall be held to include a drain or water-course, and the petition for it shall be held to include any side, lateral, spur or branch ditch, drain or water-course necessary to secure the object of the improvement, whether the same is mentioned therein or not, "but no improvement shall be located unless a sufficient outlet is provided"; and upon the construction of this qualifying clause and its application to the facts of this case rests, the determination of the present controversy.

In the first place it is contended that the sufficiency of the outlet was not a matter involved in the appeal to the probate court. It is said that whether or not the improvement is conducive to the public health, convenience or welfare, is not to be determined by the question whether the outlet is sufficient. Our judgment is, however, that these matters are so intimately interwoven or so closely connected that we can hardly dis-

associate the one from the other. It would hardly be conducive to the public health, convenience or welfare to deepen, widen or straighten a ditch unless it would perform its proper function, that is, carry off the water, and to enable it to do that a sufficient outlet must be found or provided. Without further discussion on this branch of our inquiry, it is sufficient to say that we think that an appeal upon the ground that the contemplated improvement was not conducive to the public health, convenience or welfare properly involved the inquiry as to the sufficiency of the outlet as a part of the general inquiry as to the character of the improvement.

In the journal entry of the court of common pleas reversing the action of the court below, is stated the supposed errors on which the reversal was based. They are these: That the probate court erred in overruling the motion of plaintiff asking the court to direct the jury to view the outlet of the ditch in question below the bridge near the lower terminus of said ditch and along the Portage river to ascertain whether or not the water would back up in the proposed ditch; erred in giving in charge to the jury the last sentence of the request of the defendants to charge the jury, which request is marked No. 1; and also erred in overruling the motion of the plaintiffs in error for a new trial of the cause.

We have examined with care the bill of exceptions taken in the probate court, and are unanimously of the opinion that no error was committed by that court in its refusal to send the jurors back for another view, or a more extended view, of the proposed outlet for the ditch. It seems that the jury having been previously instructed by the court, visited the line of the proposed ditch improvement and stationing themselves at first upon a bridge, obtained a view for some distance along the Portage river, the proposed outlet, and that they viewed the entire route of the ditch itself. Counsel for the landowners opposing the improvement were not satisfied with this view, and asked the court to send the jury back for another; this the court declined to do, and exception was taken, and for that action the common pleas court, as one of the grounds, reversed the judgment of the court below.

This was doubtless a matter somewhat in the discretion of the probate court. It probably would have been within the power of the probate court, if not satisfied that the jurors had made a sufficient view to apprise themselves of all the conditions, to send them back for another view; but we see nothing in the statute and nothing in the circumstances of this case that made it error for the probate court to refuse so to do.

The court of common pleas based its action also upon a claim of error in the charge to the jury, *i. e.*, the last sentence of the request of the defendants marked No. 1. I will read the entire request:

"In arriving at your verdict, you should not only consider what the witnesses have testified to, but you will also consider the facts appearing to you from the view you had of the premises along the line of the ditch, and if from the testimony adduced and your observation along the line of the proposed ditch you should find that the ditch as a whole is conducive to the public health, convenience or welfare of the neighborhood through which it passes, and that it has a sufficient outlet, you will find for the ditch improvement. The fact that a large number of landowners in the vicinity in which the ditch is located are opposed to such ditch should have no bearing or weight with you in determining the question before you."

It is not seriously contended that the opposition of any number of landowners to the improvement should have been considered by the jury in arriving at their verdict, but the contention of counsel is, as I understand it, that the tendency of this instruction was to mislead the jury into a disregard of the testimony of the landowners as to the facts which were proper to be received for the enlightenment of the jury. We hardly think, however, that this would be a natural result of this instruction. The court had immediately before, as a part of the same request, instructed the jury that they should consider what the witnesses had testified to; not the witnesses for one side or witnesses for the other, but all the witnesses; and surely intelligent jurors could not assume that the court was intending that they should disregard the testimony of some of the witnesses because they were landowners along the line of this ditch.

Taking the instructions of the court as a whole in connection with this instruction, we think that it is not probable that the jury was misled by this clause of this sentence, and our judgment is, that the court of common pleas erred in holding that there was error on the part of the probate court in giving this instruction.

The court of common pleas held that the probate court erred in overruling the motion of the plaintiffs for a new trial of said cause. We are not advised as to the precise ground on which the court of common pleas so held. It may have been one of the two grounds which this court has considered and reviewed, or it may have been the conclusion of the court of common pleas that the finding of the jury in the probate court was not warranted by the evidence; and assuming that this may have been the ground of the conclusion of the court of common pleas, it is proper that we consider for a moment whether such a conclusion of that court, if it was in fact arrived at, was justified.

There is evidence, *pro* and *con*, as to the sufficiency of the Portage river as an outlet for this proposed improvement. It is a matter of some doubt whether Revised Statutes 4448, providing that no improvement shall be located unless a sufficient outlet is provided, has application at all to the improvement of old ditches. We are not quite clear as to whether the words "widen, deepen, straighten," etc., were intentionally omitted from this section. They are used in Revised Statutes 4447, and it is possible that the Legislature had it in mind that only one finding of an outlet for a ditch established by the county commissioners would be necessary and that when a sufficient outlet had once been obtained, the ditch then located and established might thereafter be improved, preserving the same outlet for the escape of its waters. We do not care, however, to more than suggest a query as to the tenability of this construction of Revised Statutes 4448. It is plain enough that the deepening and widening of a ditch might thereby cause more water to go into the outlet than the ditch carried in the form of its original construction, and that fact might have some tendency to sustain the contention of counsel for the opposing landowners here that Revised Statutes 4448 requires a finding of a sufficiency of out-

let for every kind of improvement to a ditch already established, as well as upon the original location of a ditch. The statute provides for a view of the ditch by the jurors, and by two decisions of our Supreme Court it has been held that the view so obtained by the jurors is to be treated as evidence; in other words, that they may use for the purpose of aiding them in their inquiry all the light which they obtain from their personal examination of the ditch. It has been held under other statutes as to views by jurors, that the view is to be treated only as a means of applying evidence and not as evidence in itself. The cases referred to are *Williams* v. *Lockoman*, 46 Ohio St., 416, the syllabus of which is:

"On an appeal to the probate court from the order and finding of a joint board of county commissioners, determining that a proposed ditch is necessary, and will be conducive to the public health, convenience and welfare, the jury, in examining and determining the matter appealed from, may, under Section 4467, of the Revised Statutes, considered in evidence facts made known to them personally from an actual view of the premises."

And in the case of *Lake Erie & W. Ry.* v. *Hancock County*, 63 Ohio St., 23, Judge Williams on page 28 cites the case of *Williams* v. *Lockoman*, *supra*, adding that the jury were entitled to consider, as evidence on this subject, facts brought to their knowledge from their actual view of the premises.

Neither this court, nor the common pleas court, has had the advantage of a view of the premises in controversy. The jurors had this that was valuable aid for and means of determining the issue between the parties, not afforded to either of these courts of review. If the evidence, irrespective of the facts placed before it by the view, was manifestly inconsistent with the conclusion at which the jury arrived, it might be proper for a reviewing court to reverse the finding of the jury, but we can not, from an examination of the evidence here, arrive at that conclusion. It is entirely possible that the jury standing upon the bridge and overlooking the river, seeing the height of the bank, the width of the river, knowing the size of the ditch, knowing the extent of the proposed widening and deepening thereof, may have been enabled to form a judgment even more

intelligent and more satisfactory that that which could be arrived at by listening to the opinions of any number of witnesses; and we conclude that the court of common pleas, under all the circumstances and in view of the manifest conflict of testimony of the witnesses who were sworn and had testified, was not justified in setting aside the verdict that the jury arrived at by both testimony and view, upon the ground that it was not supported by the evidence.

There was testimony that the outlet was sufficient. It may be apparent that at some times the Portage river overflows its banks, does not at all times carry off all the water which is discharged into it by streams, drains, ditches and other water-courses, and still we hardly think that that circumstance alone is a sufficient reason for holding that the outlet is insufficient. If at times it overflows its banks, it does no more than the Mississippi river or the river Nile, and yet it can hardly be said that those mammoth water-courses are not sufficient outlets in which to discharge the waters deposited upon the adjacent country constituting their valleys by rainfall or otherwise.

It is our judgment that the common pleas court was not justified in reversing the probate court upon any of the grounds stated in the journal entry, and we think that the petition in error to this court should be sustained upon each of the six grounds specified. Some of those are perhaps merely formal and are but restatements of others.

The judgment of the court of common pleas will be reversed, the judgment of the probate court will be affirmed, and a mandate sent to the probate court for further proceedings in conformity to the law.

J. E. Ladd and *E. G. McClelland*, for plaintiffs in error.

Baldwin & Harrington, contra.

COLLISION BETWEEN ELECTRIC CAR AND VEHICLE ON HIGHWAY.

Circuit Court of Lorain County.

CLEVELAND & ELYRIA ELECTRIC RAILWAY CO. v. HUNTER. *

Decided, October, 1898.

Evidence—Statements of Passengers with Reference to Speed—And as to Whether the Speed was Slackened Just Before the Accident—Incompetent Testimony may not be Prejudicial—Rights of High Speed Cars and Vehicles in the Highway—An Irrelevent Charge Improper—Errors in Charge Cured by Subsequent Charges—Exceptions to Special Charges—Affidavits as to Misconduct of Jury—Bill of Exceptions.

1. Statements of witnesses as to the time within which electric cars have been stopped, though at other times and other parts of the line, are statements of fact and are competent as evidence bearing on the question, in an action for personal injuries resulting from a collision between an electric car and a horse and buggy, as to the time in which the car could have been stopped at the time of the accident.
2. It does not require an expert to determine, when riding in a car, whether the speed has been slackened; and the testimony of passengers upon an electric car that just prior to an accident the car was running at its usual speed, and that there was no slackening of speed until the collision occurred, was competent.
3. Where it appears, in such a case, that at the time the motorman noticed the peril of the plaintiff, he had ample time to stop the car, the testimony referred to in the preceding paragraphs, whether competent or incompetent, was not prejudicial to defendant.
4. An instruction that: "The object to be accomplished by the defendant, in the construction and operation of its road on that highway, was to furnish rapid transit for the people living along the highway, and for the general public by means of cars rapidly propelled by electricity; such use of the highway is necessarily dangerous to persons traveling thereon in vehicles drawn by horses, and as such a use of the highway is held to be reasonable and lawful, people traveling thereon in vehicles drawn by horses must exercise care commensurate with such increased, but reasonable and lawful dangers. The right of the defendant to run its car and of the plaintiff to ride in the wagon on that highway were equal.

* Affirmed without report, 60 O. S., 634.

Each assumed the dangers of the other's reasonable use of the highway, and was bound to use ordinary and reasonable care to avoid injuring the other and being injured by the other," while entirely proper in defining the rights of the parties in the highway, as a whole, was improper.

5. To have instructed the jury that a street railway company is not responsible for injuries caused by the fright of a horse arising from the ordinary use of its car, where there was no evidence tending to show that there was anything in the appearance of the car which would tend to frighten a horse of ordinary gentleness, and the instruction could have no application to the issues made by the pleadings, would have been improper.
6. An instruction that "there is no evidence tending to show that defendant was guilty of negligence in any of the respects charged in plaintiff's petition in running its car at the time and place and under the circumstances of this case, prior to the time that the motorman discovered or by the use of ordinary care might have discovered the fright of the horse," where the negligence was subsequent thereto, is within the rule stated in the preceding paragraph.
7. Where evidence, in the form of affidavits in support of an allegation of misconduct of the jury, is controverted by evidence, also in the form of affidavits, and it does not appear from the record that the bill of exceptions contains all of the evidence on that question, a reviewing court can not say that the trial court erred in granting a new trial for that reason.
8. A judgment will not be reversed because a charge to the jury too prominently set forth certain facts favorable to the plaintiff and omitted those favorable to the defendant, where such omission was offset by special requests given on behalf of the defendant.
9. Unless exception was taken and is noted upon the record, the circuit court can not say that the giving of a particular special request was erroneous.

HALE, J.; CALDWELL, J., and MARVIN, J., concur.

Prior to July, 1896, the plaintiff in error had constructed a street railroad between the city of Cleveland and the city of Elyria, passing through the township of Ridgeville, and that time and ever since has been operating upon that road cars propelled by electric motors.

On July 19, 1896, the defendant in error was on her way from Elyria to Ridgeville, traveling in the highway, in a wagon drawn by one horse driven by her brother, in the center of which highway was located the track of the railway company. In the

eastern limits of the city of Elyria there was a collision between the wagon in which the plaintiff was traveling and the car passing westward on the railroad track. In this collision the wagon was demolished, overturned, the defendant in error thrown out and sustained very serious injuries. She prosecuted in the court of common pleas her action to recover of the plaintiff in error compensation for the injuries thus sustained, claiming that her injuries were caused by the carelessness and negligence of the railway company, through its agents in running and managing the car that collided with the wagon. A more definite reference to the specific allegations of negligence will be referred to as we consider the requests that were made by defendants of the court to charge the jury.

The action was tried in the court below, resulting in a verdict for the defendant in error in the sum of ten thousand dollars. A motion for a new trial was overruled and a judgment rendered on that verdict.

The entire proceedings had in the court below are brought before this court for review by a bill of exceptions, covering something more than five hundred pages. Various errors are assigned to the rulings made by the court on the admission and exclusion of the evidence. It is only necessary to refer to a few of those rulings.

First. The defendant in error was permitted to give to the jury the statement of witnesses as to the time in which cars had been stopped upon this railroad at other times and at a different place from the place of this collision, for the purpose of showing within what time the car could have been stopped at this time.

One of the material allegations of negligence was, that the motorman was negligent and careless in omitting to check the speed of the train after he had observed or by reasonable care could have known the peril in which the defendant in error was placed. It became, therefore, material to determine within what time the car could be stopped. This testimony we do not regard as calling for an opinion of witnesses which they could not express as to the time within which the car could be stopped. It was the statement of a fact as to the time within

which cars had actually been stopped. The majority of the court are very clearly of the opinion that such testimony was competent. For myself I see some objection to the testimony.

In order to have it a proper measure to apply to the case, it necessarily involved various items—the weight of the car, condition of the motor, the grade of the track, the condition of the track—that would raise independent issues in the case. But, as I say, we hold the testimony to be competent.

The testimony in the case, both on the part of the plaintiff and defendant, agree upon the proposition that a car could be stopped within 100 to 125 feet, running at the speed at which this car was running. It could have been stopped within a distance not to exceed 125 feet.

The jury, in a special finding, found at the time the horse started to cross the track the car was 160 feet away from the point of collision.

The finding of the jury, therefore, shows that at the time the motorman should have noticed the peril of this defendant in error he had ample time to stop the car, and therefore that this testimony, whether competent or incompetent, was without any prejudice to the plaintiff in error, which affected the verdict.

A number of witnesses, some of whom were upon the car and others who observed the car were permitted to testify as to the speed that this car was running just before the accident. All of those witnesses, except two, testified only to the fact that just prior to the accident the car was running at its usual speed and that there was no slacking of the speed until the collision occurred. That testimony certainly was unobjectionable. It does not take an expert to determine, when riding in a car, whether the speed has been slackened or otherwise.

Two witnesses, Kuehne and Nicholls, were permitted to give opinions as to the speed this car was running.

Nicholls testified in his opinion it was moving from sixteen to eighteen miles per hour. Kuehne thought it was running at the rate of twenty miles per hour.

These witnesses failed to show much knowledge on the subject, entitling them to speak as experts and to give opinions.

The defendant's motorman testified that this car was running

from fifteen to sixteen miles per hour. Nicholls testified it was running from sixteen to eighteen. We do not think that the difference between the two statements is sufficient to reverse the judgment. And as to both of those witnesses we are inclined to say that they showed such knowledge and such experience as to make the testimony barely competent, but that its weight was of little value.

The testimony given by the physicians in answer to the hypothetical questions is also challenged and exceptions were taken. We see no objection to that testimony.

Wasson and Christy were examined on the part of the plaintiff in error as expert witnesses. Certain questions were put to each of them which the court did not permit to be answered. In that we think there was no error. Both of those witnesses gave to the jury all the information that was needed concerning the time in which a car could be stopped, the methods of stopping a car, the manner of applying the brakes, and educated the jury to the full extent that was necessary and competent.

So far as the rulings upon the questions of evidence, we are of the opinion that there was no error committed by the trial court.

At the close of the testimony the case was argued, and it is claimed that there was misconduct on the part of the counsel for the defendant in error. Perhaps the argument of counsel extended to the full extent that should be authorized, but on interruption by counsel for the plaintiff in error the offending counsel very gracefully came down, and we do not see that any substantial injury was done to the case of the railway company by the remarks they are complaining of.

At the close of the testimony the court was asked by the defendant in error to instruct the jury in two special requests, which were given, the second of which the plaintiff in error complains should not have been given. I find no exception noted upon the record by plaintiff in error to the giving of this request, therefore we can not say that it was error, but independent of that we think the request was one that the court might well have given.

Complaint is made that it made too prominent certain facts

favorable to the defendant in error and omitted those favorable to the plaintiff in error. But that was fairly off-set by the request that they made on the other side.

The plaintiff in error then requested the court in a large number of requests to charge the jury, four of which were given. These requests called the attention of the court to specific claims made by the plaintiff in error. The fifth request was refused and exception taken; it was in these words:

"The object to be accomplished by the defendant in the construction and operation of its road on that highway was to furnish rapid transit for the people living along the highway and for the general public by means of cars rapidly propelled by electricity; such use of the highway is necessarily dangerous to persons traveling thereon in vehicles drawn by horses, and as such a use of the highway is held to be reasonable and lawful, people traveling thereon in vehicles drawn by horses must exercise care commensurate with such increased, but reasonable and lawful dangers. The right of the defendant to run its car and of the plaintiff to ride in the wagon on that highway were equal. Each assumed the dangers of the other's reasonable use of the highway, and was bound to use ordinary and reasonable care to avoid injuring the other and being injured by the other."

That part of the charge defining the rights of the parties in the highway was entirely proper and would have been entirely proper for the court to have given in the charge to the jury so that they would have understood the rights of each in the highway; but the request as a whole we think the court was justified in refusing.

There are a number of requests which I will consider together. "The defendant was not responsible for any injury to the plaintiff caused by the fright of the horse arising from the ordinary use and operation of its car." There is no evidence tending to show that there was anything in the appearance of the car in question that would have a tendency to frighten a horse of ordinary gentleness. Another: "There is no evidence tending to show that defendant was guilty of negligence in any of the respects charged in plaintiff's petition in running its car at the time and place and under the circumstances of this case prior to the times that the motorman discovered, or by the use of

ordinary care could have discovered, the fright of the horse." Again: "The fright of the horse can not be considered by the jury except as bearing upon the conduct of the motorman after he discovered, or by the use of ordinary care ought to have discovered, such fright."

Those were all refused and exceptions taken separately to each.

The request to charge the jury as to the responsibility of the company for causing the fright of the horse by the appearance of the car, or the speed with which the car was run, was all properly refused, because it had no application whatever to the issues made by the pleadings and to be tried by the court and jury.

The petition alleges, after stating the general facts—"That the horse attached to said wagon in which the plaintiff was riding was being driven by a brother of the plaintiff and became frightened and unmanagable by and at the approach of said car of the defendant while some distance therefrom, and at a point on said highway where said street railroad tracks run along the center of said street; that said horse gave evidence of being frightened at a distance of at least two hundred feet or more from said car as it was approaching, by rearing up on its hind legs, and sprang one way and another, and it then and there sprang on and over said track of said defendant; that said rearing of said horse and its great fright and its crossing said track were all in full view of the servants and agents of the defendant running and operating said car, and at such distance therefrom when the same occurred as to afford abundant time to check the speed and stop the motion of the car before it came in contact with the plaintiff and the wagon in which she was riding as heretofore stated."

It is not charged that the character of this car or its speed caused the fright of the horse. The simple statement is, that the horse was frightened; not that there was any carelessness or negligence on the part of the company in frightening the horse.

The petition then proceeds:

"She further says that while she was passing along said highway at the point aforesaid, and as said horse and wagon were

crossing said track as above stated, the defendant, through its agents conducting and operating said car, being in full view of the plaintiff's dangerous position, carelessly and negligently omitted to stop or reduce the speed of said car, and carelessly and negligently omitted to apply the brake to stop or slacken the speed of the same, although they had ample time so to do, after the said servants and agents of the defendant so operating said car discovered, or by the exercise of due diligence and care could and ought to have discovered, the imminent danger and threatened injury to the plaintiff by omitting so to do."

The complaint in the petition is, that the horse having become frightened, the motorman failed to exercise due care in slacking his car to prevent, as he could, the collision. The requests made relating to the responsibility of the company for causing the fright of the horse was outside of the issues made in the pleadings and for that reason undoubtedly were refused by the trial court.

The charge of the court fairly covers every legal proposition involved in the case. In addition thereto the requests that I have named were given, two in behalf of the plaintiff and four in behalf of the defendant. The jury could not have failed to understand the law of the case.

But it is said that the verdict is against the weight of the evidence, and that a new trial should have been granted because of that fact.

It can not be doubted that if the witnesses that were examined on the part of the defendant in error are to be believed, the evidence was sufficient to establish every material fact essential to a recovery by the defendant in error.

It is true there was a very sharp conflict of testimony produced by the opposing parties. The motorman testifies that he shut off the current fully three hundred feet away from the point of collision; that he had approached within thirty feet of the point of collision before the horse started across the track. Of course if the real fact is as testified by the motorman there was no liability on the part of the company; but the jury, under the circumstances of the case, perhaps influenced somewhat by the fact that the buggy was carried some fifty feet after the collision,

before the car was stopped, the force of the collision and other circumstances, accepted the testimony of the plaintiff.

Now we would not hesitate to interfere with a verdict of the jury if not fairly supported by some testimony which it was the province of the jury to pass upon and which they might or might not believe. We think the testimony in this case was of such a nature that we would not be authorized to disturb the verdict of the jury. If there was any wrong done this plaintiff in error it was because of the finding of the jury upon the fact of the case which was their province to pass upon.

At the close of the plaintiff's testimony a motion was made and the court was asked to direct a verdict for the defendant, which the court refused. There was some testimony at that time tending to establish the essential facts necessary for recovery, and the court properly refused to grant that motion.

It is said that the damages were excessive and that therefore a new trial should have been granted upon that ground. That depends upon a fact that was in dispute at the trial, to-wit: the defendant in error, a considerable time after this collision and after her injuries were supposed to be fairly cured, fell, and it is said that she then by that fall received the injury from which she is now suffering, and that she is not now suffering from the result of the injury she received at the collision.

If the condition of this defendant in error to-day, and as it appeared upon the trial, as shown by this record, was caused by this collision and the company was responsible to the full extent for that injury. then these damages were not excessive.

It is said that there was some misconduct of the jury. The allegation of misconduct of the jury was supported by affidavits, controverted by other affidavits; and there was no statement in the record that the bill of exceptions contains all the evidence that was produced and offered upon that motion; hence we can not say the court erred in refusing to grant a new trial for that reason.

Again: It is said that the special questions submitted to the jury were not answered and there was error in the court receiving the questions as answered. We do not think that that

is well taken. The jury did answer the questions. One they did not very definitely answer; it related to the question of time, and they said we are unable to say the exact time, but a very short time. We have given this case as careful a review as we are able to make, and the conclusion is that there is no error apparent upon this record, and the judgment of the court below is affirmed.

Wilcox, Collister & Parmelee and *E. G. Johnson,* for plaintiff in error.

W. W. Boynton and *P. H. Boynton,* for defendant in error.

ENFORCEMENT OF STOCKHOLDERS' LIABILITY.

Circuit Court of Franklin County.

F. M. MARRIOTT v. THE COLUMBUS, SANDUSKY & HOCKING RAILROAD COMPANY ET AL. *

Decided, September Term, 1907.

Corporations—Statutory Liability of Stockholders—Pleading—Judgment—Appeal—Statute of Limitations—Insolvency—Absence from the Jurisdiction—Allowance of Attorneys Fees.

1. The indebtedness of an insolvent corporation having been ascertained in an action to assess the liability of stockholders, the averment that the defendants are stockholders but without specifying the number of shares held by each, permits the taking of a several judgment against all who are solvent and within the jurisdiction, the amount of the judgment in each case to be the proportion which the stock owned bears to the entire indebtedness together with costs.
2. Allowance and payment of attorney fees and other expenses out of the fund brought into court, does not prevent the prosecution of an appeal; but the appeal can only be taken as against those who have not paid the judgment rendered against them, and is without prejudice to them in the event an additional assessment should be made, and is also without prejudice to stockholders who were not made parties until more than six years after the right of action accrued, unless it affirmatively appear that they were insolvent at the time of pleading the bar of the statute.

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* For previous opinions in the same case, see 8 C. C.—N. S., 495 (affirmed by the Supreme Court), and 2 N. P.—N. S., 231.

DUSTIN, J.; SULLIVAN, J., and WILSON, J., concur.

In an action to assess the statutory liability against the stockholders of a corporation an averment in the petition that certain defendants are stockholders and liable as such is sufficient to warrant proof and judgment for any number of shares in the name of each.

In such action the court is not authorized to render a judgment, without regard to the amount of the indebtedness of the corporation, for an amount equal to the face value of the stock; but after first ascertaining the indebtedness must render a several judgment against all solvent stockholders within the jurisdiction in proportion to the stock owned by each for a sufficient amount to cover such indebtedness and costs.

The interlocutory order of July, 1905, was afterwards merged in the order of December, 1906, and the two together constituted the final order in the case, from which the plaintiff could not appeal as against such defendant stockholders as had theretofore paid to the receiver the full amount of the judgment against them, although not estopped to appeal from the judgment against the other defendants not paying. Nor shall such other defendants be prejudiced thereby, as any additional assessment must be made upon the same basis as if the stockholders thus released were still before the court, and the loss thus incurred be borne by the creditors. A like rule will be applied to such stockholders as were not made parties until more than six years after the right of action accrued and were therefore released from all liability upon a plea of the statute of limitations, unless it affirmatively appears that at the time of such plea they were insolvent.

The allowance by the court and receipt by the attorneys for the plaintiff of a fee of $15,000 and certain expenses paid out of the fund brought into court through their efforts did not estop plaintiff from prosecuting an appeal.

The defendants, Leroy S. Lincoln and William Huston, were residents of the state of Pennsylvania, and absent from this state when the right of action accrued against them. The period limited for the commencement of the action against them did not begin to run until they came into the state or entered their

appearance by pleading in November, 1903. The defense interposed is not good as to these two defendants.

Upon a re-examination of the issues presented by the Pullman Company and George Bellows, we adhere to the former holding of this court that the Pullman Company is liable on 1353.34 shares and that George Bellows is liable as found by the master. We adhere also to our former conclusion as to the stock held by Pomeroy, trustee, and the Sessions estate.

The stock held by the partnership Stearns & Hoover and Charles Parrott and associates is released from assessment under the defense of the statute of limitations, and as to all other stock not herein referred to, we are in accord with the findings of the court of common pleas, except that the liability of assignors of stock must be governed by the rule stated in the case of *Poston* v. *Hull*, 75 O. S., 502.

We are of opinion that, allowing for insolvency and non-residence of stockholders, the assessment should be fifty per cent. of the face value of all stock not exempt under the rule hereinbefore stated.

G. H. Stewart, for plaintiff.

W. O. Henderson et al, for defendants.

A VOIDABLE RECEIVERSHIP.

Circuit Court of Hamilton County.

FRED C. RAPP v. CINCINNATI PLASTIC RELIEF COMPANY ET AL.

Decided, November 9, 1907.

Corporations—Insufficient Allegations for a Receiver—Ratification of the Appointment of, Voidable, When—Section 5845.

1. The allegation in a petition for the appointment of a receiver of a corporation that a note, upon which the petitioner is endorser, becomes due on the day of the filing of the petition, does not come within the provisions of Section 5845 for the reason that it does not allege a past due indebtedness, and therefore does not state ground for the appointment of a receiver.
2. Where the president of the corporation consents to the appointment of a receiver under such a petition, the error of the court in

eastern limits of the city of Elyria there was a collision between the wagon in which the plaintiff was traveling and the car passing westward on the railroad track. In this collision the wagon was demolished, overturned, the defendant in error thrown out and sustained very serious injuries. She prosecuted in the court of common pleas her action to recover of the plaintiff in error compensation for the injuries thus sustained, claiming that her injuries were caused by the carelessness and negligence of the railway company, through its agents in running and managing the car that collided with the wagon. A more definite reference to the specific allegations of negligence will be referred to as we consider the requests that were made by defendants of the court to charge the jury.

The action was tried in the court below, resulting in a verdict for the defendant in error in the sum of ten thousand dollars. A motion for a new trial was overruled and a judgment rendered on that verdict.

The entire proceedings had in the court below are brought before this court for review by a bill of exceptions, covering something more than five hundred pages. Various errors are assigned to the rulings made by the court on the admission and exclusion of the evidence. It is only necessary to refer to a few of those rulings.

First. The defendant in error was permitted to give to the jury the statement of witnesses as to the time in which cars had been stopped upon this railroad at other times and at a different place from the place of this collision, for the purpose of showing within what time the car could have been stopped at this time.

One of the material allegations of negligence was, that the motorman was negligent and careless in omitting to check the speed of the train after he had observed or by reasonable care could have known the peril in which the defendant in error was placed. It became, therefore, material to determine within what time the car could be stopped. This testimony we do not regard as calling for an opinion of witnesses which they could not express as to the time within which the car could be stopped. It was the statement of a fact as to the time within

which cars had actually been stopped. The majority of the court are very clearly of the opinion that such testimony was competent. For myself I see some objection to the testimony.

In order to have it a proper measure to apply to the case, it necessarily involved various items—the weight of the car, condition of the motor, the grade of the track, the condition of the track—that would raise independent issues in the case. But, as I say, we hold the testimony to be competent.

The testimony in the case, both on the part of the plaintiff and defendant, agree upon the proposition that a car could be stopped within 100 to 125 feet, running at the speed at which this car was running. It could have been stopped within a distance not to exceed 125 feet.

The jury, in a special finding, found at the time the horse started to cross the track the car was 160 feet away from the point of collision.

The finding of the jury, therefore, shows that at the time the motorman should have noticed the peril of this defendant in error he had ample time to stop the car, and therefore that this testimony, whether competent or incompetent, was without any prejudice to the plaintiff in error, which affected the verdict.

A number of witnesses, some of whom were upon the car and others who observed the car were permitted to testify as to the speed that this car was running just before the accident. All of those witnesses, except two, testified only to the fact that just prior to the accident the car was running at its usual speed and that there was no slacking of the speed until the collision occurred. That testimony certainly was unobjectionable. It does not take an expert to determine, when riding in a car, whether the speed has been slackened or otherwise.

Two witnesses, Kuehne and Nicholls, were permitted to give opinions as to the speed this car was running.

Nicholls testified in his opinion it was moving from sixteen to eighteen miles per hour. Kuehne thought it was running at the rate of twenty miles per hour.

These witnesses failed to show much knowledge on the subject, entitling them to speak as experts and to give opinions.

The defendant's motorman testified that this car was running

from fifteen to sixteen miles per hour. Nicholls testified it was running from sixteen to eighteen. We do not think that the difference between the two statements is sufficient to reverse the judgment. And as to both of those witnesses we are inclined to say that they showed such knowledge and such experience as to make the testimony barely competent, but that its weight was of little value.

The testimony given by the physicians in answer to the hypothetical questions is also challenged and exceptions were taken. We see no objection to that testimony.

Wasson and Christy were examined on the part of the plaintiff in error as expert witnesses. Certain questions were put to each of them which the court did not permit to be answered. In that we think there was no error. Both of those witnesses gave to the jury all the information that was needed concerning the time in which a car could be stopped, the methods of stopping a car, the manner of applying the brakes, and educated the jury to the full extent that was necessary and competent.

So far as the rulings upon the questions of evidence, we are of the opinion that there was no error committed by the trial court.

At the close of the testimony the case was argued, and it is claimed that there was misconduct on the part of the counsel for the defendant in error. Perhaps the argument of counsel extended to the full extent that should be authorized, but on interruption by counsel for the plaintiff in error the offending counsel very gracefully came down, and we do not see that any substantial injury was done to the case of the railway company by the remarks they are complaining of.

At the close of the testimony the court was asked by the defendant in error to instruct the jury in two special requests, which were given, the second of which the plaintiff in error complains should not have been given. I find no exception noted upon the record by plaintiff in error to the giving of this request, therefore we can not say that it was error, but independent of that we think the request was one that the court might well have given.

Complaint is made that it made too prominent certain facts

favorable to the defendant in error and omitted those favorable to the plaintiff in error. But that was fairly off-set by the request that they made on the other side.

The plaintiff in error then requested the court in a large number of requests to charge the jury, four of which were given. These requests called the attention of the court to specific claims made by the plaintiff in error. The fifth request was refused and exception taken; it was in these words:

"The object to be accomplished by the defendant in the construction and operation of its road on that highway was to furnish rapid transit for the people living along the highway and for the general public by means of cars rapidly propelled by electricity; such use of the highway is necessarily dangerous to persons traveling thereon in vehicles drawn by horses, and as such a use of the highway is held to be reasonable and lawful, people traveling thereon in vehicles drawn by horses must exercise care commensurate with such increased, but reasonable and lawful dangers. The right of the defendant to run its car and of the plaintiff to ride in the wagon on that highway were equal. Each assumed the dangers of the other's reasonable use of the highway, and was bound to use ordinary and reasonable care to avoid injuring the other and being injured by the other."

That part of the charge defining the rights of the parties in the highway was entirely proper and would have been entirely proper for the court to have given in the charge to the jury so that they would have understood the rights of each in the highway; but the request as a whole we think the court was justified in refusing.

There are a number of requests which I will consider together. "The defendant was not responsible for any injury to the plaintiff caused by the fright of the horse arising from the ordinary use and operation of its car." There is no evidence tending to show that there was anything in the appearance of the car in question that would have a tendency to frighten a horse of ordinary gentleness. Another: "There is no evidence tending to show that defendant was guilty of negligence in any of the respects charged in plaintiff's petition in running its car at the time and place and under the circumstances of this case prior to the times that the motorman discovered, or by the use of

We suppose that the court granting the injunction, forbidding the doing of a certain act, may enforce that order in the case in which the order is made, and in the mode pointed out by the section of the statute that I have just read. Of course the court has made the order; it has gone upon the journals; the whole proceedings are before the court down to the violation of the order. The statute then provides that when it is brought to the attention of the court, by affidavit, that the order has been violated, then the party may be brought before the court and the proceedings taken pointed out by the statute. It is simply enforcing an order made by the court, of which the court has full cognizance in that particular case. We see no necessity for docketing the separate case.

"Third. The court erred in overruling the demurrer of Ray and others to the charge."

That is, upon this theory: the claim is that the affidavit should state the pendency of the original action, the orders made, and everything necessary to show that the order violated has been made by the court, that that should go into the affidavit.

We take the view, however, that the order having been made in the case, that as part of the record of the case, being a proceeding simply to prevent the violation of that order, to enforce that order, all that was required in addition to what was already upon the record was the filing of the affidavit of the violation of the order which occurred out of the presence of the court, and then the court might act.

"Fourth. The court erred in refusing to discharge Ray and others on their answer to the charge."

That answer was in substance a general denial. That is, having demurred to the affidavit, which was overruled, they then answered, denying the fact that they had violated the order made by the court, and asserting that they had no intention of violating any order of the court, and did not propose to. The court, treating that as a denial of the allegations made in the affidavit, that there had been a violation of the order, investigated, heard what both parties had to offer upon that issue as to whether

the order had been violated or not; and on the testimony found against plaintiffs in error, as the testimony fully justified the court in holding.

It is further claimed as a ground on which these parties ought to have been discharged that they had no notice of what the injunction was, or what they were forbidden from doing. There were fourteen of these parties that were arrested under this order; seven of them were held; seven discharged. And looking to this testimony, it very clearly appears that none were held for the violation of the previous order of injunction except those against whom it was fully established that they had knowledge, not only of the injunction that had been allowed against them, but that they had violated that order. The evidence fully establishes those two propositions as to those who were adjudged in contempt of court.

"Fifth. The court erred in the admission of evidence on the trial."

Without stopping and making this opinion so long, I will say that we are fully satisfied that there was no error committed by the court in the admission of testimony.

"Sixth. The judgment is not supported by sufficient evidence, and the court erred in overruling the motion for a new trial."

I have already said all I desire to say upon that.

"Seventh. The court erred in refusing the application of the accused for a jury trial."

I hardly think it would be claimed, on careful reflection, that the court granting an order of injunction must impannel a jury to ascertain whether that injunction has been violated or not, before they may proceed against parties violating it. It is eminently a question for the court to investigate and determine.

"Eighth. The amounts ordered to be paid by Ray and others aggregated $1,000, and exceed the limit fixed for a violation of an injunction provided by Section 5581, Revised Statutes."

The question there made is that there were seven that were adjudged in contempt of court. The maximum fine that could

be imposed for the use of the county was $200. There were seven of them. They were in the aggregate fined $1,000. It is claimed that the aggregate could be only $200.

We think that when you come to the assessment of the fine, it was an individual matter, and each must respond for himself for the wrong he had done, and that the limit of the $200 must apply individually, and not as a whole.

"Ninth. The State of Ohio not being a party to the proceedings, the judgment rendered as to the fines imposed are invalid."

What we have already said would answer that, that it is a proceeding in the original case to enforce the order made.

It is further said that the order as to the payment by each of the defendants is invalid, for want of definiteness and certainty.

We do not find any such indefiniteness and uncertainty as would cause us to set it aside.

The real merits of this contention are whether the proceeding provided by statute for the enforcement of an order of injunction, is a proceeding in the case in which the order was made over which the court continues to hold and have control to enforce that order in the manner pointed out by the statute, or whether it can only be done by an independent action.

We hold that the former is the true rule, and that there was no error in this proceeding.

Arnold Green, for plaintiffs in error.

Squire, Sanders & Dempsey, for defendant in error.

NECESSARIES FURNISHED TO AN INFANT.

Circuit Court of Richland County.

THE INTERNATIONAL TEXT BOOK COMPANY v. CARL W. ALBERTON.

Decided, January 31, 1908.

Infants—Books and Material Furnished for Instruction of—Claimed to have been Necessaries—Executory and Implied Contracts by Infants—Pleading and Evidence as to Reasonableness of the Account and Financial Condition of Parent.

A suit can not be maintained against an infant on his express contract for necessaries, without an averment and proof that the price to be paid for such necessaries was reasonable.

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

In an action brought in the Court of Common Pleas of Richland County by the plaintiff in error against the defendant in error a verdict was rendered for the defendant. A motion for a new trial having been made and overruled, judgment was rendered in favor of the defendant; whereupon the plaintiff instituted error proceedings to this court and asks this court to reverse the judgment of the court of common pleas for numerous reasons set forth in its petition in error. Upon an examination of the pleadings and evidence in this case we are convinced that the verdict and judgment in the court of common pleas was right, and that there is one question in this case which is decisive of the case.

The petition of the plaintiff alleges in substance that it entered into a contract with the defendant, whereby the plaintiff was to furnish the defendant with a course of correspondence instructions in the subjects embraced in the electric scholarship, with copyrighted instruction papers, examination papers and drawing plates, prepared for such scholarship; in consideration of which, the defendant agreed to pay the plaintiff the sum of $100 in installments as these matters and things were furnished by the plaintiff to the defendant; that the plaintiff has

furnished certain parts of the things agreed by it to be furnished, and that the defendant has paid for the same; that it is ready and willing to perform the balance of its contract and furnish the things agreed by it to be furnished, but that the defendant has refused to accept the same, and has refused to pay any further amount on this contract, and that there is due the plaintiff the sum of $68, together with interest, on a part of the contract, viz., for the things not delivered under the contract and which the defendant has refused to accept, for which it asks judgment against the defendant.

To this petition the defendant filed an answer, in which he alleges that at the time of the entering into the contract set forth in the petition he was a minor.

Plaintiff filed a reply to this answer, in which he admits the minority of the defendant at the time of entering into the contract, but avers that the matter and things to be furnished by it to the defendant were necessaries.

On this state of the pleadings, the question arises whether or not the plaintiff can maintain an action. The plaintiff contends that this contract being for necessaries, an action wou'd lie for its breach; whilst on the other hand the defendant claims that the contract was not for necessaries, and furthermore, that even if it were for necessaries, the plaintiff can not recover from an infant upon an express contract. Assuming for the purpose of this case that the contract was for necessaries, the question is, can an infant be sued upon his express contract?

The defendant in support of his contention has cited to us 122 Wisconsin, 318, a part of the syllabus of which reads as follows:

"An infant is bound by implied contract to pay reasonably for necessaries furnished him, but is not liable therefor upon an executory contract to furnish them, nor upon an express contract."

In 64 Connecticut, 407, another authority cited by defendant, a part of the syllabus reads as follows:

"The obligation of an infant to pay for necessaries furnished him is one imposed by law rather than one which arises from

his contract, as the party furnishing the necessaries can recover only their fair and reasonable value."

These cases, in our opinion, are well considered cases, and seem to be founded upon reason and suggest to us the idea that they are sound law. An express contract for necessaries might be a grossly unjust and inequitable one, and to say that an infant must pay the consideration agreed by him to be paid for necessaries, irrespective of the price agreed upon, would be taking from him the protection the law has thrown around minority. We think that even if the plaintiff sets forth the terms of the express contract in its petition, it would have to go a step further and allege that the sum agreed to be paid, by the defendant, was a reasonable one for the things to be furnished by the plaintiff, and upon the trial it would be incumbent upon the plaintiff to establish this fact by evidence. By doing this the plaintiff would not be recovering upon its express contract, but would be recovering upon an implied contract for the reasonable value of the books and instruments furnished by it. In the case at bar there is no allegation as to the reasonableness of the contract or its consideration, neither was there any evidence offered tending to establish such reasonableness.

We are further of the opinion that in contracts for necessaries furnished to a minor a recovery can only be had for the fair value of the executed part of the contract, and that an infant can repudiate the executory part of his contract at any time, even though such executory part of such contract be for necessaries, and that all the plaintiff can do is to recover the fair and reasonable value of the necessaries actually received by the minor.

In this particular case it affirmatively appears that the father of the defendant is living, and it nowhere is alleged or attempted to be proven that the father is not financially responsible, or that he has not furnished the defendant with all the necessaries suitable to his condition in life.

Section 310, Revised Statutes, provides: "The husband must support himself, his wife, and his minor children out of his property, or by his labor. If he is unable to do so, the wife must assist him so far as she is able." The father is entitled under

the law to all of the wages of the minor son, and in part consideration, at least, it is the duty of the father to support the son; and that means furnish him with the necessities of life. If a minor, whose father was able and willing to furnish him with the necessaries of life, could enter into express contracts for necessaries and be liable in all cases under such contracts, then the money arising from the services of the son might be diverted from the father, to the son's creditors, and the pecuniary relation between the father and the son be materially affected.

The foregoing being our views, we think the judgment below was right and that the only error committed in the court below was in the court not directing a verdict for the defendant. The judgment of the court of common pleas will be affirmed at the costs of the plaintiff in error, and this cause remanded to the court of common pleas for execution.

Harrington & Brinkerhoff, for plaintiff in error.

H. T. Manner, contra.

CONCURRENT PROCEEDINGS ON APPEAL AND ON ERROR.

Circuit Court of Hamilton County.

WALKER ET AL v. JENNEY, ADMINISTRATOR, ET AL.

Decided, February 15, 1908.

Appeal—Effect of—Court Without Authority to Dismiss—Concurrent Proceedings on Error—Become Material, When.

1. An appellant has no authority to dismiss an appeal which has been properly perfected in an appealable case; but a dismissal of an appeal to which no error is prosecuted will stand, and will be construed as the judgment of the court.
2. While error may be prosecuted before the determination of an appeal, the proceeding will avail nothing in the event the appeal is sustained; but where the appeal is dismissed and the appellant has an error proceeding pending, it is his right to have a hearing therein, and to dismiss such a proceeding is error.

SWING, P. J.; SMITH, J., concurs; GIFFEN, J., dissents.

Upon the filing of certain accounts in the probate court certain exceptions were filed by the plaintiff in error, which exceptions were upon hearing overruled by said court. Thereupon plaintiff took an appeal from the judgment of the probate court to the court of common pleas. This appeal was perfected September 26, 1905. Subsequently said plaintiff in error also had a bill of exceptions perfected, and filed in said court of common pleas a petition in error. On May 29, 1906, the following entry was made in the appeal case: "Now come the appellants in the above cause and dismiss this said appeal at their costs." Afterwards, to-wit, on May 31, 1906, the defendants filed a motion to dismiss the error proceedings in said court, for the reason that an appeal had been taken from said probate court to said court of common pleas prior to the filing of said petition in error, and that therefore there was no judgment in said probate court to which error could be prosecuted. Afterwards, to-wit, on February 7, 1907, the court of common pleas found said motion well taken and dismissed said petition in error for the reasons set out in said motion.

This action in this court is to reverse the judgment of the court of common pleas dismissing the petition in error. No proceeding was prosecuted to the judgment dismissing the appeal.

It is urged that the principle announced in the first proposition of the syllabus in 10 O. S., 617, "An appeal perfected suspends all proceedings upon the judgment appealed from," which proposition seems to be the settled law of this state, and which is followed in 77 O. S., 75, is decisive of the question here.

The record shows that in this case the appeal was perfected from the decision of the probate court to the court of common pleas prior to the filing of the petition in error, and for this reason the petition in error was dismissed.

In *Hull et al* v. *Bell Bros. & Co.,* 54 O. S., 228, the fourth proposition of the syllabus is as follows:

"While an appellant may prosecute error to the judgment appealed from before the determination of his appeal, the pro-

ceeding will avail nothing if the appeal be sustained, for then the cause stands for a new trial on the issues of fact. The judgment superseded by that of the appellate court and errors occurring in the court below, if any were committed, became immaterial. Nor can the affirmance of the judgment before the trial of the appeal give it any additional or different effect."

In the opinion of the court, at page 241, it is said:

"We are not aware of any statutory provision or rule of law which prevents a party, who has taken an appeal from a judgment, from also prosecuting error to obtain its reversal. When doubtful of his appeal, that may be a prudent and commendable practice; otherwise, if his right of appeal should not be determined until after the expiration of the time allowed for prosecuting error, and then be determined adversely to him, thus leaving the judgment in force, his remedy on error would be lost, but if the appeal be sustained the proceeding in error avails nothing, for the cause then stands for a retrial of the issues in the appellate court."

It seems clear from this decision that a party may prosecute error for a judgment after he has perfected an appeal, but of course it avails nothing if the appeal be sustained.

Was the appeal sustained in this case? The case seems to have been an appealable case, and an appeal was perfected, but it certainly was not sustained, and no trial was had on the issues joined in the appellate court. On the contrary the appeal was dismissed in the appellate court. The entry dismissing the appeal recites: "Now come the appellants in the above cause and dismiss their said appeal at their costs."

We know of no provision of our statute which authorizes an appellant to dismiss an appeal when perfected and we think there is no such power. Such power rests solely in the court and, in order to give this dismissal any effect, it must be construed as the judgment of the court, and the court had no right to dismiss the appeal unless the appeal was not properly taken, or the case was not one from which an appeal could be taken. No error was prosecuted to the judgment dismissing the appeal, and it therefore stands, although the court may have committed an error in dismissing the appeal. It seems to us that when

the appeal was dismissed the party had the right to have the judgment reviewed on error, and that the court erred in dismissing the petition in error.

J. M. Dawson, for plaintiff in error.

W. H. Mackoy, for defendants in error.

AUCTION SALE—WARRANTY.

Circuit Court of Richland County.

BAILEY & WALTERS v. SIGMUND PETERS ET AL.*

Decided, 1906.

Presumption—That a Purchaser Understands the English Language—Otherwise Notice Must be Given to the Contrary.

One who undertakes to do business in this country is presumed to be able to transact business in the language of the country, and if he can not, it is his duty to make that fact known; and if he does business without making that fact known he does it at his peril.

The facts in this case are as follows:

Plaintiffs in error sold to defendants in error at public auction in the city of Mansfield, Ohio, on March 3, 1902, a horse, sold as coming three, sound and broke double.

Plaintiffs sold the horse under the following rule, which was printed and attached to a post near the auctioneer's box, to-wit: "Guarantee on all draft horses sold by Bailey & Walters shall expire at twelve o'clock noon of the day following the day of sale." That the auctioneer called the attention of defendants in error and others at the opening of the sale to this rule; that the horse was not returned within the time limit, nor any notice given of the sickness of the horse until after death; that the horse lived about ten days after the sale.

Defendants claimed they were Germans, and did not understand what the auctioneer said when he called the attention to the rules, admitting that they were present.

Charge to jury: The plaintiffs bring their action upon a promissory note, which note is set up by copy, and the interest which the note bears is set forth. There is no controversy on the plaintiff's cause of action. The plaintiffs, in reckoning the interest, have made rests. You are not authorized to do that. You will reckon the interest right along to the first day of this term of court, and you will find that amount for plaintiff.

Then we come to the question these parties have been litigating.

The answer, in substance (and you will have it before you, to look at its terms), sets forth that this promissory note was given for the purchase of a horse, and that as a part of the contract of sale this horse was warranted to be sound; that it turned out he was not sound, but diseased, at the time, and that from the disease he died on the hands of the defendants; that the defendants in endeavoring to cure him and protect him as against the disease, expended some thirty odd dollars, but the horse finally died.

To this claim of the defendants there is a general denial, denying all the allegations of this contract claim of defendants.

Although, in terms, there is a denial of the warranty, the attorneys for the parties, now in open court, admit there was a warranty, but claim it was a limited one. So you will see that the controversy narrows down to, not in fact whether there was a warranty, but was the warranty that was made limited, as the plaintiffs contend?

The testimony tends to show that when the horse was put up for sale, the representation was made that this horse was "sound, three years old, and broken." If that representation was made to induce the sale of the horse, and it induced the defendants to bid on the horse, it constitutes what we call in law a warranty. Or, in other words, the term "warranty," in warranting a horse, is not necessarily to be used, but any term that clearly imports that one party contracts that the horse is sound, and the other buys the horse on the faith of that contract—that in law constitutes warranty.

We come to the real matter in dispute between the parties. Al-

though not set up in the pleadings in any way, still it is contended under the denial in the reply—and the reply denies all the allegations of the cross-petition—that although these words were spoken, and spoken at the time of the sale of the horse, the parties understood that they were limited by this notice that was claimed to be hanging on the post. As a matter of course, if the parties knew there was a rule by which these words were limited, and bought with reference to that rule, they are bound by it, as they would be in any other transaction. But it is contended that the defendant could not read the English language, and that it was no notice to him. And it is contended that it was said in English, "This sale is governed by the same rules as heretofore." I do not quote the exact language, but the substance of it. You are to look at the parties. Did they understand that the old gentleman was a German and might not understand the English language clearly? Was there anything occurred to induce them to know that the old gentelman was a German? If they knew he was a German, I do not think any presumption arises that he could read the English language.

Gentlemen, treat these parties fairly. If this horse is sold under the warranty that is set up, then the parties are entitled to reply upon that warranty.

The next question is, was the horse sound at the time he was sold? As a matter of course, if he was sound at that time, and he took sick a few miles out, the plaintiff would not be liable on the warranty. But you may look at the condition of the horse in an hour, or a day or two after the time he was sold, to determine the fact as to whether or not he was sound at the time of the sale.

The verdict of the jury was for defendants.

Per curiam.

This is an action to recover on a promissory note.

The defendants admit the execution of the note, but say that the same was executed to evidence the purchase price of a horse purchased by the defendants from the plaintiffs on March 3, 1902; that said plaintiffs, as a part of the consideration of the

purchase price of said horse, represented and warranted the same to be sound and freed from disease, but that it then was afflicted with disease which resulted in the death of the horse in a few days or weeks after its purchase. They claim that by reason thereof there was a total failure of consideration, and that defendants were put to great expense in the care and treatment and nursing of the horse and burying of the same, and ask to recover the sum of $150 damages, and that sufficient of said damages be counter-claimed and set-off against plaintiff's note, and that they may have judgment for the residue thereof.

Plaintiffs for reply deny generally the allegations of the answer and cross-petition, and the issue so made up was tried to a jury, resulting in a verdict for defendant. Judgment was rendered thereon, and error is prosecuted to this court to reverse the same.

We think that the court erred in its charge to the jury, touching the ability of Leopold Peters to read the English language, and in saying to the jury that a copy of the rules printed in the English language was no notice to him, and when inquiring from the jury: "Did they understand that the old gentleman was a German and might not understand the English language?" Further inquiring: "Was there anything occurred to induce them to know that the old gentleman was a German, and in the further statement that if they knew he was a German, there was no presumption that he could read the English language."

We are of the opinion that if any man undertakes to do business in any language, he represents, and the parties dealing with him have a right to understand, that he is able to deal in that language, unless the contrary clearly appears.

If he was not able to transact business in this country in the language of this country, it was his duty to protect himself by securing the services of someone who could aid him in that behalf, and therefore, when he undertook to act for himself, he in effect represented that he was able to take care of his side of the business transaction, and there is nothing appearing in this record that would make this case an exception to the rule.

As to the weight of the evidence, we think it clearly appears by

the evidence of the defendant, Leopold Peters, that he knew what the rules were in former sales. True, he does not admit that he understood what the auctioneer said, when he said that the rules of former sales should control this one, but claims that he could not understand so much English; yet he does say very clearly that he understood him to say that the horse was sound and well broken.

We think that if he understood that much in his behalf, he ought to have understood what was said on behalf of plaintiffs; but even if he did not, and he knew that the rules were posted there for the information of purchasers at this sale, and if he knew that they were in a language that he could not read and could not understand, he engaged in the bidding at his peril, if he did not seek information from one who could read and who could understand.

It was his duty, in other words, to advise himself when opportunity was offered, and if he failed, it was his mistake and not the fault of the plaintiffs.

The plaintiff had a right to make the conditional warranty contained in the rules, and in sales made under these rules the limitation thereof necessarily became a part of the contract.

The purchaser is at liberty to buy or not to buy at a sale where such rules are promulgated with such limitations of warranty; in fact the sellers might refuse by their rules to warrant at all, and then the doctrine of *caveat emptor* would apply; so that if there be a limited warranty the purchaser, in order to avail himself of the terms of the warranty, must comply with the conditions thereof.

Therefore, we are of the opinion that the verdict in this case is against the manifest weight of the evidence, viewing the evidence in connection with the law that must control.

We therefore find that there is error apparent upon the record, to the prejudice of the plaintiffs in error, in the charge of the court as above specified, and in overruling the motion for a new trial on the ground that verdict was against the weight of the evidence.

The cause is reversed for these reasons, with costs, and re-

manded to the court of common pleas for further proceedings and trial according to law. Exceptions of defendant in error are noted.

W. H. Gifford and *J. P. Seward,* for plaintiffs in error.

Andrew Stevenson, for defendants in error.

DEEDS SIGNED IN OTHER THAN THE USUAL PLACE.

Circuit Court of Auglaize County.

ELIZA GRAHAM ET AL V. MICHAEL BURGGRAF ET AL. *

Deeds—Record of, Competent Evidence, When—Identification of Deed —Signature of Grantor Established—Wife Signed on Opposite Page —Instrument Construed to be as to Her a Contract—Such an Instrument Sufficient as a Basis of Equitable Relief.

1. The record of deeds is competent as evidence in an action involving title to land, where there are irregularities in the execution of the deed.
2. The testimony of a witness who saw a deceased grantor sign a deed, and the identification of the deed in question, and the testimony of three or four expert witnesses that the handwriting is that of such grantor, there standing uncontradicted, are sufficient to establish the signature of such grantor.
3. A party may sign a deed elsewhere than in the place provided for that purpose; and if in other respects regular, and the signature is properly identified, the fact that one of the grantors signed on an opposite page from the place for the signature does not render a deed invalid.
4. An instrument purporting to be a deed, and proper in all respects except as to the signature of the wife of the grantor, which appears in another than the ordinary place therefor, and without seal, as the law at the time required, and without proof that the witnesses were present and saw her sign her name, amounts to a deed by the husband and a contract by the wife.
5. Such an instrument, while lacking one or more essentials as to the form of its execution, forms a basis upon which a court of equity may give relief to parties holding possession thereunder, especially where there is evidence tending to prove payment received by the

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* Affirmed without report (59 Ohio St., 603).

wife at the time of such conveyance, and that those claiming through her acquiesced in the adverse possession of grantees for a long period of years. The instrument under these conditions confers an equitable title, and injunction to restrain acts of ownership by grantees, will be refused.

PRICE, J. (orally); DAY, J., and FINLEY, J., concur.

Plaintiffs brought their suit in the court below against Michael Burggraf and M. H. Goodkind, and for a cause of action say they are the sole and only heirs at law of Cynthia Cornell, deceased, and as such are entitled to the reversion of a certain tract of land in this county, containing about fifty acres; that the defendant, Michael Burggraf, is the owner of the present outstanding life estate in the premises of one George W. Cornell; that on September 11, 1895, the defendant, Burggraf, without authority or right from the plaintiffs, executed and delivered to Goodkind an oil lease on the same premises; that under that lease Goodkind had wrongfully entered the premises and had begun to extract oil from the ground in large quantities; that the lands were valuable for oil producing purposes, and to remove the oil would be somewhat disastrous to the value of this estate; and they ask an injunction against the operation of these premises for oil purposes, and an order to enjoin entering the premises and also for an accounting for the oil that has been produced.

The defendant, Burggraf, answers in three defenses. The first is a general denial to the plaintiffs' title to the land; the second, that the defendant had executed a lease to Goodkind for oil purposes on the premises, and that it is necessary to operate for oil by reason and in order to save the waste which would occur by reason of the adjacent territory to this fifty-acre tract being drawn upon by the sinking of wells on that land and drawing from the fifty acres; third, by way of cross-petition, that he is in possession of the premises and is the owner in fee simple, and that the plaintiffs claim some right in the premises which he asks they may be compelled to set up, and that his title may be quited against them, and for other and further relief.

On the hearing of this case there were some objections made to the introduction of testimony, which we should dispose of before proceeding to the balance of the case. The plaintiff, by his counsel, introduced the record of deeds, Vol. 22, page ——; there was an objection made to the introduction of that by one of the parties, and my recollection is that it was introduced by the plaintiff. There would be no error in that, for the record is evidence by reason of the association of the parties. The record of the deed offered in evidence between the parties was the one which Mrs. Cornell made at the time. The deposition of George W. Cornell is introduced in evidence, subject to objections made to certain questions in the deposition; we have marked in lead pencil in the margin opposite such questions as we think should be ruled out, and in that way counsel can determine the evidence that we regarded as competent and incompetent.

What is the evidence, then, in regard to the title in this case? No question is made as to the conveyance by George W. Cornell, the husband of Cynthia, but that it is in proper form. The record shows no signature of the wife joining in the execution of the deed; but the deed is produced and identified, the deed of which the record is a copy and in which it is claimed Cynthia signed her name, not in the form of subscribing to the deed, but signing it between two lines on the opposite page of the deed and in another part of the deed where there is language regarding the covenants embraced in the conveyance.

Is the evidence satisfactory that that was the signature and handwriting of Cynthia Cornell? We have a deed identified by a witness who saw her sign a certain deed and testifies positively that she signed that paper, which was introduced in evidence as a standard of comparison. The handwriting in the deed in question was compared by three or four witnesses who were introduced as experts in comparison of handwriting, and as a result of their examination, they say that this handwriting in the deed in question is by the same hand that wrote the signature to the other deed, identified by the other witness; there is no evidence opposed to this; at least there is no expert testimony on the subject, and while the evidence is not as full and clear as

we would like it in a case of such importance, we believe it fairly establishes the fact that the handwriting of the name of Cynthia Cornell, on the page opposite to where her husband signed, is in the handwriting of Cynthia Cornell.

That being the case, the next question raised is, what is the effect of the signature at that place? It is not witnessed, and is in a different locality from the place where signatures are generally recorded. From an examination of the authorities cited and the usual rules regulating the execution of deeds under the law as it existed at the time this conveyance was made, we are of the opinion that it doesn't have the character of a deed of conveyance, so far as the wife is concerned. It would lack the one element, clearly, perhaps that there is no seal annexed to her name, and it can not be said to be clear that the witnesses who attested the signature of the husband were present and saw her sign her name at the place mentioned; but so finding does not necessarily give the plaintiffs a right to the relief prayed for.

We think from our investigation of the authorities and from the language of our statute, that a party may sign a deed elsewhere than under the place usually provided for that purpose in the forms; like the law regulating wills, the signature need not be necessarily at the close of the will but may appear elsewhere if it is identified as being the signature of the testator, and otherwise regular in form and execution. So we think it stands at least in the form of a contract—a deed by the husband, and in the form of a contract by the wife; and while in an old case involving title, in an action of ejectment where the general issue was joined, such document would not be sufficient to defeat the plaintiff's right to recover possession of the property, yet in a court of equity, where it is made to appear that this contract was executed on its face purporting to be a conveyance, yet lacking one or more essentials as to the form of its execution, it is such basis as would authorize a court, upon a proper pleading, to execute a contract, and give relief to the parties who held possession under such instrument. In this evidence it appears, while not amounting to much in weight, in the evidence of the son, that $800 was paid at the residence of Cornell in

the presence of his wife, which was turned over by the husband to the wife for safe-keeping; that she had knowledge of the consideration. There was no notary public there to take the acknowledgment of this deed by either party. There is some evidence as to the place of its execution, namely, at the office of Joseph Plunkett.

There is another circumstance in this case, the mother of this child dying, if we are informed correctly, seventeen years ago, at least it so appears from the deposition, there was an acquiescence on the part of this plaintiff, up to a certain period of time, in the possession of the parties under whom the defendant holds.

Now, on the whole case are the plaintiffs entitled to enjoin defendants from enjoying possession of this property; they must show a clear right to this remedy. We think that the case, taken as a whole, shows that Mrs. Cornell signed this instrument; that she signed it as a contract at least, and no doubt, we think, intended to join in the conveyance, and that it is such an instrument as confers upon Burggraf, and the other parties under whom he holds, an equitable title, one that is capable of being enforced in equity. That being the case, the plaintiffs have no standing in court to enjoin the peaceable enjoyment of the possession of the premises under this title. There will be a finding for the defendants; plaintiff's petition dismissed, and the title of the defendants quieted as against the plaintiffs and each of them; costs to plaintiffs and judgment for costs; the injunction dissolved and cause remanded to the court of common pleas for execution.

Goeke & Culliton, for plaintiffs.

Wm. H. Cunningham and *Layton E. Stueve,* for defendants.

LOCATION WITH REFERENCE TO A DWELLING HOUSE OF AN ADDITION TO A CEMETERY.

Circuit Court of Hancock County.

MARIAH MORLOCK v. IGNATIUS T. HORSTMAN ET AL.*

Cemeteries—Location of, within not less than One Hundred Yards of a Dwelling—Not an Infringement on the Vested Rights of the Property Owner, When—Such Use of Adjoining Land should be Anticipated, When—Reasonableness of the Provision in Section 3573.

1. The change in Section 3573, whereby the distance from a dwelling at which a cemetery may be located was made not less than one hundred yards instead of not less than two hundred yards, can not be construed as an infringement on the vested rights of a property owner who purchased and made his improvements prior to such change, especially where the land which it is proposed to devote to such use adjoins an established cemetery in a rapidly growing town.
2. A restriction as to the location of cemeteries, which was considered reasonable when it was adopted, may be removed or modified when the Legislature determines that necessity or circumstances so demand; and it is not unreasonable to require that such modification be anticipated as to land adjoining cemeteries established, and in use, and so situated that adjoining land would naturally be selected when more burial space becomes necessary.
3. One who purchases land adjoining the cemetery of a religious society, and builds a house one hundred and sixty feet from the nearest lot therein and makes other improvements, is not entitled to an injunction restraining the society from using for cemetery purpurposes land purchased by them boerdering on the established cemetery grounds, where the part to be so used is more than one hundred yards from the plaintiff's dwelling, although the nearest boundary line is less than one hundred yards from his dwelling.

NORRIS, J.; DAY, J., and PRICE, J., concur.

The plaintiff, Mariah Morlock, complains that the defendant, Ignatius Horstman, is the Bishop of Cleveland, and as such holds title of real estate of the Catholic church in his diocese, and so holds certain land in Washington township in this county. St. Wendelas Catholic congregation of Fostoria, Ohio, is a relig-

* Affirmed by the Supreme Court without report (60 Ohio State, 629).

ious society. The plaintiff owns and occupies as a residence the premises adjoining on the west the land held by the church; her residence and out-buildings are less than one hundred yards from the land of the church. She says that it is the intention of said religious society of St. Wendelas church to lay out its said lands for a cemetery for the dead of that congregation. She says that if that be done it will make impure the water supply for her residence, and will greatly injure and depreciate the value of her property; and she asks that defendant may be restrained from establishing and using the lands described for cemetery purposes.

Defendants deny that they intend or will lay out and establish a cemetery within three hundred feet of plaintiff's residence, but say that they are about to locate and lay out a cemetery which will be at its nearest point more than one hundred yards from plaintiff's duelling-house. They aver that when plaintiff purchased her property and built her house and made her improvements the Fostoria city cemetery was located and used adjoining her lands, and no more than one hundred and forty feet from her said dwelling-house, and that said cemetery is now, and before she so purchased, and ever since has been used as a cemetery and place for the burial for the dead, and that the land so proposed by the defendant to be used as a cemetery adjoins the said Fostoria cemetery.

The issues thus presented reach this court by appeal from the common pleas. There is substantially no disagreement as to the facts in this case. There was thought to be a difference as to distances. The west line of the land so held by the religious society is less than one hundred yards from the plaintiff's dwelling, but the testimony shows that the portion of the land proposed to be used as a cemetery is three hundred feet and more from plaintiff's residence; and that being true, what is the law of the case?

The testimony informs us that plaintiff's premises are one hundred and sixty and one-half feet from the nearest lot in the Fostoria cemetery, which is separated from her premises by the public highway.

The Fostoria city cemetery was established forty years ago, and ever since has been and now is in use as a place of interment. Plaintiff's property was acquired eighteen years ago, about, and the improvements were made all since that time.

Under our statute the rule appears to be that a cemetery can not be established upon premises that do not adjoin a cemetery already located, if the lands sought to be used for cemetery purposes lie within two hundred yards of a dwelling-house, unless the owner of the dwelling-house gives his consent. This rule, however, is not without its exceptions, and notably where it is sought to use for cemetery purposes property adjoining a cemetery already located and used. In such case the limit shall not be less than one hundred yards from a dwelling-house, if the dwelling-house has been erected after the laying out and establishment of the cemetery so located and used.

We think there is nothing uncertain or ambiguous about this provision of Section 3573, Revised Statutes. The case at bar is clearly controlled by it. A cemetery is located and has been in use for forty years and is now in use adjoining it, with a cemetery road between, which is merely a public easement and does not fix the land lines on plaintiff's premises. Her home is one hundred and forty-seven feet from the old cemetery line, and one hundred and sixty and one-half feet from the nearest lot in it. Her property was acquired and her dwelling built years after the location of the adjoining cemetery. The land upon which this cemtery is sought to be established joins the old cemetery, the same as do the premises of plaintiff, and is distant from the dwelling over one hundred yards.

It appears that a state of facts such as is recited by the testimony in this case was in contemplation by the law makers when this provision of Section 3573, Revised Statutes, was enacted. As to her vested rights, Section 3573 is a general law. Each may use his property for legitimate purposes subject to whatever restriction the law imposes.

Land used for cemetery purposes is not being used for an illegitimate purpose. If two hundred yards was the distance from a dwelling-house at which the location of a cemetery was

fixed, when she made her improvement, it didn't determine any right in her; it simply curtailed the rights of somebody else; it restricted the rights to use property for a legitimate purpose.

A restriction that might have been a reasonable one, when necessity or circumstances required it, may be removed or modified as the wisdom of the Legislature may determine; and it does not appear unreasonable that such modification shall be anticipated as to land adjoining cemeteries already established and in use. She located beside ground, which was then held, near a large and growing town, as a place for the sepulchre of the dead. She was, to some degree at least, chargeable with notice that the people of that place, of whatever religious sect or denomination, would naturally incline to that locality when conditions required more burial space. We do not think that this general law can be construed as an infringement upon her vested rights.

Plaintiff's petition will therefore be dismissed at her costs.

Blackford & Blackford, for plaintiff in error.

Seney & Sayler and *John Sheridan*, for defendants in error.

ASSESSMENTS IN EXCESS OF THE STATUTORY LIMITATION.

Circuit Court of Hamilton County.

THE FIFTH NATIONAL BANK OF CINCINNATI v. CITY OF CINCINNATI ET AL.

Decided, February 15, 1908.

Streets—Assessments for Improvement of—Where by Petition Under Section 2272—Application of the Restrictions to Assessment Under the Municipal Code.

While a lot owner can not escape payment for a street improvement made in accordance with a petition signed by him, even though the assessment exceeds the statutory limitation, he is entitled to have such an assessment added to any later assessment made within five years, for the purpose of ascertaining whether the total exceeds thirty-three and one-third per cent. of the value of the land after the improvement has been made; and if excess is found he is entitled to relief from the second assessment to that extent.

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

In 1899, Henry Moemke was the owner of lot 89, situtated at the corner of Mansion place and Myrtle place on Price Hill, being 37.50 feet on Myrtle and 135 feet on Mansion place, and signed a petition for the improvement of Mansion place and for the assessment of the whole cost of such improvement except two per cent. and cost of intersections. The amount of the assessment including interest is $400.90.

An ordinance to improve Myrtle place was passed August 8th, 1904, and the assessing ordinance was passed July 17th, 1904. This assessment with interest amounts to $389.99.

On September 12, 1904, the lot was assessed for a sidewalk in Mansion place in the sum of $64.45, which has been paid. And on June 3d, 1907, the lot was assessed for a sewer in Mansion place in the sum of $99.88, which has been paid.

It is agreed that the property is worth $1,725. The plaintiff is now the owner of the lot and prays that the assessments be reduced to the amount allowed by statute, and for an injunction.

The lot owner having signed a petition for the improvement of Mansion place and for the assessment of the cost thereof is not entitled under Section 2272, Revised Statutes, then in force, to the benefit of any statutory limitation upon the power of assessment for that improvement, although such petition was not subscribed by three-fourths in interest of the owners of the property abutting upon Mansion place, and although legislation similar to Section 2272, Revised Statutes, has since been held by the Supreme Court to be unconstitutional. *Shoemaker* v. *City of Cincinnati,* 68 O. S., 603.

It does not follow, however, that the owner of the lot, by signing the petition, waived his right to have such assessment added to later assessments levied upon the same lot within a period of five years, to ascertain whether the total exceeds thirty-three and one-third per cent. of the actual value thereof after improvement is made, as provided in Section 53 of the municipal code as amended April 20, 1904 (97 O. L., 126).

He did not then know and could not anticipate what improve-

ments would be made or what assessments would be levied within the statutory period.

Besides the municipal code expressly 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 thirty-three and one-third per cent. of the actual value thereof," which provision admits of no exception, other than when a petition is signed and presented, and then only to be applied to the particular improvement asked for, or when otherwise waived. The owner could not escape payment for the improvement in accordance with the petition even though the assessment exceeded the limitation then in force (Section 227, Revised Statutes) or now in force (Section 53, municipal code).

The illegality attaches to the later assessments levied within a period of five years, and not to the original assessment authorized by petition.

The Myrtle place assessment was legal to the extent of $174.10, which together with the assessment of Mansion place equals thirty-three and one-third per cent. of the actual value of the lot. The collection of the excess of the Myrtle place assessment, amounting to $215.89, will be enjoined. Such illegal assessments as were voluntarily paid can not be recovered, nor set off against those that remain unpaid. *Wilson* v. *Pelton*, 40 O. S., 306; *Brooks* v. *Village of Norwood*, 12 C. C., 257.

Wm. F. Chambers, for plaintiff.

Charles F. Hornberger, Assistant City Solicitor, for the city.

HUSBANDS' NAMES INSERTED IN PARTITION DEEDS.

Circuit Court of Franklin County.

WATERMAN v. WATERMAN. *

Quit-Claim Deeds in Amicable Partition—Names of Husbands of the Heirs Inserted—Title of Heirs not Affected Thereby—Possession of Husbands not Adverse.

1. Where a family who had inherited certain real estate agreed to an amicable partition, the heirs joining in quit-claim deeds to each other in which deeds the names of their husbands were inserted, the heirs took title by inheritance and the quit-claim deeds will be regarded as merely the means adopted to sever the tenancy in common.
2. The insertion of the names of the husbands of the heirs in quit-claim deeds thus executed did not invest the husbands with title to any part of the property, but was a mistake of the scrivener, the husbands holding an undivided one-half of the property in trust for their wives, which upon the death of the wives descends to their heirs.
3. Under such circumstances the occupation of the property by the husband of one of the heirs during her lifetime was not adverse.

STEWART, J., SHAUCK, J., and SHEARER, J.

BY THE COURT.

A family by the name of Anderson, having inherited certain real estate in Franklin county, in 1855, by a mutual agreement had an amicable partition made, in which the various heirs and their consorts joined in quit-claim deeds to each other. One of these Andersons, to-wit, Rebecca Ann, had married a man by the name of Waterman, but when the quit-claim deed by the others was made, they inserted in it, as grantees, not only Rebecca Waterman, who was the sole owner, but also her husband's name. The same kind of a deed was made to the other female heirs, that is: their husband's names were inserted with them, as grantees in the deed. Waterman and his wife lived on this place and used and occupied the same until a year or two before the commencement of this action, when Mrs. Water-

* Affirmed without report (57 Ohio State, 659).

man died. Her husband claimed under the deed to be entitled to one-half of the property and also his dower in his wife's one-half. The children of Mrs. Waterman claimed that she was the equitable owner of the entire tract. A decree was granted as follows:

This day this cause came on for hearing, upon the petition of the plaintiff filed herein January 22, 1894; the answer and cross-petition of Chas. F. Waterman, and others, filed herein March 14, 1894; the answer of Edward Waterman, Clarence Waterman and Mabel Waterman, infants, by their guardian *ad litem*, filed March 18, 1895; the answer of Herbert Waterman, Florence Waterman, Walter Waterman and Harold Waterman, infants, by their guardian *ad litem*, filed March 23, 1895; the answer and cross-petition of Ida M. Waterman, filed March 23, 1895, and the second amended reply of the plaintiff, filed March 30, 1895, and was heard upon said pleadings, the exhibits and the testimony, and was argued by counsel and submitted to the court, and upon consideration thereof and being fully advised in the premises, the court doth find from the evidence the following facts and the law governing the same, as follows, to-wit:

First. Rebecca Ann Waterman took title to the forty-five acres in dispute by inheritance. The deeds and partition proceeding being the means adopted to sever the tenancy in common and set apart separate tracts to each.

Second. That in the execution and exchange of the deeds and the election in partition, there was no intention on the part of the plaintiff and his deceased wife to make a gift or advancement to the plaintiff.

Third. The insertion of the plaintiff's name in said deed from the Andersons and in the election confirmed by the court, was a mistake of the scrivener drawing the deed and furnishing the entry of confirmation. The occupation of said premises by the plaintiff during the lifetime of Rebecca Ann Waterman, his wife, was not adverse.

Fifth. The improvement of the estate by the plaintiff was made with knowledge on his part of the facts supporting the

title of his wife, Rebecca Ann Waterman. From these facts so found, and arising from the attending circumstances, it follows, as a matter of law, and the court find that Rebecca Ann Waterman was seized in fee not only of the legal title of undivided half of the forty-five acre tract, but also of the beneficial interest in the other half, and that A. Frederick Waterman only held the title to the undivided one-half thereof in trust for said Rebecca, and so the title remained until the death of said Rebecca, when it descended to the defendants as her heirs at law.

To each and all of which findings of fact and conclusions of law the plaintiff excepts. It is now, therefore, ordered and adjudged that the petition be and the same is hereby denied. To which judgment of the court the plaintiff excepts. And it is now further considered and adjudged that the plaintiff, A. Frederick Waterman, make, execute and deliver to the defendants, Mary E. Waterman, Emma L. Waterman and Alfred G. Waterman, children of Rebecca Ann Waterman, deceased, and to Edward Waterman, Clarence Waterman, Mabel Waterman, Herbert Waterman, Florence Waterman, Walter Waterman, Harold Waterman, children and heirs at law of Charles F. Waterman, deceased, who was a son of the said Rebecca Ann Waterman, a good and sufficient deed or deeds of quit-claim, conveying to said defendants a fee simple title to the undivided one-half of the said forty-five acres of land described in the petition subject to his rights of dower therein, and that in default thereof for a period thirty days from the date of this decree, that it operate and stand as such conveyance. Said forty-five acre tract of land is described as follows, to-wit:

Situated in the county of Franklin, state of Ohio, and in Franklin township, being forty-five acres of land off from the east side of the tract estimated to contain sixty-six acres adjoining on the east the farm known as the John Anderson Homestead farm, said sixty-six acre tract being the same conveyed by John Anderson to his sons, Robert, Joshua and J. Redding Anderson, by deed dated May 30, 1836, and being the same forty-five acres of land quit-claimed and released to Rebecca Ann

Waterman, and A. Frederick Waterman, by deed dated December 24, 1855, by J. Redding Anderson and others, and appearing of record in deed book 84, page 92, Franklin county deed record.

To all of which orders, judgments and decree of the court the plaintiff excepts. The said deed or deeds of quit-claim to be executed by the said A. Frederick Waterman shall convey the undivided three-fourths of the undivided one-half of the said forty-five acre tract subject to the dower estate therein to the said Mary E. Waterman and Alfred G. Waterman jointly, so that each of said seven children shall take an undivided one-seventh of said undivided one-fourth so conveyed subject to the right of dower of the said Ida M. Waterman, as the widow of Charles F. Waterman, deceased, in the said undivided one-fourth so conveyed.

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Where, in an action on a contract, release is claimed from part performance, that fact should be alleged in the petition. 462.

Contract for the improvement of a county road rendered invalid because of failure to make a record of the meeting of the county commissioners at which the contract was awarded, or to file an auditor's certificate as required by Section 2834*b*; such a contract can not be enforced against the county, nor can an equitable accounting be

granted for the labor and material expended in improving the road; a contract can not be implied. 462.

The different breaches of a contract are separate causes of action if sued on when occurring, but if no action is brought until after the term of the entire contract the different breaches become one cause of action. 490.

Proper procedure where a county contractor fails to complete the work. 530.

There can be no recovery in an action against a contractor and his sureties for damages by reason of failure to complete a contract entered into with county commissioners, where there is no averment that the contract relied on was one of binding force and effect; endorsement of contract by prosecuting attorney and all other prerequisites to a complete and valid contract must be averred; these prerequisites are not for the benefit of the soverign power alone, but are of the essence of the contract, which without them is void. 530.

Executory and implied contracts by infants; pleading and evidence necessary as to the reasonableness of an account for necessaries by infant and the financial condition of the parent. 583.

Where a wife signed a deed in the wrong place and without seal or witnesses; as to her, instrument held to be a contract. 594.

CONTRIBUTION—

Recovery by a lower from an upper county for contribution to the cost of a joint county ditch; jurisdiction of the common pleas; parties to the action. 16.

CORPORATIONS—

The provisions of Section 5109, relating to the verification of pleadings by agents and attorneys, apply to pleadings of corporations. 14.

The consent of a street railway company to a grant for the duplication of a part of its line can only be given by the stockholders in the manner provided by statute. 89.

The president of a corporation is not liable for deceit in signing stock certificates purporting to be fully paid up and non-assessable, notwithstanding his knowledge that property had been accepted at a great overvaluation in payment for stock, when. 217.

The Legislature is without power to alienate or qualify the right of a private corporation to contract with reference to property; Section 3231-1, providing for liens on railways for labor and material, unconstitutional. 408.

COSTS—

In a premature proceeding on appeal. 427.

COUNCIL—

Sufficiency of record of "yea" and "nay" votes on a resolution and ordinance providing for a street improvement. 38.

COUNTY COMMISSIONERS—

Proceedings before the boards of three counties with reference to improving a joint county ditch; where county commissioners clean and enlarge that part of a county ditch lying within their county in a manner providing better drainage for an upper county, contribution toward the cost may be recovered from such upper county. 16.

Are not liable for negligence to one who was injured owing to the bad condition of a country road along which he was driving. 115.

An act fixing the salaries of county officers, and providing that the county commissioners of the several counties shall fix the compensation of deputies and other employes, is valid. 175.

Power of, to improve a watercourse which is partly artificial; may locate a ditch substantially along the line of or adjacent to a

living stream; irregularity of proceedings with reference to a county ditch may be disregarded or cured, when. 201.

Jurisdiction of, in the matter of a county ditch; one joint owner in charge of the land may bind his co-tenants to payment of assessment by signing the petition; ditch bricked over and made a closed sewer within municipal limits. 259.

Liability of, for maintenance of prisoners sentenced by the common pleas court to the city work house is not essentially contractual, but is based rather on the mandatory requirements of Section 1536-369. 277.

Are not required by Section 1296-29 to provide for payment for horses and vehicles for the uses of the sheriff. 398.

The statutory requirement that county commissioners shall file annual reports "itemized in amount" does not necessitate a statement of expenditures with the explicitness of an account; itemized bills may be entered as one transaction and payments to the same person for a single purpose as one item without separation. 401.

A contract which is let at a meeting of which no record is made, and without the filing or recording of an auditor's certificate as required by Section 2834*b*, can not be enforced against the county. 462.

COUNTY SURVEYOR—

A county surveyor performing services for the county does not come within the purview of Section 4364-62*a*, fixing a day's work for mechanics and laborers at eight hours; can not where he works more than eight hours charge the county for his excess time as hours of another day, in addition to his regular *per diem*. 185.

A county surveyor is entitled to payment at the rate of four dollars per day for all the days of service by his deputies, though he may not have been required to pay his deputies at that rate, or for all their days of service. 185.

A county surveyor can not charge for his services on a county ditch at the rate of a certain number of days per mile of work, but he must base his charges on the number of days of service actually rendered. 185.

COURTS—

The holding of the Supreme Court in *Traction Co.* v. *Parrish* to the effect that where one brings an action to protect a legal right the question of his good faith is of no importance, is not an *obiter* but has become the established law of the state. 89.

It is the duty of the common pleas to retain and try the matters in issue in an appropriation proceeding brought up from the court of insolvency, the judgment of which it has been found necessary to reverse. 105.

Authority of, to hear a motion to set aside a default judgment at a term subsequent to that of the entry of default is only obtained by the filing of a motion therefor during the term of the entry and its due continuance until heard. 224.

COVENANT—

In a mortgage for release of a part of the property covered by the mortgage upon payment of a stipulated sum, not available to the mortgagor after proceedings for foreclosure of the mortgage have been begun. 430.

CRIMINAL LAW—

Character of the crime for the conviction of which a witness may be discredited. 433.

A trial court is without jurisdiction to hear a motion for a new trial in a criminal prosecution at a term subsequent to that in which the verdict was rendered. 66.

Prosecution for failure to take out a license for maintaining a public ball ground; what it is necessary the affidavit shall charge; proof required to convict; objection to bill of exceptions too late, when. 60.

One acquitted under an indictment for stealing certain property may be subsequently indicted and tried for receiving and concealing the same property, knowing it to have been stolen. 131.

Prosecution under Section 7024 of a teacher for having sexual intercourse with one of his pupils; necessary averments; proof as to other acts than the one charged in the indictment; discrepancy in the testimony as to the day of the week on which the offense occurred. 169.

Meaning of the word "term" as used in Section 7024. 169.

Where the prosecuting attorney in his argument to the jury referred to a damaging paper which he supposed was in evidence, but investigation proved was not in evidence, the subsequent conviction of the defendant should be set aside, notwithstanding the trial judge and the prosecutor both requested the jury to disregard the remark. 185.

Prosecution of a county surveyor for presenting false claims to the county. 185.

Prosecution for keeping a bucket shop; indictment for, not insufficient, when; not necessary that the nature of the contracts be defined; inquiry of customers as to their intentions does not sheild the defendant from responsibility; gravamen of the offense; charge of court. 245.

Where one is convicted of cruelty to a mule which was being worked with sore shoulders, the conviction can not be set up as a plea in bar to a second prosecution for cruelty on the same day to another mule, which was being worked in another team and by a different driver. 371.

A *prima facie* case of criminal liability is made against a principal, when it is shown tnat an act which is made an offense under the statutes was done by his agent in the course of his employment and with the apparent authority of the principal. 371.

Where one lawfully engaged in liquor selling receives an order by mail to ship a package of liquor into dry territory C. O. D., and the express company collects the money and returns it to the seller, the sale is completed on delivery of the package to the carrier, and the seller is not guilty of violation of the local option law in force at the point to which the package was shipped. 417.

A verdict finding the accused guilty of assault and battery under an indictment which charged only shooting with intent to wound, is not equivalent to an acquital; the accused is not entitled under such a verdict to an arrest of judgment or discharge. 468.

In a prosecution for violation of a smoke ordinance, where the smoke comes from a building controlled by a corporation, the proper defendant is not the president of the company, but the corporation itself or the employe who causes the smoke. 495.

Publication in newspaper that jurors had been bribed not ground for a new trial, when; as to disqualification of juror, because his name was not drawn from jury wheel, and for service on the grand jury which returned the indictment. 497.

It is proper for the judge rather than the clerk to call the jury in a criminal case; it will be assumed that the entire twelve men were called, when. 497.

Proof that marks opposite certain names on a certified list of voters were made by the defendant, held to be satisfactory; use of such marks as a standard of comparison in determining wheth-

er other marks were made by the same hand. 497.

Trial not vitiated by the fact that the prosecuting attorney, in reply to a challange to state why the defendant was not tried long before, replied that the reason was he absconded and could not be found by the police. 497.

CUSTOM AND USAGE—

Evidence as to the custom of a railway conductor to give warning signals to trainmen assisting in the making up of a train is admissible in an action for damages for the wrongful death of one of the trainmen. 281.

Where the court in its charge to the jury refers to a habit as a custom, evidently meaning a custom in the general acceptation of the term and not as a custom having the force of law; complaint thereof can not be made unless a charge was framed by the dissatisfied party which would correct the alleged error; a general exception to the charge is not sufficient. 281.

DAMAGES—

In an action for conspiracy the damage sustained is the gravamen of the action and proof of special damage is required and can not be implied. 228.

In an action for damages for conspiracy to injure by use of libel or slander, the statute of limitations does not apply unless the testimony fails as to the conspiracy, and libel or slander alone is left upon which to base a judgment for damages. 228.

The liability for, where several persons have contributed independently to the production of a nuisance, is not joint; where the action is against one only of several independent wrong-doers, the jury should be instructed to find, with a liberal hand if necessary but as accurately as possible, the damage resulting from the acts of that particular wrong-doer. 320.

A verdict of $450 as damages for assault and battery and the throwing of the plaintiff down a flight of stairs is not excessive; in such a case punitive as well as compensatory damages may be assessed and a reasonable attorney's fee included. 433.

DEBTOR AND CREDITOR—

A valid debt is created against the estate of one who acknowledges services rendered and exacts a promise that they shall be continued to his wife after his death and directs that she make suitable provision in payment therefor. 69.

DECEIT—

The president of a corporation is not liable for deceit in signing certificates of stock purporting to be fully paid and non-assessable, notwithstanding his knowledge that property had been accepted in payment for stock at a great overvaluation, when. 217.

DEED—

Expressing upon its face a valuable consideration, may be shown by parol evidence to have been for natural love and affection, when. 311.

The record of deeds is competent evidence in an action involving title to land, where there are irregularities in the execution of the deed involved. 594.

The signature of a deceased grantor is sufficiently established by testimony standing uncontradicted, of a witness who saw the deceased sign a deed, and the identification of the deed in question, and the testimony of expert witnesses who say that the signature on the deed is the handwriting of the deceased. 594.

The fact that one of the grantors signed the deed on the page opposite the place for signature does not render the deed invalid, if the deed is otherwise regular and the signature is properly identified. 594.

Where a deed, proper in other respects, is signed in the wrong place by the wife, and her signature is without seal as the law at the time required, and there is no proof that witnesses were present who saw her sign her name it will be treated as a deed by the husband and a contract by the wife; such an instrument confers an equitable title, when. 594.

The insertion of the name of a husband in a quit-claim deed to a wife in an amicable partition does not invest the husband with any part of the title, but will be treated as a mistake of the scrivener; possession of the husband under such circumstances not adverse, and upon the death of the wife the property descends to her heirs. 605.

DEFAULT—

Under a mortgage and commencement of foreclosure proceedings, renders unavailable a reservation of the right of release of a part of the property from the lien upon payment of a stipulated portion of the indebtedness. 430.

DEFENSES—

Matters of a merely defensive nature need not be met earlier than the filing of the reply. 449.

DELIVERY—

The proceeds of a policy of life insurance are payable to an assignee of the policy without delivery, in preference to a subsequent assignee in whose possession the policy was placed. 396.

Of goods shipped C. O. D.; where the money is collected by the carrier, the sale is complete at the time of delivery to the carrier. 417.

DEPOSITIONS—

Failure to attach to a bill of exceptions depositions used at the trial below, or to properly mark them for identification, does not prevent their being treated as a part of the bill of exceptions, when. 105.

DESCENT—

The course of descent of property which passed to a wife in partition proceedings is not changed by the fact that the name of her husband was by inadvertence inserted with hers in the deed. 605.

DEVISE—

Where a devise of real estate was held to be for life only with power to sell for the benefit of the estate. 69.

Of residue by husband to wife with power of disposition; held, that wife's will disposing of said residue was rendered invalid by reason of her prior death, and that the husband died intestate as to the residue, which goes to his heirs at law by descent. 345.

DISCRETION—

Where lodged in mayor with reference to granting or refusing license for certain amusements; ordinance clothing mayor with discretion invalid, when. 60.

Not an abuse of discretion for the trial judge to allow a fee of $7,500 to a prosecuting attorney for services in recovering $215,000, collected by county treasurers as interest on public deposits and appropriated by them to their own use. 182.

DISMISSAL—

Where a petition after the striking out of redundant and improper matter still states a cause of action against the defendant, the court is without power to dismiss the action without prejudice in the absence of any pleading traversing the averments left in the petition. 49.

An appellate court has authority on its own motion to dismiss an action and adjudge the costs against the appellant, when the appellant is the plaintiff and is in default for petition. 224.

An appellant is without authority to dismiss an appeal which has been properly perfected in an

appealable case; but a dismissal to which no error is prosecuted will stand, and will be construed as the judgment of the court. 586.

DISTRIBUTION—

Where of a decedent's estate coming by inheritance, parol evidence is admissible to show that a deed, which expresses upon its face a valuable consideration, was in fact for natural love and affection. 311.

Of residue of husband's estate, which he bequeathed to his wife and she disposed of by will, but her will was rendered inoperative by her prior death. 351.

DITCHES AND DRAINS—

Jurisdiction of the common pleas court in an action to apportion the cost of a joint county ditch; right of contribution from an upper county not lost on account of the ditch becoming a public water-course by operation of Section 4510; parties to an action for contribution for a joint county ditch; when veiwers are to report. 16.

A county surveyor can not estimate his time on a county ditch improvement at the rate of a given number of days per mile, but his charge must be based on the actual number of days of service; he is entitled to four dollars a day for his deputies, though he may not have been required to pay them at that rate; the provision of Section 4364-62*a* fixing a day's work of mechanics and laborers at eight hours does not apply to a county surveyor. 185.

Power of county commissioners to improve a water-course which is partly artificial; water-course established by prescription; location of a ditch substantially along the line of or adjacent to a living stream; apportionment of a ditch assessment; finding of the commissioners final, when; defect in proceedings not fatal to assessment, when; estoppel against land owners with reference to collection of assessment; irregularities which may be cured. 201.

Where a county ditch is converted into a closed brick sewer to the benefit of the land through which it runs, a joint land owner, who has stood silently by and allowed his land to be benefited by the improvement without objection, can not thereafter resist collection of the assessment on the ground of irreguluarity in the proceedings. 259.

A joint owner who has actual control of the land may bind his co-tenants to a proposed county ditch improvement running through the land by signing the petition therefor. 259.

Jurisdiction of county commissioners in the matter of a county ditch improvement. 259.

The improvement by the county commissioners of a county ditch, lying partly within an unincorporated village having no solicitor, can not be enjoined by an individual tax-payer in an action in his own name but on behalf of the village. 325.

Sections 4483 and 4484, providing procedure for the petitioning by a municipality through its mayor for the improvement of a county ditch lying partly within its limits, are not unconstitutional for failure to provide for notice to property owners, or for appeal, or for a jury; these sections are to be taken as part of the entire chapter applying to ditches, wherein provision is made for such matters. 325.

DIVORCE AND ALIMONY—

Where notice is had by publication and application is afterward made to set aside the decree on the ground that no actual notice was received, and the trial court finds against the application, the appellate court can not determine whether the question was correctly decided, unless there is filed with the record a bill of exceptions containing all the evidence. 265.

Section 5355, providing when a judgment obtained on service by publication may be opened, has no reference to divorce cases. 268.

There is imposed upon one seeking to have a judgment obtained on service by publication set aside, on the ground that no actual notice was received, the burden of proving that he had no such notice; and a record showing that no evidence was produced on the hearing of such application would disclose that the court did not err in overruling the application. 268.

Effect of submitting on error a record which is incorrect. 268.

Property rights of parties to a divorce proceeding may be adjudicated notwithstanding the defendant is insane; appointment of a trustee for an insane defendant in a divorce proceeding is proper procedure; whether present insanity is a bar to divorce is not decided. 524.

DOW TAX—

Cold storage houses maintained separate from a brewery, and from which daily deliveries of beer are made to customers on orders previously taken, are subject to the Dow law tax. 361.

DURESS—

Action for the cancellation of a real estate mortgage on the ground of duress exerted upon plaintiff, soon after she attained her majority, by her parents, whereof the mortgagee had knowledge, not open to demurrer. 512.

EASEMENT—

The taking of telephone wires from poles and placing them in a conduit in the street imposes a new servitude upon abutting property for which the owners are entitled to compensation. 307.

ELECTION (Between Remedies)—

An election between remedies can be made but once, and where a plaintiff has chosen to ask for specific performance he can not subsequently maintain a suit for damages. 167.

ELECTIONS (Political)—

Under the Jones local option law; motive of signers of petition for an election can not be inquired into; overlapping districts. 233.

Sufficiency of proof that the defendant made a certain mark opposite certain names on the certified list of voters at a primary election; use of these marks as a standard of comparison whereby an expert testified that other marks were made by the same hand. 497.

A *prima facie* case of negligence is made against a company which places an employe at work in a room which is crossed by wires heavily charged with electricity and unguarded, and it appears that his death was due to striking his head against one of the wires as he was rising from a stooping position. 297.

EMINENT DOMAIN—

In an appropriation proceeding preparatory to a change of grade of a railway through farm lands, the assessment of damages to the residue of the tract must be based on present conditions, and not have reference to conditions existing prior to the location of the railway years before. 87.

Where error is prosecuted from the court of insolvency to the common pleas in an appropriation proceeding and the judgment is reversed, it is the duty of the common pleas to retain the case and proceed to try the matters in issue as provided in Section 6438. 119.

In condemnation proceedings involving a number of pieces of property, it is not error to single out one parcel and hear testimony and fix damages as to that parcel before proceeding with the inquiry as to the remaining parcels, providing the whole inquiry is before the same jury. 416.

ENGLISH—

There is a presumption that one who undertakes to do business in this country understands the English language. 589.

ERROR—

Requests for instructions to the jury will not be considered by a reviewing court, where the record does not affirmatively show that they were submitted in writing. 1.

Where a motion for a new trial includes the ground that the verdict was contrary to the law, it includes error of the court in the charge to the jury, and a bill of exceptions prepared within forty days from the overruling is prepared in time. 33.

It is prejudicial error in an action for damages growing out of negligence to strike from the petition language that is material and a proper averment of the cause of action; but it is not prejudicial error to strike out matter which sufficiently appears in another part of the petition. 49.

It is error to charge the jury with reference to the doctrine of the last chance, where there is no allegation in the petition which would warrant its application. 64.

It is not error to direct a verdict for a defendant railway company, where the testimony shows that the injured plaintiff was using the track as a convenient path of travel, and by a proper exercise of his faculties might have had warning of the approaching train. 73.

No prejudicial error can be based on the receiving of a verdict to which interrogatories were attached, where some of the interrogatories are answered neither affirmatively nor negatively, but simply "don't know," and the questions relate to evidential matters rather than to ultimate facts. 105.

Where error is prosecuted from the court of insolvency to the common pleas in an appropriation proceeding and the judgment is reversed, it is the duty of the common pleas to proceed to try the matters in issue as provided in Section 6438. 119.

Failure of a jury to answer special interrogatories is not ground of error when not excepted to at the time. 134.

Where a case has been tried on the theory that there had been a waiver of one of the conditions of the contract, it is not error after verdict to permit an amendment to the petition setting up such waiver. 134.

In charge of court as to the time required by a municipality to acquire by prescription the right to discharge sewage into a natural water-course. 135.

It would be error to give to a jury a case involving damages for injuries, where the facts in evidence are of such a character as to make it impossible to determine whether the accident happened in the manner claimed by the plaintiff. 149.

It is error in an action for damages for wrongful discharge by a master from his employment, to charge the jury that the burden is on the servant to prove that his discharge was without any just cause. 163.

Where the whole evidence is contained in the bill of exceptions, a reviewing court in determining whether the judgment should be reversed will examine the evidence as well as the charge of the court with the view of determining whether substantial justice has been done, and if it has the judgment will not be reversed for error in the charge. 163.

Error will not lie where prosecuted by a tax-payer to an allowance made by the trial court to the prosecuting attorney for services rendered in the successful prosecution by him of an action in behalf of the tax-payers of the county. 182.

It is not error to set aside a default judgment and revive the

cause for further consideration at a term subsequent to that of the entry, if the motion therefor was filed during the term of the entry and was duly continued. 224.

It is not error to instruct the jury to return a verdict for the defendants in an action for conspiracy to injure plaintiff in his reputation and deprive him of public office, when. 228.

Where one voluntarily submits his case to a reviewing court with full knowledge of what transpired in the court below and of the state of the record, he will not be heard thereafter on an application to set the judgment aside on the ground that the record so submitted was incorrect. 268.

It is not prejudicial error, in an action for damages against a railway company for the wrongful death of a switchman, for the court in the charge to the jury to fail to refer to the rules of the company in evidence, when. 281.

Evidence as to defective apparatus may be competent, although no recovery of damages for injuries could be based on such evidence, when. 281.

A general exception to the charge of the court is not sufficient to bring to the attention of the reviewing court a reference to a habit as a custom, when the dissatisfied party failed to frame a charge which would have corrected the alleged error. 281.

It is error to direct a verdict for the defendant, where the action is for the wrongful death of an employe who was at work under unguarded wires carrying heavy currents of electricity, and it appears that his death was due to striking his head against one of them as he was rising from a stooping position. 297.

It is not error to fail to define the meaning of the word "margin" in a prosecution for keeping a bucket shop, where there was no request that its meaning be defined to the jury. 345.

Where the action was for damages against one of several, who, acting independently, had created a nuisance. 320.

Will sometimes lie when appeal will not; statutes governing appeals and proceedings in error. 427.

It is not error to sustain an objection to the introduction of a record of conviction of a witness of crime, where the offense for which conviction was obtained was against a city ordinance only. 433.

The presumption that error is prejudicial does not apply to an irregularity in the levying of a street improvement assessment. 438.

It is error to refuse to direct a verdict for the defendant railway, where it appears that the plaintiff, who was struck by a train, was familiar with the location of the railway tracks, and attempted to cross without looking for the approaching train, which might have been seen two thousand feet distant. 448.

It is error to charge that a traction company is liable for an injury, where the testimony shows that the car might have been stopped in time to have avoided the injury, unless there is an allegation to that effect in the petition. 467.

The improper requiring in a charge to the jury of the burden of proof upon a given issue constitutes reversible error. 473.

It is error to require a plaintiff to separate and number different branches of a contract as separate causes of action, where suit has been delayed until after the term of the entire contract. 490.

A judgment should be affirmed if any one of the defenses interposed was valid, or if there is any other sufficient reason for sustaining it under the law. 530.

While error may be prosecuted before the determination of an appeal, the proceeding will avail

nothing in the event the appeal is sustained; but where the appeal is dismissed and the appellant has an error proceeding, it is his right to have a hearing therein, and to dismiss such a proceeding is error. 586.

EQUITY—

A court of equity is without jurisdiction to enjoin a threatened libel merely because it is a libel; necessary allegations to give jurisdiction. 289.

To plead or prove the invasion of a private right does not stir the conscience of a court of equity. 307.

Will not permit the ordering of an accounting for labor and material expended in a county road improvement under an illegal contract, when. 462.

ESTOPPEL—

A mortgagee who has become the owner of the property through foreclosure is estopped from denying that the property has been benefited by the improvement or that it is not valuable enough to stand the assessment, when the mortgagor joined in petitioning for the improvement. 31.

Can not be pleaded by the sureties on a fiduciary bond, when. 46.

Against property owners complaining of an assessment for a county ditch. 201.

To constitute an estoppel *in pais*, the party claiming such estoppel must have proceeded upon the admission, or declaration or statement, or whatever it may be, to his prejudice. 243.

Arises against abutting property owners who, having knowledge of the defective construction of their street, made no complaint thereof until after the work had been approved and the contractors paid in full. 263.

One who has accepted a policy in a mutual fire insurance company under representations that it is a standard cash policy, is not estopped from thereafter denying liability for assessments thereunder. 422.

Runs against an insurance company on account of an incorrect answer given in an application for insurance, when the agent construed the question in a manner to fit the case of the applicant. 449.

EVIDENCE—

Evidence of an agreement to pay what work was reasonably worth amounts to a failure of proof, and not to variance, under pleading which admits that the work was to be done under a contract at a stipulated price. 53.

In an action to contest a will the burden is on those maintaining that the erasure of the name of the testator from the will while it was in his possession was not done by him *animo revocandi*. 57.

Necessary to convict of unlawfully failing to secure a license for maintaining a public ball ground. 60.

As to damages to farm lands from a change of grade of the railway passing through them; remittitur granted. 87.

In a trial for recovery on a policy of life insurance, a receipt for premium paid stands as *prima facie* evidence of compliance with the conditions of the policy as to payment. 134.

The rule which admits of the proving of a case by circumstantial evidence requires that the evidence be such that the court or jury can reason from established facts to well-defined conclusions; is not applicable if the conclusions are based in any degree on conjecture or speculation. 149.

A court is not warranted in sending to the jury a case involving damages for injuries, where the inherent weakness of the evidence makes it impossible to say as a deduction from the facts that the accident happened in the manner claimed by the plaintiff. 149.

In a criminal prosecution as to other acts of the same nature as

the one charged in the indictment; discrepancy in testimony as to the day of the week on which the offense charged occurred. 169.

Effect of comment in a criminal trial upon a damaging paper which was not in evidence. 185.

Proof of special damages required and can not be implied in an action for conspiracy. 228.

There is an entire failure to show the accomplishment of a conspiracy to injure plaintiff in his reputation and deprive him of public office, where the testimony merely establishes the means used to accomplish the conspiracy and fails to show any resulting injury. 228.

To establish a mistake in the proceedings of a city council preliminary to the making of an improvement, the proof must be clear and satisfactory. 243.

Establishing the relation of vice-principal and subordinate. 276.

In the absence of evidence of notice of the condition of a street, a municipality is entitled to an instructed verdict in its favor as against one claiming damages for an injury resulting from a defect in a street. 296.

Of custom in the matter of signals in an action for damages for the death of a brakeman alleged to have been due to negligence of the conductor in the giving of signals. 281.

Evidence as to defects in apparatus may be competent in an action for damages for wrongful death, although no recovery could be based on such defects, when. 281.

Statements of a deceased workman as to the safety of the place where he was at work was admissible, in an action for wrongful death, as bearing upon the question of contributory negligence. 297.

Parol evidence is admissible to show that a deed, which upon its face expresses a valuable consideration, was in fact a gift for natural love and affection, where the action is for distribution of a decedent's estate coming by inheritance. 311.

A plea of usury where made as a defense to a written instrument must be supported by clear and satisfactory evidence. 377.

A verdict based on the testimony of two sets of witnesses who directly contradict each other will not be set aside on the ground of the weight of the evidence. 433.

Character of a conviction which may be used to discredit a witness. 433.

Proof of the mailing of a letter, properly stamped and addressed affords *prima facie* evidence that it was delivered; but the presumption of delivery may be overcome by evidence of equal weight and countervailing force. 473.

Parol evidence is competent to vary the recital in the acknowledgment of a mortgage deed, where the validity of the paper is attacked on the ground of duress. 512.

Required as to the reasonableness of the price charged for necessaries furnished to an infant on his express contract. 583.

The record of deeds is competent evidence in an action involving title to land, where there are irregularities in the execution of the deed conveying the title. 594.

Testimony which is sufficient to establish the signature of a deceased grantor. 594.

EXHIBITS—

Failure to attach to a bill of exceptions or to properly mark for identification does not prevent their being treated as a part of the bill, when. 105.

FEES (Compensation)—

It is not an abuse of discretion for a trial judge to allow a fee of

$7,500 to a prosecuting attorney for services in recovering $215,000 collected by county treasurers as interest on public deposits appropriated by them to their own use. 182.

FENCES—

Owners of adjoining lands are required, under the act of April 18, 1904, to build and maintain in good repair all partition fences between them in equal shares, unless otherwise agreed upon between them in writing, although such lands may not be enclosed with fences. 509.

FINAL ORDER—

An order appointing a receiver, but going no further in the way of determining ultimate rights, is not such a final order as will give a court jurisdiction on appeal. 427.

FINE—

Where a number of persons violate an injunction, the fine imposed as a penalty relates to each individually, and not to all collectively, and the maximum fine may be imposed on each individual found guilty. 577.

FRAUD—

In inducing the belief that a mutual fire insurance policy is a standard cash policy. 422.

GAMBLING—

Prosecution for keeping a bucket shop; sufficiency of indictment; inquiry by defendant of his customers as to their intentions does not shield him from responsibility; gravamen of the offense; charge of court. 345.

GASOLINE—

Alleged negligence in the sale of coal oil which had been mixed with gasoline and exploded, causing loss and death. 149.

GOOD FAITH—

The failure to carry into the syllabus of *Traction Co.* v. *Parrish* the declaration that the good faith of one who brings an action to protect a legal right is of no importance, does not make it an *obiter*, but this doctrine has now become the established law of the state. 89.

Burden of proving, where attacked on the ground that an improper advantage had been taken of a fiduciary relation. 512.

HOLDING-OVER—

Under a lease defectively executed. 249.

HOMESTEAD—

The head of a family continues to be a resident of the state and entitled to exemptions in lieu of homestead so long as he and his family are still here, without regard to the fact that he is on the eve of removing from the state; exemption allowed out of household goods which were loaded on a car for transit to Canada. 313.

HOMICIDE—

Motion by one convicted of, for a new trial on the ground of newly discovered evidence, filed after term; court without jurisdiction to entertain; remedy of the accused. 66.

HUSBAND AND WIFE—

A claim that the proof has established that the cause of action, if any existed, was in favor of the wife, and not at all in favor of the husband, does not on review furnish a basis for the contention that there has been a misjoinder of parties, where leave to answer the alleged misjoinder was not sought at the trial below. 1.

The joining of a husband, by gift, assignment or otherwise, in a cause of action existing in the wife is not necessarily a matter of prejudice to the defendant. 1.

Where a husband bequeathed the residue of his estate to his wife which she disposed of by will; held that her prior death rendered her will inoperative, and

residue should be distributed to his heirs by descent. 351.

The insertion of a husband's name in a quit-claim deed conveying property to his wife in an amicable partition proceeding, invests him with no part of the title, and his possession is not adverse, but upon the death of the wife the property descends to her heirs. 605.

Where a husband signed a deed properly and the wife in an illegal way; deed held to be a deed as to the husband and a contract as to the wife. 594.

INDICTMENT—

Necessary averments where charging a teacher with sexual intercourse with one of his pupils. 169.

A verdict of guilty of assault and battery under an indictment charging only shooting with intent to wound, is not equivalent to an acquittal; accused not entitled under such a verdict to an arrest of judgment or discharge. 468.

INFANTS—

A suit can not be maintained against an infant on his express contract for necessaries, without an averment and proof that the price to be paid for such necessaries was reasonable. 583.

Pleading and evidence as to reasonableness of the account against an infant and financial condition of the parent; executory and implied contracts by infants; books and materials furnished for instruction of, claimed to have been necessaries. 583.

INJUNCTION—

Against the building of a street railway will lie where the petitioner is an abutting property owner, when; good faith of the abutter not a matter of importance. 89.

A court of equity has jurisdiction in an action in injunction, where the plaintiffs claim to be the legally elected trustees of an incorporated church, and seek to enjoin others who also claim to be trustees from interfering with their control of the church property or their use of it for public worship. 121.

A magistrate's judgment of ouster is not a bar to an action by the tenant to enjoin interference with his possession, when. 249.

Will not lie against the publication of a pamphlet merely because it is a libel; a plaintiff in such a case must allege danger of injury to property rights, or intimidation of others in their dealings with him, or he will be remanded to an action at law; allegations of irreparable injury to the reputation of an office holder by a publication by one against whom a judgment in damages would be uncollectible does not give jurisdiction, unless there is added an allegation of danger that people will be prevented from dealing with him in his official capacity or that his tenure of office will be interfered with. 289.

An abutting owner who consents or submits to the use of the street in front of his premises for telephone purposes by means of wires and poles is not entitled to an injunction as a matter of law or as an invasion of private rights. 307.

Will not lie to restrain the improvement of a county ditch lying partly within an unincorporated village having no solicitor, where the action is by an individual taxpayer on behalf of the village. 325.

Will not lie to tie up a railroad until the claim of a complaining lienholder is satisfied, as contemplated in one of the provisions of Section 3231-1. 408.

Upon being served with an injunction, those to whom it applies are supposed to inform themselves at once at to its scope. 577.

Will not lie to restrain acts of ownership by grantees, where the

grantor executed a valid deed but his wife signed in an illegal way, when. 594.

Will not lie to prevent the location of a cemetery within one hundred yards of a dwelling, when. 599.

Procedure where there has been a violation of an order of injunction; an independent prosecution not necessary, but the order may be enforced under authority of Section 5581; affidavit need only allege a violation of the order not in the presence of the court; not necessary that the affidavit or a copy of the order be served on the accused; where the order has been violated by a number of persons, the penalty is applicable to each individually and not to all collectively, and the maximum fine may be imposed on each individual. 577.

INSANITY—

In an action for divorce where the defendant is insane, the property rights of parties may be adjudicated; appointment of a trustee for the defendant proper procedure; whether present insanity is a bar to divorce not decided. 524.

INSURANCE—

Where the plaintiff, in action on an insurance policy, has been released from performance of any of the conditions of the contract, he should aver such facts in his petition; but matters of a merely defensive nature need not be met earlier than at the filing of the reply. 449.

Where an agent of an insurance company who, in filling out an application for insurance, construes a certain question incorporated in the application to suit the circumstances of that particular case, he acts for the company, and the company can not escape liability on the ground of the incorrectness of the answer as viewed under a different construction of the question. 449.

A mutual fire insurance company issuing a policy without the word "mutual" conspicuously printed therein, as provided by Section 3653, and inducing its acceptance by representing that there will be no contingent liability thereon, acts unlawfully and commits a fraud upon persons induced thereby to enter into an agreement with the company. 422.

Acceptance of such a policy under the impression that it is a standard cash policy and payment of the premium thereon, does not estop the insured from denying liability for assessments thereunder. 422.

Waiver of the condition of the policy as to prepayment of premiums; where the receipt of the company for the premium is offered without explanation, it stands as *prima facie* evidence of compliance with the conditions of the policy, and a verdict for the beneficiary will stand regardless of any question as to waiver of the condition of prepayment of premiums. 134.

The proceeds of a policy of life insurance are payable, to the extent of his claim, to an assignee of the policy without delivery, in preference to a subsequent assignee in whose possession the policy was placed. 396.

INTEREST—

A promissory note bearing eight per cent. interest to be paid annually, interest and principal to bear eight per cent. after maturity with interest payable semi-annually, is not usurious. 153.

Recovery of, from county treasurers who had collected it from banks and appropriated it to their own use; allowance to prosecuting attorney for services in that behalf. 182.

Where usury is pleaded as a defense to a written instrument in contradiction to the terms thereof, the burden is on the party so asserting and the plea must be

supported by clear and satisfactory evidence. 277.

Where one hazards money in a business conducted by himself and others jointly, or by others for his benefit, the law as to usury does not apply to money so risked. 377.

The advancing of money to be used by another in making usurious loans and purchasing time certificates of wage earners is not a usurious transaction, where the profits and losses are to be divided equally, or where the one advancing the money agrees to accept a stated per cent. as liquidated profits, but remains liable for his share of the losses. 377.

INTERROGATORIES—

Where interrogatories are submitted to a jury relating to matters of an evidential nature rather than to ultimate facts, no prejudicial error can be based on receiving a verdict in which some of the answers to the interrogatories are neither affirmative nor negative, but simply the words "don't know." 105.

Failure of a jury to answer special interrogatories is not ground of error when not excepted to at the time. 134.

IRREGULARITIES—

The premature delivery of a bill of exceptions to the trial judge for his signature, where due to an inadvertence of the clerk of the court, is not an irregularity that will deprive the reviewing court of jurisdiction, when no substantial injury will result by disregarding the irregularity. 105.

JEOPARDY—

Acquittal on the charge of theft is not a bar to trial on the charge of receiving the same property knowing it to have been stolen. 131.

JUDGMENT—

A motion to set aside a default judgment and revive the cause for further consideration may be heard at a term subsequent to that of the entry of the judgment only when the motion has been filed during the term of the entry and duly continued. 224.

Section 5355, providing for the opening up of a judgment in which service was had by publication and no actual notice was received, has no application to divorce cases. 268.

Where one seeks to have a judgment set aside on the ground that the service was by publication and no actual notice was received, is imposed the burden of proving that he had no notice; and a record showing that no proof was adduced at the hearing of an application to set aside the decree discloses that the court did not err in overruling the application. 268.

An appellate court can not determine whether an application to set aside a decree was properly overruled, unless there is filed with the record a bill of exceptions containing the evidence submitted in support of the application. 265.

Effect of prosecuting error on a record that is incorrect and as to the condition of which the party complaining had full knowledge. 268.

A judgment should be affirmed, if among the defenses interposed there was one that was valid, or if there is any other sufficient reason under the law for sustaining the judgment. 530.

An unauthorized dismissal of an appeal to which no error is prosecuted will stand and will be construed as the judgment of the court. 586.

JURISDICTION—

Of the common pleas in an action to apportion the costs of a joint county ditch. 16.

The fact that one joint obligor on a fiduciary bond can not be served because out of the jurisdic-

tion does not prevent the taking of judgment against obligors who are within the jurisdiction. 46.

A reviewing court is not deprived of jurisdiction by the premature delivery of the bill of exceptions to the trial judge for his signature, when. 105.

The court is without jurisdiction to entertain a motion for a new trial on the ground of newly discovered evidence filed after term in a criminal case. 66.

A court of equity has jurisdiction in an action brought by persons claiming to act as trustees of an incorporated church to enjoin others who also claim to be trustees from interfering with their control of the church property or their use of it for public worship. 121.

To set aside a default judgment and revive the cause for further consideration at a term subsequent to that of the entry; must be based on the filing of a motion therefor at the term of the entry and its due continuance until heard. 224.

Justices of the peace have jurisdiction co-extensive with their counties "to issue attachments and proceed against the goods and effects of debtors in certain cases"; amendment excepting justices in Cuyahoga and Franklin counties from the general provisions of Section 584, unconstitutional. 247.

A court of equity is without jurisdiction to grant an injunction against threatened libel, unless. 289.

Of a justice of the peace to discharge an attachment. 313.

An appellate court has no jurisdiction over an appeal from an order appointing a receiver, but going no further in the way of determining ultimate rights. 427.

There is no jurisdiction in a court of equity to reduce a sewer assessment which is not grossly excessive. 522.

JURY—

Publications to the effect that bribes have been given to jurors not ground for a new trial, when; disqualification of juror by reason of the fact that his name was not drawn from the wheel is waived, when; trial not vitiated by reason of the fact that one of the jurors who tried the defendant sat on the grand jury which returned the indictment, when. 497.

JUSTICE OF THE PEACE—

Proper procedure on appeal from the overruling by a justice of the peace of a motion to dissolve an attachment. 161.

The amendment of April 18, 1894, to Section 584, excepting Cuyahoga and Franklin counties from the general provisions of said section as to the jurisdiction of justices of the peace in attachment, is unconstitutional; justices of the peace in said counties, as well as in all the counties of the state, have jurisdiction co-extensive with their counties "to issue attachments and proceed against the goods and effects of debtors in certain cases." 247.

Effect of motion before, by the defendant in an attachment suit, in which he states that he has selected the property attached in lieu of homestead, and neither he nor his wife is the owner of a homestead; jurisdiction of the justice to dispose of the contention. 313.

KNOWLEDGE—

On the part of a landlord and his grantee that the tenant who has been in possession for a long period holds under a lease defectively executed. 249.

Of an insurance solicitor as to the facts, when he construes a question in the application for insurance in a manner to fit the circumstances of that particular case. 449.

The proper test as to knowledge of danger under certain circumstances is not knowledge possessed by the plaintiff, but that of per-

sons of ordinary care and prudence when placed under like circumstances. 543.

LACHES—

Can not be pleaded on behalf of sureties on the bond of the attorney of a building association, through whose negligence a mortgage was taken on property held by the mortgagor by a defective title, when. 46.

By abutting owners who failed to make complaint of the faulty construction of the street until the work had been approved and the contractors paid in full, although aware of the character of the construction at the time the work was done. 263.

LANDLORD AND TENANT—

Where a tenant has been in possession for a considerable period under an imperfectly executed lease, the writing will be treated as a contract for a lease, and as against a purchaser having knowledge of the facts who is seeking to oust the tenant a decree will be granted directing that a vaild lease be executed; the fact that the lessor, with the knowledge of the owner, took in another with him as a partner would not invalidate the agreement for occupancy. 249.

A judgment in forcible entry and detainer in an action brought by a purchaser who has knowledge that his grantor permitted the lessee to remain in possession under an invalid lease and collected the rent for such occupancy, is not a bar to injunction proceedings by the tenant to prevent interference with his possession. 249.

The proper place for demand for and payment of rents is at the place stipulated, at some convenient hour during the business day. 249.

LANGUAGE—

There is a presumption that one who undertakes to do business in this country understands the English language. 589.

LAST CHANCE—

It is error to charge a jury with reference to the doctrine of, where there is nothing in the petition which warrants its application. 64.

LEASE—

The proper place for demand for and payment of rent is at the place stipulated, at some convenient hour during the business day. 249.

A defective lease will be treated as an agreement to execute a lease, when; the fact that the lessee with the knowledge of the lessor took in another with him in the business held not to have invalidated his agreement for occupancy; judgment of ouster in an action in forcible entry and detainer is not a bar to an action by the lessee to enjoin interference with occupancy, when. 249.

LIBEL AND SLANDER—

An action for conspiracy and an action for libel or slander are not so identical in character as to bring them both into one category under the statute of limitations; where conspiracy forms the gist of the action, and libel or slander is merely incidental to the accomplishment of that purpose, the action is not barred by the statute applying to libel or slander, unless. 228.

Declarations which would raise an implication in an action for libel or slander will not sustain an action for conspiracy where proof of special damage is required and can not be implied. 228.

Use of slanderous words or a libelous publication in furtherance of a conspiracy. 228.

A court of equity has no jurisdiction to enjoin the publication of a pamphlet merely because it is a libel. 289.

One fearing injury from a threatened libel will be remanded to an action for damages, if his

petition for an injunction fails to allege injury to property rights or intimidation of others in their dealings with the plaintiff. 289.

Allegations by an office holder that he will be irreparably injured in his reputation by the publication of a false and obscene pamphlet, by one against whom a judgment in damages would be uncollectible, does not give jurisdiction to a court in equity to grant an injunction, when. 289.

LICENSE—

Where an ordinance confers upon the mayor the power to grant or refuse a license at his discretion, it confers upon him more than administrative duty and is invalid to the extent that it is not general in its application. 60.

Prosecution for failure to take out a license; what it is necessary the affidavit shall charge; proof required to convict. 60.

Imposed by a municipality on tne owners of vehicles using the streets; validity of; application of, to non-residents. 199.

Distinction between licensees and those acting by invitation. 329.

As applied to occupations; amended law requiring the examination and licensing of steam engineers of certain classes is constitutional; requirements as to qualifications quite as definite as those applying to the professions of law, medicine or teaching; provisions as to existing licenses not objectionable. 536.

LIFE ESTATE—

A widow to whom property was devised for life with the power of disposition "for her use and benefit," the residue at her death to be divided among the children of the testator, must answer to their charge that she has wastefully and improvidently used sums in excess of the reasonable expense of her support. 323.

LIMITATIONS—

Of the right of release from the lien of a mortgage, upon payment of a stipulated part of the indebtedness, where foreclosure proceedings have been begun. 430.

LIMITATION OF ACTION—

Where conspiracy forms the gist of an action, and libel or slander are merely incidental thereto, the action is not barred by the statute of limitations applying to libel or slander, unless the testimony fails to establish a conspiracy and libel or slander is left alone upon which to base a judgment for damages. 228.

An action for the reduction of a street assessment alleged to be in excess of benefits is not governed by the four year statute of limitations. 263.

LIQUOR LAWS—

Overlapping districts under the Jones law; construction of the phrase "residence district"; motive of signers of petitions can not be inquired into; policy of the state tending toward a stricter regulation of the liquor traffic. 233.

A brewing company which maintains a cold storage house in a location separate from its brewery, and makes daily deliveries from the storage house of beer to customers on orders previously taken by a soliciting agent, is a trafficker in intoxicating liquors within tne meaning of Section 4364-9, and is subject to Dow tax thereon. 361.

Where liquor is shipped on a mail order into dry territory by express C. O. D., and the money is collected by the express company and returned to the seller, the sale is completed upon delivery of the package to the express company, and the seller does not violate the local option law. 417.

MAIL—

Notice sent by; *prima facie* evidence afforded that the notice was received, when. 473.

MANDAMUS—

Will not lie to compel county commissioners to approve the bill of the sheriff for the purchase of horses and vehicles for his use. 398.

Will not lie to compel county commissioners to file annual reports in which expenditures are stated with the explicitness of an account. 401.

Will lie to compel the payment of fees to the city solicitor as *ex officio* prosecuting attorney of the police court notwithstanding the appointment of an assistant prosecutor. 517.

MASTER AND SERVANT—

Technical construction of rules of a railway company; presumption of negligence on the part of an injured employe, where by a proper exercise of his faculties he would have become aware of the danger. 73.

An employer can not be held liable for the injury of a servant, where the alleged negligence of the employer is based on evidence that is vague, speculative and theoretical. 105.

In an action brought by a servant against his employer for damages for discharging him before his term of service had expired, it is the duty of the employer to aver and prove that the discharge was for reasonable cause; a charge of court that the burden of proof rests upon the servant to show that the discharge was without any just cause is error. 163.

Evidence which discloses that the plaintiff was told by the defendant's foreman to help A whenever A called upon him so to do is sufficient to establish the relationship of vice-principal and subordinate between A and the plaintiff. 276.

Servant may rely on warning signals given in the course of the work by a superior; competency of evidence with reference to such signals; charge of the court with reference to such signals. 281.

Evidence as to defects in apparatus may be competent, although no recovery could be based on such defects, when. 281.

Evidence as to defects in apparatus not charged in the petition admissible, when. 281.

In an action for the wrongful death of a servant who was placed at work in a room which was crossed by wires carrying heavy currents of electricity, a *prima facie* case of negligence is made where it appears that the wires were on a lower level that his head and were unguarded and that his death was due to striking his head against one of them as he arose from a stooping position. 291.

Construction to be placed on warning given to a servant as to danger in the place where he was at work; admissibility of evidence as to statements by the deceased as to the safety of the place. 297.

Where a corporation permits its servants to leave their dinner pails in a certain building and to eat dinner there, it owes to such servants the duty of not injuring them by its negligence while they are using the building in their customary manner; where injury occurs to a servant while using the building in that way, and the injury is due to the want of ordinary care on the part of the corporation, it is liable although the building was used for other purposes and the servant would not have been injured had he remained at his usual place of work. 329.

Privilege to employes; resulting advantage to master; continuance of his liability for safety to his men; distinction between licensees and those acting by invitation. 329.

MAYOR—

Where a bill of exceptions in a prosecution before a mayor was duly signed and regularly filed in the common pleas, it is not open to objection in the circuit court on the ground that it was not filed by the mayor or noted on his docket. 60.

Where an ordinance provides that no person shall be engaged in the business of the keeping of public ball rooms or ball grounds without first obtaining a license therefor, and the power to grant or refuse such a license is delegated to the mayor at his discretion, there is more than administrative duty conferred upon him, and the ordinance is invalid to the extent that it is not general in its application. 60.

What it is necessary that the affidavit should charge in a prosecution under such an ordinance. 60.

MECHANICS' LIENS—

Section 3231-1, relating to liens for labor and material furnished to railroads, transcends the power of the Legislature in that it qualifies the right of a private corporation to contract with reference to property, and is unconstitutional. 408.

MERGER—

The different breaches of a contract become merged when the suit is deferred until after the term of the entire contract. 490.

MISCONDUCT—

Where a prosecuting attorney is challenged by counsel for the defendant to state to the jury why he had not tried the case long before, and in his reply the prosecutor declared the reason to be that the defendant absconded and could not be found by the police, the declaration does not amount to misconduct and the trial is not vitiated thereby. 497.

MISJOINDER—

In an action to enjoin interference with control and use of church property, the fact that the plaintiffs sue as trustees and also as members of the church and in behalf of other members thereof, does not present a case of misjoinder, notwithstanding they are perhaps asserting rights in two capacities. 121.

MORTGAGE—

A stipulation in a mortgage that the mortgagee will release part of the mortgaged premises from the lien of the mortgage, upon payment of an agreed sum, is not available to a mortgagor after proceedings have been begun to foreclose the mortgage. 430.

An action for the cancellation of a mortgage on the ground of parental duress, exerted soon after the plaintiff attained her majority, is good against demurrer, where it appears that the mortgagee had knowledge or may be held to have had knowledge of such duress. 512.

While a mortgagee will not be held to the ascertainment at his peril of bad faith in the execution of a mortgage, he must make reasonable inquiry when known facts suggest that advantage is being taken of a fiduciary relation; and the convenience of banking houses in transacting business with persons thus related is subordinate to the protection of property rights of persons in actual or *quasi* wardship from the greed of their protectors. 512.

MOTIVE—

The motive of signers of a petition for an election under a local option law can not be inquired into. 233.

MUNICIPAL CORPORATIONS—

Procedure necessary to render legal the construction of a sidewalk and the levying of an assessment therefor. 9.

Where the notice served on a property owner calls for the construction of a sidewalk of sand-

stone, the laying of a cement walk by the municipality imposes no obligation on him for the costs thereof. 9.

There is substantial compliance with the statutory provision requiring the vote of council for street improvements to be by "yeas" and "nays," although the form of the record of the vote can not be approved, when. 38.

Whether abutting property has been benefited by a street improvement is not to be determined alone by the market value of the property before and after the improvement was made; the real question is whether there will be potential benefits, and the determination of tne question is within the discretion of council rather than of the courts. 38.

Questions as to the determination of frontage on a flat-iron shaped parcel. 38.

Ordinance requiring that certain amusements shall be licensed; discretion lodged in mayor as to issuing license; prosecution for failure to take out license; 97 O. L., 504 (30) considered. 60.

Where only an approximate estimate can be made of the cost of a proposed improvement, a certificate that there is in the treasury of the corporation and unappropriated money sufficient to pay for the cost of the improvement as approximately estimated, there is a sufficient compliance with Section 2702 to render the expenditure valid. 71.

Grants for street railways and extensions of street railways; life of consents; duplication of grants over same street; motive of an objecting abutter who petitions for an injunction. 89.

A municipality may improve with a sewer the unsewered portion of a street, or some part of tne unsewered portion, and assess the cost on the property abutting on the part of the street so improved. 103.

Charge of court as to the time required by a municipality to acquire by prescription the right to discharge sewage into a natural water-course. 135.

Wnere an issue of bonds has been provided sufficient in amount to pay the whole cost of a proposed sewer improvement, no certificate is required from the auditor that sufficient funds are in the treasury and unappropriated to pay the cost thereof. 137.

Proceedings of council relating to the construction of a proposed sewer; fixing the assessment; benefits; slight changes from the plan as first adopted. 137.

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Proceedings of council relating to the construction of a proposed sewer; fixing the assessment; benefits; slight changes from the plan as first adopted. 137.

An ordinance providing for a license for the use of vehicles on the streets refers to continued or repeated use, and applies to nonresidents as well as residents; such an ordinance is not void for lack of uniformity of operation. 199.

Council is not estopped from fixing a different proportion in an assessing ordinance and thus laying a heavier burden on property owners than was contemplated in the original resolution, where the property owners have done nothing in reliance upon the original declaration. 243.

What constitutes an estoppel *in pais* with reference to the amount of a street assessment; to estab-

lish a mistake in the proceedings of council preliminary to a street improvement, tue proof must be clear and satisfactory; expense of removal of water boxes may be charged against an abutting owner, when. 243.

As to liability for maintenance of prisoners sentenced by the common pleas court to the city work house; construction of Section 1536-369. 277.

In an action for injury resulting from an alleged defect in a street, the municipality is entitled to an instructed verdict in its behalf, where actual notice of the condition of the stret is not claimed and there is no notice or constructive notice except as based on speculation. 296.

It is within the powers of a municipality to provide by ordinance for the regulation of the emission of smoke; the test as to the validity of such an ordinance is its reasonableness. 495.

Proceedings with reference to construction of a sewer; benefits; pumping station may be included in the assesment. 522.

Right of, to acquire and to contract with reference to property can not be qualified by the General Assembly. 408.

Appropriation of property by, for park purposes; where there are a number of parcels involved it is not error to permit the inquiry to proceed as to the parcels separately, provided the inquiry as to all is before the same jury. 416.

MUTUALITY—

Of an agreement whereby employes were given an option to purchase stock of the corporation. 355.

NECESSARIES—

Where the debt is for necessaries, the plaintiff may have an attachment, without reference to the existence of the other grounds for attachment provided in Section 6493. 313.

A suit can not be maintained against an infant on his express contract for necessaries, without an averment and proof that the price to be paid for such necessaries was reasonable. 583.

NEGLIGENCE—

Of the attorney of a building association, whereby a mortgage was taken on property which the mortgagor held by a defective title. 46.

Where a street railway company was charged with negligence in operating its cars on parallel tracks which were so close together that a passenger standing on the running board was swept off by a car on the parallel track. 49.

Not negligence *per se* to drive along a street railway track in the direction traveled by the cars; but a presumption of negligence arises when it is admitted by the driver that he traveled for three hundred feet without looking behind for an approaching car, his only reason for following the track being that his wagon ran more easily there. 64.

Whether a motorman who ran his car at an unusually rapid rate on a dark and stormy night was guilty of negligence as a matter of law depends on the circumstances of the case. 64.

A railway employe who uses the track as a convenient path of travel in going to his work is not, while so doing, within the course of his employment, and the engineer of an approaching train is not bound to look out for him, and if he is truck and injured no liability attaches to the company, unless the engineer or those in control of the train had actual knowledge of his peril. 73.

A company operating a double-track railway is not bound to use either track for running of trains in either direction; injury by

being struck by a train running in the opposite direction from what was to be expected. 73.

A railway company owes no duty to one using its tracks as a convenient path of travel to give notice by bell or whistle of an approaching train. 73.

An employer can not be held liable for an injury to a servant alleged to have been due to the defective apparatus, where the question of his negligence is based on evidence that is vague, speculative or theoretical. 105.

Where the porter of a Pullman car was burned by the car taking fire from heating apparatus alleged to have been defective. 105.

An action for damages for injuries due to the bad condition of a country road will not lie against county commissioners under Section 845. 115.

Alleged negligence in the sale of coal oil which was mixed with gasoline and exploded. 149.

Whereby a railway switchman was killed while making up a train; custom in the matter of signals and evidence relating thereto; brakeman may rely on signals of conductor. 281.

Evidence as to defects in apparatus not charged in the petition admissible, when. 281.

A *prima facie* case of negligence is established where it appears that the decedent was employed in a room which was crossed by unguarded wires carrying heavy currents of electricity and that his death was due to striking his head against one of these wires as he arose from a stooping position. 297.

Whether or not a warning to one thus employed not to touch the wires was understood by him as a warning of the great peril of touching them, or merely as a warning that they were something that should not be disturbed, was a question for the jury where the evidence was such as to lead reasonable minds to differ. 297.

In an action for damages for the death of an employe under such circumstances, statements made by him to others as to whether there was danger in working in such a place are admissible for the purpose of showing the state of the decedent's mind with reference to working in such a place, as bearing upon the question of contributory negligence. 297.

Where an employe of a corporation was injured through lack of ordinary care on the part of the corporation, while eating his dinner in a building used for other purposes but in which the employes had long been accustomed to deposit their dinner pails and eat their dinners. 329.

Where one who is familiar with the location of railway tracks attempts to cross without looking for an approaching train, which might have been seen for a distance of two thousand feet, and is struck by it, he is guilty of contributory negligence, and it is not error to direct the jury to return a verdict for the railway company. 448.

Where it was claimed that the motorman knew or should have known of plaintiff's peril in time to have stopped the car and prevented the accident. 467.

Where a street car conductor in response to a warning "Look out" extended his head beyond the line of the car and was struck by a projecting roof and killed, the question of contributory negligence as between him and the car barn boss who gave the warning is one for the jury; but in the absence of any averment that the conductor did not know of the projecting roof, and the evidence indicating that he must have known of it if he had exercised ordinary care, it was not error for the court to take the case from the jury on the ground of assumed risk. 528.

Where a passenger sitting with his arm on the window sill of the car was injured by his arm being suddenly projected out of the window by a lurch of the car at the moment a car was passing on the parallel track; sufficient allegations regarding; error to instruct jury as to speed and construction of car where there is no allegation as to excessive speed or improper construction; proper test as to knowledge of danger. 543.

NEW TRIAL—

The trial court is without jurisdiction to entertain a motion for a new trial on the ground of newly discovered evidence in a criminal case, when filed after the term at which the verdict was returned. 66.

Publication in a leading newspaper that certain of the jurors had been bribed, not ground for a new trial, when. 497.

The fact that a juror was disqualified for the reason that his name was not drawn from the wheel, not ground for a new trial when it appears that counsel knew of the disqualification at the time the jury was impanneled and entered no objection. 497.

Service on the grand jury which returned the indictment by one of the petit jurors who tried the case, not ground for a new trial, when. 497.

Declaration by prosecuting attorney, in reply to a challenge as to why the defendant was not tried long before, not ground for a new trial, when. 497.

NEWSPAPERS—

Publications by, during pendency of trial, that jurors have been bribed, does not afford ground for a new trial, when. 497.

NOTICE—

Where notice is served on a property owner to lay a sidewalk of a certain material, and the municipality subsequently and without further notice lays a walk of a different material, payment of the assessment therefor can not be enforced. 9.

Members of an incorporated church can not be expelled without notice and an opportunity to defend. 121.

To property owners of proceedings for construction of sewer not necessary when the proposed sewer constitutes part of a general system of sewers already planned and provided for. 137.

Purchasers of property on which a street assessment is about to be laid are chargeable with notice, when. 263.

Construction of Section 5355, providing for the opening up of decrees where service was had by publication and no actual notice was received. 268.

In an action for damages for injuries resulting from an alleged defect in street; the municipality is entitled to an instructed verdict in its behalf, where actual notice of the condition of the street is not claimed and there is no evidence of constructive notice except as based on speculation. 296.

Failure to provide for notice to property owners does not render Sections 4483 and 4484 unconstitutional. 325.

Proof of the mailing of a letter properly stamped and directed affords *prima facie* evidence of its receipt by the person to whom directed; and this presumption applies notwithstanding the address of the addressee may have lately changed; but this is a rebuttable presumption which may be met by evidence of equal weight or countervailing force; a preponderance of proof that a letter was not received is not necessary to overcome the presumption of delivery. 473.

A fraternal beneficial association can not predicate a forfeiture of membership on failure to pay a death assessment, where

the notice thereof was mailed to the old address of the insured because of failure to make a record of the new address, and the notice failed to be delivered. 473.

Nature of notice to be served on persons accused of violating an order of injunction. 577.

One who undertakes to do business in this country and is unable to understand the English language must give notice of that fact or waive any claim based on his failure to understand what was said. 589.

NOXIOUS VAPORS—

Liability of several who by independent action have created the nuisance is joint in an action in equity for its abatement, but is not joint where the action is for damages; separation of damages. 320.

NUISANCE—

The liability of different persons and agencies contributing by independent action to the production of a nuisance, while joint in an action in equity to abate the nuisance, is not joint in an action at law for damages. 320.

Where a jury is impanneled to assess damages against one only of a number who have participated independently in the production of a nuisance, they should be instructed to find, with a liberal hand if necessary, but as accurately as possible, the amount of damages resulting from the acts of that particular wrong-doer. 320.

The smoke nuisance; a municipality may provide against by ordinance; the test of validity of such an ordinance is its reasonableness. 495.

OBITER DICTUM—

The failure to carry into the syllabus of *Traction Co.* v. *Parrish* the declaration of the court that the good faith of one who brings an action to protect a legal right is of no importance, does not make it an *obiter*, for it was one of the questions made in the case and has become the established law of the state. 89.

OFFICE AND OFFICER—

An officer, in the sense in which the word is used in the Constitution of Ohio, is one who takes the oath of office and becomes responsible to the public for his own official acts and those of his subordinates. 175.

It is competent for the Legislature of Ohio to fix the salaries of county officers, leaving it to the county commissioners of the several counties to fix the sum to be paid to deputies and other employes. 175.

Change of compensation during term of office; what constitutes uniform operation of a law regulating salaries to be paid to county officers. 175.

Officers receiving their compensation under a fee system are not salaried officers, and a change in the method of compensation from fees to salaries is not a change which affects the salary of any officer during his existing term. 175.

An act providing that the salaries of county officers shall be fixed under a rule based on population does not fail of uniform operation throughout the state. 175.

A day's work of a county surveyor performing work for the county is not fixed by Section 4364-62*a* at eight hours; engineer can not charge excess time as part of another day; is entitled to payment for his deputies at the rate of four dollars a day, though he may not himself be required to pay them at that rate; in work on a county ditch he can not estimate his services at a certain number of days per mile, but must base his charges on the actual number of days of service rendered. 185.

Services rendered by a prosecuting attorney in recovering from county treasurers interest collected by them on public deposits and converted to their own use, are outside of his official capacity and compensation may be allowed therefor. 185.

Where a conspiracy is charged to injure the character of a public officer and deprive him of his office, the testimony fails if it shows merely the means used for carrying out the conspiracy; resulting injury must be shown. 228.

OPTION—

To employes to purchase stock in the corporation; mutuality of agreement; uncertainty of time for payment; consideration. 355.

ORDINANCES—

Requiring the licensing of certain amusements; what it is necessary the affidavit shall charge in a prosecution for failure to take out a license; proof necessary to convict; ordinance invalid where it is left to the discretion of the mayor whether or not a license shall be isued. 60.

An ordinance providing for the assessment of property benefited by a proposed sewer improvement is of a special nature, and does not fall within the provision of Section 1695 as to publication. 137.

Validity of, where imposing a license fee on the owners of vehicles using the streets of the municipality; construction of the word "use"; ordinance applies to residents and non-residents alike. 199.

Offenses against, do not constitute crimes for the conviction of which a witness may be discredited. 433.

The validity of an ordinance regulating the emission of smoke depends upon its reasonableness. 495.

Relating to sewers; sewer district not changed by reference to part of the territory only. 522.

PARENT AND CHILD—

An action for duress in the execution of a mortgage will lie, where it is alleged that the duress was exerted soon after plaintiff attained her majority, and it appears that the mortgagee had knowledge of the improper advantage which was being taken. 512.

Argument or persuasion, or appeals to the bounty of a parent, unless in some respect unfair or coupled with circumstances indicating incapacity on the part of the parent, are not ground for setting a deed aside on the ground of undue influence. 579.

Where a father was the grantor and his son the grantee, the relationship between them raises no presumption of undue influence in the making of a deed. 579.

Pleading and evidence necessary as to the reasonableness of an account for necessaries furnished to an infant on his express contract, and as to the financial condition of the parent. 583.

PARKS—

In assessing the value of property condemned for park purposes where a number of parcels are involved, the inquiry may proceed as to a single parcel separately, provided the whole inquiry is before the same jury. 416.

PARTIES—

A claim that the proof has established that the cause of action, if any existed, was in favor of the wife and not at all in favor of the husband, does not on review furnish a basis for the contention that there has been a misjoinder of parties, where leave to answer as to the alleged misjoinder was not sought at the trial below. 1.

The joining of a husband by gift, assignment or otherwise, in

a right of action existing in the wife against an administrator would not necesarily be a matter of any prejudice to the administrator. 1.

The owners of lands affected by a joint county ditch improvement can not join with the county commissioners in an action for contribution to the cost thereof from an upper county. 16.

In an action to determine the right to control church property as between two sets of trustees. 121.

PARTITION—

Insertion of husband's name in a quit-claim deed made to a wife in an amicable partition treated as a mistake of the scrivener, which invested the nusband with no part of the title, and at the death of the wife the property descends to her heirs; possession of the husband under such circumstances not adverse. 605.

PARTNERSHIP—

The forming of a partnership does not invalidate a lease to the property occupied by the firm, when the partner was taken in the business with full knowledge by the lessor and without objection from him. 249.

PENALTY—

Where a number of persons are guilty of violation of an injunction, the penalty applies individually and not collectively, and the maximum fine may be imposed on each individual. 617.

PERFORMANCE—

In an action on a contract, where release from part performance is claimed, that fact should be alleged in the petition. 449.

PLEDGE—

The proceeds of a policy of life insurance are payable to an assignee without delivery, in preference to a subsequent assignee in whose possession the policy had been placed. 396.

PLEADING—

An allegation of demand and default is not necessary, in an action against an administrator for care and support furnished the decedent; the presentation of the claim to the administrator and its rejection by him is sufficient. 1.

The provisions of Section 5109, relating to verification of pleadings by agents and attorneys, apply to the pleadings of corporations as well as those of natural persons. 14.

A motion for new trial which includes the ground that the verdict was contrary to law includes also error in the charge of the court, and a bill of exceptions prepared within forty days from the overruling of such a motion is prepared in time. 33.

It is prejudicial error for a court in an action for damages on acount of negligence to strike from the petition language which is material and a proper averment of the cause of action; but it is not prejudicial error to strike from a petition language which sufficiently appears in another part of the petition. 49.

Where a petition after the striking out of redundant and improper matter still states a cause of action against the defendant, the court is without power to dismiss the action without prejudice, in the absence of any pleading traversing the averments left in the petition. 49.

Where it is admitted that work was to be done under a contract at a stipulated price, a claim is unproved in its general scope and meaning by evidence of an agreement to pay what the work was reasonably worth. 53.

A motion for a new trial in a criminal case on the ground of newly discovered evidence is too late when filed after term. 66.

The nature of an action is determined by, and where the pleadings show mixed causes of action the case is not appealable, notwithstanding only the equitable issues were tried. 83.

Motion to dissolve an attachment; proper procedure where overruled by a justice of the peace. 161.

A motion to set aside a default judgment and revive the cause for further consideration may be heard at a term subsequent to that of the entry of the judgment, when. 224.

In an action for conspiracy to injure by libel or slander, where loss of an office is alleged. 228.

Necessary allegations to give jurisdiction to a court of equity to enjoin a threatened libel. 289.

In an action in tort for conspiracy in assisting a bankrupt to place his property beyond the reach of his creditors. 339.

Of usury as a defense to an action on a promissory note; burden of proof. 377.

Where one has been convicted of cruelty to a mule that was being worked with sore shoulders, he can not set up such conviction as a plea in bar to a second prosecution for cruelty to another mule on the same day, which was being worked in another team with a different driver. 371.

Where the plaintiff in an action on an insurance policy has been released from performance of any of the conditions of the contract, he should aver such fact in his petition; but matters of a purely defensive nature need not be met earlier than the filing of the reply. 449.

Where there is no averment that the motorman of the car which caused the injury knew or should have known of plaintiff's peril, a charge is erroneous which makes the defendant liable for the injury, if the jury find that the car might have been stopped after the motorman knew of the danger to which plaintiff was exposed. 467.

The numbering of paragraphs in a pleading is not approved, for the reason that it leaves room for doubt and uncertainty as to whether it is intended to simply number the paragraphs or to number the causes of action. 490.

The different breaches of a contract are separate causes of action if sued on when occurring, but if no action is brought until after the term of the entire contract the different breaches become one cause of action and it is error to require plaintiff to separately state and number the different breaches as separate causes. 490.

A petition for the cancellation of a real estate mortgage on the ground of parental duress, exerted soon after the plaintiff attained her majority, is not open to demurrer where the mortgagee had knowledge or may be held to have had knowledge of such duress. 512.

In the absence of an averment that the servant did not know of the peril, it is not error to take from the jury on the ground of assumed risk the action for damages on account of his death, where the evidence shows that he knew of the obstruction which caused his death or by the exercise of ordinary care would have known of it. 528.

Necessary averments in an action against a contractor and his sureties for damages for failure to complete a contract entered into with county commissioners. 530.

In an action for damages for injuries to the arm of the plaintiff, which was projected out of the window of the car in which he was a passenger, the averment that while he "was sitting in said car with his arm on the window sill, it was thrown out by a sudden jerk or movement of the car," states a good cause of action, when taken in connection with allegations as

to the dangerous construction of parallel tracks and the proximity of the cars to each other. 543.

Where the action is on an account for necessaries furnished to an infant on his express contract. 583.

POLLUTION OF STREAM—

Action for damages against one of several parties who, acting independently, had created a nuisance; liability for, joint in an action in equity to abate the nuisance, but not joint in an action at law for damages; separation of damages. 320.

PREJUDICE—

An assessment for a street improvement will not be set aside for irregularity, unless it is shown that the plaintiff has been prejudiced thereby. 438.

The presumption that error is prejudicial does not apply to an irregularity in the levying of an assessment for a street improvement. 438.

PRESCRIPTION—

See Adverse Possession.

The provision of Section 4500, constituting an established ditch a natural water-course after seven years of uninterrupted use, was not designed to take away rights the public had acquired over it as a ditch or drain. 201.

PRESIDENT—

Of a corporation not liable for deceit in signing certificates of stock purporting to be fully paid and non-assessable, notwithstanding his knowledge that property had been accepted at a great overvaluation in payment for stock. 217.

PRESUMPTION—

A presumption of negligence arises where a driver traveled along a street railway track, in the same direction the cars ran, for three hundred feet at a slow trot without looking to see if a car was approaching from behind. 64.

Where the name of the testator is erased from a will, the presumption is that the erasure was by the testator himself with the intention of revoking the will, when. 57.

Where one is struck by a train at a point where by a proper exercise of his faculties he would have had warning of its approach, a presumption arises that he did not exercise due care. 73.

As to the character of service rendered by a servant who was discharged before his term of service had expired. 163.

That error is prejudicial does not apply to an irregularity in the levying of a street improvement assessment. 438.

That a letter properly stamped and placed in the mail was delivered to the party to whom addressed. 473.

One who undertakes to do business in this country is presumed to understand the language of the country; otherwise he should make that fact known, and if he remains silent it is at his peril. 589.

PRISONERS—

As to the expenses of maintaining prisoners sentenced by the common pleas court to a city work house. 277.

PROPERTY—

The inalienable right to contract with reference to, can not be denied to private corporations. 408.

PROMISSORY NOTES—

A promissory note which provides for eight per cent. interest to be paid annually, principal to bear eight per cent. after maturity, interest to be paid semi-annually, is not usurious. 153.

PROSECUTING ATTORNEY—

Services rendered by a prosecuting attorney in an action for recovery from county treasurers of

interest received by them from banks on county deposits and appropriated to their own use, are services outside of his official capacity; for recovery of $215,000, it is not abuse of discretion to allow the prosecuting attorney a fee of $7,500. 182.

Where such an action is successfully prosecuted on behalf of the tax-payers of the county by the prosecuting attorney, it is not competent for a tax-payer to prosecute error to the allowance made by the trial court to the prosecuting attorney for the services rendered. 182.

The appointment of an assistant prosecuting attorney of the police court does not terminate the tenure of the city solicitor to the office of prosecutor, and he may still recover compensation therefor. 517.

PUBLIC FUNDS—

Recovery from county treasurers of interest collected by them for use of public funds and appropriated to their own use; allowance to prosecuting attorney for services in that behalf. 185.

PUBLIC POLICY—

The policy of the state of Ohio is tending toward a stricter regulation of the liquor traffic. 233.

Offenses against; prosecutions for cruelty. 371.

QUANTUM MERUIT—

An action against an administrator for care and support of the decedent is an action for *quantum meruit*, and reference in the petition to an agreement or contract by the decedent to pay for the services is surplusage. 1.

Where changes are made in a building contract of the character involved in this case and by consent of the parties, payment should be made under the contract as far as it can be traced, and for anything beyond that the contractors are entitled to their *quantum meruit*. 53.

RAILWAYS—

A railway company is entitled to a directed verdict, where it appears that the plaintiff, who was struck by a train, was familiar with the location of the tracks and attempted to cross without looking for the train, which might have been seen two thousand feet distant. 448.

A railway company owes no duty to an employe or other person, who is using its tracks merely as a convenient path of travel, to give notice by bell or whistle of an approaching train, or to run at any particular rate of speed. 73.

An employe who, while off duty but in obedience to an order to report immediately at a certain point, walks along the track as a matter of convenience and to save time, is not while so doing within the course of his employment. 73.

Where one is struck by a train at a point where by a proper exercise of his faculties he would have had warning of its approach, a presumption arises that he did not exercise due care. 73.

A railway company maintaining a double-track road has the right to use either track for the running of trains in either direction; rules of the company must not be too technically construed. 73.

In appropriating land preparatory to a change of grade through farm lands, the assessment of damages to the residue of the tract should be based on present conditions, and not have reference to conditions existing prior to the location of the road years before. 87.

Brakeman may rely on signals of conductor while switching cars in the making up of a train; cus-

tom in the matter of signals; failure of court to mention the rules of the company specifically is not prejudicial error when the rules of the company impose no obligations not imposed by law. 281.

REAL ESTATE—

Breach of contract for conveyance of; election between the remedies of specific performance and an action for damages. 167.

Owner of, liable to a broker for a commission for the sale of land, although the contract for the sale was not signed by the owner, when. 342.

RECEIPT—

Effect of presentation of, at a trial without explanation. 134.

RECEIVER—

An order appointing a receiver, but going no further in the way of determining ultimate rights, is not an order that gives a court jurisdiction on appeal. 427.

RECORD—

Where one submits an incorrect record to a reviewing court with full knowledge of what transpired in the court below and of the condition of the record, he will not be thereafter heard on an application to set the judgment aside on the ground of the incorrectness of the record. 268.

RELIGIOUS SOCIETIES—

The fact that members of a church disapprove of the control into which it has fallen and have ceased to attend its services, does not afford ground for their dismissal or expulsion without notice or an opportunity to appear and defend; a vote of expulsion without such notice and opportunity does not terminate membership. 121.

The office of trustee of a church is not one coupled with such an interest that the church body in its corporate capacity may not, at a meeting of its members duly called and held, terminate the tenure of such office. 121.

A court of equity has jurisdiction to determine rights, where the plaintiffs claim to be the legally elected trustees of an incorporated church, and ask that the defendants who also claim to be trustees of the church be enjoined from interfering with plaintiffs' control of the church property or their use of it for purposes of public worship. 121.

The fact that in such a case the plaintiffs sue as trustees and also as members of the church and in behalf of other members of the church, does not present a case of misjoinder. 121.

Action by a church which is effective for the termination of a pastorate. 121.

REMEDY—

Election between remedies can be made but once; where the bringing of an action for specific performance is followed by one for damages, the plaintiff will be regarded as having elected to adopt the first remedy, and a dismissal of the action for specific performance without prejudice while the action for damages is pending is not a bar to the bringing of a subsequent suit for specific performance. 167.

RES JUDICATA—

A motion to vacate an order of arrest before judgment, having been once heard and refused, is *res judicata*. 358.

RESIDENCE—

The head of a family continues to be a resident of the state within the meaning of the attachment laws so long as he and his family are still here, and without regard to the fact that he is preparing to remove from the state with his family and is on the eve of so doing. 313.

RESIDUUM—

Where a husband bequeathed

the residue of his estate to his wife, her prior death renders invalid her will attempting to dispose of said residue, and it goes to his heirs by descent. 351.

Residuary legatees may call upon a widow to answer for wastefully using sums in excess of the reasonable expense of her support, where the property was devised to her for life, with power of disposition "for her use and benefit," the residue to be divided as thereafter directed. 323.

REVIVOR OF ACTION—

A default judgment may be set aside and the cause revived for further consideration at a term subsequent to the entry of the judgment only when the motion therefor was filed during the term of the entry and duly continued. 224.

ROADS—

An action for damages against county commissioners will not lie on the ground of negligence in the maintenance of a county road. 115.

Annual reports of directors of improved roads; form in which they should be filed. 401.

Where a contract for improvement of a county road is let at a meeting of the county commissioners of which no record was made, and no auditor's certificate was filed or recorded as required by Section 2834*b*, the contract can not be enforced against the county, nor can a contract be implied, or an equitable accounting granted. 462.

SALARY—

A salary is a determined and stipulated sum to be paid for a fixed period; a change from a fee to a salary system is not a change which "affects the salary of any officer during his existing term." 175.

An act providing that the salaries of county officers shall be fixed under a rule based on population does not fail of uniform operation throughout the state. 175.

SALES—

An owner of land is liable to a broker for a commission for its sale, where he enters into a contract for its sale and the broker secures a purchaser who tenders the money and demands a deed, notwithstanding the written contract was not signed by the purchaser. 342.

Agreement for the sale and purchase of stock in a corporation; mutuality; consideration; uncertainty as to time for payment. 355.

In the case of deliveries of beer by a brewing company from cold storage elsewhere than at the brewery, on orders previously taken for future delivery as directed, the sales become complete at the time of the delivery. 361.

Where goods are shipped by express C. O. D., and the money is collected by the express company and returned to the seller, the sale is complete upon delivery of the package to the express company. 417.

As to warranty of a horse sold at auction. 589.

SCINTILLA RULE—

While contradictions in testimony ought generally to go to the jury for determination, that is not required nor does the scintilla rule require a trial judge to give to the jury a case involving damages for injuries, where the inherent weakness of the evidence makes it impossible for the court to say, as a deduction from the facts in evidence, that the accident happened in the manner claimed by the plaintiff. 149.

SETTLEMENT—

Settlement by some of the lot owners assessed for a street improvement does not invalidate a second assessment which omits the

lots for which settlement had been made. 438.

SEWERS—

The unsewered portion, or some part of the unsewered portion, of a street may be improved with a sewer, and the cost assessed upon the property abutting on the portion so improved. 103.

Charge of court in an action involving the acquirement by a municipality by prescription of the right to discharge sewage into a natural water-course. 135.

Notice to property owners of proposed construction of, not necessary when the proposed sewer is part of a general system already planned and provided for; publication of ordinance not necessary; certificate of auditor not necessary when entire cost is to be met by bond issue; slight changes in adopted sewer plan do not invalidate assessment, when. 137.

A sewer district is not changed by reference in the resolution of necessity to a part of the territory only, leaving the remainder for future description and improvement. 522.

Where a sewer is adequate and so located that it may be utilized in the future, lands must be regarded as specially benefited thereby although not so improved as to make sewer connections available; a pumping station is a necessary part of a sewer equipment and its cost may be included in the assessment. 522.

There is no jurisdiction in a court of equity to reduce a sewer assessment which is not grossly excessive. 522.

SEXUAL INTERCOURSE—

Between a teacher and his pupil; prosecution of teacher therefor under Section 7024. 169.

SHERIFF—

The provision of Section 1296-29, allowing to sheriffs all expenses in "maintaining horses, vehicles," etc., covers the cost of feed and keep only, and does not mean that horses and vehicles may be purchased for the sheriff at the county expense. 398.

SIDEWALKS—

Necessary procedure for the construction of a sidewalk and the levying of an assessment therefor. 9.

SIGNALS—

Where a railway conductor has been in the habit of giving warning signals to the trainmen assisting him, they have a right to rely on such signals; evidence as to such a custom. 281.

SMOKE—

It is within the powers of a municipality to provide by ordinance for the regulation of the emission of smoke; the test as to the validity of such an ordinance is its reasonableness; in a prosecution for violation of such an ordinance, where the building from which the smoke came is controlled by a corporation, the proper defendant is the corporation itself or the employe causing the smoke. 495.

SPECIFIC PERFORMANCE—

Where a plaintiff has asked for specific performance, he can not subsequently maintain an action for damages, and having first filed an action for specific performance, he will be regarded as having elected to adopt that remedy, and a dismissal of the action for specific performance without prejudice while an action for damages is pending is not a bar to the prosecution of a new action for specific performance. 167.

SPECIFICATIONS—

Practicability of, where referring to a street improvement with wood blocks; intending bidders held not to have been shut out of the competition through inability to obtain in the market the pure coal tar creosote oil required by the specifications. 406.

STATUTES CONSIDERED—

Sections 1536-210-211*a*,-232-235, relating to sidewalks and assessments therefor. 9.

Section 4488*a*, relating to joint county ditches and apportionment of the cost. 16.

Section 4510, providing when county commissioners may cause a ditch to be altered or improved. 16.

Section 4510-10, relating to cleaning and repairing of a county ditch. 16.

Section 4510-1, relating to the duty of county commissioners as to certain ditches. 16.

Section 2272, relating to restrictions in certain municipalities when three-fourths in interest petition for a street improvement. 31.

Section 5102, providing when pleadings may be subscribed and verified. 14.

Section 5109, providing when an affidavit verifying a pleading may be made by an agent or attorney. 14.

Section 5296, providing when a failure of proof shall not be regarded as a variance. 53.

Section 2702, known as the Burns law. 71.

97 O. L., 504 (30), relating to the licensing of certain amusements. 60.

Sections 2378 and 2379, relating to the construction of sewers and assessment of the cost thereof. 103.

Sections 1536-188 and 1536-189, relating to consents from abutting property owners to the building of a street railway. 89.

Section 845, relating to the liability of county commissioners for damages. 115.

Section 6438, relating to proceedings in the common pleas on error. 119.

Section 6453, providing to what class of appropriation proceedings the chapter shall not apply. 119.

Section 1536-114 of the municipal code. 119.

Section 5114, providing that certain amendments may be made to pleadings at any time. 134.

Section 1695, relating to the publication of ordinances. 137.

Section 3179, providing the maximum rate of interest which may be stipulated in instruments. 153.

Section 6494, providing how property may be discharged from attachment. 161.

The act of March 22, 1906 (98 O. L., 89), fixing the salaries of certain county officers, is constitutional. 175.

Sections 1277 and 1278*a*, relating to the duties of prosecuting attorneys and compensation therefor. 182.

Section 4364-62*a*, fixing the number of hours which shall constitute a day's work for mechanics and laborers. 185.

Section 4491, providing the extent to which proceedings for the construction of a county ditch may be declared void. 201.

Section 4500, providing when a ditch shall be regarded as a public water-course. 201.

Sections 4982 and 4983, known as statutes of limitations. 228.

Section 6589, relating to the failure of appellant to file a petition. 224.

Section 5354, providing how common pleas and circuit courts may vacate or modify judgments or orders after term. 224.

Section 5357, providing a mode of procedure in certain cases. 224.

Section 584, relating to the jurisdiction of justices of the peace in attachment in Cuyahoga and Franklin counties. 247.

98 O. L., 68, known as the Jones local option law. 233.

Section 4483, providing that a municipality may by its mayor petition the county commission-

ers for the construction of a county ditch. 259.

Section 4484, providing that with reference to a county ditch improvement the whole or a part of a municipality may be considered as a single tract. 259.

Section 4485, relating to notice to municipal authorities with reference to a county ditch and proceedings thereafter. 259.

Section 4982, known as the four year statute of limitations. 263.

Section 5355, providing for the opening up of judgments where service was had by publication and no actual notice was received. 268.

Section 1536-369 held to be comprehensive and mandatory with reference to distribution of the expense of maintaining prisoners offending against state statutes and city ordinances respectively. 277.

Section 4172, relating to value of advancement expressed in deed. 311.

Section 6493, providing how attachment shall be executed. 313.

Section 5441, providing what property shall be exempt from levy. 313.

Section 1778, providing when a tax-payer may institute suit. 325.

Section 4483, providing that a municipal corporation may petition through its mayor for the building of a county ditch which lies partly within the municipal limits. 325.

Section 4484, providing that the whole or a part of a municipality may be considered as a single tract in apportioning the cost of a county ditch. 325.

Section 6934*a*-1, prohibiting bucket shops and gambling in stocks, etc. 345.

Section 4364-9, providing for a tax on the sale of intoxicating liquors and known as the Dow law tax. 361.

Section 6951, providing penalties for cruelty to animals. 371.

Section 1296-29 (98 O. L., 96), providing for maintaining horses and vehicles for the sheriff at the county expense. 398.

Section 3231-1, providing for a lien for labor and material furnished to railroad and other enterprises. 408.

Section 917, as amended, requiring county commissioners to file annual reports "itemized as to amount." 401.

Section 4898, pertaining to the annual reports of directors of improved roads. 401.

Section 1536-109, in relation to the condemnation of property for park purposes. 416.

Section 3653, providing what kind of policies mutual fire insurance companies may issue. 422.

Section 5226, providing when an appeal may be taken to the circuit court. 427.

Section 6707, defining what shall be regarded as a final order. 427.

Section 6709, relating to jurisdiction on error to the circuit court. 427.

Section 2327 (1536-280), providing that proceedings with reference to street assessments shall be liberally construed. 438.

Section 2834*b*, providing that no public contract shall be entered into unless a certificate is filed by the auditor that the funds necessary to meet it are in the treasury and unappropriated. 462.

Section 3644, providing when an insurance solicitor shall be held to be the agent of the company. 449.

Sections 1536-663 and 1536-844, relating to the city solicitor in his capacity of prosecuting attorney of the police court. 517.

Section 7061, providing a penalty for fraudulent writing on poll books or tally sheets. 497.

Section 4239, as amended, relating to partition fences. 509.

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Section 4956, providing when special provisions shall govern. 524.

Section 5000, providing how an insane person may defend. 524.

Section 799, relating to contracts for public buildings. 530.

Section 4364-89*i*, relating to the operation of steam boilers. 536.

Section 4364-98*q*, relating to the operation of steam boilers. 536.

Section 962, relating to the appointment of a superintendent by infirmary directors. 545.
ments for street intersections. 550.

Section 4447, relating to improvement of ditches. 554.

Section 4448, defining the words "ditch" and "according to benefits." 554.

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Section 5581, providing how an injunction may be enforced and disobedience punished. 577.
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Section 3573, fixing the distance from a dwelling at which a cemetery may be located. 599.

Section 2272, relating to street assessments. 602.

STEAM ENGINEERS—

Sections 4364-89*i* and 4364-98*q*, providing for the examination and licensing of steam engineers of certain classes, is a valid and constitutional enactment. 536.

STIPULATION—

In a mortgage for release of part of the property upon payment of a specified sum, not available after foreclosure proceedings have been begun. 427.

STREETS—

Delay in completing a street improvement does not relieve abutting owners from assessment; a mortgagee who has become the owner by forclosure is estopped from denying that the property is not benefited to the extent of the assessment, or that it is not valuable enough to stand the assessment, where the mortgagor joined in petitioning for the improvement. 31.

In so far as it affects the validity of an assessment for a street improved upon petition of the abutting owners, Section 2272 is constitutional. 31.

Record of the proceedings in council with reference to the "yea" and "nay" votes in ordering the improvement of. 38.

Whether property has been benefited by a street improvement is not to be determined alone by its market value before and after the work was done, but the real question is as to whether there will be potential benefits, and the determination of this question is within the discretion of council rather than of the courts. 38.

As to assessable frontage where the lot is shaped like a flat-iron or wedge. 38.

The unsewered portion of a street, or a part of the unsewered portion, may be improved by sewerering and the cost assessed upon the property abutting on the portion of the street so improved. 103.

A license fee may be imposed on the owners of vehicles using the streets. 199.

Council not estopped from fixing a higher proportion in an assessing ordinance than that fixed in the original resolution, when; abutting property owners may be assessed for the expense of removing water boxes; mistakes in the preliminary proceedings of council can only be established by clear and satisfactory proof. 243.

An action for a reduction of a street assessment which it is

claimed is in excess of benefits is not barred by the running of the four years statute of limitations. 263.

Abutting owners who knew of defects in the construction of a street before the work had been approved and the reserve fund paid to the contractors, are estopped from thereafter contesting the assessment on the ground of such faulty construction. 263.

A municipality is entitled to an instructed verdict in an action for injury from a defect in a street, where actual notice of the condition of the street is not claimed and there is no evidence of constructive notice except as based on speculation. 296.

The putting of a street to a new and inconsistent use is not necessarily a taking of private property within the meaning of the Constitution, but the new use must be such a use as palpably and injuriously affects the adjacent property. 307.

An abutting owner who consents or submits to the use of the street in front of his property for telephone purposes by means of wires and poles is not entitled to an injunction against the placing of the wires in a conduit in the street; but such a use is a permanent occupancy for private gain, and imposes an additional servitude for which the property owner is entitled to compensation. 307.

The specifications for wood blocks in this case held not to be an infringement of the Bevier patent; bidders not shut out of the competition by inability to obtain pure coal tar creosote oil in the market. 406.

The presumption that where error is shown it is prejudicial, does not apply in apportioning assessment for a street improvement; such cases are governed by the liberal construction provided in Section 1536-280. 438.

A street improvement assessment will not be set aside for informality, unless it is shown that prejudice resulted to the plaintiff from the informality. 438.

Where an assessment has been set aside after settlement has been made as to some of the lots and lands affected, a reassessment as to the lots with respect to which there was no settlement is not invalid on account of the omission from the reassessment of the lots for which settlement has been made. 438.

The omission from the assessment of one of the parcels described in a special improvement does not affect the validity of the assessment, where the omitted parcel was not specially benefited by the improvement. 438.

A street assessment made in accordance with a petition signed by the property owner for the improvement of the street may be added to a second assessment made within five years, and if the two assessments exceed thirty-three and one-third per cent. of the value of the land after the improvement is made, relief may be had from the second assessment to the extent of the excess. 602.

STREET RAILWAYS—

Presumption of contributory negligence where the driver who was injured followed the track for three hundred feet in the same direction the car ran without looking behind. 64.

Whether it is negligence as a matter of law to run a car at a high rate of speed depends on the circumstances of the case. 64.

Constitutionality of the law requiring the procuring of consents from abutting property owners; fresh consents necessary for the laying of a new road in place of one whose grant had expired; consents to the building of an extension of an existing line inure only to the company obtaining them and its assigns, and not to a third party who is a stranger to the

franchise; the vitality of consents is expended, when; consent by an existing company to a grant for a duplication of a part of its line. 89.

Failure to allege that the motorman might have stopped the car in time to have avoided the injury, renders erroneous a charge making the company liable if the jury so found. 467.

Where a conductor in response to a cry "Look out" from the stable boss extended his head beyond the line of the car and was struck by a projecting roof and killed; held that under the pleadings the case was properly taken from the jury on the ground of assumed risk. 528.

Where a passenger was injured by having his arm projected through the window of the car where he was sitting by a sudden lurch of the car, when the arm was struck by a car on the parallel track; proper test as to knowledge of danger; charge of court. 543.

SUMMONS—

Failure to serve on one of the joint obligors on a fiduciary bond, because out of the jurisdiction, does not prevent the taking of judgment against obligors who are within the jurisdiction. 46.

Where summons has been had by publication and application is made to set the decree aside on the ground that no actual notice of the pendency of the proceeding was received, and the court finds against the application, the appellate court can not determine whether the question was correctly decided, unless there is filed with the record a bill of exceptions containing all the evidence submitted in support of the application. 265.

Section 5355, providing for the opening of judgments in which service was had by publication and no actual notice was received, has no application to divorce cases. 268.

Burden of proving that no actual notice was received where service was had by publication. 268.

TAX-PAYER—

Where an action brought on relation of the prosecuting attorney on behalf of the tax-payers of the county is prosecuted to a final judgment favorable to the county, it is not competent for a tax-payer to prosecute error to an allowance made by the trial court to the prosecuting attorney for his services rendered therein. 182.

Can not maintain an action to enjoin the improvement by the county commissioners of a county ditch lying partly within an unincorporated village having no solicitor. 325.

TAXATION—

Cold storage houses, maintained apart from a brewery, and from which daily deliveries of beer are made to customers on orders previously taken, are subject to the Dow law tax. 361.

TEACHER AND PUPIL—

Prosecution of teacher under Section 7024 for having sexual intercourse with his pupil. 169.

TELEPHONE—

An abutting owner who has submitted or consented to the use of the street in front of his premises for telephone purposes by means of poles and wires is not entitled to an injunction against the placing of the wires in a conduit in the street; but such a use of the street is a permanent occupancy for private gain, and to that extent is an exclusion of the public therefrom and an additional servitude for which an abutting owner is entitled to compensation. 307.

TENANTS IN COMMON—

One of several joint owners may, when he has actual control of the land, bind his co-tenants to the proposed improvement of a

county ditch running through the land. 259.

TENDER—

Under a contract for the purchase and sale of real estate. 167.

As applied to an offer to pay rent. 249.

TENURE—

Of office of trustee of an incorporated church may be terminated by the church body acting in its corporate capacity at a meeting duly called and held. 121.

Termination of a pastorate was made effective by the action taken in the case at bar. 121.

TIME—

Discrepancy in testimony as to time a criminal act occurred. 169.

In the absence of a time stated for the payment for stock by employes of the corporation who had been given an option for its purchase, a reasonable time will be fixed. 355.

TITLE—

A decree will be granted quieting the title of one to whom property has been conveyed by a widow in payment for services acknowledged by her husband before his death, when. 69.

Of a trustee in bankruptcy. 339.

Of the heirs of a wife is not affected by the fact that in an amicable partition the husband's name was inserted in the quit-claim deed to the wife; his possession under such circumstances is not adverse. 605.

TORT FEASORS—

In the production of a nuisance by independent action; liability joint in an action to abate the nuisance, but is not joint in an action for damages; separation of damages. 320.

TRIAL—

A trial judge is not warranted in sending to the jury a case involving damages for injuries, where the evidence makes it impossible for the court to say, as a deduction from the facts disclosed, that the accident happened in the manner claimed by the plaintiff. 149.

Effect of a reference by a prosecuting attorney in his argument to the jury in a criminal trial to a damaging paper which he supposed was in evidence, but as a matter of fact was not in evidence. 185.

Publications in a leading newspaper that jurors then sitting in a criminal case have been offered bribes, etc., not ground for granting a motion to discharge the jury on account of prejudice created by such publication against the defendant, when it does not appear that any of the jurors read the publications complained of. 497.

In a criminal case it is proper for the judge rather than the clerk to call the jury; it must be assumed that the entire twelve men were called, when. 497.

Not misconduct for a prosecuting attorney, in reply to a challenge by counsel for the defendant, to state that the reason the defendant was not tried long before was that he absconded and could not be found by the police. 497.

TRUSTS—

Tenure of office of trustees of an incorporated church; action by one set of trustees to enjoin others claiming to be trustees from interfering with their control of the church property. 121.

Where property is devised to a widow for life, with power of disposition "for her use and benefit," the residue at her death to be divided among the children of the testator, she is a *quasi* trustee for said children. 323.

Actions which a trustee in bankruptcy may maintain; title of trustee; pleading. 339.

TURNPIKE DIRECTORS—

Annual reports of; form in which they should be filed. 401.

UNIFORM OPERATION—

A law which provides that the salaries of county officers shall be fixed under a rule based on population does not fail of uniform operation throughout the state. 175.

USURY—

The provision in a promissory note that it shall bear eight per cent. interest, principal and interest to bear eight per cent. after maturity with interest payable semi-annually, is not usurious. 153.

VARIANCE—

Where it is admitted that work was to be done under a contract at a stipulated price, evidence of an agreement to pay what the work was reasonably worth does not amount to a variance, but to a failure of proof. 53.

VENDOR AND PURCHASER—

The marking of a package for shipment C. O. D. serves to retain the vendor's lien; where the money is collected and returned by the carrier, the sale was completed upon its delivery to the carrier. 417.

VERDICT—

The claim in a motion for a new trial that the verdict was contrary to law includes a claim of error in the charge to the jury. 33.

A verdict for damages in a substantial amount for an injury alleged to be due to defective apparatus can not be based on evidence that is vague, speculative or theoretical. 105.

A municipality is entitled to an instructed verdict in its favor in an action for injury alleged to have resulted from defect in a street, where it is not claimed that the city had received actual notice of the condition of the street, and there is no evidence of constructive notice except as based on speculation. 296.

An instruction to return a verdict for the defendant is error, where the action is for the wrongful death of an employe, and it appears that he was employed under unguarded wires carrying heavy currents of electricity, and that his death was due to striking his head against one of them as he was rising from a stooping position. 297.

Where based on the testimony of two sets of witnesses who directly contradict each other, will not be set aside on the weight of the evidence. 433.

A verdict of $460 as damages for assault and battery and the throwing of plaintiff down a flight of stairs will not be set aside as excessive; a jury is warranted in such a case in assessing punitive as well as compensatory damages, and in including a reasonable attorney's fee. 433.

Should be directed for the defendant railway company, where it appears that the plaintiff, who was struck by a train, was familiar with the location of the tracks, and attempted to cross without looking for the approaching train which might have been seen two thousand feet distant. 448.

Effect of a verdict of guilty of a lower crime than the one charged. 468.

Calling of the jury upon return of, in a criminal case. 497.

VERIFICATION—

The provisions of Section 5109, relating to the verification of pleadings by agents and attornews, apply to the pleadings of corporations as well as to those of natural persons. 14.

Officers who may verify pleadings without restriction. 14.

VESTED RIGHTS—

Of an owner of property with a dwelling thereon are not infringed by the location of a cemetery with-

in one hundred yards of the dwelling, when. 599.

VIEWERS—

Time within which viewers acting under Section 4510-10 are to report. 16.

VILLAGES—

A certificate that the money necessary to meet the cost of a proposed improvement is sufficient, where the estimate was approximate only but the best that could be made under the circumstances. 71.

A tax-payer suing on behalf of a village having no solicitor can not enjoin the building by the county commissioners of a county ditch lying partly within the village limits. 325.

WAIVER—

Where a case is tried on the theory that there had been a waiver of a condition of the contract, the waiver may be set up by amendment to the petition after verdict. 134.

In an action on a contract, where it is claimed that part performance was waived, this fact should be averred in the petition. 449.

Of objection to jurors. 497.

WARRANTY—

Question as to the warranty of a horse sold at auction. 589.

WATER AND WATER-COURSES

Where a county ditch established by law has been in use for over seven years, it does not by operation of Section 4510 become a public water-course in the sense that the right to improve it as an established county ditch no longer exists. 16.

A charge of court is erroneous as to the time required by a municipality to acquire by prescription the right to empty sewage into a natural water-course, if it is nowhere stated that the time required to create the right must be at least twenty-one years. 135.

Power of county commissioners to improve a water-course which is partly artificial; a county ditch may be located substantially along the channel or adjacent to a living stream, but a living stream can not be converted into a ditch. 201.

Pollution of a stream by different parties acting independently; liability therefor is joint in an action in equity to abate the nuisance, but is not joint in an action at law for damages. 320.

WAY—

Impaired access over private right-of-way over a railway; evidence as to damages from change of grade of the railway. 87.

WIDOW—

Conveyance by, in payment for services rendered to herself and her husband before his death held to have been valid under the circumstances of this case. 69.

Must answer to the charge of testator's children that she has improvidently and wastefully used sums in excess of the reasonable cost of her support, where the property was devised to her for life with the power of disposition "for her use and benefit," the residue to be divided at her death among the children of the testator. 323.

WILLS—

Where a will remains after its execution in the possession of the testator until his death, when it is found among his papers with his name erased, the presumption is that the erasure was made by the testator himself and that it was done with the intention of revoking the will. 57.

Where a devise of real estate was held to be for life only with power to sell for the benefit of the estate. 69.

A widow to whom property was devised for life, with power of disposition "for her use and bene-

fit," the residue to be divided among the children of the testator, is a *quasi* trustee for said children, and must answer to their charge that she has improvidently and wastefully used sums in excess of the reasonable expense of her support, etc. 323.

Where a testator makes his wife his residuary legatee with power of disposition, her death prior to his renders invalid her will attempting to dispose of said residue; in such a case the husband dies intestate as to the residue, and it goes to his heirs at law by descent. 351.

WITNESS—

It is only such a conviction as under the old law would have rendered the witness incompetent that can be introduced under the law as it is today to discredit him; not error to sustain an objection to the introduction of a record of the conviction for the purpose of discrediting a witness, where the offense was against a city ordinance only and not for a crime or misdemeanor under any statute of the state. 433.

WORDS AND PHRASES—

Meaning of the word "term" as used in Section 7024. 169.

Meaning of the phrase "residence districts" as used in the Jones local option law. 233.

Meaning of the word "trafficking" as used in connection with the sale of intoxicating liquors. 361.

Meaning of the word "maintaining" as used in Section 1296-29, providing for maintaining horses and vehicles for the sheriff at the county expense. 398.

Construction of the phrase "itemized as to amount" as used in Section 917, having reference to the annual reports of county commissioners. 401.

WORK HOUSE—

Distribution of expense of maintaining prisoners confined in, who have offended against state statutes and city ordinances respectively. 277.

Ex. J. M.
5/7/08