OHIO APPELLATE AND CIRCUIT COURT REPORTS.

NEW SERIES. VOLUME XXIV.

CASES ADJUDGED

IN

THE COURTS OF APPEAL AND CIRCUIT COURTS OF OHIO.

VINTON R. SHEPARD, EDITOR.

CINCINNATI:
THE OHIO LAW REPORTER COMPANY.
1916.

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

HON. REYNOLDS R. KINKADE, *Chief Justice*, Toledo.
HON. PHILLIP M. CROW, *Secretary*, Kenton.

FIRST DISTRICT.

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

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

SECOND DISTRICT.

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

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

THIRD DISTRICT.

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

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

FOURTH DISTRICT.

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

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

FIFTH DISTRICT.

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

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

SIXTH DISTRICT.

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

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

SEVENTH DISTRICT.

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

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

EIGHTH DISTRICT.

Counties—Cuyahoga, Lorain, Medina and Summit.

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

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OHIO APPELLATE AND CIRCUIT COURT REPORTS.

NEW SERIES—VOLUME XXIV.

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

NEGLIGENCE AS BETWEEN A CHAFFEUR AND A MOTORMAN.

Court of Appeals for Hamilton County.

THE CINCINNATI TRACTION COMPANY v. BERTHA WEBSTER HARRISON.

Decided, March 29, 1915.

Automobile Struck by Street Car—Whether Ordinary Care Was Exercised by Either Chauffeur or Motorman a Question for the Jury—Relative Value of Testimony of Witnesses—Claim of Husband Who Paid Bills of Nurse and Physician—Models in Evidence.

1. The degree of care required of motormen between street intersections is not as great as at street crossings, while drivers of other vehicles should exercise greater care in crossing street car tracks between intersections than at street crossings.
2. Whether a chauffeur exercised ordinary care in driving out of private grounds upon the street in the face of an approaching car, with the result that his machine was struck by the car and his employer injured, is for the jury to determine in view of all the circumstances surrounding the case.
3. It would be error to charge a jury that "if you find the witnesses are of equal credibility, then I charge you that the affirmative testi-

mony of the witness who says that he heard the gong sounded is of greater value than the testimony of the other witnesses," unless the qualification be added that "they had equal opportunity to hear."

4. Where a husband testifies that he has assigned to his injured wife the claim on account of services of a physician and nurse, he estops himself from asserting such a claim in a future action, and these items may be submitted to the jury to be included in the damages awarded notwithstanding the assignment was not in writing.

Kinkead & Rogers, for plaintiff in error.
Galvin & Galvin, contra.

GORMAN, J.

This was an action to recover damages for personal injuries sustained by the defendant in error, by reason of a collision between her automobile and a car of the plaintiff in error company, on Gilbert avenue near Chapel street, in January, 1912. A verdict of $3,750 was rendered in her favor below, and the cause is now here on error.

The principal contention of plaintiff in error is that the verdict is against the weight of the evidence. We have read the record of the evidence in the case ,and carefully considered same. It appears that defendant in error was driving out of the premises of Mrs. Krippendorf, on the west side of Gilbert avenue, about forty feet south of Chapel street. There was a slight cut in the driveway near the street line, and the driveway gradually sloped from the house, which stood back perhaps eighty or a hundred feet, to the street line. Plaintiff in error claims that it was such negligence on the part of the chauffeur, who was driving the automobile of defendant in error, to drive his automobile onto the street car track ahead of a north bound car on Gilbert avenue; that the defendant in error is precluded from recovery.

The evidence tends to show that at the time the chauffeur drove out upon the street, there was a south bound car standing at the intersection of Chapel street and Gilbert avenue, about forty feet north of the driveway, the front end of the south bound car being not more than ten or fifteen feet from the driveway. There was a great deal of snow, which had been cast

onto the sides of the street by the sweepers of the traction company, leaving no space between the street car tracks and the curbs on either side of Gilbert avenue for the automobiles or vehicles to pass, and it was necessary for automobiles to keep to the center of the street along the street car tracks in order to pass over the street. The evidence tends to show that there was a north bound car approaching Chapel street at the time the chauffeur drove onto Gilbert avenue from the driveway of Mrs. Krippendorf, and the distance this car was from the driveway at the time the chauffeur crossed the sidewalk, on the drive, to the street, is placed at from eighty feet to four hundred and fifty feet away.

Now it is claimed by plaintiff in error that it was negligence on the part of the chauffeur to undertake to drive onto the street in front of this approaching car when it was so near to him as the evidence tended to show it was. Mrs. Harrison testified that she saw the approaching car and also saw the stationary south bound car, but that the north bound car was so far away that she didn't think there could be any danger in driving upon the street ahead of the car.

We think that it was a question for the jury to determine under all the circumstances of the case, taking into consideration the speed of the car, the necessity of Mrs. Harrison's automobile to drive in the part of the street where the street car tracks were laid, whether or not a reasonably prudent person would have driven upon the track at the time and place the chauffeur of the defendant in error did drive. If, as a reasonably prudent chauffeur, he believed that, under all the conditions before him, it was reasonably safe to drive upon the north bound track at the time and place he did, then he was not guilty of negligence. If, on the other hand, the approaching car was so near to him at the time he undertook to drive upon the north bound track that a reasonably prudent chauffeur would not undertake to drive upon the track, then he would have been guilty of such negligence as would preclude a recovery on the part of the defendant in error.

It was not, in our opinion, as a matter of law, negligence for the chauffeur to drive upon the track of the street car company,

even though there was an approaching car and he saw it approaching. As we understand the rule laid down in the Brandon case, 87 O. S., which, to be sure, was a case at an intersection, it was a question of whether or not a reasonably prudent driver would under the circumstances undertake to drive upon the track; and this rule we believe applies whether it be at an intersection or between intersections. It is true that between intersections greater care is required to be exercised by drivers of vehicles to avoid being injured in crossing tracks of the street railway, and the degree of care to be exercised by a motorman between intersections is not as great as that required to be exercised at an intersection. But when we consider that the car was approaching Chapel street, an intersecting street, and this automobile was not more than forty, and perhaps not more than thirty feet away from this intersection, it was the duty of the motorman to have his car under such control as to be able to stop it within a reasonable distance and to be on the lookout for persons and vehicles who might be on the street and had a right to be on the street. The street car had no superior right in the street over and above the right of the defendant in error and her automobile. Each of the parties, the chauffeur of the defendant in error and the motorman of the plaintiff in error, were bound to exercise ordinary care. Ordinary care under some circumstances is a higher degree of care than under other circumstances, but the whole question whether or not the parties were guilty of negligence, or contributory negligence, if there was any evidence tending to show negligence or contributory negligence, or both, is one for the jury under proper instructions from the court. Upon this point we do not find any error in the charge of the court, and we feel that there was evidence tending to support the verdict, as to the negligence of the plaintiff in error.

This court ought not set aside a verdict on the ground that it is not supported by the weight of the evidence, unless it be manifestly against the weight of the evidence. The trial judge heard all the testimony of the witnesses, and saw them face to face, and was better able to judge as to the weight to be given to their testimony and the value of their testimony, than

a reviewing court. The trial court having refused to set aside the verdict on the ground that it was against the weight of the evidence, we feel that this court should not do so unless it is manifestly against the weight of the evidence. We are not prepared to say that the verdict was manifestly against the weight of the evidence.

It is further urged that the court erred in refusing to give special charges Nos. 1 and 2 requested by plaintiff in error.

We think that special charge No. 1 was substantially given in special charge No. 3; so that, if it be true that special charge No. 3 is substantially the same as special charge No. 1, there was no error in the court's refusal to give special charge No. 1, because plaintiff in error had the benefit of the rule of law embodied in special charge No. 1.

As to special charge No. 2, refused, we do not think the court erred in refusing to give the same, because there was omitted from the charge the question of whether or not the witnesses testifying had equal opportunities to hear whether or not the gong sounded. This charge was predicated upon the rule of law that where two witnesses of equal credibility and equal opportunities of seeing and observing testify to the same fact, one of whom testifies positively that a certain thing was done, and the other testifies that he did not see or hear it done, then greater credence must be given to the witness who testifies that it was done, than to the witness who testifies that he didn't see or hear it done.

Now, if there had been added to special charge No. 2, which was refused, the words "and have equal opportunities to hear," we think that the charge would have been correct. But the charge does not contain this language. The language is:

" * * * and if you find that the witnesses are of equal credibility, then I charge you that the affirmative testimony of the witness who says that he heard the gong sounded is of greater value than the testimony of the other witness."

This charge should have read as follows:

" * * * and if you find that the witnesses are of equal credibility, and *had equal opportunities to hear,* then I charge you," etc.

Thirdly. It is claimed that the court erred as to its rule, in the charge, respecting the liability of plaintiff in error to the defendant in error, for the doctor's bill, nurse's bill, etc. The evidence discloses that the doctor's bill was incurred by the husband of the defendant in error, and also the nurse's bill. A claim was made by defendant in error in the case, on the trial below, for $400 damages by reason of the doctor's bill and nurse's bill. The husband of defendant in error testified as to these services, and so did the doctor and the nurse. There was some evidence as to the reasonable value of the doctor's services, but no evidence as to the value of the nurse's services. It is contended that defendant in error could not have recovered for these items of damage because there was no assignment in writing of the claim by the husband to her. While it is true that an assignment of this claim should have been made to the defendant in error in writing, nevertheless, in view of the fact that the husband of the defendant in error took the stand and testified that he had assigned his claim to his wife, we feel that he would be precluded from asserting this claim against the plaintiff in error at any future time. He would be estopped to assert this claim in any future action, and this is the point which concerns plaintiff in error as to this matter. We do not feel that the verdict should be disturbed because of the admission of testimony relating to these claims, or because of the charge of the court relating to these claims.

It is next claimed that there was error in the admission of certain exhibits—photographs, models and a plat taken from the auditor's office of this county. It is admitted that the plat taken from the auditor's office is substantially accurate and drawn to a scale and we can see no error in admitting it in evidence. It is practically the same sort of a plat that was offered by plaintiff in error, with the difference that there was indicated back from the street certain buildings upon the property. As to the photograph, it was an enlarged one, but was not for that reason inadmissible. It has been held by the Supreme Court that photographs are admissible in evidence to show location, situation and surroundings of the place where the cause of action arose. As to the models, they were, to be sure, amateurish, but

nevertheless, interesting and instructive. They showed a section of the street and street car tracks, the driveway, the north bound car and the south bound car, and the automobile, and were used purely for illustration and in the argument to the jury. We can not find that, because these models were not highly artistic and beautifully designed, they were improperly admitted or improperly used in the argument to the jury.

The amount of the verdict in this case was not so great as to indicate that there was any prejudice or bias on the part of the jury. Indeed, it is not claimed that the verdict was excessive. On the contrary, we think the jury might have returned a very much larger verdict, if the defendant in error was entitled to recover at all.

We are of the opinion that the case was fairly tried and there was no substantial error in the admission or exclusion of evidence; the charge of the court was as fair as could have been asked, and substantial justice has been done by the rendition of the verdict in favor of the defendant in error.

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

JONES (E. H.), J., and JONES (Oliver B.), J., concur.

COMMITMENT OF WITNESS BY NOTARY FOR CONTEMPT.

Court of Appeals for Erie County.

IN RE APPLICATION OF GEORGE J. SAGE FOR A WRIT OF HABEAS CORPUS.

Decided, June 5, 1915.

Contempt—Sufficiency of Commitment Issued by Notary Against a Witness Refusing to Testify—Nature of an Oath.

1. An order of commitment of a witness for contempt for refusing to be sworn, issued by a notary public before whom his deposition is sought to be taken, is not defective in failing to show a specific order that the witness be sworn, where it recites that the witness unlawfully refused to be sworn; and such order of commit-

ment need not recite that the notary was not a relative or attorney of either party, or otherwise interested in the action.

2. An oath includes an affirmation and embraces every method whereby the conscience of a witness is obligated to testify to the truth.

George A. Groot, Herman Preusser and *H. L. Peeke,* for plaintiff in error.

Stanley & Horwitz, contra.

RICHARDS, J.

Error to the court of common pleas.

While the case of *The Ohio Assets Company* v. *George A. Groot, George J. Sage et al* was pending in the Court of Common Pleas of Cuyahoga County, the plaintiff gave due notice to the defendants that the deposition of George J. Sage would be taken on October 19, 1914, before a notary public in Erie county, in which county said Sage resided. A subpoena was served on Sage to appear at the time and place named and testify as a witness. The witness appeared in accordance with the command of the subpoena but refused to be sworn as a witness. He was thereupon committed to the jail of Erie county by order of the notary public, for contempt, whereupon he sued out a writ of habeas corpus in the probate court, and on a hearing being held in that court he was discharged. Error was prosecuted from that decision to the court of common pleas, where the judgment of the probate court was reversed and the petitioner remanded to the custody of the sheriff. To reverse this latter decision rendered by the court of common pleas, this proceeding in error is brought in this court.

The order of commitment issued by the notary public recites, substantially, the facts of the pendency of the action in Cuyahoga county; the service of notice on October 14, 1914, to take the deposition of Sage at the office of the notary on October 19, 1914; that the witness appeared at the office of the notary at the time specified; that his fees as a witness had been paid; that he was called by plaintiff in that case as a witness, and that he refused to be sworn as a witness in the taking of said deposition. The commitment further recites that thereupon the notary

found and determined that he was guilty of contempt by his unlawful refusal to be sworn as a witness, and ordered and adjudged that he be imprisoned in the county jail of Erie county, there to remain until he should submit to be sworn, testify and give his deposition, or until otherwise legally discharged.

When the case came on to be heard in the probate court counsel for the petitioner moved that court for a discharge of the prisoner for two reasons: first, that the commitment is defective in that it does not specify the cause of commitment as required by law; and, second, that the return of the sheriff fails to show the facts in reference to the case which are required to be set out by the sheriff in making his return.

On the hearing of the case in the court of appeals it was insisted by counsel for the petitioner that the commitment issued by the notary is insufficient for the reason that it does not show that any order was made upon him to be sworn or to give his testimony at such hearing, and that the notary had no authority to issue the commitment because the witness' deposition could not be taken a second time, it having already been taken in said action. It is further insisted on behalf of the petitioner that the commitment is defective in that it fails to show that the notary is not a relative or attorney of either party or otherwise interested in the action; and it was contended in oral argument that the commitment is defective in failing to show that the witness had refused to be affirmed as well as refused to be sworn.

The order of commitment as recited contains a finding by the notary public that the witness had unlawfully refused to be sworn as a witness, and such refusal necessarily involves a finding that the witness had been lawfully called upon to testify. The refusal of the witness to testify could not be an unlawful refusal unless the circumstances were such that the witness was properly required to testify, and when the notary finds and determines that the witness has unlawfully refused to testify, he has made all the finding in that respect which is required by law. (General Code, 11510.)

In view of the evidence contained in the bill of exceptions, the contention that this was a second taking of the deposition of the

witness and that, for this reason, the notary had no authority to commit him for contempt, certainly exhibits ingenuity. It appears in the bill of exceptions that an attempt had been made to take the deposition of this witness in the same case on September 10, 1914, on which occasion the witness appeared and was sworn, but refused to answer very many material questions. The issue in the case was whether a certain conveyance of real estate, from Groot to his brother-in-law, Sage, situated on Scovill avenue in the city of Cleveland, was fraudulent as against creditors, the plaintiff claiming that the conveyance had been made without consideration and that it was invalid. In view of this issue in the pleadings, the witness was inquired of when the first attempt was made to take his deposition, as to how much he had paid for the property. His answer was, "That is my own business. I shall give no answer to that. It is none of your business. I am not going to answer." He was asked whether his answer would incriminate him in any way and he answered that it would not. The notary thereupon held that the answer was sufficient and that he could not compel the witness to answer further.

The deposition of September 10th contains many other illustrations of refusals to answer pertinent questions. It is impossible to conceive of any circumstances which would have justified these refusals, and, as the questions to which answers were desired were of vital importance in the case and the special fact which plaintiff desired to prove, it could not in any sense be said that the deposition of the witness had in fact been taken. It is true that many years before, an action had been brought by some other creditor to set aside the conveyance and that such creditor had failed in the action, but the plaintiff in the action in which the deposition was being taken was not a party to the prior action and in no sense bound by the judgment therein rendered. In addition to all this, the trial of the case in which the deposition of September 10th was taken was commenced, and that deposition, such as it was, was offered in evidence. The trial court, apparently concluding that it was in effect no deposition so far as the material issue was concerned, stopped the trial, manifestly for the purpose of enabling the plaintiff to take the

deposition of Sage, and if any order to take a second deposition was necessary, this action of the court would be a substantial compliance therewith.

It is said that the commitment is defective because it fails to show that the witness refused to affirm; and this contention is made in the face of the language contained in General Code, Sec. 1, where it is enacted that, "the word 'oath' includes affirmation." The same enactment is again contained in General Code, Sec. 10213. It is provided in General Code, Sec. 11542, that the officer before whom the deposition is taken shall certify that the witness was first "sworn" to testify, etc., and it is further provided in General Code, Sec. 12137, that a refusal to be sworn may be punished as for a contempt. Section 11510 has been held applicable to confer power on notaries public (*DeCamp* v. *Archibald,* 50 O. S., 618; *Ex Parte Malcolm Jennings,* 60 O. S., 319). We hold, in view of these provisions, that an oath, within the meaning of the statutes, embraces every method whereby the conscience of a witness is obligated to testify to the truth. The sections of the code cited show that the objection was a mere triviality. In addition to this, the record discloses that the witness had in fact been sworn, without objection on his part, when they sought to take his deposition a month previous, so that he evidently had no conscientious scruples against taking an oath.

The contention that the warrant of commitment is defective in that it fails to show that the notary was not a relative or attorney of either party, or otherwise interested in the action, is without merit. The record shows that the notary public was duly qualified as such within the county of Erie, and that he had jurisdiction of the person of the petitioner who was duly subpoenaed as a witness, and he had, of course, jurisdiction and authority to take depositions. It would be announcing altogether too strict a rule to say that the absence of every disqualification must appear in the commitment. If it were true that the notary was subject to any disqualification, that fact could easily be made to appear on the hearing of the habeas corpus proceeding, and no attempt was made to show that. The whole record discloses

a persistent and flagrant attempt to frustrate the endeavors of the plaintiff to ascertain the truth on issues properly made and awaiting determination in a court of justice.

Finding no error, the judgment of the court of common pleas will be affirmed.

CHITTENDEN, J., and KINKADE, J., concur.

JUSTIFIABLE REPUDIATION OF A SETTLEMENT AGREEMENT.

Court of Appeals for Cuyahoga County.

ELIZABETH FARLEY, ADMINISTRATRIX, v. THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY.

Decided, May 26, 1914.

Release of Claim for Wrongful Death—Terminated by Failure of Defendant to Carry Out One of its Essential Features.

1. An agreement to pay a widow a specified sum of money in full settlement of her claim for the wrongful death of her husband, and also to pay her lawyer a stipulated sum under his agreement with her when he took the case or to protect her against the claim of the lawyer, is so far repudiated by a subsequent refusal to settle with the lawyer as to justify the party of the first part in tendering back the amount she had received and declaring the whole agreement at an end.
2. Where one of the parties to an agreement of settlement has repudiated an integral part of it, and the other party has thereupon elected to disavow the whole of it with an offer to restore the *status quo ante*, the rescission is an accomplished fact and requires no judicial declaration of the result thereby accomplished.

G. B. Keppel and *Chas. A. Thatcher*, for plaintiff in error.

Cook, McGowan & Foote, contra.

GRANT, J.

Error to the court of common pleas.

In 1913 and at the time of his death, one George F. Farley, the plaintiff's intestate, was engaged in the service of the defendant company, and while so engaged was killed.

The plaintiff is his widow as well as the administratrix of his estate. In the latter capacity she brought suit against the defendant for damages occasioned by her husband's death, alleging it to have resulted from the wrongful acts and omissions of the company. For the prosecution and conduct of that action she employed one Thatcher as her agent, engaging to pay him for his service in that behalf 25 per centum of any recovery or settlement reached in the case without going to a trial on the merits.

While that action was pending in court and untried, the plaintiff came to an agreement of settlement with the defendant for the sum of $3,000, and executed a full release, accordingly.

Whereupon, such settlement having been approved by the probate court having jurisdiction, the suit was discontinued by the plaintiff, or at her instance.

The agents of the defendant who effected this settlement knew at the time it was made of the contract between the plaintiff and Thatcher as to the latter's stipulated compensation, and it was a part of their agreement with her, either to pay Thatcher's claim at the rate contracted for, or to "protect" her against it—which of the two things agreed to be done in this respect being in dispute in the record in this case. After the release was signed Thatcher claimed $750 for himself under his agreement with Mrs. Farley. He was entitled to more, his compensation being liquidated at one-fourth of the recovery, and the recovery being $3,000 *and* such sum as might be coming to him in addition.

The defendant refused to pay Thatcher. Mrs. Farley then—as she stood obligated to do—paid him the amount he claimed, to-wit, $750, and so satisfied and kept her promise to him.

Mrs. Farley thereupon treated this repudiation by the defendant of what she regarded as a material part of an indivisible contract, as a rescission of it, *pro tanto*, and elected to rescind it on her own part as an entirety. Accordingly, she tendered back to the defendant company all the money received by her in settlement of her claim, with interest to the day the tender was made, and commenced this action, the tender having been refused.

The petition alleged two causes of action. The first was at law, strictly, being in fact a restatement of the original suit

for damages for the alleged wrongful death of her intestate. The second demanded that the alleged contract of settlement be vacated and set aside, and concluded with a prayer for a money judgment upon the first cause of action.

The defendant, by answer, among other things, pleaded the release.

The plaintiff replied, alleging again in substance the second cause of action of the petition.

Upon the trial in the court below the plaintiff called for the submission to a jury of the issue joined by the pleadings on the second cause of action. This demand was denied, and the court proceeding to a trial of that issue, upheld the release, and dismissed the action.

It is alleged that error has intervened in both of these respects, that is, in refusing a trial of the issue raised by the second cause of action by a jury and in rendering final judgment against the plaintiff.

In support of the first proposition the case of *Perry* v. *O'Neill & Co.*, 78 O. S., 200, is relied on.

Assuming, but not deciding, that the doctrine of that case allows, as of right, a jury trial where the question to be decided is whether on account of the absolute incapacity of a party to make it, a contract is void, *ab initio*, we are of the opinion that no such question is presented in this case. The most that is said in the petition in this respect is that Mrs. Farley, at the time she executed the release, "suffered great mental anguish and grief" and that the defendant knew it.

This allegation falls short of alleging that the settlement contract was void for want of capacity on the part of Mrs. Farley to make it, instead of being voidable at her instance because she, although mentally qualified to make it, was induced to make it by the false and fraudulent conduct and representations of the defendant.

This allegation, without more, does not bring the case within the principle announced in *Perry* v. *O'Neill*, or within the remarks made in the opinion in that case.

It is to be remembered that a pretty stringent rule has recently been announced by the Supreme Court of Ohio in this

respect. In *Palmer* v. *Humiston*, decided February 25, 1913, the syllabus is:

"1. The issues of a case are defined by and confined to the pleadings."

It is quite true that in the later case of *Ryland Coal Co.* v. *McFadden*, decided April 21, 1914, the following syllabus declares the law also on this subject, in the following words:

"2. In such case the issue of contributory negligence is not made by the pleadings, but is raised by the evidence properly offered by the parties in support of their respective claims. The issue of contributory negligence thus raised is to be determined by the same rules as to burden of proof and otherwise as if made by the pleadings."

We are not at present called upon to say which of these two cases, in apparently hopeless conflict, as they appear to be, is the law for us, because neither does the petition sufficiently raise a jury issue, nor is one raised by the testimony disclosed by the record before us, as we think.

We shall spend no time in discussing the question of whether the contract of settlement was induced on the part of Mrs. Farley by the active fraud of the agents of the defendant company, or whether the representations they made to her as part of such inducement were representations which, although false and known by them to be so, were still such representations as she had no right in law to rely upon, and did rely upon them at her own proper peril. Our conclusion rests upon another, and, as we think, more certain and less difficult ground. Nor need we determine whether or not that question presents an issue triable as of right by a jury.

The agents of the defendant company knew, at the time they made settlement with Mrs. Farley, that she had agreed to pay Thatcher at least $750 on the basis of that settlement, and not that she had merely reserved the right to have a lawsuit with Thatcher over his compensation when he should come to the point of demanding it. Just what they agreed to do in regard to Thatcher's claim is not so clear; the testimony on that point

is in dispute. Mrs. Farley says the agreement was to pay Thatcher, unreservedly. The agents say it was to "protect" her against Thatcher.

As these agents had not just fallen from a Christmas tree, but were experienced and seasoned men in that line of activity, it is not likely that they did not at the time have in view the avenue of retreat finally taken by their company in refusing to pay Thatcher, and rely on the requisite degree of darkness that would be shed upon their agreement by the word "protect," as used in relation to Mrs. Farley. In this view of the matter it is probable that the testimony of one of the agents is not far afield. His language is:

"Well, I conferred with Mr. Hruska, who was in the adjoining room, and together we told her that we would protect her against Mr. Thatcher and not to accord him the mere privilege of suing her."

What they really meant by agreeing to "protect" her, instead of paying the debt she had obligated herself to pay, is disclosed by their letter to her of April 8th, 1913, which they caused to be read aloud to her "at about 5:30 P. M.," as the endorsement on the communication is at pains to state.

In that letter they tell her plainly that what they mean by "protecting" her is to allow her to be sued by Thatcher, when she should send the summons to them and the company would then do the defending. They further notify her that if she fails to do this, or if she voluntarily pays Thatcher what she thinks she owes him, or in any way assists him to the company's prejudice, then they will consider themselves relieved from "protecting" her further and will regard their agreement to do so as at an end. This was a matter of ten days after they had gotten the release.

It is of no moment, in our estimation, whether one version or the other of this part of the settlement agreement is accepted, although the brief refers to an answer of one of the agents who affected it as being "illuminating." The answer shows that the agent told Thatcher that they would not pay him $750;

that while that was the proper percentage reserved in the latter's contract with Mrs. Farley, still as he, Thatcher, had not brought about the settlement there was simply no percentage about it; he had earned nothing under his agreement; but that, nevertheless, they were willing to pay him what he reasonably had earned. In other words, having earned nothing they would pay it.

In the view of the matter that the promise was to "protect" Mrs. Farley, instead of to pay what she owed Thatcher, even so, the kind of "protection" to which, upon every just consideration, she was entitled, was that due to an honest and honorable woman, although an Irish woman, namely, not to back her in an attempt to break faith and repudiate an obligation and to be put in the attitude of one who is to be sued before she will pay what she owns is an honest debt. To defend her in such a lawsuit, in which she goes on an enduring and public record as one who will not keep her written engagement, is no adequate "protection" to a woman, who having a higher sense of honor than that, paid the debt out of her own pocket and thus received a less sum than she had been promised, to meet the loss occasioned by her husband's killing. In the view we take of the matter it was no "protection" at all.

It may be that Mrs. Farley's idea that she ought to be protected in keeping her agreement with Thatcher instead of breaking it, was rather primitive; but such as it was, it was hers. She was entitled to have it, and it is not believable that she would have settled if she had not thought it was the idea of the company also. The record shows her to be that kind of a woman, and she and not the company was doing the obliging when she agreed to settle her lawsuit. If it shall be said that by going back from her settlement she showed herself willing to break contracts, too, the answer must be the example she had just had in that line, from men who told her that they were her real friends and her only disinterested advisers.

The defendant company broke its agreement in this respect. Mrs. Farley, because she would not break *her* agreement—and no amount of typical "protection" could either in law or morals

compel her to do so—did not receive in settlement the amount the company bargained to pay her, and the vice of the defendant's initial repudiation of its contract penetrated the entire transaction, and entitled Mrs. Farley to treat it as at an end, at her own election. She did so elect and offered to restore to the defendant all she had taken from it.

It does not affect this conclusion to say that as the two parts of the contract have regard to two separate things, one to paying Mrs. Farley for her loss, and the other to paying a debt which the defendant assumed to pay in her stead, therefore the company may keep that part of the agreement which is of advantage to itself and may violate the part which it deems burdensome, and send the other party forth to revel in the luxury of a lawsuit, or, in legal parlance, remit him to his remedy at law. It would be most inequitable to allow this. The two parties are not equals in this respect. To the defendant, lawsuits are easy things, old and familiar acquaintances. To a poor Irish woman they are a burdensome thing. And to compel her to indulge in one, when her sole desire is to keep her own engagements and to expect others to keep theirs, which if done would obviate lawsuits, must be regarded as an unjust thing. Speaking for myself, it would be with extreme reluctance that a view of the law would be entertained which could permit a party to a contract to retain its benefits and reject its burdens, with no alternative right except to engage in all the uncertainties, vexations and expenses of the litigation to which the other party should be remitted. The defendant company could have easily held its settlement contract by keeping its part of it, and at a relatively small expense; for it is not seriously contended now that Thatcher's claim was unreasonable in amount. The responsibility, therefore, is on the company and not on Mrs. Farley. In receding from her part of the agreement she was only entering on a path to which she was invited by her adversary, who had opened the way for her. If this case goes to a jury it will be because the defendant company sent it there.

When the defendant repudiated its contract to "protect" her, within the intendment of that word as we find it, it was Mrs.

Farley's right to declare the agreement as a totality at an end, to tender back the money received by her on account of it, and stand where she stood before it was made. She might then sue in damages as for a breach of it, or be remitted to her original cause of action, which would then remain wholly unadjudicated and unaffected by a settlement which had failed through no fault of hers, but through the sole fault of the other party to it.

Mrs. Farley has elected, seasonably, to take the latter alternative.

When, because the defendant had repudiated an integral part of the settlement agreement, the plaintiff chose to end the whole of it and offered to put the other party in *statu quo ante,* the rescission of it was a fact accomplished—accomplished by the parties themselves, as their right was—and no duty remained to the court in that respect, but upon the prayer of the plaintiff to make a judicial finding and declaration of the already rightfully accomplished result. The prayer of the petition is broad enough to allow this to be done.

Our conclusion is that the trial court should have done this and sent the case, thus stripped of its impotent settlement agreement, to a jury for determination upon the first cause of action in the petition.

Because this was not done, the judgment complained of is reversed and the cause is remanded to the court of common pleas for further proceedings, in accordance with law.

Having made this disposition of the petition in error, the appeal in the same case is dismissed.

WINCH, J., and MEALS, J., concur.

CLAIM TO PART OF STREET BY PRESCRIPTION.

Court of Appeals for Hamilton County.

CLARA HERMANN v. JOSEPH SPITZMILLER ET AL.

Decided, June 25, 1914.

Adverse Possession—Policy of the Law With Reference to Prescriptive Title to Land Dedicated for Street Purposes—Character of the Improvements Which Will Create Estoppel Against the Public.

1. The decisions of the Ohio Supreme Court show a tendency to require a private person, claiming through adverse possession title to land which originally belonged to the public for street purposes, to base his claim on estoppel rather than the statute of limitations, and recognition will hardly be given to a claim by prescription unless in regard to land upon which valuable improvements have been erected.
2. Where the grade of an unimproved street was such that it could not be used by vehicles until improved, the inclosure by an abutting owner of a part of the dedicated strip by a fence for a period of less than twenty-one years does not afford ground for enjoining its improvement on a claim of title by adverse possession.

Ellis B. Gregg and *J. T. Rhyno*, for plaintiff.

Walter M. Schoenle and *Dennis J. Ryan*, City Solicitors, and *Gideon C. Wilson* and *John O. Eckert*, contra.

JONES (Oliver B.), J.

This action was brought by the plaintiff for the purpose of enjoining certain grading that was being done upon a strip of land 25 feet wide by about 70 feet long, which is the east end of an unnamed street, along the north section line as shown on the plat of James H. Oliver's subdivision of St. Peter's, Lick Run, Section 31, Town. 3, Fractional Range 2 of the Miami Purchase, as recorded in plat book 1, page 254.

The action was originally brought against Joseph Spitzmiller, a contractor who was doing the work of grading, and Jennie Wahl, who owned the property east of plaintiff's property and who had been granted permission by the city of Cincinnati to

grade said part of said street by private contract, on behalf of the city and under the direction of the city authorities. The city of Cincinnati was afterwards made a party, and claimed in its answer and cross-petition that the strip of land described in plaintiff's petition is a public street and forms a part of what is known as Fairmount avenue, and asked for a permanent injunction against plaintiff from interfering with its use and enjoyment as a public street.

At the time of the record of Oliver's subdivision the territory comprised in the plat was not within the city of Cincinnati. The plat was made, signed, acknowledged and recorded in accordance with the terms of the act of March 3, 1831 (29 O. L., 350), as found in Swan's Statutes of 1854, at pages 948-9. And under Section 8 of that act, now General Code, 3589, the recording of this plat made the strip of land shown along the north line thereof a public street and vested the title in fee simple in the county for public use as such. After the annexation of this territory to the city of Cincinnati, the platting commission of the city (under the platting commission act of 1871, 68 O. L., 36, afterwards R. S., 2626 and 2639), by resolution of May 27, 1875, adopted a plat of the territory of which this subdivision was a part, showing this strip 25 feet wide as a dedicated and accepted street of said city, and showing as located and recommended for street purposes a strip 30 feet wide along its north line, and five feet wide along its south line—which three strips taken together would make a street 60 feet in width known as Fairmount avenue. The strip 30 feet wide along the north line was afterwards dedicated by the will of Robert W. Orr, found in will book 86, page 384, which together made a dedicated street 55 feet in width, with five additional feet on the south recommended by the platting commission but not yet dedicated.

Plaintiff holds the title to lots in J. H. Oliver's subdivision which abut upon the south line of this 25 foot street under deeds which describe the property by lot numbers and refer to the recorded plat. The description of the property in these deeds does not embrace, by metes and bounds or otherwise, the tract of land as to which she seeks an injunction, and she does not

claim title under any deed, but claims to be the owner of that tract of land by adverse possession.

There is, therefore, no question but that the tract of land in dispute was part of a regularly dedicated street by statutory dedication, and that the title to same which originally vested in the county became vested in the city by the annexation of the territory embracing this subdivision, as a public street. The provision of law now found in Section 3723, General Code, did not require an acceptance by ordinance of this particular street, as that section is made for the protection of the city against liability for care and maintenance of the street rather than for the perfection of its title, and the action of the platting commission under the law in force at that time would constitute a complete acceptance of the street if a specific acceptance were required.

The question presented to the court is, whether the city has lost that title and the plaintiff has acquired title to this tract by adverse possession.

It is well settled in Ohio that an abutting property owner can acquire no right in a public highway by encroachment or occupation however long continued, where such encroachment or occupation is of a temporary character, such as fences, walls, shrubbery, etc., and is upon that part of the street not then required for public use. *Lane* v. *Kennedy,* 13 O. S., 42; *McClellan* v. *Miller,* 28 O. S., 488; *Ry.* v. *Commissioner,* 31 O. S., 338; *Ry.* v. *Commissioner,* 35 O. S., 1; *Ry.* v. *Elyria,* 69 O. S., 414.

The doctrine that adverse possession of a public highway can be established alone by fencing it in is not sustained by the late Ohio decisions. The tendency of the Supreme Court decisions seems to be to place the right of the private person to claim land belonging originally to the public for street purposes upon the ground of equitable estoppel rather than that of the statute of limitations and to refuse to recognize any claim of right by adverse possession unless accompanied with the erection of valuable improvements upon the land. *Elster* v. *Springfield,* 49 O. S., at 98.

The subject has been quite thoroughly examined and the decisions of this state considered in *Heddleston, Supervisor,* v.

Hendricks, 52 O. S., 460, the third syllabus of which is as follows:

"The right of an adjacent landowner to inclose by a fence, however constructed, a portion of a public highway, can not be acquired by adverse possession, however long continued."

And Minshall, J., in the opinion of the court, at page 465, used the following language:

"The general rule is that the statute of limitations does not apply as a bar to the rights of the public unless expressly named in the statute; for the reason that the same active vigilance can not be expected of it, as is known to characterize that of a private person, always jealous of his rights and prompt to repel any invasion of them,"

following this with a discussion of Ohio cases, and then saying:

"More recent cases place the right of the public as against encroachments on its highways, however long continued, on the ground that they are public nuisances, in favor of which the statute of limitations does not run."

And refers to Section 6921, Revised Statutes, now found in Section 13421, General Code, which imposes a penalty on whoever obstructs or incumbers by fences, buildings, etc., a public street or alley in a municipal corporation.

A good discussion of the law in regard to adverse possession of a public highway by fencing, is found in the decision of the superior court, general term, in the case of *Winslow* v. *Cincinnati,* 6 N. P., 47.

There is some conflict in the decisions of the circuit court in regard to this question of adverse possession of a street, but this conflict is not serious when the facts of each case are considered, and it is not necessary nor have we space to discuss all of the cases or attempt to point out wherein they differ or how they may be reconciled.

Plaintiff relies upon the case of *Mott* v. *Toledo,* 17 C. C., 472, where the facts justified the decision. The owners of the land dedicated a certain street by plat dated February 20, 1866, duly accepted by council March 21, 1866, but on October 25, 1866,

conveyed by metes and bounds a portion of the land covered by such plat, including part of the dedicated street, and under that deed possession was taken and the land enclosed, and the property was used by the grantee and assigns for more than twenty-one years before the city made any effort to improve or take possession of the street. The court, in its opinion, on page 483, said:

"We do not intend to decide now that the owner of land who dedicates it for street purposes may himself set up a title against the public, claiming to hold by adverse possession, unless he shall hold by such possession of the property after the dedication, as to have made it notice to the public and to the city that he intended to hold that property against the city and to ignore and set aside his deed of dedication."

Another case relied upon by plaintiff is that of *Seese* v. *Village of Maumee,* 7 C.C.(N.S.), 497, where the effect of Section 4977, Revised Statutes, as amended in 1889, now Section 11220, General Code, was discussed. The facts there made out a case showing adverse possession within the terms of that section, and the case was properly decided. In its opinion, the court, discussing numerous cases, saw fit to question the decision found in *Morehouse* v. *Burgot,* 22 C. C., 174, and *Wright* v. *Oberlin,* 3 C.C. (N.S.), 242. We think this was unnecessary, and on the contrary approve the doctrine as laid down in the cases last named.

In the case at bar we think the evidence has failed to make out a case of adverse possession under the terms of Section 11220, General Code. It appears that the property covered by this subdivision of which the street was a part was rough and hilly, that there was an old fence upon the north line called Orr's fence, between the lands of Oliver and Orr, and also a fence upon the east line between the lands of Fenton and Oliver, part of the property being now owned by the defendant, Jennie Wahl. These fences were in existence at the time of the subdivision and have not been changed except by decay and renewal. The evidence fails to show that there ever was a complete enclosure of the tract owned by plaintiff, and also shows that there was a certain amount of passing along the lines of Fairmount avenue and

Massasoit avenue, formerly called Orr's lane, by pedestrians traveling from Fairmount into Lick Run. It shows that the property was practically not in use, except for pasturage purposes during certain parts of the year, until about fourteen years ago when plaintiff built her dwelling-house upon her lots, and the only dominion she has undertaken to exercise over this particular tract since that time has been by grading and grassing same and the planting of one or two trees upon it. The street was of a character that could not be traveled conveniently by vehicles without grading and improvement. There was no necessity on the part of the city to tear down fences in advance of proceedings for such improvement, as the only travel that could be had upon it was that of pedestrians who could and did use the streets regardless of the fences.

The evidence also shows that the 20-foot street or alley known as Hill street, along the east side of the Oliver subdivision, was vacated by the council of the city of Cincinnati, at the instance of plaintiff, and that in January, 1913, she presented to council a petition and ordinance asking for the vacation of the tract in question under the description of an "unnamed 25-foot alleyway between High street and Massasoit avenue, along the south line of Section 31, Millcreek township," which vacation was not granted—thus showing a recognition at that time of the existence of the streets and ways shown in the Oliver subdivision.

To bar "rights under the statute of limitations the possession must be actual, open, notorious, continuous, exclusive and adverse, shown by overt acts of unequivocal character which clearly indicate an assertion of ownership to the premises to the exclusion of the rights of the real owner." *Gill* v. *Fletcher,* 74 O. S., 295 (3 Syl.).

"Adverse possession to give title must have been open, notorious, continuous and adverse for twenty-one years, and where it appears that land, part of a dedicated and accepted public street, while yet unopened and unimproved, was fenced in by an adjoining owner for twenty-one years, such fact is only one element of evidence necessary to establish his right to possession, and would not be conclusive to establish such right. The question remains under what circumstances and claim the fence was

built and maintained." *Reynolds* v. *Newton,* 14 C. C., 433, 434; 1 Am. & Eng. Enc. (2d Ed.), 759.

The plaintiff has not shown adverse possession to bring herself within the terms of Section 11220 of the General Code; even conceding all that she claims from the evidence, certainly not for a period longer than fourteen years. To entitle the plaintiff to an injunction the burden is upon her to show clearly that she is the owner of the land claimed. In this we think she had failed. In our opinion the evidence shows that the city is entitled to improve this street directly or by means of a permit granted to any interested property owner, as it may see fit.

The petition of plaintiff will therefore be dismissed and a decree will be entered enjoining her from interfering with the city in the possession of this land.

JONES (E. H.), J., concurs; SWING, J., dissents.

SWING, J., dissenting.

I can not agree with the decision of a majority of the court. I have no contention about the law as announced in the decision, but the facts of the case, in my judgment, do not fit the law as laid down. This is not an encroachment on a part of the street, but for more than fifty years the public has been excluded from any portion of the street and the plaintiff and her predecessors in title have for more than fifty years enjoyed the adverse, continuous and exclusive possession of the street, and under such conditions the plaintiff has acquired a good title as against the public and everybody else.

RIGHTS UNDER A PRIVILEGE OF DRILLING FOR OIL.

Circuit Court of Wood County.

ALBERT J. STEELE v. OHIO OIL COMPANY.

Decided, May 3, 1912.

Allegations of Reprehensible Conduct—Not Ground for Affirmative Relief, When—Right to Drill for Oil—Not Affected by Alleged Membership in an Oil Trust.

An allegation that the defendant is a member of an unlawful conspiracy in restraint of trade, designed to create and perpetuate a monopoly in the business of producing, transporting and manufacturing petroleum and its products, is not ground for quieting the title of plaintiff in certain land on which the defendant claims the right to drill for oil.

Geo. H. Phelps and *Silas E. Hurin,* for plaintiff in error.
J. W. Schaufelberger and *F. P. Riegel,* contra.

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

Error to the Court of Common Pleas of Wood County.

In the court of common pleas, Albert J. Steele sued for the purpose of restraining the defendant from drilling oil wells upon a forty-acre tract of land owned by him in this county, and asked to have his title quieted against any claim made by the defendant. Subsequently he filed a second amended petition in which he set up additional grounds for an injunction. The additional grounds alleged were, in a general way, that the defendant is a member of and acting in furtherance of an unlawful and fraudulent conspiracy in restraint of trade designed to create and perpetuate a monopoly in the business of producing, transporting and manufacturing petroleum and its products in violation of the statutes of Ohio. The pleading contained other analogous allegations in further statement of the details of such claim of unlawful trust and conspiracy, but the pleading does not contain any averment that such alleged combination and conspiracy had anything to do with the oil lease referred to in plaintiff's

pleadings or that said lease was entered into in furtherance of the claimed conspiracy.

Thereafter, upon motion, all of these allegations contained in this pleading which relate to the claim of unlawful and fraudulent conspiracy were stricken from the pleading by order of the court of common pleas. At a later date, to-wit, on September 26th, 1911, the journal entry recites that the parties came with their attorneys and by consent in open court the plaintiff is permitted to withdraw all pleadings filed by him in the case subsequent to the original petition. The issues were then made up and the case tried upon the original petition and answer thereto, which averred a right to operate the lands for oil by reason of certain facts set forth in the answer, and a reply filed by the plaintiff which denied the right claimed by the defendant company by reason of the claim that such right was barred by the statute of limitations.

Upon the trial in the court of common pleas the issues were found for the defendant, the Ohio Oil Company. The plaintiff thereupon filed a petition in error in this court, in which he assigns as his only ground of error that the court erred in sustaining the motion of the defendant to strike from the second amended petition the matter constituting the plaintiff's principal ground of action. No bill of exceptions was taken and the plaintiff does not contend any error was committed by the court except in the one particular mentioned.

The state of the record is such in this case, that we are unable to see that the error upon which reliance is placed, arises. The plaintiff by leave of court voluntarily withdrew his pleading, which had, as he claims, been emasculated by order of the court, and the only issue submitted to the trial court, and upon which this judgment was based, was the issue made by the pleadings remaining in the case, viz., the original petition, the amended answer thereto, and the reply. None of these pleadings contained any of the averments which it is contended were erroneously ordered to be stricken out.

Under such circumstances error can not be predicated upon the action of the court in striking from the second amended petition the allegations to which reference has been made. If any

error was committed in that respect, it was waived by a voluntary withdrawal of the pleading upon leave of the court. We have, however, examined the question sought to be made because of its importance and of the attempt to present it upon the record. If the question were fairly before us we would be constrained to hold that the court of common pleas committed no error in ordering the matter, which avers that the Ohio Oil Company was a party to an unlawful conspiracy in restraint of trade, stricken from the second amended petition.

The question was before this court two or three years ago in Sandusky county in the case of *Herbrand Company* v. *Bellefontaine Bridge & Iron Company,* an unreported case. In that case the court of common pleas had held that the fact, if it was a fact, that the Bellefontaine Bridge & Iron Co. was a member of an unlawful trust and combination called "the bridge trust," did not prevent its recovering upon a contract for furnishing the Herbrand Co. certain building material for a structure being erected by the latter company in the city of Fremont. We see no reason to differ with the holding thus made. If a plaintiff were a member of a gang of highwaymen, such plaintiff would not thereby be deprived from recovering in a court of law upon a contract having no relation to his criminal membership in such organization. In analogy to this principle we cite *Kinner* v. *L. S. & M. S. Ry. Co.,* 69 O. S., 339, in which the familiar rule is announced that the plaintiff when he comes into a court of equity must come with clean hands, requires only that the plaintiff must not be guilty of reprehensible conduct with respect to the subject-matter of his suit. This principle is one of universal application and has been followed in *Holland Stock Remedy Co.* v. *Independent Chemical Co.,* 17 Ohio Dec., 207, and in many other cases.

It is insisted in argument that the plaintiff is not entitled to prosecute error for the reason that no exception was lodged to the final judgment of the trial court, but no exception need be taken to a final judgment. See *Commercial Bank* v. *Buckingham,* 12 O. S., 402.

Finding no prejudicial error the judgment of the court of common pleas will be affirmed.

AS TO OWNERSHIP OF PROCEEDS OF A POLICY OF LIFE INSURANCE.

Court of Appeals for Hamilton County.

HENRY SCHLACHTER, ADMINISTRATOR, ETC., OF MARY TEEPEN, DECEASED, v. AL. H. TEEPEN.*

Decided, June, 1915.

Wills—Determination as to Ownership of the Proceeds of a Policy of Life Insurance of Husband—Bequeathed by Wife to Husband.

A bequest by a wife of all her property both real and personal to her husband, includes a policy of insurance on the life of her husband (who was still living), made payable to her, her executors, administrators and assigns.

Clore & Clayton, for plaintiff in error.
Charles M. Leslie, contra.

JONES (Oliver B.), J.; JONES (E. H.), J., and GORMAN, J., concur.

The insurance policy, the proceeds of which is in controversy here, was written on the life of Herman Teepen, and made payable to Mary Teepen, his wife, "her executors, administrators or assigns." Mary Teepen died in 1898, leaving a last will in which the material clause was as follows:

"Second: Subject to the payment of my debts, should there be any, I give, devise and bequeath all my property, both real and personal of which I may die seized, to my husband, Herman Teepen, to him and his heirs forever."

Herman Teepen was appointed executor, and duly elected to take under this will. He settled the estate and filed his final account. Nothing was done by him in this administration or account in regard to this insurance policy. After the death of Herman Teepen in 1911, the plaintiff in error was appointed administrator *de bonis non* with the will annexed of Mary Tee-

*Affirming, *Teepen* v. *Schlachter*, 18 N.P.(N.S.),—.

pen, and collected and now holds the proceeds of such insurance. Defendant in error was appointed administrator of Herman Teepen and filed a claim on behalf of his estate with said administrator *de bonis non* of Mary Teepen by virtue of the clause in her will above quoted, and demanded payment to him of the proceeds of said insurance, which being refused this action was brought in the court below.

A demurrer to the petition was overruled. An answer was then filed which alleged that Herman Teepen procured said insurance with the intention of himself and of his wife to make provision for his wife and children, and to make its proceeds her separate estate if she survived him, and if not, such proceeds would go to and become the property of their children to be exclusively for their benefit; that such insurance was taken out in contemplation of Section 9398, General Code, for the purpose of creating a fund and separate estate for said wife and children independent of said Herman Teepen and his creditors, and that it was not the intention of Mary Teepen by her will to invest any estate or interest in the proceeds of said insurance in her husband because it could not be collected until after her death. A demurrer to this answer was sustained.

The question to be determined is whether Mary Teepen had such a vested interest in the insurance policy that it would pass under the terms of her will to her husband, or whether by virtue of Section 9398, General Code, it was limited to her children.

There is no question but that the words of Mary Teepen's will are sufficiently broad to include every interest in property vested in her at the time of her decease. As the beneficiary named in the policy she obtained a vested interest in it the moment it was issued, and it continued to be her property up to the time of her decease. *Bliss on Life Insurance* (2d Ed.), Section 318; *Manhattan Life Ins. Co.* v. *Smith*, 44 O. S., 156, 163; *U. S. Life Ins. Co.* v. *Buxon*, 62 O. S., 385, 390; *Washington Central Bk.* v. *Home*, 128 U. S., 195; *Marsh* v. *Legion of Honor*, 149 Mass., 512, 515.

After her death, as it was written to her and " her executors, administrators or assigns," her executor became the owner for

the purpose of administration under the terms of her will. The fact that it had not then matured and that under the will it passed to her husband who was himself the insured, can make no difference. It would become his property for the benefit of his estate. Nor was it necessary for him as executor of her estate to make a formal assignment of the policy to himself in the settlement of her estate, although that might have propertly been done.

It is true that under the terms of Sections 9398 and 9399, General Code, this policy might have been made payable to and written for the benefit of the wife and children, instead of, as it was, to her and her executors, administrators or assigns. In that event, it would have gone to the children after her death. Or, she might have bequeathed it by her will to her children instead of to her husband. Either plan would have accomplished the intention for which plaintiff in error contends. But the policy was not solely to her, but to her "and her executors," etc., and giving the broadest construction possible to the sections of the statute relied upon, they would not prevent her disposition of it by her will.

The history of the legislation now embodied in these sections shows that it was enacted before the married woman's enabling act, for the purpose of permitting insurance for the separate estate of a married woman for her benefit and that of her children, free from the debts of her husband.

It is not necessary to say more as the questions involved have been fully considered in the opinion of the court below.

The judgment is affirmed.

INTEREST OF TRIAL JUDGE IN THE DECREE ENTERED.

Court of Appeals for Ashland County.

THE ASHLAND BANK & SAVINGS COMPANY AND JACOB FRIEDLINE v. JOSEPH W. HOUSEMAN.

Decided, 1915.

Disqualification of Judge—Not Brought About by His Interest in the Judgment to be Entered, When—Judgment and Decree of Foreclosure where Entered by Default—Not Open to Collateral Attack by Interest of the Judge in the Issue—Causes for which a Judge may be Disqualified.

1. A default judgment taken on promissory notes and for the foreclosure of the mortgage securing the same, entered by a judge who is interested in the cause or matter pending as stockholder in plaintiff company, if the proceedings are all regular, is not void and can not be collaterally attacked.
2. The causes provided in the statute are the only ones disqualifying a judge in the trial of a cause or matter pending in his court. The clause "or is otherwise disqualified to sit in such cause or matter" brings into the statute all the common law causes for which a judge may be disqualified, in addition to those enumerated in the statute, and the statutory remedy of filing an affidavit of prejudice applies to all of them.

Error to the Court of Common Pleas of Ashland County.

Mykrantz & Patterson and *Semple & Sherick*, for plaintiff in error.

McBride & Wolfe and *C. P. Winbigler*, contra.

SPENCE, J.

The defendant in error, Joseph W. Houseman, began this action in the Court of Common Pleas of Ashland County against the plaintiffs in error, the Ashland Bank & Savings Company and Jacob Friedline, and for his cause of action averring that on July 25, 1914, the Ashland Bank & Savings Company took a judgment against him on a cognovit note for the amount of one thousand dollars and interest, and caused the sheriff to levy upon and sell certain personal property for the payment of said

judgment; that on the 25th day of July, 1914, the Ashland Bank & Savings Company began an action against him in the Court of Common Pleas of Ashland County, Ohio, asking for a judgment on certain notes and a decree of foreclosure of the mortgage securing the same; that on the 25th day of August, 1914, a judgment for $2,227.87 was rendered on said notes against the plaintiff and a decree of foreclosure was given on said mortgage. Then the petition recites the sale of the mortgaged property.

Plaintiff further avers that on the 25th day of July, 1914, the Ashland Bank & Savings Company filed its petition in the Court of Common Pleas of Ashland County, Ohio, against this plaintiff asking for judgment on certain notes and a decree of foreclosure of the mortgage securing the same; that on the 25th day of August, 1914, a judgment for $5,500 was rendered on said notes in favor of the Ashland Bank & Savings Company and against the plaintiff and a decree of foreclosure was given of the mortgage securing said notes, and the petition recites the sale of the mortgaged property.

Then follows this averment:

"Plaintiff further says that each and all of said judgments, orders and decrees were taken before one William T. Devor who was the common pleas judge holding court in Ashland county, Ohio, at each of the several times at which said decrees were rendered and given, and that the said William T. Devor, judge as aforesaid at the time of rendering each and all of said judgments decrees and orders, was wholly and completely disqualified to render said judgments for the reason that said Devor was at and prior to and ever since has been a stockholder of the Ashland Bank & Savings Company and was financially interested in the result of said judgment and as such judge willfully and without any authority to do so and being wholly disqualified by law, rendered said judgments in each and every instance as aforesaid."

Plaintiff prays that each and all of said judgments may be vacated, set aside and held for naught, and that the property sold be restored to him; that an accounting may be made to him for the use of the property and he asks damages in the sum of $12,000.

The Ashland Bank & Savings Company by answer admits bringing the actions as alleged in the petition and the taking of the various judgments, orders and decrees of foreclosure of mortgages as alleged in the petition and the sale of the mortgaged property, and that William T. Devor was the owner of ten shares of stock of the value of one hundred dollars each in the Ashland Bank & Savings Company at and before the time that each of said judgments, orders and decrees of foreclosure were entered, and by way of answer says first, the personal property sold for the payment of the judgment in the first action set up in the petition was sold by agreement between Joseph W. Houseman, the Ashland Bank & Trust Company and the sheriff who held the execution, and that the proceeds of the sale were applied to the payment of the judgment.

As a third and fourth defense the Ashland Bank & Savings Company sets up the judgment and orders of foreclosure in the two actions begun on July 25th, 1914, and says that the proceedings in these cases were all regular and legal and that they are a bar to the plaintiff's claim.

The answer further avers that personal service of a summons in each of said cases was made on Joseph W. Houseman, and that he failed to file answers or demurrers within the time provided by law and each of said judgments was entered by default. The petition avers that Jacob Friedline claims some interest in the property located in Ashland. The court sustained a demurrer to the third and fourth defenses and the plaintiff filed a reply to the second defense.

This case was tried on the petition and the second defense of the answer and the reply to a judge of the Court of Common Pleas of Ashland County, Ohio, who found in favor of the defendant on the first action set forth in the petition, and in favor of this plaintiff on the second and third actions set forth in the petition and directed that the judgments, orders and decrees set forth in said actions be and the same are set aside, vacated and held for naught for the reason that at the time of the rendition of the same by one William T. Devor, then judge of the Court of Common Pleas of Ashland County, Ohio, the said William T.

Devor was a stockholder in the said the Ashland Bank & Savings Company.

Counsel for all parties to this action agree that the only question here presented for the consideration and determination of this court is whether the judgments, orders and decrees in said actions set forth in the petition are void because William T. Devor, a judge of the Court of Common Pleas in and for Ashland County, Ohio, was a stockholder in the Ashland Bank & Savings Company at the time he entered said default judgments, orders and decrees.

The question is made in this case by the court sustaining demurrers to the third and fourth grounds of the answer and upon the trial and judgment or finding of the court. While the question is here presented in different forms, first upon the court sustaining the demurrer and second upon the trial and judgment or finding of the court, it all goes to the one question: were the judgments, orders and decrees of the court void because of the interest of Judge Devor in the Ashland Bank & Savings Company?

Counsel for plaintiffs in error contend that this action is a collateral attack upon the judgments set forth in the petition, that at most they could only be voidable, and if only voidable they can not be collaterally attacked, which is clearly the law. Counsel for defendant in error contend that the judgments are absolutely void and can be collaterally attacked, which contention is true if the judgments are void and not merely voidable.

Counsel for Houseman earnestly contend that the question of the right of an interested judge to enter judgment in a cause in which he is interested, has been determined by the Supreme Court in the case of *Gregory* v. *Cleveland, Columbus & Cincinnati Railway Company*, 4 Ohio St., 675. In that case two of the judges of the court of common pleas were stockholders in a railroad company which was seeking to appropriate property for a right-of-way. These interested judges appointed appraisers to fix and determine the value of the land to be appropriated and to fix and determine the benefits from the road to the land owner; the court appointing the appraisers received their report to which report Gregory filed a motion to set it aside for

several reasons, one of which was that two of the judges of the court of common pleas which appointed the appraisers or commissioners were stockholders in the railroad company. The court refused to set it aside but certified it to another county for hearing by a judge of that county, where the report was approved and confirmed by the common pleas court, from which finding Gregory prosecuted error to the district court, which court reversed the finding of the common pleas court, and from the decision of the district court the railroad company prosecuted error to the Supreme Court, which court affirmed the judgment of the district court.

In his opinion in the Gregory case, Kennon, Judge, says:

"The statute confers on the court, and upon the court only, the power of selecting the men who shall decide the facts in the case, who determine how much benefit the road will be to the landholder, and how much damages he will sustain by the appropriation. There are few subjects upon which men are more likely to differ in opinion, and few cases in which an interested judge, in the mere selection of the commissioners, could (if he chose to do so) more effectually injure the landholder and that, too, without redress, if his judgment could not be reversed without showing actual error in the proceedings."

In his conclusion Judge Kennon says:

"We think, for the administration of justice, the safe way is, in all cases, for interested judges to decline acting in such cases, and where it appears on the record that they were interested and acted on questions of fact, especially when they were to select the jury who try the facts, they should refuse to sit, and make known their interest at the earliest stage of the proceedings, that the case may, under the statute, be transferred to an adjoining county."

It is not stated either in the syllabus or the opinion that the judgment is void, but it was simply reversed for error. It will be seen that the facts in the Gregory case are entirely different from the facts in the case at bar, where Judge Devor only made a formal entry in a case where the facts were determined by statute and he had no discretion in the case. Section 11281, General Code, provides:

"When the action is for the recovery of money only there must be endorsed on the writ the amount stated in the precipe, for which, with interest, judgment will be taken if the defendant fails to answer. If the defendant fails to appear, judgment shall not be rendered for a larger amount and costs."

Section 11383, General Code, provides for entering a default judgment as follows:

"In an action upon an account, or written instrument for the payment of money only, or in foreclosure, judgment may be entered at any time during the term after the defendant is in default for answer, unless for good cause shown the court gives further time to answer."

There is no contention that the proceedings in the cases set forth in the petition were not in every respect regular and legal and that the defendant was in default for answers at the time the judgments, orders and decrees were entered. The code gave the court authority to enter judgments, orders and decrees, and also fixed the amount for which the default judgments should be entered. All that the judge could do was to make the formal entry as directed by statute. The only discretion given to the court by the statute is on good cause shown to give further time to answer, which was not asked for in those cases. In *Van Ingen* v. *Berger*, 82 Ohio St., 255, Spear J., at page 260, commenting on now Section 11283 of the code, says:

"It would seem not to require argument to show that the statute and the rights of parties under it can not be abridged by a rule of court."

In the Gregory case Judge Kennon quoted the old English maxim "No one ought to be a judge in his own case." And also refers to the case of *Pearson* v. *Atwood*, in 13 Mass., 324, and says:

"The plaintiff brought an action of trespass against the dedefendant, for arresting the plaintiff, on a warrant held by the defendant as constable, that by the laws of Massachusetts, a moity of the fine went to the town in which the justice resided and that therefore he was interested."

The court did not find it necessary in the case to hold the act of the justice wholly void. This case is an authority against

the contention of counsel for defendant in error that the judgments are wholly void.

In the case of *Probasco* v. *Raine, Auditor,* 50 Ohio St., 378, Burket, Judge, at page 392, says:

"A probate judge acts judicially in the appointment of guardians and administrators and receives a fee for each appointment, and yet such fee does not disqualify him from acting in the premises. A justice of the peace acts judicially and is paid therefor by fees collected from litigants before him, and while his mind may be biased in particular cases, it can not be claimed that he is thereby disqualified from discharging his judicial duties. A judge who is a large tax-payer in his county or city is not thereby disqualified from sitting in judgment in cases against the county and city."

This conclusion is the reverse of that reached by the court in the Massachusetts case above referred to.

In Cooley's Constitutional Limitations, Fifth Ed., page 511, the author says:

"Mere formal acts necessary to enable the case to be brought before a proper tribunal for adjudication an interested judge may do."

There are many cases holding that it is not error for an interested judge to make a formal entry in a case. In *County of Floyd* v. *Cheny,* 57 Iowa, 160 (10 N. W., 324), syllabus:

"A decree of foreclosure entered on default and without mutual consent by a judge who was an attorney for one of the parties in the transaction, is not for that reason void."

Rothreck, J., at page 325 says:

"By Section 2685 of the revision of 1860 which was in force when the plaintiff's foreclosure was had, a judge was disqualified from acting as such in any case where he had been an attorney for either party in the action, unless by mutual consent of the parties. It does not appear that Collins, the party defendant, to the foreclosure, appeared in the action. If he did not but was in default, his default was an admission of the cause of action and that something was due on the debt secured by the mortgage. Under these circumstances the amount of the judgment is usually ascertained by the clerk, and the decree is entered as a matter of form. We do not think that the decree was void, presuming as we may that it was entered by default."

The amount for which judgment shall be entered in an action for money only in this state is fixed by the code and the judgment or decree is entered as a matter of form.

The correct conclusion in this case will not be advanced by a consideration of the common law rules or by a review of the decisions in other states, as the matter is controlled in this state by statute and we must look to the statutes for its proper solution.

Section 1687, General Code, as amended May 8, 1913, was in force when the original actions were begun, and provides as follows:

"When a judge of the common pleas court or of the superior court of Cincinnati is interested in a cause or matter pending before the court in a county of his district, or is related to, or has a bias or prejudice, either for or against, a party to such matter or cause, or to his counsel, or is otherwise disqualified to sit in such cause or matter, on the filing of an affidavit of any party to such cause or matter, or of the counsel of any party, setting forth the fact of such interest, bias, prejudice or disqualification, the clerk of the court shall enter the fact of the filing of such affidavit on the trial docket in such case and forthwith notify the chief justice of the Supreme Court, who shall designate and assign some other judge to take his place. Thereupon the judge so assigned shall proceed and try such matter or cause."

The statute after stating a number of cases for which a judge may be disqualified, contains this clause:

"Or is otherwise disqualified to sit in such cause or matter."

This clause necessarily brings into the statute all the common law causes for which a judge may be disqualified, in addition to those enumerated in the statute and applies the statutory remedy to all of them; that is, by filing an affidavit containing one or more of the causes for disqualification of a judge, under the statute it is not the existence of any of these causes, but the filing of the affidavit which disqualifies the judge. If the relief provided by statute is not sufficiently broad to cover all cases that may arise, the remedy is with the Legislature and not with the courts.

In *Patterson* v. *Police Court,* 123 Cal., 453 (56 Pac., 105), the court say:

"The causes enumerated by Code Civil Proc., Sec. 170, as amended in 1897, are the only ones disqualifying a judge."

In *State* v. *Moore,* 121 Mo., 514 (26 S. W., 345), it is said:

"The only way by which a judge may be disqualified from sitting in the trial of a cause is by the reason of the existence of some one or more of the causes mentioned by Section 4174, Revised Statutes 1889, and by a compliance with the provisions."

In *Probasco* v. *Raine, Auditor,* 50 Ohio St., 378, Burket, Judge, at page 392 says:

"Almost every officer in this state is more or less directly or indirectly interested in the result of the duties by him performed, whether ministerial or judicial, but such interest does not disqualify him from performing his official duties, unless the Legislature has by statute so provided."

It is argued by counsel for defendant in error that Houseman did not know of the existence of the cause at the time the judgments and decrees were entered. We have failed to find any such an allegation in the petition, or any such evidence in the record, as he was not called as a witness. Judge Devor was one of the regular judges in that judicial district, holding court in Ashland county, and from anything that appears in the record Houseman knew at and before the judgments and decrees were entered that Judge Devor was a stockholder in the Ashland Bank & Savings Company.

It is our conclusion that all the judgments, orders and decrees in the cases set forth in the petition are not void, and can not be collaterally attacked, as in this proceeding; that the remedy provided by statute in case of a judge, who is interested in a cause or matter pending before the court in one of the counties of his district, is exclusive and must be followed or it is waived by the parties.

The judgment of the court of common pleas will be reversed and final judgment rendered for plaintiff in error.

SHIELDS, J., and POWELL, J., concur.

LIBEL OF A JUDGE TOUCHING PROCEEDINGS WHICH HAVE BEEN TERMINATED.

Court of Appeals for Hamilton County.

JOHN M. DUGAN v. STATE OF OHIO ET AL.

Decided, November 22, 1915.

Contempt—Punishment for, Can Not be Based on Defamatory Comments Regarding the Court, When Libel Does Not Constitute Contempt.

A libelous attack upon a judge can not be made the basis of a charge of contempt, unless it has a tendency to impede or hinder the court in the administration of justice by having reference to the action or conduct of the judge in a pending case or proceeding.

Charles L. Swain and *Pogue, Hoffheimer & Pogue,* for plaintiff in error.

Hosea & Knight, contra.

BY THE COURT (Edward H. Jones, Frank M. Gorman and Oliver B. Jones, JJ.).

This is a proceeding in error to the judgment of the Superior Court of Cincinnati imposing a sentence of fine and imprisonment upon the plaintiff in error, John M. Dugan, under a charge of contempt.

The facts briefly stated are as follows:

On October 31, 1914, the Juvenile Protective Association, by its president, Frank H. Nelson, brought an action for injunction and damages in the Superior Court of Cincinnati against Millard F. Roebling, who at that time was a candidate for the office of judge of the court of domestic relations. The Juvenile Protective Association, whose object is indicated by its name and whose purposes were closely allied with the duties and functions of the court of domestic relations, had endorsed for judge of that court the opponent of Mr. Roebling, and had issued a circular for public distribution which while not mentioning the name of

the candidate so endorsed by said association, called upon the electors to carefully consider the qualifications and fitness of the respective candidates and cast their ballots for the man best qualified for the position. A very short time after the appearance of said circular or pamphlet, another pamphlet was circulated purporting to be issued by the Juvenile Protective Association, the greater part of which adopted the language of the original circular. This latter circular concluded with the endorsement of Millard F. Roebling for the position of judge of the court of domestic relations.

The petition of the Juvenile Protective Association in the case against Roebling above referred to set forth the above facts and charged that said circular representing the Juvenile Protective Association as endorsing Mr. Roebling for judge was a misrepresentation and a fraud wholly unauthorized by said association and intended to place said association in a false and unenviable attitude, etc. That case was partially heard before one of the judges of the superior court on the day before the election, when it was shown that the spurious or bogus circular was printed at the printing establishment conducted by Mr. Henry S. Rosenthal. And it therefore became important in the conduct of the case and in order to render a correct judgment therein to ascertain who authorized the printing and distribution of said bogus circular. To this end during the progress of the case Mr. Henry Rosenthal was called as a witness.

It is only necessary, in order to understand the nature of the case under consideration, to further state that on account of alleged evasive and false answers given by Mr. Rosenthal at said time, and after a lengthy and fruitless examination, the judge presiding found that the witness Rosenthal was concealing the truth and in effect refusing to testify; that his conduct in the presence of the court was an obstruction to the administration of justice and, under the authority of Section 12136, General Code, adjudged the witness Rosenthal guilty of contempt of court.

This took place on the 6th day of November, 1914. On the same day Rosenthal instituted a suit in habeas corpus in the Court of Common Pleas of Hamilton County, which was heard and finally determined on the 25th day of November, 1914.

We deem it necessary to give this short history of the Rosenthal matter in order that the charge against Dugan and the ground of this decision may be fully understood, and we now come to the part that Dugan took in the matter which led to the formal charges of contempt filed against him by a committee of the bar appointed for that purpose.

It appears that late in December, Dugan as correspondent for a periodical known as the *Typographical Journal,* which is said to be the official paper of the International Typographical Union of North America, wrote an article to that journal which was printed in its January, 1915, number. This article or contribution of Dugan occupied several columns of the journal and consisted of items of news supposed to be of interest to printers. In one of these items Mr. Dugan entered into a lengthy and somewhat animated defense of Mr. Rosenthal, with reference particularly to the trouble which arose in the Printers' Union No. 3 over the taking away from Rosenthal and his establishment of the union label for the alleged offense of printing the spurious circular above referred to and the use of the label thereon without the number of said label.

It will be borne in mind that at the time of the writing of the article, and a long time before its publication, the contempt proceedings against Rosenthal had ended, and that the habeas corpus proceedings growing out of the adjudication of that case had terminated. It was language used by Dugan at this time which was made the basis of the charge of contempt against him. On page 68 of the *Typographical Journal* Dugan wrote:

"During the discussion of the case at the last meeting of No. 3 it was plainly shown that a member of No. 3, an officer of the allied council, had visited the homes of members working in the Rosenthal office trying to secure evidence from these members to assist in convicting the president of the Rosenthal plant in an action that was then on in Hamilton county courts. When the proprietor of this shop was on trial this member of No. 3 and an officer of the allied council sat on the bench with the judge prompting him and coaching him as to how to proceed against Mr. Rosenthal."

To the charges of contempt Mr. Dugan filed an answer containing three separate defenses:

The first defense was in effect a denial that said article or any part or portion thereof insulted, villified or intimidated the judge, or had a tendency so to do; he denies that it inflamed or had a tendency to inflame the prejudices of the people, etc.

The second defense was briefly stated in the answer and we quote it in full:

"This defendant adopts and makes part hereof all and singular the allegations stated in the first defense, and says that the proceedings referred to in said publication were, at the time the same was written and published in said journal, wholly concluded and terminated, and that neither said article, nor anything therein contained obstructed or tended to obstruct in any manner the administration of justice in the proceeding in which Henry Rosenthal was tried for contempt."

And in the third defense Dugan states that his only object in writing and publishing said article was to inform the printing craft of the trial of Henry Rosenthal and the charges made against him and the subsequent removing and taking away the union label from the firm of Rosenthal & Company. He further states that in writing and publishing said article he did the same in good faith without any intention, purpose, thought, design or desire to embarrass or obstruct the process of the court in the proceedings against Henry Rosenthal or in the suit of *the Juvenile Protective Association* v. *Roebling,* and now disclaims any intention or thought of disrespect or imputing corrupt or improper motives to said judge or court or any of its officers, or questioning its integrity or interrupting, embarrassing or in any manner obstructing the administration of justice therein.

A review of the evidence adduced in the court below shows that the defendant utterly failed to prove his first and third defenses. It was shown by the evidence in the case that the portion of the article quoted above, in whcih it is stated that someone sat by the judge during the trial and coached him, was absolutely unfounded, and that there was no justification whatever for the publication in anything that Mr. Dugan had seen or heard. He was not present in court while Rosenthal was on the witness stand or when he was adjudged in contempt, or at any

other time during the progress of the case. The only foundation which he claimed for the article was that at a meeting of No. 3 he had heard someone say that a Mr. Bell had prompted the judge during the Rosenthal hearing. He could not say who it was who made the statement in his hearing and did not show that he had made any effort to ascertain the identity of the person making the statement before writing the false and scurrilous attack upon the judge.

It seems a travesty, almost, upon judicial procedure for him to use this language in his first defense:

"He denies that it degraded or had a tendency to degrade said court in the estimation of the community; he denies that it inflamed or had a tendency to inflame the prejudices of the people against said court."

The truth or falsity of this must be determined by the court from the language used. We do not see how reasonable minds could differ as to the obvious purpose and effect of this language. That it was false, no one now denies. We believe that it was not only false, but was deliberately and wilfully false, without any excuse or justification whatever. The attack was libelous; it was vile and venomous.

The third defense is equally unsupported by the evidence. It does not show that Mr. Dugan made this statement about the judge in good faith "without any intention or thought or disrespect or imputing corrupt or improper motives to said judge or court or any of its officers, of questioning its integrity or interrupting, embarrassing or in any manner obstructing the administration of justice therein."

But we think the second defense of the answer is a good defense, and that it is supported by the evidence in the case, which shows that at the time the article was written and at the time it was published the proceedings for contempt against Mr. Rosenthal—which was obviously the case referred to by Mr. Dugan in his article—was fully terminated.

It seems to be the well settled law in most, if not all, of the states of this Union that however libelous a written attack upon a judge may be, it can not be successfully made the basis of a

contempt charge unless it is with reference to the conduct of the judge in a pending case or proceeding and thus has a tendency to impede or hinder the court in the administration of justice.

Without further comment we will cite a few authorities in support of this well recognized rule of law:

In 6 R. C. L., p. 512, the general principle is thus stated:

"Under our laws defamatory comments on the past conduct of the judge or relating to his fairness or honesty, may be libelous, but do not constitute contempt, even though they may well embarrass the court to some extent in pending litigation."

In *Post* v. *State,* 14 C. C., 112, the last paragraph of the syllabus reads as follows:

"Newspaper comments, however libelous, having relation to proceedings which are past and ended, are not in contempt of court, or of the authority of the court to which reference is made."

On page 121, in the opinion of this case, the court referring to the opinion of the Supreme Court of Ohio in the case of *Myers* v. *Ohio,* 46 O. S., 473, say:

"It is apparent to us that this language of the court was intended to, and the court does hold that the libels upon the court which do not relate to cases pending, are not a contempt, and concur with the adjudications in those states which so hold."

In *Rosewater* v. *State,* 47 Neb., 630, the court says:

"To constitute any publication contemptuous it must reflect upon the conduct of the court in reference to a cause or proceeding then pending in court and undetermined and be of a character tending to influence its decision or obstruct, interrupt or embarrass the due administration of justice."

Clark, J., in the concurring opinion in the case of *State* v. *Cox and Burba,* 11 N.P.(N.S.), 265, tersely expresses the same principle thus:

"The authority, this extraordinary power residing in the court being founded on necessity, it must find its limit when the

necessity ceases, and this necessity as has been set forth extends only to the preservation of its freedom of action in the business it has in hand."

We again quote from the opinion by Hale, J., in the case of *Post* v. *State of Ohio, supra,* from the concluding paragraph on page 123:

"The tendency of the article was not to embarrass the court in the disposition of the case then pending before the court. * * * In both the general discussion and in the specific instance referred to, the reference was to a past transaction, to matters done and ended. It will not be claimed that the publication of this article had, or could have had, the slightest influence on the judge named therein, in the disposition of a case then pending, or in any way embarrass him in the disposition of any case thereafter to be tried. It did not, therefore, within the meaning of the statute, in the judgment of this court, obstruct the administration of justice. It was an unjust criticism of a faithful and upright judge, but not a contempt of court."

Every word of this quotation is peciliarly applicable to this case. The false and unjust criticism by Mr. Dugan had no reference, as we view the evidence, to any case pending before the judge who was the object of Dugan's mean attack. Although libelous in the extreme, it was not contempt.

The judgment will therefore be reversed.

CHANGE OF BENEFICIARIES BY A POLICY HOLDER OF UNSOUND MIND.

Circuit Court of Cuyahoga County.

LAURA L. JORDAN v. THE MUTUAL LIFE INSURANCE COMPANY ET AL.

Decided, November 26, 1906.

Insanity—Evidence of Egomania and Megalomania.

An insane degenerate with paranoidal tendencies and delusions which take the form of egomania and megalomania, may continue in the pursuit of his daily business and exercise such self-restraint that those associated with him will not be aware of his condition, so that, where two alienists after an exhaustive examination unqualifiedly declare a person to have been suffering with that form of insanity, their testimony will be of more weight than that of numerous associates who came in contract with him in a business way.

HENRY, J. (orally); WINCH, J., and MARVIN, J., concur.

This is an appeal by the plaintiff. The action as originally begun was an action to recover the amount of an insurance policy issued by the Mutual Life Insurance Company, the defendant, to Frank Jordan, plaintiff being the widow of said Frank Jordan. And a part of the relief asked for by the prayer of the petition is, that a certain change of the beneficiaries that had been sought to be made by Frank Jordan in his lifetime, with the concurrence of the insurance company, should be set aside as null and void for one or more of three reasons.

First, that the plaintiff had paid some of the premiums upon the policy, upon the faith of an agreement that the policy should be taken out in her favor.

Second, that Frank Jordan, the insured, was at the time the change of beneficiaries was made, of unsound mind, and that the person who was made beneficiary under the change, namely, his sister, Maude A. Wood, fraudulently induced him to make such change not, however, by actual fraud, but by construction of law.

Third, that the policy's terms forbid an assignment without the consent of the beneficiary named therein.

As regards the first and third of these reasons, we may say without discussing them that we do not found our judgment upon them. There is no evidence tending to show that the state of facts claimed with reference to either of these grounds exists, and our construction of the policy and the provisions therein contained with reference to the change of beneficiary is not the construction which the plaintiff here seeks us to have put upon it.

With regard, however, to the second ground, namely, that Frank Jordan, the insured, was of unsound mind at the time the alleged change of beneficiary was made, and that, therefore, he was incapable of making a valid change, we have submitted to us the testimony of a great number of witnesses, pro and con.

Among the plaintiff's witnesses are two physicians of this city, experts, Dr. Aldrich and Dr. Upson, both of whom, upon an exhaustive examination by hypothetical questions and with respect to the results of an examination which they made of documentary matter of great variety, which was submitted to them, and the handwriting of Frank Jordan, testified unqualifiedly that he was of unsound mind; that he was an insane degenerate with paranoidal tendencies and delusions which took the form of egomania and megalomania and delusions of persecution imagined to have been suffered by him in the domestic affairs and as shown by other evidence resulting in an insane jealousy of his wife and extreme ill-treatment of her on several occasions in consequence of the delusions referred to. Their examination was exhaustive and their testimony in that behalf was, as I say, unqualified. If we say he was of sound mind, we must do so in the face of the positive testimony of these physicians. Moreover, a physician, one of the defendant's experts, Dr. Straight, as a witness, undertook to testify from his acquaintance with Mr. Jordan in his lifetime, that, although he was a man of some peculiarities of character and conduct, yet he was of perfectly sound mind. On cross-examination, he said that if Frank Jordan wrote the writings that were submitted to him upon the stand, he should be of the opinion the Jordan was insane.

A large number of business men of this community were examined as witnesses for the defendant, having been business associates of Mr. Jordon, who, by the way, was an insurance agent. He had a wide circle of acquaintances, was a member of the Chamber of Commerce and of a committee which was appointed a few years ago to get new members, and his work on that committee was very successful. A number of business acquaintances in this city, of high standing, who saw him from time to time in connection with his work on the Chamber of Commerce committee, or his professional duties and otherwise, testified on behalf of the defendant that in their judgment he was of sound mind. Several of them were quite emphatic that he was of sound mind, saying that the suspicion never entered their minds that he was insane.

Here there was a sharp conflict.

Referring again to the testimony of plaintiff's experts. Their testimony was to the effect that a person suffering from this form of insanity may continue in the discharge of his business and the duties thereof for a long period of time without his insanity necessarily interfering with his success therein. And it is possible for a man suffering from this form of mental trouble to continue for a period of time without his mental trouble being particularly noticeable, or even noticeable at all, to those who meet him from day to day while in the discharge of his duties. And it is true to a degree of such insane persons, as it is indeed of all persons, that they are capable of exercising some self-restraint in respect to making an exhibition or expression of their peculiar delusions, and, hence, it is not at all surprising, according to the testimony of these expert physicians, that the business associates of a man suffering under the form of insanity that the experts say Frank Jordan suffered from, should fail to observe that he was thus afflicted.

Without entering into a resume of the great variety of instances that were adduced in the testimony on the trial, which, for length, in this court was unprecedented, it is sufficient to say that the documentary matter which was presented to the experts and presented in evidence to us, we have examined carefully. It

consists, in the main, of books owned by Frank Jordan which he had marked by drawing lines around passages that struck him, on the margins of the pages, and by writings upon the fly-leaves.

The markings of the books was of itself very erratic, to say the least. He seemed to have a passion for marking his books, and some of them are marked page after page by pencil marks that disfigure the books, and marked without reference to anything in the printed page. But some of the pages are very significant, being with clear reference to the contents and meaning of the printed words upon the page. And the things that are written upon the fly-leaves of some of these books, so far as they are intelligible at all, and particularly of the Bible, would tend to show, according to the testimony of Dr. Straight, a hypocritical and immoral life; yet Dr. Straight testified that Jordan, if he went home and read the Bible for hours and days at a time and marked passages such as were marked, would be insane.

We have examined this bill which is marked at great length and these books, some of which are Meyer's Christian Living, Long's Thoughts of Marcus Aurelius, Clerk's Instructions to Christian Converts, Jordan's Kingship of Self-Control, etc., and if these experts, witnesses, have correctly detailed the indicia or symptoms of this species of insanity to which they testify, and if there is such a species of insanity as we have no doubt there is, we think from our examination that we have made of these documents, in the light of the instruction that we have received from these experts, on the subject of insanity, that their deductions from these writings and these books and the markings thereon, are correct.

We can not come to any other conclusion than that the man who made these entries in these books, and made these peculiar marks, was a man of unsound mind. And, without further discussion of the evidence and because our conclusions of fact require the judgment we render, we simply say that the judgment will take the form of a reformation or annullment of the change of beneficiary that was made by Frank Jordan, and a judgment

for the plaintiff against the insurance company for the amount of the policy.

I may say the insurance company is not contesting this policy; they have paid the proceeds into the hands of the Society for Savings, which is acting as receiver or trustee, by agreement of the parties.

CORRECTION OF VERDICT RETURNED BY MISTAKE.

Circuit Court of Cuyahoga County.

THE CADY-IVISON SHOE COMPANY v. A. CHICOWICZ.

Decided, November 24, 1905.

Trials—Court May Re-submit a Case to Jury Where a Verdict is Plainly a Mistake.

Where a jury after returning a verdict in a replevin case were discharged, and certain members of the jury having inquired of the court as to the effect of their verdict and upon being informed that it was in favor of the defendant, protested that that was not their intention, it was not error for the court to re-assemble the jury and after ascertaining that all of them were mistaken as to the effect of their verdict, re-submit the case to them after further instructions.

Kline, Tolles & Goff, for plaintiff in error.
Henry Du Laurence, contra.

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

This was a replevin case commenced before John Brown, J. P., defendant in error, a retail shoe dealer, who had bought, partly on credit, a bill of goods of plaintiff in error, wholesale shoe dealers. The former having failed to pay punctually therefor, his entire stock was replevied by the company, including not only those that remained of the shoes for which he had not paid, but also others bought of the same and other wholesale dealers.

All that had not been bought of plaintiff in error were subsequently returned. The rest were kept.

The cause was appealed to the common pleas court, and, on the trial there, the jury returned a verdict evincing on its face a misunderstanding of the peculiar form of verdict returnable in such cases. While court and counsel were discussing whether the verdict might not be rectified by treating part of it as surplusage, the jury were excused and told to report to the jury room for duty. Part of them left the room and part crowded about the court's desk, inquiring about the effect of their verdict and whether it imported a finding for plaintiff or defendant. Being told by the court that it was finding against Chicowicz, they protested that it was not their verdict. Thereupon the court called the whole jury back, and having charged them further, sent them out to deliberate once more. They later brought in a verdict against the plaintiff in error, upon which judgment was rendered.

The facts that transpired after the first verdict was rendered, are brought into the record largely by the affidavits of the jurymen themselves, filed in resistance to the motion for a new trial, and incorporated in a bill of exceptions. It is complained that the testimony of jurors can not be heard to impeach their own verdict. Such, however, is manifestly not the purpose or effect of this evidence. The first verdict is self-impeached, and the door is thus opened to let in the testimony of the jurors themselves in confirmation of their misunderstanding. *Farrar* v. *State*, 2 O. S., 54.

It is objected further that the court was without power, having once discharged the jury, to reconvene them; and that the jury were without power having once rendered a verdict and separated, to withdraw the same and render another. *Sutliff* v. *Gilbert*, 8 Ohio, 405, cited by plaintiff in error in support of this contention, appears, however, when examined, to afford abundant justification for the action of the court and jury under such circumstances of this case.

It is objected further that the verdict and judgment as finally rendered, are for a sum in excess of the possible liability

of the plaintiff in error in view of the amount of Chicowicz's unpaid indebtedness. This contention overlooks the fact that other goods were taken besides those for which Chicowicz was indebted.

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

PROTECTION OF A RETIRING PARTNER.

Circuit Court of Cuyahoga County.

EMILY SCHNEIDER, EXECUTRIX OF THE WILL OF W. F. SCHNEIDER, DECEASED, v. GUSTAVE STERN ET AL.

Decided, November 24, 1905.

Partnership—No Notice of Dissolution Necessary, When.

When a partnership name does not disclose the names of the individuals who constitute the firm, no general notice of dissolution is necessary to protect a retiring partner from the claim of one who becomes a creditor after the dissolution and who had no knowledge that the retiring partner had been a member of the firm.

W. C. Rogers, for plaintiff in error.

P. G. Kassulker and *W. C. Rogers,* contra.

MARVIN, J. (orally); WINCH, J., and HENRY, J., concur.

For some time prior to the month of August, 1897, there was a co-partnership doing business in this city, the members of which were John Lindy, J. G. Waite and W. F. Schneider, the latter being now deceased and being the testator under whose will the plaintiff in error is acting. The firm name of this co-partnership was "Cleveland Book Bindery." A proper certificate of the name of the members of this co-partnership was filed with the clerk of the court of common pleas on the 9th day of April, 1895. No change in said certificate has been made, nor has any certificate been filed with such clerk showing any change in the personnel of said firm.

In August, 1897, said W. F. Schneider retired from said firm and was never thereafter a member of it, but the remaining partners continued in the business under the same firm name, or possibly under the name of "Cleveland Book Bindery Co." While said W. F. Schneider was a member of said co-partnership, Gustave Stern was never a dealer with said firm.

On the 12th day of January, 1896, there was executed a promissory note, reading.

"CLEVELAND, OHIO, Jan. 12, 1898.

"$74.00.

"Ninety days after date we promise to pay to the order of Consolidated Paper Co. seventy-four dollars.

"At 198 Seneca St. Value received.

"CLEVELAND BOOK BINDERY CO.,
"JOHN LIND, *Mgr.*"

Said note is endorsed: "John Lindy. Consolidated Paper Co. by F. C. Kauffman."

This note, by due course of business and before maturity, became the property of the said Gustave Stern.

On the 29th day of March, 1898, there was executed and delivered to the said Gustave Stern a promissory note reading:

"CLEVELAND, OHIO, March 29, 1898.

"$75.00.

"Thirty days after date we promise to pay to the order of Gustave Stern seventy-five dollars, at 198 Seneca St. Value received.

"CLEVELAND BOOK BINDERY,
"JOHN LIND, *Mgr.*"

On this note the following words are endorsed: "Consolidated Paper Co. John Lindy."

Neither of these notes being paid and both being the property of said Gustave Stern at maturity, the said Stern brought suit upon them, first before a justice of the peace, and an appeal was then taken to the court of common pleas from the judgment of said justice, and thereupon said Stern filed his petition in said court upon said notes, making defendants in said suit John Lindy, J. G. Waite and W. F. Schneider, partners as

"Cleveland Book Bindery" and "Consolidated Paper Co." While the case was pending in the court of common pleas said W. F. Schneider died, and the action was revived against the present plaintiff in error, as executrix of the will of said decedent. The first trial of the case resulted in a verdict and judgment for plaintiff, and, on motion, such judgment was set aside and a new trial granted. The second trial resulted as the first had done, in a verdict and judgment against the defendants. The plaintiff in error filed a motion for new trial, which was overruled, and she comes into this court by proper proceedings in error, seeking to reverse said judgment.

A defense made for Schneider was that he was not a member of the firm when either of the notes sued upon was executed. This fact was established beyond controversy. But it is urged by plaintiff below that this did not relieve him from liability upon these obligations, unless he had given proper notice of his withdrawal. This notice it was claimed Schneider had given, and the real question, so far as this matter of notice is involved, is as to what notice he was bound to give to relieve himself from liability to Stern.

If Stern had been a customer of the firm when Schneider was a member of it. and if, after his retirement, the remaining partners continued to do business under the same firm name, then Stern would have been entitled to actual notice of the change, unless in some other way the knowledge had come to him of the retirement of Schneider. Perhaps it is not profitable to discuss the question of whether the business, in this case, was continued under the old name, because it seemed to be concluded on the hearing that it was, although, as has already been pointed out, the first of the two notes sued upon was not signed by the name shown in the certificate of partnership, the latter being "Cleveland Book Bindery," while the name signed to the note is "Cleveland Book Bindery Co." The other note, however, is signed by the name shown in the partnership certificate.

The court in its charge to the jury said, on the question of notice:

"I say to you, gentlemen of the jury, as matter of law, that the plaintiff was not such a dealer, within the contemplation of the law, with the partnership as would entitle them to actual notice."

It has already been said, as a fact, in this opinion, that Stern was not a dealer with the firm while Schneider was a member of it. Attention was not called to the evidence on that point, but an examination of the evidence clearly shows that the court was right in saying to the jury what has been quoted from the charge on that point.

The court immediately followed what has been quoted with these words:

"But the plaintiff claims that even though he had had no dealings previous to these notes, he was entitled to general notice, and in this respect I say to you that under the circumstances the plaintiff would be entitled to notice, but not to actual notice; fair notice in a public or notorious manner is sufficient, * * * and it is for you to say whether the defendant Schneider gave fair notice of his withdrawal from the partnership. If he did, then he would not be liable. If he failed to exercise reasonable diligence by adopting a fair and usual method to give such general notice, one that would be reasonably likely to give general public notice, then he can not escape liability even though he had withdrawn from the partnership prior to the time of the giving of these notes."

We hold that this language in the charge, given as it is without any qualification as to whether Stern had ever known that Schneider was a partner in the firm, was erroneous. If there had been added the qualification that this general notice must be given to relieve from liability to one who had known of Schneider's being a partner in the firm, it would have been a correct statement of the law.

In *Meacham's Law of Partnership*, at paragraph 263, it is said:

"Of the persons who have not had dealings with the firm there are likewise two classes, those who knew of the partnership but had not dealt with it, and those who did not know of it prior to its dissolution. As to the latter class, it is said that no notice at

all is necessary, upon the ground that, as they did not learn of the existence of the partnership until it had actually been dissolved, they could have no reason for holding it liable; and this is doubtless correct where no element of estoppel is involved."

It must be borne in mind that there was nothing in the name of this firm indicating who were partners in it, so there was no holding out by the firm name that any particular person was a partner.

Instructive notes on this question of notice are found on pages 290, 291 and 292 of 26 American Decisions, being notes on the case of *Prentiss* v. *Sinclair*. The following quotations are from these notes:

"A person who did not know of the existence of a partnership can not, after it has been dissolved, say that he relied on its continuing to exist, or that he was induced by that unknown existence to give credit.

"There seems to be a distinction made in the case of new customers, between those who had actual knowledge of the existence of a partnership and of its membership, and those who had no such information; to protect the former the general notice by advertisement appears especially to apply, while as to the latter the giving of any notice would seem to be unnecessary."

A great number of errors are claimed by the plaintiff in error. Each has been carefully considered, but none of them seem sufficient to justify a reversal of the judgment, except the language of the charge hereinbefore criticized.

For error in the charge as pointed out, the judgment is reversed and the case remanded.

DUTY OF ONE ABOUT TO CROSS A STREET CAR TRACK.

Circuit Court of Cuyahoga County.

J. F. GRIESE v. CLEVELAND ELECTRIC RAILWAY CO.

Decided, January 21, 1907.

Evidence—Witnesses—Negligence—Trials—Not Error to Strike Out Answer when too General—One Approaching Street Car Tracks Must Use His Senses to Discover Approaching Cars—Violation of City Ordinance Not Per Se Negligence—Not Error to Fail to Amplify Instructions When Not Asked.

1. It is not error to strike out answers which are in terms so general as to be indefinite and uncertain, as that a car was moving "fast" or "very fast" or "at an awful rate of speed."
2. A witness who has been accustomed to riding upon street cars and whose observations and experience has been such as to make his judgment reliable, may testify as to the rate of speed a car upon which he was riding was travelling.
3. One about to cross a street car track, is bound to use his senses to ascertain whether a car is about to cross or is approaching a crossing, and if he fails to see or hear anything, when a careful and prudent man by using his eyes and ears with ordinary care would have discovered a car in so close proximity to the crossing that he could not safely drive across, he is guilty of negligence and can not recover for his injuries.
4. Violation of a city ordinance in the operation of its street cars is not *per se* negligence which makes the company liable to one injured at a street crossing.
5. Where what was said by the court to the jury in the charge was clearly the law, if the plaintiff desired the court to charge further on the subject in question, a request for such further charge should have been made, and none having been made, the court did not err in failing to give any other proposition on the subject, whether such other proposition would have been warranted or not.

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

The parties here are as they were in the court below; the result in that court having been a verdict and judgment for the defendant.

The plaintiff filed his petition seeking damages for injury to his person and injury to his horse and buggy which he claims

to have received on the 14th day of September, 1901, by reason of a collision between the carriage in which he was riding and the horse drawing such carriage on the one part, and the car of the defendant on the other. This collision occurred at the corner of Wade Park avenue and Giddings avenue, in the city of Cleveland. The plaintiff was driving his horse, attached to said buggy in which he was riding, to the north on Giddings avenue; the defendant's car was traveling to the west on the tracks of the company on Wade Park avenue. The petition alleges that the collision occurred and the injury was sustained without fault on the part of the plaintiff, and wholly by reason of the negligence of the defendant in two particulars, to-wit: that the car of the defendant was being moved at an unlawful rate of speed and that no gong was sounded or other alarm given by the defendant when approaching the crossing of these two streets. The defendant answered with a general denial, and with an allegation that if the plaintiff was injured, his own negligence contributed thereto; but there was no contention that the two avenues did not cross each other; that the car of the defendant was moving to the west, and that the plaintiff was in his carriage driving his horse to the north, and that a collision occurred. The real contention was that there was no negligence on the part of the defendant which caused the collision, and in any event there was negligence on the part of the plaintiff, which contributed to this collision.

On the part of the plaintiff there was introduced in evidence an ordinance of the city of Cleveland which provided that the rate of speed of street cars should not exceed twelve miles an hour, and it was admitted on the hearing that there was a valid ordinance of the city of Cleveland in force at the time which required that "all street cars shall be provided with a signal bell or gong, said bell or gong shall be sounded at least one hundred feet distant from all street intersections, and shall be continuously sounded while passing the same."

The evidence as to whether the speed at which the car was going was greater than 12 miles an hour was conflicting, as was also the evidence as to whether any gong or bell was sounded, or other alarm given of the approach of the car to the crossing.

For the purpose of establishing the proposition that the car was moving at a higher rate of speed than that allowed by the ordinance, the plaintiff introduced a witness who testified that the car was moving "at an awful rate of speed." Another witness testified that the car was moving "fast," and another that it was moving "very fast."

The court on motion of the defendant excluded each of these answers. It is urged that this is error, and in support of it we are cited to Section 7754 of *Thompson on Negligence*, Vol. 6, where this language is used:

"Thus a witness may state that a car was running fast, although he had not sufficient experience to enable him to show how fast. The rule will allow a witness of ordinary intelligence to compare the speed of a train at the time of the accident with the speed of the train on previous days."

The cases cited by the author in support of this are cases in which the evidence that the car or the train was running fast had been received, and the court refused to reverse the case because of the admission of such evidence. We think it doubtful whether in either of these cases the court would have reversed the case if the evidence had been excluded, and we find no case in Ohio which will support the claim made by the plaintiff here. The language that a car is moving "fast," or "at an awful rate of speed," or "very fast," is so indefinite and uncertain that it is not error to reject such evidence, although it is not necessary that one should be able to give definitely the speed with which the car was moving. We find no error of the court in this regard. While the plaintiff, who is a physician, was on the stand, the following question was asked him: "You may state what, if any effect, the injuries sustained there had on your ability to carry on your profession?"

An objection was made by the defendant to this question, and that objection was sustained. As to this, it is sufficient to say that no suggestion was made as to what answer was expected from the witness, and hence we can not assume that the plaintiff was prejudiced by the ruling of the court. This is true as to a number of instances, in which it is claimed that there

was error in the ruling of the court on the admission of evidence.

Another alleged error took place upon the examination of one Gemlich, a witness on the part of the plaintiff. He had testified that there was an ice wagon moving to the south on Giddings avenue, which crossed Wade Park avenue immediately before this collision took place, and from his testimony, and that of other witnesses, the jury might well have found that this wagon barely escaped being struck by the car. The wagon was on the easterly side of Giddings, while the plaintiff was on the westerly side; that is, as they would have passed one another, the wagon would be on the side of the street towards which the defendant's car was at the time. The witness then said, speaking of the plaintiff, "the doctor could not see the street car." A motion to take this from the jury was sustained. There was no error in this. If the question became important of whether the doctor could have seen the car, the jury could have found that out by having the real positions of the car, the wagon and the doctor's buggy described to them together with a description of such wagon. Again it is urged that there was error in the ruling upon the introduction of evidence when the defendant was making its case, and had placed one Harriman on the stand, who testified that he was a passenger upon the car; that he was accustomed to riding in street cars, and he thought he could approximately give the speed at which the car was moving. He was then permitted, over the objection of the plaintiff, to testify that "the car was moving somewhere about ten miles an hour." In support of the plaintiff's contention in this regard we are cited to the same section on *Thompson on Negligence,* where this language is used:

"There is authority for the determination that the rate of speed can not be shown by the opinion of witnesses observing, when from the inside, unless they are experienced and their observations is such as to make their judgment reliable."

One case only, in support of this proposition is cited, that of *Grand Rapids Railroad Company* v. *Huntley,* 38 Mich., 537. In the opinion of that case, at page 540, this language is used:

"In regard to opinions of persons riding in the cars, and not observing them from the outside, we are not prepared to say that they may not be received, but we think they should be excluded unless the witnesses first show such extended experience and observation as to qualify them for forming such opinions as would be reliable. It is not presumable that ordinary railway travelers usually form such habits."

As has already been stated, the witness who was under examination here had testified that he had paid attention to the rate of speed at which cars traveled, whether fast or slow, and that he thought he would be able to tell, approximately, about what rate of speed this car was traveling. There is no inherent reason why the testimony of one riding in the car is not as competent as that of one observing from the outside. The weight to be given to the testimony of witnesses upon this, as upon every other subject, is to be determined by the amount of knowledge which the witness has upon the subject, and concerning which he testifies. The evidence here sought to be excluded was competent; the weight to be given to it was to be determined by the jury. Careful attention has been given to each of the alleged errors, in the matter of ruling upon the evidence, and we find no error in any such ruling which would justify a reversal of the case.

It is further urged on the part of the plaintiff that the court erred in its charge to the jury. The court, among other things, said in its charge:

"Plaintiff in approaching this crossing was bound to use his senses to ascertain if a car was about to cross or was approaching the crossing, and if he failed to see or hear anything, when a careful and prudent man by exercising his eyes and ears with ordinary care would have discovered this car in so close proximity to the crossing that he could not safely drive across, he would be guilty of such negligence as would defeat his recovery. The fact that his view of the track toward the direction from which the car was coming, if such you find to be the fact, was obstructed by buildings or an ice wagon, would not excuse him from exercising ordinary care to ascertain whether he could cross in safety. If there were any such obstructions, plaintiff was bound to exercise such care as an ordinarily careful person should exercise under like circumstances. He must exercise

ordinary care commensurate with the surroundings and circumstances in which he found himself. Not to exercise such care would be negligence on the part of the plaintiff. If there was any object to obstruct the view of the plaintiff in the direction from which the car was coming, and the plaintiff by the exercise of ordinary care could have seen the car and stopped his horse in time to have avoided this collision, it was his duty to exercise that care and stop his horse."

It is said that though this is the rule applicable to the course of the tracks of the ordinary steam railroad in the country, it is not the rule as applied to the course of street railroads in cities.

In the case of *The Cleveland Electric Railway Company* v. *Charles Wadsworth*, reported in 25 C. C. Reports, 376, this court said:

"It is contributory negligence, precluding recovery, for a passenger upon alighting at night from a street car to pass around the rear end of the car and attempt to cross a parallel track upon which cars are running in an opposite direction every three minutes, without looking in that direction, or checking his pace, or taking any precaution for his safety, he having knowledge of the surroundings and situation of the tracks and of the operation of cars thereon."

On page 379, Judge Laubie in his opinion says:

"There can be no question about the negligence of the railway company, of the men who were in charge of the west bound car; they were running at too great a rate of speed, in passing a car that was stopping at this crossing. But it is evident, from his own testimony, and from all the testimony in the case, that the plaintiff was himself guilty of negligence contributing to his injury."

This case was affirmed in the Supreme Court without report.

Complaint is further made that the court used this language in its charge:

"Certain provisions of the city ordinance have been admitted in evidence, but if you find that the defendant at the time of this accident was running the car at a greater speed than 12 miles an hour, or did not ring the gong or bell or give any warning,

that would not of itself constitute negligence, but may be considered by you with the other facts and circumstances of the case in determining the question of whether or not the defendant was negligent at this time."

Clearly what was meant by this and what must have been understood by the jury, was that the simple fact that the defendant was violating an ordinance of the city did not of itself constitute negligence, for which the defendant would be liable. This is amply justified by what was said by this court in the case of *Hoppe* v. *Parmalee,* 20 C. C. Reports. 303, the second clause of the syllabus of that case reading as follows:

"The Supreme Court of Ohio has never yet gone so far as to say that an act done in violation of a statute or an ordinance is negligence *per se.* Nor has that court gone so far as to say that the violation of such statute or ordinance raises a presumption of negligence, although there are many authorities outside of Ohio in support of each of these propositions."

In that case an infant has been employed in a manufactory; his age was such as to make his employment a violation of the statute. The trial court in its charge to the jury quoted the statute and then said that the jury might consider the statute in connection with the other facts in the case in determining whether or not there was negligence on the part of the employer.

It was urged that the court should have said more, and it is urged here that the court should have said more and explained to the jury that the plaintiff had a right to rely upon the observance by the defendant of the ordinance of the city applicable to the situation, but no request was made for any charge in that regard; and in *Hoppe* v. *Parmalee, supra,* this language is used in the first clause of the syllabus:

"Where what was said by the court to the jury in the charge was clearly the law, if the plaintiff desired the court to charge further on the subject in question ,a request for such further charge should have been made, and none having been made, the court did not err in failing to give any other proposition on the subject, whether such other proposition would have been warranted or not."

So here we think that if the plaintiff desired further instruction to the jury on the question of the negligence of the defendant, a request for such charge should have been made.

Taking the entire charge together, we think the law stated to the jury was correctly stated under the rules in this state, and that it was not misleading. Whether the rule adopted in Ohio is entirely consonant with reason, it is not for us to say. It is sufficient for our purpose that we follow the ruling as laid down by the Supreme Court.

That rule is announced in numerous cases, among others, in *Meek* v. *Pennsylvania Co.*, 38 O. S., 632, where the first clause of the syllabus reads:

"In an action to recover for an injury alleged to have been caused by cars moving on a railroad track, proof that the company was moving its cars in violation of a city ordinance at the time the injury was inflicted, while not sufficient *per se* to create a liability, is yet competent to go to the jury as tending to show negligence."

We find nothing in the charge in this case which would justify us to reverse the judgment.

The question is raised, not yet mentioned in this opinion, upon the action of the court on a motion which was filed by the plaintiff to require the defendant to make definite and certain its answer, in specifying in what particulars the plaintiff was negligent. This motion was overruled. Unless some prejudice came to the plaintiff by reason of this action of the court, no reversal could be predicated upon it. There was no evidence introduced, nor was any sought to be introduced, of negligence on the part of the plaintiff which he could not have anticipated, and hence he was not prejudiced by this action of the court, whether he was entitled to have such motion sustained or not.

It follows from what has been said, that the judgment of the court of common pleas should be, and it is affirmed.

STALE CLAIM FOR ALIMONY.

Circuit Court of Cuyahoga County.

SARAH MORGAN v. JOSEPH WAKELIN.*

Decided, February 29, 1904.

Alimony—Equity—Delay of Twenty-Four Years in Asking Alimony Makes Claim Stale.

A delay of twenty-four years after a husband has secured a divorce in another state, before applying for alimony, during all of which time the husband was the owner of real estate situated in the county which might have been subjected to the payment of alimony and during which time the wife has remarried, makes a claim for alimony stale.

E. Sowers, for plaintiff in error.
Blandin, Rice & Ginn, contra.

HALE, J. (orally); MARVIN, J., and WINCH, J., concur.

Mrs. Morgan, who brings this action, was formerly the wife of Wakelin. In 1876 they were divorced, and the same year she married Morgan and has been his wife since that time. She brings an action now for alimony. The case was commenced in 1900, and seeks to reach real estate located in this county. One parcel of real estate is owned in common, as the deeds show, by her and her former husband, Wakelin. That property she has occupied during all these years, notwithstanding the husband has the title to one-half of it. The other parcel of property was acquired by Wakelin in 1888.

The court below held that under these circumstances the action was delayed too long; that the cause of action, being equitable in its nature, had become stale, and that courts would not entertain now an action to enforce it. This judgment of the court of common pleas was rendered upon the pleadings as they stood, without any evidence. If it is desirable to review the judgment of the court of common pleas, it can be easily done as it now

*Affirmed without opinion, *Morgan* v. *Wakelin*, 72 Ohio State, 656.

stands. We are inclined to think the court of common pleas was correct, as more than twenty-four years had elapsed between the granting of the decree and the bringing of this action.

The reason why alimony was not allowed in the first action was because the divorce was granted in Arkansas, on the application of the husband, and gave the wife no opportunity to make a claim for alimony.

The property has all the while—one parcel since the divorce and the other parcel since 1888—been in this county, and could have been reached as well before 1900 as in 1900, and we are inclined to hold that the court of common pleas was correct in rendering judgment on the pleadings and we affirm the judgment.

ILLEGAL CONTRACT FOR DIVISION OF ATTORNEY'S FEES.

Circuit Court of Cuyahoga County.

LOUIS B. WHITNEY v. HARRISON W. EWING, ADMINISTRATOR OF THE ESTATE OF HARRISON J. EWING, DECEASED.

Decided, December 24, 1903.

Contract—A Party to an Illegal Contract Can Not Invoke Aid of Court to Secure a Division of Profits.

A plaintiff who has knowledge of, and is party to, an agreement between an attorney and a client by which it is agreed that the attorney shall have one-half of all the money he succeeds in obtaining from the husband of the client as alimony or otherwise, is party to an illegal contract, working a fraud upon the court, and can not invoke the aid of the court to recover from the attorney one-half of the sum obtained in the transaction and which the attorney had agreed to divide with plaintiff for recommending him to the client as an attorney.

W. C. Ong, for plaintiff in error.
Harrison Ewing, contra.

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

The plaintiff here was the plaintiff below, and brought suit against Harrison J. Ewing, then in full life but since deceased, seeking to recover upon a contract entered into between said parties and which, as set out in the petition, is as follows:

"Plaintiff went to the office of the defendant, Harrison J. Ewing, then a practicing attorney, and said to him that a woman by the name of Hornsby was in his (Whitney's) office and desired the service of an attorney and had directed and authorized this plaintiff to select for her some one to act as her counsel and attorney for her, in order to recover alimony or maintenance and support from her husband. This plaintiff then and there said to said defendant, Harrison J. Ewing, that he (plaintiff) would recommend the appointment of Harrison J. Ewing if he (Ewing) should give to the plaintiff a fair proportion of whatever he (Ewing) should receive for fees or compensation finally in said case and growing out of said appointment, whereupon the defendant said to this plaintiff that if he (the plaintiff) should recommend him (the defendant, Harrison J. Ewing) as counsel in the case he would give to the plaintiff one-half of all the fees and compensation received for such service."

He then sets out that he did recommend the said Ewing to the said Mrs. Hornsby as a suitable person for her to employ as an attorney, and then introduced Mrs. Hornsby to the said Ewing; that he, the said Ewing, took the case for Mrs. Hornsby, and received as fees for his services the sum of $3,000, no part of which has been paid to the plaintiff, though he has demanded from the said Ewing the payment of $1,500—one-half of the fee so received by Ewing.

Upon the conclusion of the evidence introduced upon the trial by the plaintiff the court, on motion, directed the jury to return a verdict for the defendant, which was done, and judgment entered for him. On the part of the plaintiff it is urged that in so granting said motion the court erred. This brings us to a consideration of the evidence in the case.

Upon the trial it appeared that Mrs. Ormsby went to the office of the plaintiff, who was a private detective, on the 9th day of August, 1897, and complained to him that her husband was neglecting her, failing and refusing to provide for her and was in other respects violating his obligations as a husband, and

sought plaintiff's advice, and he said to her that he was not an attorney and that it would be necessary to have an attorney in order to obtain her rights. She said to him that she was without money and that whatever compensation was received by anybody in helping her would have to come out of whatever was recovered from her husband, who had a considerable amount of money. Whitney went to the office of Ewing, told him of the situation of the woman and agreed with him that he would bring her, if he could, to Ewing's office, and that Ewing should pay him one-half of whatever he (Ewing) should receive as compensation for his services. Ewing then went with Whitney to the latter's office and was introduced to Mrs. Hornsby. She stated her case to him, and he thereupon entered into a written contract with her by which it was agreed between them that Ewing should receive one-half of whatever he recovered from her husband for her. He filed a petition asking for alimony. Service was had upon Hornsby, who was the next day arrested at the instance of Ewing upon a charge of stealing a ring from his wife, and while so under arrest Ewing made some arrangement with Hornsby by which he was to file an answer in the alimony suit, which was prepared by Ewing and signed by Hornsby and filed. As a result of the transaction and within about two months of the time when the suit was brought Hornsby paid to Ewing in settlement of this suit the sum of $6,000, one-half of which Ewing paid to Mrs. Hornsby and retained the other one-half, $3,000, in pursuance of his contract with her. He never paid Whitney anything.

That the contract made by Ewing with Mrs. Hornsby was absolutely void is conceded by plaintiff's counsel, as it must be by any reputable lawyer.

It was against public policy. It was calculated to impose upon the court to whom the appeal for alimony was to be made. It was a contract out of which Ewing had no right to profit and by which, if appeal had been made to any court, he would not have permitted to profit. If the plaintiff was a participant with Ewing in perpetrating this imposition upon Mrs. Hornsby, and in aiding in perpetrating this imposition upon the court, he is not entitled to profit by it, and no court should aid him to profit

by it. This is practically conceded by counsel for the plaintiff. But it is urged that Whitney is entirely innocent in the matter; that he knew Ewing would be entitled to compensation for his services, and that it would be proper that he should receive something for introducing a client to him and aiding him in procuring evidence upon which the suit might be won, for, though no claim is made in the petition for any compensation for any other services than the introduction of the parties to each other and the recommendation of Ewing to Mrs. Hornsby, still the evidence shows that the plaintiff did aid in obtaining evidence. He sent a detective to disreputable places in this city for the purpose of obtaining such evidence. Whatever may be thought of rendering such aid, this case is determined upon the plaintiff's participation in the fraudulent contract made by Ewing with Mrs. Hornsby.

In the plaintiff's own testimony, in speaking about his first conversation with Ewing on the matter, he says:

"I said to him that I had said to her that she needed an attorney, after talking with her, and I had come up to see if he would take hold of the case and would take hold of the case with me."

Again, he says:

"He said to me, 'If you will take me down and introduce her we will take hold of this case together and whatever we get out of it for fees we will divide between us.'"

And again:

"He stated that he would take hold of this case with me, and that I was to look up and get proof where he had been around to different places where Hornsby had been, the different places here, and get proof to him, and we would take hold of this case together and we would pay ourselves out of whatever money was got from Hornsby for her, alimony or otherwise."

Again, in speaking of this conversation he had between Ewing, Mrs. Hornsby and himself, this question was put to him by his own counsel: "What, if anything, was said about who was to collect the money and what was to be done with it, that is, the

money he received; who was to collect it?" To this he answered, "Mr. Ewing." Then followed the question, "State what was to be done with what was collected." He answered: "To give to Mrs. Hornsby one-half of it, and the remaining one-half to be divided between Mr. Ewing and myself." That this was said at the first conversation had between the three together appears from the question and answer immediately following. The question is: "Well, then, what occurred? Where did they go, if they went anywhere, out of your office?" (Answer) "Went into Mr. Ewing's office." It appears that earlier in this same conversation Ewing had said that he would prepare a written contract between himself and Mrs. Hornsby, and that in the afternoon of the same day he reported to the plaintiff that such a contract had been executed. This seems to settle beyond any question that the plaintiff had full knowledge at the time that it was made of the contract between Ewing and Mrs. Hornsby, and that this contract with Ewing was dependent upon that. It follows that his contract with Ewing was tainted with the same fraud as was Ewing's contract with Mrs. Hornsby.

It is urged here, however, that the action of the court resulted in permitting Ewing to hold and enjoy all the fruits of his own wrongdoing. This is true, so far as this case is concerned. When the courts shall be appealed to by the person or persons from whom Ewing fraudulently obtained this money, it can be determined whether any one shall be entitled to enjoy the fruits of such a fraud. It is said that so far neither Mr. Hornsby nor Mrs. Hornsby have made any complaint of the conduct of Ewing, but this is no reason why the court should give its aid to any wrongdoer to profit out of this despicable transaction. To permit a recovery here would be for the court to lend its affirmative aid to a wrongdoer in obtaining profit from his own unlawful act. This can not be done. It is true that Ewing has no right to this money, but he has not asked for the intervention of the court, nor is the judgment entered by the court below any affirmance of any rights in Ewing to this money. It is only a denial of any rights in the plaintiff. The reasoning which would justify a judgment in favor of the plaintiff here would apply with equal force if there had been a contract pure

and simple to obtain money from Hornsby by blackmail and divide the money so obtained between Ewing and the plaintiff, and if such money had been obtained by blackmail and paid into the hands of Ewing and the plaintiff had brought suit to recover a portion of it. The trial court had no opportunity in this case to give the money to the party to whom it rightfully belongs, but was only called upon to say whether, as it did not rightfully belong to either Ewing or the plaintiff, the plaintiff having aided in unlawfully getting it into the hands of Ewing, should have a part of it paid to him.

It seems clear that the judgment of the court of common pleas was right, and it is affirmed.

PURCHASE OF STOCK CONTRARY TO A POOLING AGREEMENT.

Circuit Court of Cuyahoga County.

ELIZABETH METZLER ET AL v. THE MASON STEAM LAUNDRY.

Decided, November 4, 1904.

Equity—One Who Demands Equity Must do Equity.

Where the subscribers to a stockholders pooling agreement have never done anything to put the agreement into effect and for a term of years have ignored its existence, one of the subscribers, who has himself purchased stock in violation of the agreement can not afterwards insist upon the carrying out of the agreement by the others while refusing to surrender to the pool the stock which he, himself, had purchased.

Jas. F. Walsh and *White, Johnson, McCaslin & Cannon,* for plaintiffs.

Foran, McTighe & Gage, contra.

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

The Mason Steam Laundry Company was incorporated January 3, 1894, with an authorized capital of $10,000, divided

into 100 shares. On the fifth day of January, 1894, the incorporators of the company duly ordered books of subscription to stock to be opened and on the same day twenty-five shares of stock were subscribed for, directors were elected and the company organized.

By the terms of an instrument dated January 5, 1894, and signed by all of the stockholders of the company, each and every one of the subscribers agreed that for a period of five years no one of them would sell any of the stock which he held in the company, except to the other subscribers thereto, jointly, upon a valuation to be agreed upon, if possible, and, if not, to be fixed by arbitration, and each and all of the subscribers agree to buy any such stock so offered, jointly for the benefit of all of the subscribers at the valuation so to be fixed. It was further agreed that the subscribers should assign their stock to G. E. Milligan, one of the directors of the company, in trust to secure the performance of the agreement. By a like instrument signed January 5, 1899, the same agreements were extended for a further period of four years, or until January 5, 1903, the directors of the company for the time being and their successors in office being substituted for Milligan as trustees to whom the subscribers' stock should be assigned in trust; both of these agreements provided that at the termination of the periods therein named said trustees should reassign the stock to the respective owners.

No such assignments of the stock to the trustees were ever made, but the stock certificates, after being properly signed by the officers of the company, were never removed from the stock certificate book which remained in the custody of the officers of the company.

Section X of the rules and regulations adopted by the stockholders provides as follows:

"The stock book of the corporation shall remain in the custody of the secretary and treasurer, who shall have control thereof, and not more than twenty-five shares of the capital stock of the company shall be sold without the consent of four-fifths of the board of directors and then only when it appears that it is necessary that more money shall be had in order to conduct and carry on the business of the corporation."

While the subscribers to the pooling agreements mentioned do not appear to have complied with its terms to the extent of themselves purchasing stock of subscribers who desired to sell, the evidence shows some of the subscribers desired to dispose of their stock during periods covered by said agreements and gave notice of their desires, whereupon the Mason Steam Laundry Company out of its own funds purchased certain of its own stock, the several transactions and amounts paid by the company being as follows: June 13, 1895, T. E. Milligan, 4-1/3 shares, $500; June 10, 1898, Annie Kearney, 1 share, $337; June 8, 1901, Nellie Carroll, 1/2 share, $50; July 15, 1901, Rose Callaghan, 1 share, $100, being in all 6-5/6 shares, and $987.50 being expended by the company in the purchase thereof and all the certificates representing said shares were duly assigned to the "Mason Steam Laundry Company."

November 28, 1903, and after the bringing of this suit, but before any relief with reference thereto was prayed for by any of the pleadings, the Mason Steam Laundry Company sold the 4 1/3 shares of stock it had purchased of Milligan to J. T. Murphy, who paid for it the par value thereof.

The only other shares of stock which have changed hands are 1½ shares purchased previous to January 5, 1903, by R. A. Butler, one of the plaintiffs in this suit, director and secretary of the company and one of the original subscribers for stock and of the pooling agreements. He testifies that he bought these shares with the knowledge of the company and the other subscribers and because they were unable to purchase them. While the evidence does not bear him out in all these claims, it does not appear that the other subscribers after they had knowledge of these purchases by Butler ever offered to buy said shares or made any tender with reference thereto or complaint with regard thereof, except as complaint is made by cross-petition filed in this case.

At a regular meeting of the board of directors of the company held April 1, 1901, Butler being absent, the other four directors voted for and passed the following resolution: "Authorized more stock issued to help pay off the indebtedness of Mason Laundry Company."

The minutes of the next regular monthly meeting of the company held May 6, 1901, all five directors being present, set forth the following:

"On motion. Limited to ten shares of stock issued to help pay off the indebtedness of Mason Laundry Company bills: Anna Colgan, four shares of stock; Maggie McIntyre, two shares of stock; Anna McNamara, two shares of stock; Hannah Larkins, two shares of stock. On motion ten shares of stock issued to the four above named."

Butler protested against this action on the ground that the issue of stock was illegal and he then and there refused to take any of said shares. The other four directors voted for the motion and two of them were named in it as persons to whom the stock should be issued.

May 10, 1901, certificates of stock for ten shares were duly issued to the persons named in the resolution of May 6, but said certificates were never removed from the stock certificate book. Said shares were paid for and the company received cash to the par value thereof, which is used in paying part of its indebtedness.

August 2, 1901, Butler and Metzler filed their petition in the common pleas court praying that the defendant corporation be restrained from delivering said ten shares of stock to defendants, and that on the final hearing said sale of stock to be set aside and the defendants ordered to deliver up said certificates and that they be canceled.

By subsequent pleadings filed in the common pleas court and in this court, where the case was brought on appeal, issues have been made up as to the several transactions mentioned and we are now asked by plaintiffs not only to set aside said issue of ten shares, but also to set aside the transfer to Murphy of the 4 1/3 shares; on the other side defendants ask that Butler be decreed to hold the 1 1/2 shares of stock purchased by him, as trustee for all the stockholders and subscribers to the pooling agreement.

Considering the questions raised chronologically and not attempting to set forth all the facts upon which our conclusions are based, we first take up the pooling agreements.

Plaintiffs claim that these contracts, so far as they are executory, are illegal, being in restraint of alienation and are also without consideration, for the agreement to buy is at a price to be agreed upon, and if not agreed upon, then fixed by arbitration and, if so agreed upon or arbitrated, upon breach of the agreement the stockholder desiring to sell and still holding his stock would be entitled in damages only to the difference between the real value of his stock and the price agreed to be paid; there being no difference between the two there would be no damage, hence no consideration for the promise to buy. So far as executed, the plaintiff claims the pooling agreements are legal. Urging this distinction between executory and executed contracts of illegal character, plaintiff says that as to the 4 1-3 shares of stock sold by Milligan to the company the contract was executed, the company became the owner thereof as trustee for all the stockholders, that he is entitled to his pro rata share thereof and that the subsequent sale of said 4 1-3 shares to Murphy, who knew all the facts, was illegal and should be set aside for plaintiffs' benefit.

As to the 1½ shares purchased by himself, Butler says he is not bound by the agreement to hold the same in trust for the other stockholders, because as to this 1½ shares the pooling agreement is not executed, and said agreement being illegal, he can not be bound by it.

In other words, Butler asks the benefit of the pooling agreement as to the 4 1/3 shares of stock, but himself declines to live up to the spirit of it as to his 1½ shares. This narrow ground upon which Butler stands does not give him an assured position before a court a court of equity. It was with much force that counsel for defendants suggested to the court that the time honored maxims "He who comes into equity must come with clean hands," and, "He who asks equity must do equity," were not mere platitudes, but should be applied in this case.

The conclusions we have arrived at are in accord with such rules, but are based upon more specific reasons. We find as a fact, that the pooling contracts were never lived up to or acted upon by anybody. No stock was ever presented to the trustee for purchase, none was ever purchased by the trustees; it was

presented by consent of all persons to the directors of the corporation for purchase. The 6 5/6 shares were bought by the directors of the corporation in behalf of the corporation, were paid for by the corporation funds, and were assigned to the corporation. This was done with the assent of everybody.

As to these shares the agreement was disregarded from the beginning.

We find the same to be true with regard to the 1½ shares purchased by Butler.

We leave these purchases and sales where the parties left them and no relief is granted to either party under said pooling agreement.

It follows that the company, having made an unlawful use of its funds in the purchase of its own stock, not only had a right, but it was its duty, to resell the same and return to the treasury the funds thus improperly expended. It has attempted to do so with regard to the Milligan stock, resold to Murphy, and we find said sale was a fair one and should be confirmed.

There remains for consideration the issue of ten shares of additional stock, the sale of which was authorized in April and confirmed in May, 1901.

We hold that the stock books were not closed after the subscription for the original twenty-five shares and that the effect of Section X of the rules and regulations of the company was but a direction of the stockholders to the directors to go carefully in receiving further subscriptions. When the section was adopted twenty-five shares *had* been sold without consent of four-fifths of the directors, for then there were no directors, but having provided for the election of directors, the stockholders limited their discretion as to the issue of additional stock, requiring of them a four-fifths vote and their judgment as to the necessity of a sale of stock as a means of procuring more money in order to conduct and carry on the business of the corporation.

We find that on April 1, 1901, four-fifths of the directors duly authorized the sale of ten additional shares and that a necessity then existed for the sale thereof to procure funds to pay the debts of the corporation, then existing, in order that the business of the company might be continued.

We find that the sale of these shares at par was for their full value. Indeed, we doubt if the stock at that time was worth par intrinsically.

The evidence as to the good faith of the directors in selling part of this stock to themselves is not entirely satisfactory; we are inclined to think all stockholders should have been notified that the ten shares were to be sold and that the four directors should not have trusted their own judgment that no other stockholders were able to take additional stock. One of the directors testified that all but three of the stockholders were notified of the additional stock to be sold. Butler was a director and admits he knew on Saturday before the meeting on Monday, May 6th, that additional stock was to be sold. On May 6th, he could have applied for his share of the additional ten shares. He declined to do so and said he would not take additional stock, but gave a bad reason for his refusal; the issue *was* legal if made in good faith. As to the other plaintiff, Mrs. Metzler, there is little evidence. But that both plaintiffs, if they were in anywise prejudiced by the confirmation of the sale by the directors on May 6th, to two of their own number, have slept on their rights, there is no question. The stock was not paid for nor issued until four days later, yet they took no prompt steps to restrain the directors from issuing the stock or receiving pay therefor. They did nothing for three months; they knew of the financial difficulties of the company growing out of its connection with the Cuyahoga Savings & Banking Company, which failed just at that time, but they did nothing to help the company out, did not offer to take stock, stood by and let the defendants use their own money and after the company had finally been put upon its feet again, they at last determined, not that they wanted part of said shares, but that they did not want the subscribers for the ten shares to keep them, and so they brought suit after three months inaction. We hold that they were too late to be entitled to the relief they now ask, in pleadings subsequently filed, that they have part of said ten shares, and finding no equities in the petition, it is dismissed, as are also all cross-petitions, each party to pay his own costs.

CONSTITUTIONALITY OF THE RURAL SCHOOL ACT.

Court of Appeals for Holmes County.

ALBERT E. CLINE v. OATH MARTIN ET AL.

Decided, December 11, 1915.

Schools—Arrangement of Districts—Discretion of County Board of Education Will Not be Interfered With, Unless—Members of the Board Not County Officers—Constitutionality of the New Act.

1. What is known as the rural school code confers a broad discretion on the county board of education in the matter of the establishment of new school districts, and where this is done by attaching four sub-districts to a village school district a court will not grant relief to a complaining tax-payer in the absence of a showing of fraud or an intentional abuse of discretion.
2. There is nothing in the evidence submitted in the case under consideration which would indicate an abuse of discretion on the part of the county board, and the court would not be justified in limiting by construction the discretion so exercised.
3. Failure of the rural school act to provide for the election of the members of the county board of education by the people does not render the act invalid, for the reason that the jurisdiction of members of the county board is exclusive of territory embraced in any city school district and they are, therefore, not county officers.
4. Full power is vested in the General Assembly, under Section 3 of Article VI of the Amended Constitution of September, 1912, to provide for the organization, administration and control of the public school system of the state, and the act in question is within the limits of this power.

Carl Schuler, Prosecuting Attorney, *Weygandt & Ross* and *W. F. Garver*, for plaintiff.

C. H. Workman, George W. Sharp and *C. J. Fisher*, contra.

HOUCK, J.

This cause is here on appeal from the Common Pleas Court of Holmes County. The petition in substance avers:

That the plaintiff is an elector and tax-payer in the school district in question, and that the defendants claim to be the

members of the board of education of said district, which is known as the Nashville Village School District; that the county board of education of Holmes county, Ohio, on the 3rd day of December, 1914, attempted to pass a resolution adding certain territory, amounting to four "sub-districts," to the Nashville Village School District; that the same was done under a pretended authority given under Section 4736 of the General Code of Ohio (Ohio Laws, Volume 104, page 138); that four organized "sub-district" schools with an attendance of more than twelve pupils each were thereby discontinued; that said children as a result were transported in wagons to said Nashville school, which was a great inconvenience to said pupils so transported; that the defendants are about to issue and sell bonds in the sum of $18,000 for the erection of a school building in the said Nashville Village School District; that said county board of education is without authority to change the lines of said district; that said Section 4736 of the General Code and related sections thereto are in contravention of and repugnant to Sections 1 and 2 of the Constitution of Ohio. Wherefore plaintiff prays for injunction, and that said sections of the "New School Law of Ohio" be declared unconstitutional and null and void.

The defendants filed an answer, making certain admissions therein, but in substance being a general denial.

The plaintiff relies upon the following grounds for the relief prayed for in his petition:

First. That the resolution passed by the county board of education was not sufficient to give to it jurisdiction, if it had jurisdiction over the subject matter.

Second. That said county board of education was without authority to do what it attempted to do, and had no jurisdiction to do so, and its acts therefore are null and void.

Third. That there was an abuse of discretion, on the part of said county board of education, because the schools were not arranged so as to be most easily accessible to the pupils.

Fourth. That Section 4736, General Code, and kindred sections thereto (Ohio Laws, Vol. 104, page 138), are unconstitutional,

We are aware of the importance of the present case, and that several of the questions here presented are now, for the first time, before an appellate court in Ohio. What is denominated the "Rural School Code," being the act of February 5th, 1914, and which is a radical departure in many respects, so far as school legislation is concerned, is now attacked. The sections of the act involved in this proceeding are found in Volume 104, pages 136 and 138, Ohio Laws, and are as follows:

"Section 4728. Each county school district shall be under the supervision and control of a county board of education composed of five members who shall be elected by the presidents of village and rural boards of education in such county school district. Each district shall have one vote in the election of members of the county board of education except as is provided in Section 4728-1. At least one member of the county board of education shall be a resident of a village school district if such district is located in the county school district and at least three members of such board shall be residents of rural school districts, but not more than one member of the county board of education shall reside in any one village or rural school district within the county school district.

"Section 4728-1. All school districts other than village and city school districts within a civil township shall be jointly entitled to one vote in the election of members of the county board of education. The presidents of the board of education of all such districts in a civil township shall meet for the purpose of choosing one from their number to cast the vote for members of the county board of education." * * *

"Section 4729. On the second Saturday in June, 1914, the presidents of the boards of education of the various village and rural school districts in each county school district shall meet and elect the five members of the county board of education, one for one year, one for two years, one for three years, one for four years and one for five years, and until their successors are elected and qualified." * * *

"Section 4735. The present existing township and special school districts shall constitute rural school districts until changed by the county board of education, and all officers and members of boards of education of such existing districts shall continue to hold and exercise their respective offices and powers until their terms expire and until their successors are elected and qualified."

"Section 4736. The county board of education shall as soon as possible after organizing make a survey of its district. The board shall arrange the schools according to topography and population in order that they may be most easily accessible to pupils. To this end the county board shall have power by resolution at any regular or special meeting to change school district lines and transfer territory from one rural or village school district to another. A map designating such changes shall be entered on the records of the board and a copy of the resolution and map shall be filed with the county auditor. In changing boundary lines the board may proceed without regard to township lines and shall provide that adjoining rural districts are as nearly equal as possible in property valuation. In no case shall any rural district be created containing less than fifteen square miles."

Coming now to the first claim of plaintiff: was the resolution fixing the lines of the district in question sufficient, and did it fully comply with the requirements of Section 4736, General Code? We have examined the resolution, and we are of the opinion that it fully complies with the requirements and provisions of said statute, and that said county board of education had jurisdiction of the subject matter, and that it was fully authorized to adopt the resolution, and that it contains, in substance and in fact, all of the necessary things required by said statute.

As to the second claim of the plaintiff, that the county board of education was without authority to create the new district, let us examine the language of the statute as found in Section 4736: *"To this end the county board shall have power by resolution at any regualr or special meeting to change school district lines and transfer territory from one rural or village school district to another."*

In the present case four "sub-districts" as they originally existed were attached to the Nashville Village School District. Could any language be more plain and explicit than the above in giving the board authority to do just what it did in the premises? Certainly not. It provides for the changing of lines and the transfer of territory from one rural or village district to another—just what was done by the county board in this case.

when it transferred the four "sub-districts" as they originally existed to the Nashville Village School District. Sub-districts not being provided for in the act of February 5th, 1914, do not now exist, and it was only the territory that was bounded by the "sub-districts" as they formerly were that was annexed.

We do not think that the county board is limited in its right to arrange districts, by simply taking the territory from one rural district and adding to another. We feel that the statute is broad enough and gives to the county board authority to take territory from a rural district and attach it to a village district.

It is contended that Nashville is not a village district, and therefore the territory in the "sub-districts" could not legally be attached. We do not think it necessary for the proper solution of this question to determine whether it was or was not a village district, because under the provisions of Section 4736 it is immaterial, for the reason that it was territory that could be attached as provided and contemplated therein.

The third contention of plaintiff is that the county board of education did not arrange the schools as to topography and population, so as to make them most easily accessible to the pupils in said territory, and thereby abused its discretion.

A county board is required to make a survey and prepare a map of the district, and to arrange the schools according to topography and population, and in such a manner as that they be most accessible to pupils in the district, in order that they may reach the schools with as little inconvenience as possible; yet the Legislature certainly intended that a broad discretion be given the county broad in this particular. The statute nowhere limits the authority of the county board in this matter, and there is nothing in the evidence submitted to the court that would indicate an abuse of authority on the part of the county board, and we do not think that a court would be justified in imposing a limitation by construction, or in any way interfering with the acts of such board in arranging the lines of the district and otherwise acting under said provisions of the statute, in the absence of proof clearly establishing fraud or gross and intentional abuse of discretion. And not finding in the present case,

on the part of the county board, any equitable grounds of fraud, or mistake, and not finding its acts wrongful, fraudulent, collusive or arbitrary, we do not feel that the board abused its discretion.

We come now to the fourth and last claim made by the plaintiff, that said sections hereinbefore referred to of the "New School Law" are unconstitutional, being in conflict with Sections 1 and 2 of Article X; also Section 26 of Article II of the Constitution of Ohio.

We may now inquire, When is a law in conflict with the Constitution, and under what circumstances and state of facts should it be declared unconstitutional?

The Legislature is a co-ordinate department of the government, and as such is invested with certain duties and responsibilities, and we think in the enactment of laws it is only fair to presume that it has considered and discussed the constitutionalty of all measures passed by it, and therefore the unconstitutionality of the act must be clear or courts will sustain it. Courts may resort to an implication to sustain a statute, but not to destroy it; and courts can not go beyond the province of legitimate construction in an attempt to save a statute. In other words, where the language used is clear, and the meaning plain, words can not be read into it or out of it for that purpose. A statute can not be declared invalid for the reason that it is unwise, unjust, unreasonable, or opposed to the spirit of the Constitution; and unless it violates some express constitutional provision it must be held valid. While we change, while we alter, while we improve in our material and social life, yet these principles of construction now exist and will continue so until time shall be no more.

We think this doctrine is well established in this state, and we need only to cite the case of *Probasco* v. *Raine, Auditor,* 50 Ohio State, page 390, where Judge Burket says:

"Whatever may be the rule elsewhere, it is clear that in this state the validity of an act passed by the Legislature must be tested alone by the constitution, and that the courts have no right to nullify a statute upon the ground that it is against public policy.

"When the Legislature is silent, the courts may declare the public policy, and mark out the lines of natural justice; but when the Legislature has spoken, within its powers conferred by the Constitution, its duly enacted statutes form the public policy, and prescribe the rights of the people, and such statutes must be enforced and not nullified, by the judicial and executive departments of the state.

"When the Legislature, within the powers conferred by the Constitution, has declared the public policy, and fixed the rights of the people by statute, the courts can not declare a different policy, or fix different rights. In this regard the Legislature is supreme, and the presumption is that it will do no wrong, and will pass no unjust laws. The remedy, if any is needed, is with the people and not with the courts."

Section 26 of Article II of the Constitution of Ohio provides:

"All laws, of a general nature, shall have a uniform operation throughout the state, nor shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the General Assembly, except as otherwise provided in this Constitution."

Section 1 of Article X provides:

"The General Assembly shall provide, by law, for the election of such county and township officers as may be necessary."

Section 2 provides:

"County officers shall be elected on the first Tuesday after the first Monday in November, by the electors of each county, in such manner and for such term, not exceeding three years, as may be provided by law."

Counsel for plaintiff urge that members of a county board of education are county officers, and must be elected by the people, and therefore the sections of the act hereinbefore referred to contravene the above sections of the Constitution of Ohio. We have now reached the place in the present case where we are called upon to pass upon, as well as to determine, who are county officers. We are pleased to cite, upon this branch of the case, the case of *State* v. *Hunt*, 84 Ohio State, page 149, where Judge Spear says:

"We have not undertaken to enter the field of definition of the term 'office' or 'officer.' As given in the books they are multitudinous, not to say multifarious. Indeed, so varied are they, scattered through the books, that the ingenious barrister may find support for almost any proposition relating to the general subject which the necessities of his case may seem to demand. But, alike maxims of the law, when used indiscriminately and without judgment, they are apt to mislead. One which seems to have met with most favor, perhaps, is that an office is a public position to which a portion of the sovereignty of the country attaches, and which is exercised for the benefit of the public. And yet, without a satisfactory definition of what is and what is not 'the sovereignty of the country' this definition seems to fail to adequately define. Manifestly, however, each case should be decided on its peculiar facts, and involves necessarily a consideration of the legislative intent in framing the particular statute by which the position, whatever it may be, is created."

In view of the statement made by the learned judge in the above opinion, we will proceed in the light of the facts and the statute under consideration, and say that a county officer is one whose right, authority and duties are created and conferred by law, and whose jurisdiction is co-extensive with the county. If our definition is correct, then and in that event a member of a county board of education is not a county officer, from the fact that his jurisdiction does not extend over the entire county, for the reason that city school districts are not included in county school districts, but are especially exempted therefrom under favor of Section 4684 of the General Code, which provides: "Each county, exclusive of the territory embraced in any city school district, * * * shall constitute a county school district." * * * The jurisdiction being a limited one—to a county school district—which does not include the county as a whole, it necessarily follows that such position is not within our definition of a county officer.

In addition to what we have already said concerning the constitutional question involved in the case at bar, we think that the entire matter is disposed of by Section 3 of Article VI of our Amended Constitution of Ohio, as adopted September 3d, 1912, which provides:

"Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds; provided, that each school district embraced wholly or in part within any city shall have the power by referendum vote to determine for itself the number of members and the organization of the district board of education, and provision shall be made by law for the exercise of this power by such districts."

If we give to the language used in the above amendment that plain meaning which the words and sentences certainly convey, we can reach but one conclusion, and that is the Legislature had power and authority to pass an act providing for a school system in our state, and that the said constitutional provision so authorizes. The language is clear, plain, and in no way ambiguous: *"Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds."*

This certainly delegated to and gave full and complete authority and power to the Legislature to pass the school act now under consideration, and to provide for its organization, administration and control. It will further be observed that said amendment especially provides for legislation with reference to city school districts, and that the Legislature so provided in the school act by exempting city school districts from the supervision and control of county school districts, which is in accord with our theory that a member of a county school board is not a county officer, and that neither the framers of the Constitution nor the Legislature so intended.

The court is therefore unanimously of the opinion that said sections of the statute under consideration herein are not unconstitutional, and are not in conflict with or repugnant to the Constitution of Ohio, ar any article or section thereof.

We further find that none of the claims of plaintiff is well taken, and that he is not entitled to the relief prayed for in his petition, and the petition is dismissed at the costs of plaintiff.

Judgment accordingly.

SHIELDS, J., and POWELL, J., concur.

BOY HURT ON FREIGHT ELEVATOR.

Court of Appeals for Hamilton County.

VICTOR BITTNER, A MINOR AGED SIXTEEN YEARS, BY HIS FATHER AND NEXT FRIEND, EDWARD BITTNER, v. THE DOLLY VARDEN CHOCOLATE COMPANY.*

Decided, February 2, 1915.

Negligence—Freight Elevator With Open Sides—Boy's Foot Caught Between Elevator and Window Sill—Master Not Liable.

Failure to screen a window lighting an elevator shaft does not render the proprietor liable to a boy whose foot, when projected over the open side of a freight elevator, was caught and crushed between the base of the elevator and the window sill.

Cowell & Lamping, for plaintiff in error.
Waite & Schindel, contra.

JONES (Oliver B.), J.

The action below was for personal injury to a boy sixteen years of age, caused by his foot being caught between an elevator platform and the side of the shaft at the top of a window which admitted light and air to said shaft.

The only negligence relied upon is that defendant had failed to comply with the provisions of Paragraph 4, Section 1027, General Code, which is as follows:

"The owners and operators of shops and factories shall make suitable provisions to prevent injuries to persons who use or come in contact with machinery therein or any part thereof, as follows:

* * * * * * * * *

"4. They shall *case in all unused openings* of elevator shafts and place automatic gates or floor doors on each floor where entrance to the elevator carriage is obtained. They shall keep such gates or doors in good repair and examine frequently and keep in sound condition the ropes, gearing and other yarts of elevators."

*Affirmed by the Supreme Court without opinion November 9, 1915.

The evidence shows that the elevator in question was a freight elevator operating in a five-story building. It was open in the back and front for the purpose of admitting freight, and was closed at the sides, and operated in a shaft which was entirely enclosed, having doors on an alley and into the storeroom on the first floor and a door on each of the upper floors, these door openings being provided with automatic gates and firedoors at each floor. In each story was an ordinary glass window opening into the shaft to admit light and air.

Plaintiff's testimony was to the effect that these glass windows were each set in a recess about one inch back from the face of the wall, while defendant, being called for cross-examination by plaintiff, testified that the tops of these windows were flush with the wall, but that they were recessed about one inch at the bottom.

The accident occurred by plaintiff extending his foot beyond the elevator platform in such way that his heel was caught between this platform and the top of the window at the front of the shaft on the second floor. Plaintiff charges an omission of duty, contrary to the provisions of Section 1027 in the defendant failing to case or screen in such window. This section is an amendment of an act passed March 20, 1900, found in 94 O. L., 42, which required owners and operators of factories and workshops to make suitable provisions to prevent injury to persons who may come in contact with machinery, and such

"provisions shall include * * * the *railing in all unused elevator openings,* the placing of automatic gates or floor doors and the keeping of same in good condition, on each floor from which and where on each side or sides, or elevator openings, entrance to the elevator carriage is obtained, the frequent examination and keeping in sound condition of ropes, gearing and other parts of elevators."

From reference to this law it will be seen that the windows in question in this case were not such "unused openings" as are referred to in the statute. There is no charge made in the petition of any negligence on the part of defendant, either in the construction or the operation of the elevator. Such an accident might occur in any well constructed freight elevator by a pas-

finger carelessly and negligently extending a hand or foot beyond the line of the platform in such way as to be pinched against the side of the shaft, or at a door or window. For similar cases, see: *Connell* v. *Miller, DeBrul & Peters Co.*, 19 Bul., 22; *Malavermeri* v. *Turner Construction Co.*, 126 N. Y. Supp., 303; *Hoekmann* v. *Moss Engineering Co.*, 23 N. Y. Supp., 787, 791; *McDonald* v. *Dutton*, 190 Mass., 391; *Roberts* v. *Sanitas Nut Co.*, 142 Mich., 589.

In the opinion of the court it was not error in the trial court to direct a verdict for defendant, as was done, and the judgment is therefore affirmed.

JONES (E. H.), J., and GORMAN, J., concur.

LIABILITY FOR GOODS LOST BY FIRE WHILE IN TRANSIT BY RAIL.

Court of Appeals for Hamilton County.

THE HUENEFELD COMPANY v. THE CHESAPEAKE & OHIO RAILWAY COMPANY.

Decided, March 15, 1915.

Railways—Provision of Bill of Lading Exempting Carrier from Liability—Where Fire Occurs Without Its Fault—Testimony Required to Show the Company was without Fault.

In an action against a railway company to recover the value of goods destroyed by fire, after being billed for shipment, where the bill of lading exempts the carrier from liability for loss occurring by fire without its fault, after the non-delivery of the goods is shown the duty rests upon the carrier to show that the loss was within the terms of the exception and occurred without its fault; and this principle is applicable although the fire originated on the premises of the plaintiff.

Charles A. J. Walker, for plaintiff in error.
Galvin & Galvin and *E. J. Tracy*, contra.

RICHARDS, J.

Action was brought against the railway company for the purpose of recovering the value of a car-load of washing machines

which had been shipped by the plaintiff and were destroyed by fire. The goods were billed to the Bostwick-Braun Company, Toledo, Ohio, and were shipped from the factory of the plaintiff company situated at Augusta, Kentucky. Whatever rights, if any, the consignee had to recover for the loss of the goods, have been assigned to the plaintiff.

An empty car had been left on January 28, 1906, on a spur track of the railway company extending back something more than 900 feet, to the plant of the plaintiff. Plaintiff proceeded to load the car with the goods, completing the same about five o'clock P. M. on January 29, 1906, and upon the completion of the loading a bill of lading was made out and signed by the agent of the railway company and the company informed that the car was ready to be forwarded to destination. During the night of January 29th the car and its contents were destroyed by a fire originating in the plant of the plaintiff, the same fire also destroying two car loads of ties, the property of the railway company, standing on the same siding.

On the trial of the case the plaintiff introduced in evidence the bill of lading, which contained a clause, in substance exempting the railway company from liability for loss occurring by fire without its fault. The railway company offered no evidence, and at the conclusion of the evidence offered on behalf of the plaintiff the court directed the jury to return a verdict in favor of the defendant, on which verdict so returned judgment has been entered.

No question is made as to the knowledge of the plaintiff of the terms of the limitation contained in the bill of lading, and it is said, in justification of the ruling made by the trial judge, that the evidence offered by the plaintiff shows the origin of the fire to have been on the plaintiff's property, and that the record contains no evidence of any negligence on the part of the railway company. The evidence contained in the record is very meager, the only material facts on this matter being that the fire occurred on the same night that the car was loaded, and while it still remained on the spur, and that it was in a small village, not a terminal point of the railway company. It may be true that, when it appears the fire originated on the property

or in the plant of the plaintiff, the law under such circumstances would imply that the fire originated without fault of the railway company, but the mere origin of the fire is not the only fact which is important in this case. It does not appear what length of time the fire continued to burn, nor at what time of the night the property in question was destroyed. Whether the railway company had any knowledge of the existence of the fire, or whether it had any facilities for removing the car from the zone of danger, does not appear; neither does it appear whether the railway company had any grounds to anticipate that a fire was likely to occur.

We think, under the circumstances stated, the plaintiff had made a *prima facie* case and the duty rested on the railway company to offer some evidence tending to show that the loss occurred without any fault on its part at the time of the fire. It would be an easy matter to show whether the company or its employees had knowledge of the fire and, if such was the fact, that it was without fault in allowing the car to remain in a place of danger after the fire started.

The case was disposed of on a matter of practice and the Ohio rule appears to be well stated in the case of *Graham* v. *Davis*, 4 O. S., 362.

See also, *Union Express Co.* v. *Graham*, 26 O. S., 595; *Penna. Co.* v. *Yoder*, 1 C.C.(N.S.), 283.

These cases establish the Ohio rule to be that the duty rests on the common carrier to show not only that the loss was within the terms of the exception, but that the same occurred without its fault. The plaintiff's evidence having established that the loss occurred by fire, it became incumbent on the defendant to show the destruction of the goods did not result from its negligence. The trial court, under the circumstances shown, was not justified in directing a verdict for the defendant, because it could not be said, as a matter of law, that the defendant was without fault. The question depends upon the circumstances existing at the time. While the burden of proof did not change, yet the plaintiff having offered the evidence which appears in the record, the duty then rested on the defendant to go forward with the case by offering such evidence as it had tending to

show that it was without fault for the loss of the goods shipped.

Under the federal authorities the burden rests on the carrier to show that the damage resulted from a cause excepted in the bill of lading, and, after that proof, the burden is then on the plaintiff to show that the loss occurred by the negligence of the carrier. See *Cau* v. *Texas & Pacific Ry. Co.*, 194 U. S., 427. But the case on this matter we hold to be controlled by the rulings of the courts of the state where the action is brought. The case last cited is based on *Clark* v. *Barnwell*, 12 How., 272, which was justly criticised by Judge Ranney in *Graham* v. *Davis*, 4 O. S., 372, cited *supra*, and which the Supreme Court of Ohio expressly declined to follow.

The judgment will be reversed and the cause remanded for new trial.

CHITTENDEN, J., and KINKADE, J., concur.

ADMINISTRATOR WITHOUT INTEREST IN ANNUITY BONDS.

Court of Appeals for Hamilton County.

MARK A. CRAWFORD, ADMINISTRATOR, v. THE FOREIGN CHRISTIAN MISSIONARY SOCIETY; AND MARK A. CRAWFORD, ADMINISTRATOR, v. THE AMERICAN CHRISTIAN MISSIONARY SOCIETY.

Decided, March 8, 1915.

Gifts—Donations to a Religious Society—Evidenced by Bonds Upon Which Annuities Were Paid—Held to Have Been Executed Gifts.

Donations made by the decedent to the defendant society, receipted for by papers denominated annuity bonds and which recite that such donations are executed gifts to the society and are to belong to such society from the date thereof without any account or liability therefor, and which contain an agreement to pay an annuity to the donor during his lifetime, and such annuities being paid to the time of the donor's death, are in fact executed gifts in which the administrator of the donor has no interest.

W. C. Lambert and *Guy W. Mallon*, for plaintiff in error.

Galvin & Galvin and *H. A. Bayless*, contra.

CHITTENDEN, J.

Plaintiff below, Mark A. Crawford, as administrator of the estate of John F. Davis, deceased, began suit in each case to recover an amount of money which it was alleged the defendant had received for the benefit of the deceased or his estate. The defendants are religious organizations formed for the purpose of promoting the Christian religion.

It appears that at various times from 1897 to 1909, Mr. Davis had given various sums to these organizations, amounting in the aggregate to more than $30,000. Upon receipt of a given amount the societies issued to him a paper denominated an annuity bond. These bonds, in substance, recite that Mr. Davis had donated to and paid into the treasury of the society a specified amount of money, and recite that such sum so donated by him is to be considered as an executed gift to said society and to belong to said society from this date, without any account or liability therefor. It is further provided in the bonds that the society should pay an annuity of a given amount, in semi-annual payments, such payments to cease upon the death of the donor. These annuities ranged from four to six per cent. on the amount of the donation.

Without undertaking to discuss in detail the interesting arguments of counsel, we will state that it is our conclusion that the transaction constituted an executed gift, and that the paper issued by the society and denominated an annuity bond is a complete and specific declaration that it is a completed and executed gift. Such paper not only constitutes a declaration on the part of the society that it is receiving the money as a gift, but it is likewise a declaration upon the part of the donor who accepted these bonds and retained them during his lifetime. Whether the agreement upon the part of the society to pay the annuities could have been enforced by the donor, need not here be considered, because the societies did in fact pay to the donor such annuities until the time of his death.

Entertaining the views above announced, it follows that the judgments should be, and the same are hereby affirmed.

RICHARDS, J., and KINKADE, J., concur.

NEGLIGENCE IN PLACING A LOAN.

Court of Appeals for Holmes County.

ROBERT S. TORBET v. NORA YOUNG.

Decided, November 1, 1915.

Waiver by Silence of Trial to Jury—Loan Placed on Property to Which Deed Had Been Forged—Agent Acting Without Pay and Claiming to Have Been Duly Diligent—Held to Have Been Negligent and Held Liable to the Owner of the Funds.

1. Where so far as the record discloses, a party sat by in silence and permitted an action for money only to be tried without the intervention of a jury without interposing an objection thereto, he is estopped from complaining for the first time in a court of review that he was prejudiced thereby.
2. An agent or bailee, serving without pay, made a loan on farm property to a stranger the title whereof was shown by an abstract to be perfect in the grantor of the borrower, who exhibited an unrecorded deed to the property which was placed on record before the loan was consummated. The deed proved to be a forgery, and the owner of the funds loaned brought an action against the party who acted for her in making the loan for the amount of her loss. *Held:*

The making of the loan to a stranger, without further inquiry than as to the validity of the title in his grantor, was gross negligence, and plaintiff is entitled to judgment for the full amount of the loss.

Taggart & Ross and *N. Stilwell,* for plaintiff in error.
C. R. Cary, contra.

HOUCK, J.

This is a proceeding in error seeking to reverse a judgment of the court below in a suit in which the present defendant in error, Nora Young, was plaintiff, and the plaintiff in error, Robert S. Torbet, was defendant. The petition of the plaintiff below is as follows:

"Plaintiff in her petition avers that some time prior to the 14th day of October, 1910, the defendant was employed as the agent of plaintiff to obtain and make for plaintiff safe loans secured by mortgage on real estate of which plaintiff had knowledge, in the vicinity of defendant's home in Ripley township,

Holmes county, Ohio, and on or about September 12th, 1910, the defendant received from plaintiff about $2,800 in money to be held by him in trust for plaintiff, and to be used by defendant for said purposes, and for no other purpose; that defendant has failed and refused to comply with and carry out the terms and conditions of said agency and trust, and refused to account for said money on demand, and prays for an accounting and for judgment for the amount found to be due, and for other relief, and for costs."

The defendant below filed an answer setting forth two defenses, the first defense being a general denial and the second defense being in substance as follows:

"That on or about September 10th, 1910, and for a long time prior thereto he received from plaintiff divers sums of money and at her request made loans and investments in her name; that on or about September 12th, 1910, he received $2,800 for said plaintiff, and informed her of the fact, and at her request retained said money, to be loaned and invested for her; that he loaned said money to one William Hoover, who represented himself to be the owner of a farm of ninety-seven acres situated near the village of Dalton in Wayne county, Ohio; that Hoover executed his promissory note for $2,800 with interest at six and one-half per cent. due in three years, and his mortgage deed conveying said farm to plaintiff to secure said note, and delivered said note and mortgage to defendant, and that said defendant placed said note and mortgage with other papers and evidences of indebtedness belonging to plaintiff, which were deposited in the Farmers Bank at Shreve, Ohio; that all of said defendant's acts relating to the loaning of said money were in good faith, without compensation and wholly gratuitous, and that in all of his acts pertaining thereto he exercised reasonable care and prudence."

The answer further alleges, and in detail, that notwithstanding the fact that it was afterwards learned that the deed to said ninety-seven acre farm upon which said $2,800 loan was made had been forged by said Hoover, and although Hoover had not the legal title to said farm, yet said loan having been made in good faith, and he (Torbet) having exercised reasonable care and prudence, prays to go hence without day.

A reply in the nature of a general denial was filed by plaintiff below to this answer, and upon the issue joined the case

was submitted to the court upon the evidence, without the intervention of a jury. The record is silent as to anything relating to the submission of the cause to a jury. The court found for the plaintiff below in the sum of $2,800, with interest from October 14th, 1910. The plaintiff in error seeks a reversal of this judgment upon two grounds: first, that the cause being one triable to a jury the court below erred in permitting the same to be tried without the intervention of a jury; second, that the judgment is manifestly against the weight of the evidence and is contrary to law.

Proceeding now to the alleged errors, let us first determine whether or not the action at bar is for the recovery of money only. This must be determined from the language of the petition and the relief sought therein. Without discussing the question we think the allegations of the petition constitute a cause of action for the recovery of money only and therefore is triable to a jury. Having arrived at this conclusion, the next inquiry is: Have the rights of the plaintiff in error been prejudiced by the court trying the case and rendering a judgment without a jury having been first waived? The record shows that both parties appeared and without objection or question as to the right of the court to try and determine the cause submitted the same to the court, and the first objection in that regard is made in this court. No question is made here that the court below was without jurisdiction to hear and determine the rights between the parties, but it is claimed that being an issue triable by jury that it could not be tried by the court without a waiver by the parties of a jury, and there being no waiver by the parties of record the judgment should be reversed.

So far as appears from the record here presented the defendant below preferred to have the case tried to the court and not submitted to a jury; he made no demand for a jury trial; he sat by in silence and permitted a trial to the court without interposing any objection thereto, and made none until after the issues were found against him, and he certainly is now estopped from making any such claim. We think the rule of law here laid down is well established in Ohio, and we need refer to but

two cases; *Bonewitz* v. *Bonewitz*, 50 O. S., 377-378, where the court say:

"To submit a case to a court is an affirmative act; it is to ask the court to hear the evidence, consider it and apply the law. What more potent consent could be given than this? A jury was not demanded because in all probability the counsel and the court alike regarded it as a court and not a jury case. * * * But actions sometimes speak louder than words. It was not until after the court had found and adjudged against the defendant that he discovered he had been prejudiced by not having his case tried to a jury. His objection to the mode of trial we think comes too late; to sustain his claim would seem to be trifling with justice. He proceeded to trial, without objection, to a court having jurisdiction of the parties and capable of being clothed with jurisdiction of the subject-matter for all purposes, taking his chances on a favorable result, and can not, now that the chance is turned against him, be heard to question the authority of the tribunal to which he consented to submit his cause."

And also the case of *Lingler* v. *Wesco*, 79 O. S., 243, where the court say:

"Therefore it appears that no one objected to the court hearing the evidence and passing on it. No one asked for a jury, but the parties proceeded with the submission of the case. The condition of the record here warrants the use of the rule established in *Bonewitz* v. *Bonewitz*, 50 Ohio State, page 373. A party may waive his right to a jury trial by acts as well as by words."

Coming now to the second ground of alleged error, namely: Is the judgment manifestly against the weight of the evidence and contrary to law? Counsel for plaintiff in error contend that the said plaintiff in error occupied the position of agent or bailee of the defendant in error, without pay, and being a gratuitous agent or bailee could only be held liable for acts of gross negligence. Admitting that to be the law, do the facts in the case at bar as disclosed by the record, and applying thereto the well established elements necessary to constitute gross negligence, warrant the finding of this court that the plaintiff in error was guilty of gross negligence; or did he, un-

der all the circumstances and surroundings, act and do in the premises and exercise such care as a person of common prudence should have done? Counsel for plaintiff in error inquire, "What could Torbet have done that he did not do to be more careful in negotiating this loan? He was informed by Judge Weiser of the character and value of the land; he acquired an abstract of title which showed the title to be perfect; he insisted that the abstract be made by attorneys in whom he had confidence and who had been attorneys for Mrs. Young in her claims and partition suit; he saw the note and mortgage signed; took it to the recorder's office and had it recorded; saw that Hoover had the deed transferred at the auditor's office and duly recorded, and retained the abstract in his possession, placing the note with the rest of Mrs. Young's papers."

We think these inquiries would be pertinent if the loan that Torbet was about to make for Mrs. Young was being made to the Mosers, the alleged grantors in the deed to Hoover, but the loan was being made to Hoover, and it seems to the court that the real foundation or basis of the loan was the strength of the title in William Hoover. The loan was being made to him, and Torbet's inquiries and investigations should have at least been directed as to the title in Hoover. Hoover was a perfect stranger, and we might ask, What inquiry did Torbet make as to him? Not any! What inquiry, if any, did any of the persons in interest make as to the standing, honesty or integrity of William Hoover? Not any! A stranger, unknown to Torbet or any one connected with the transaction, was entrusted with the duty of seeing that the deed from Moser to him was properly executed—which afterwards proved to be a forgery! Hoover stated that he was a widower, and without any inquiry on the part of Torbet to ascertain as to the truthfulness or untruthfulness of that statement he was permitted to sign the mortgage alone, and received the $2,800 from Torbet. Without any acquaintance with or knowledge of Hoover on the part of Torbet prior to this transaction, he assigned the $2,800 certificate of deposit over to him, and at least stood by and saw him receive the money from the bank on this certificate of deposit. All of this was done with a stranger; no one had recommended

him to Torbet, and so far as the record shows he made no inquiry concerning Hoover. What inquiry did Torbet make of the grantors in the deed, or of the witnesses to it, or of the notary who was reputed to have acknowledged it? Not any! In the face of these facts can it be properly claimed that plaintiff in error exercised that care and prudence required of a gratuitous agent or bailee? Certainly not. What constitutes gross negligence has been defined by our Supreme Court in the case of *Johnson* v. *State*, 66 O. S., 67-68, where the court say:

"Negligence may consist of acts of omission as well as commission, and what may be mere ordinary negligence under one class of circumstances and conditions may become gross negligence under other conditions and circumstances. Negligence is the failure to exercise ordinary care. Gross negligence may consist in failure to exercise any or very slight care. There are other definitions, but these are sufficient now for our purpose, so we may truly say that negligence differs only in degree. With this we can not overlook what experience has taught for many years: that what may seem ordinary negligence when contemplated by one mind may be regarded by another as very gross negligence. The inferences drawn from the same facts by different minds may often greatly differ."

Applying this rule of negligence to the facts in the present case the plaintiff in error was certainly guilty of such negligent acts of omission as well as commission as would not justify a reversal of the judgment below. We think the claim made by the plaintiff in error is untenable, and finding no error in the record prejudicial to the rights of plaintiff in error the judgment of the common pleas court is affirmed.

SHIELDS, J., and POWELL, J., concur.

INVALID GIFT BY AN AGED WOMAN.

Court of Appeals for Hamilton County.

ANNIE LAWS AND ALICE LAWS v. JAMES M. MORLEY ET AL, ADMINISTRATORS OF ELLEN LEHANE, DECEASED.

Decided, December 13, 1915.

Action for Recovery of Corporate Stock—Validity of Gift of, Denied—Contractual and Testamentary Capacity Distinguished.

1. An action for recovery of the value of corporate stock, received by the defendant as a gift from one alleged to have been incompetent by reason of senility, is an action for the recovery of money only where the stock has been transferred by the donee.
2. It is not error to permit, during trial, an amendment which eliminates a charge of fraud and substitutes therefor a charge of undue influence; particularly where the jury subsequently found that the decedent (the donor) was of unsound mind but that no undue influence was exerted; nor is it error to refuse a continuance because of such an amendment.
3. Contractual rather than testamentary capacity is required to uphold a gift of corporate stock, made by an aged woman without immediate prospect of death and rendered immediately effective by assignment and delivery.

DeCamp & Sutphin, for plaintiffs in error.
Horstman & Horstman, contra.

JONES (Oliver B.), J.

The action under review in these proceedings was brought in the common pleas court by defendants in error, who were plaintiffs below, as the administrators of Ellen Lehane, deceased, against plaintiffs in error, who were defendants below, to recover the value of twenty-seven shares of preferred stock in the Procter & Gamble Company, which had been transferred by her without consideration to one of the defendants for the benefit of both, five days before her death.

Ellen Lehane had been employed as a servant in the household of their parents from the time defendants were small children and after their parents' death remained with them in the same

capacity continuously until defendants removed from their old homestead on Dayton street into a new home upon the hill, when Miss Lehane, then seventy-five years of age, concluded to give up active work, and secured quarters with friends or relatives, living thus upon her income for a period of about five years, during the remainder of her life. She had lived as a faithful servant in defendants' family for a period, in all, of forty-three years.

While her wages were small, she was frugal in her habits, was under little expense, and had carefully saved, depositing money from time to time in a savings bank, from 1895 up to the time of her death. Her accumulations thus made were invested partly in the Procter & Gamble stock in question in this case, which was purchased about the time of the organization of that company in 1890, and partly in stock of the American Sugar Refining Company and American Locomotive Company, which was purchased in parcels from time to time, in 1907 and previous thereto. These investments were made with the advice and assistance of the brother of the defendants.

While Ellen Lehane was living with defendants and their family her relations with them were of an intimate and friendly character. The defendants were looked upon by her as confidential friends and advisers and they continued in that relation up to the time of her death, looking after her personal comfort and assisting her in her business matters. She could neither read nor write; she signed her name with a mark. One of the defendants would draw checks for her on her account in the savings bank and would collect the dividends on her stocks, bringing her the cash for them. They arranged for a telephone in her room so they could converse with her at will, and by means of which she could reach them whenever she wished to or needed their assistance. They called upon her at her room from time to time, and frequently made her little presents.

Ellen Lehane had never married, and she had no brothers or sisters living at the time she left the service of the defendants, but she had numerous relatives, descendants of deceased sisters, with whom she was on good terms, and especially one nephew of whom she was quite proud, the Reverend P. P. Crane,

a Catholic priest who lived in St. Louis, and Mrs. May Sommers Soards, a grand-niece, of whom she was quite fond, and with whom she lived for a time, and who remained attentive to her up to the time of her death.

The stocks which constituted the small fortune of Ellen Lehane were at her request kept for her by the brother of the defendants in his safe deposit box. At a meeting in his office in 1907, when Mr. Laws and Miss Annie Laws were present with Ellen Lehane, she executed assignment blanks assigning all the sugar and locomotive stock to her nephew, Father P. P. Crane. The transfer of this stock was not then made, but the stock and the assignments were left with Mr. Laws to give to Father Crane at her death, and no change was made as to the dividends which were to continue to be paid to her during her lifetime, to live upon. These assignments were kept by Mr. Laws until after her death, when he sent them to the respective companies and had new certificates made in the name of Father Crane and delivered them to him as hereinafter stated.

On Monday morning, October 28, 1912, May Sommers Soards visited her aunt at her home and found her prepared to go out with one of the defendants to Mr. Law's office, but learning that she did not feel well, Mrs. Soards at her request telephoned Miss Laws and postponed the trip until the next day. On the following day, Tuesday, at about ten o'clock Miss Alice Laws called at the Phelan home where Ellen Lehane then lived, at Broadway and New street, and together they walked to Mr. Law's office in the First National Bank Building at Fourth and Walnut streets. There they met Mr. Laws in his private office where, he says, he was told by Ellen Lehane that she desired to give her Procter & Gamble stock to "her girls," as she called the defendants, that they had been kind to her and she wished to return their kindness. He says he told her that if she gave it to them she should "give it to them out and out, without any strings to it," and she said that was what she wanted to do. Thereupon he sent his son, who was in the office, to the safe deposit box for the certificate of stock, and had his bookkeeper, Mr. Muller, prepare an assignment of the stock. At the suggestion of Mr. Laws that the transfer should not be made to both but to Annie Laws alone,

it being understood that she would hold it for her sister and herself, it was drawn to Annie Laws. This assignment was then signed by the name of Ellen Lehane, who made her mark, which was witnessed by Mr. Muller and Harry L. Laws and by Miss Alice Laws, and the paper was left in the hands of defendants' brother.

Miss Alice Laws and Ellen Lehane then returned, walking back to Ellen's home, where Alice left her at the foot of the stairs. Mrs. Phelan seeing her come, assisted her upstairs and, finding her in a state of collapse, put her to bed and gave her stimulants. She was about the house the rest of the week, suffering from a cold, until Saturday, when she consented to have a doctor called. The doctor found her suffering from a rheumatic and bronchial condition, of which she had been complaining for some five or six weeks, and he prescribed for her. She was found dead in bed Sunday morning, November 3. The doctor testified that "the indirect cause of her death was a senile degeneration of all of her organs, that is, her heart and lungs."

Miss Annie Laws, who had called and seen her on Thursday, was notified at once of her death by Mrs. Phelan, and she came and took charge of affairs and made the necessary funeral arrangements, sending for Father Crane, who came on from St. Louis and performed the church services.

Upon the request of Miss Annie Laws Father Crane came to Cincinnati December 2, 1912, and met her and her brother, and was told by them of the transfer to him of the sugar and locomotive stocks, the new certificates for which in his name were then delivered to him. On his inquiry in regard to Procter & Gamble stock there is a conflict of testimony, Father Crane saying that Mr. Laws told him it had been sold by him years ago to invest the money in these stocks, while Mr. Laws testified that he told Father Crane that Ellen had disposed of the stock before her death, without giving him any of the particulars as to how or when she had disposed of it.

The certificate for the twenty-seven shares of Procter & Gamble stock, together with the assignment to Annie Laws, was sent by Harry L. Laws, through his broker, for transfer on Thursday, October 31, 1912, and it was transferred to Annie

Laws. It was sold by her brother for her December 16, 1912, for $190 per share, and the proceeds were placed by Harry L. Laws in an account to the credit of "Alice Laws, Special."

On December 16, 1912, a letter was written by the attorneys of the plaintiffs below to Miss Annie Laws advising her that they had been appointed administrators of Ellen Lehane's estate and asking for information regarding it. She responded with a letter referring them to Father Crane for such information. Thereupon proceedings were had in the probate court for a citation against Annie Laws and Harry Laws to appear and disclose to the court their knowledge concerning the property and effects of Ellen Lehane's estate. Learning, as a result of this citation, of the transfer of this stock, plaintiffs brought this action, which resulted in a verdict and judgment in their favor.

The original petition, setting out but one cause of action, was for the recovery of the value of this stock. While two causes of action were set out in the fourth amended petition, on which the trial was had, it was alleged that the defendants had sold the stock and had appropriated its proceeds to their own use. There could be, therefore, no relief obtained by setting aside the transfer, or seeking to recover the stock itself. It was an action for money, the value of property which defendants claimed had been given to them, but the validity of which gift was denied by plaintiffs upon two grounds: first, because of unsoundness of mind on the part of their intestate; second, because of undue influence on the part of defendants.

It was not necessary to set out two causes of action. The primary demand was for the recovery of money only, as was held by this court in dismissing the appeal sought to be taken from this judgment.

Nor was it improper in the trial court to permit an amendment of the petition during the trial by the elimination of the charge of fraud as a ground of recovery and substituting the charge of undue influence, nor was it error to refuse a continuance because of that amendment. Any possible error because of this amendment is removed by the answers given by the jury to the interrogatories submitted at the request of defendants. By these answers the jury found that at the time of the alleged gift the

decedent was of unsound mind, but that no undue influence had been exercised upon her by the defendants.

The judgment is therefore based upon the finding that decedent was of unsound mind, and many of the errors claimed by defendants in error in regard to the matter of undue influence are thus necessarily eliminated from consideration.

It is contended that the court erred in its general charge, in discussing the issue of unsound mind. Plaintiffs in error insist that decedent must be required to have merely testamentary capacity at the time of the execution of the assignment of this stock in order to perfect it as a valid gift.

It is true that a person may lack capacity for the transaction of ordinary business, and lack contractual capacity, and yet may have testamentary capacity (*Wadsworth* v. *Purdy*, 12 C.C. [N.S.], 8, 12). A less degree of mental capacity is required to make a will than to make a contract or to transact ordinary business involving a contest of reason, judgment, experience and the exercise of mental powers not at all necessary to the testamentary disposition of property (*Rowcliffe* v. *Belse*, 261 Ill., 566, 573). It is, however, doubtful whether mere testamentary capacity would be sufficient to sustain a gift such as is claimed here. A will disposes of property to take effect only after death. It can be revoked at any time by the testator up to the time of his death. But a gift such as this, once made, is irrevocable by the donor alone, without the consent of the donee. It was not made to take effect at death, but was to be operative at once. It would divest Ellen Lehane of all of her property except merely the income of the stock to be given to Father Crane at her death, which also she had reserved no right to sell or recover back. She made no condition to retain the income until death, as to this stock, but simply relied upon a general understanding that the Misses Laws would look after and supply her wants without any definite obligation on their part in return for the gift. While she was old, she had no immediate prospect of death, but might have lived for years. Under these circumstances it would require a contractual rather than testamentary capacity to uphold such a gift.

The part of the charge particularly objected to by plaintiffs in error, in which the court says that

—"the jury would be warranted in finding Ellen Lehane of unsound mind"—

when the purported gift was executed, if she was then

—"so far incapable of acting rationally in the ordinary affairs of life and of comprehending the nature and value of her property as to be incapable of transacting or procuring to be transacted ordinary business, and of reasonably understanding the business or transactions in which she engaged as to the nature, purpose, effect or result, and did not act rationally in the ordinary affairs of life"—

taken in connection with the finding of the jury that she was then of unsound mind, would indicate a greater degree of incapacity found by the jury than was deemed necessary by plaintiffs in error to invalidate the gift.

While the charge may be subject to criticism as to certain independent paragraphs when taken alone, taken as a whole, as it must be, we find it without error prejudicial to plaintiffs in error. And the court did not err in refusing to separately charge the jury, when so requested by plaintiffs in error, that the issue of fraud was not in the case, the jury having then been distinctly charged to "only regard the issues made by the pleadings, which are unsoundness of mind and undue influence."

A reading of the argument, in full, as made to the jury by Mr. Horstman, on which plaintiffs in error predicate a claim of misconduct of counsel, fails to show that the bounds of legitimate argument have been so far exceeded as to create error to their prejudice.

A careful consideration of the voluminous record and of the extended arguments and briefs of counsel, fails to disclose that the judgment is not sustained by the evidence, or that prejudicial error has intervened, but shows that substantial justice has been done.

The judgment is affirmed.

JONES (E. H.), P. J., and GORMAN, J., concur.

PRIORITIES UNDER A DECREE OF DISTRIBUTION.

Court of Appeals for Licking County.

J. W. HORNBY v. HARRY D. RANK ET AL.

Decided, October Term, 1915.

Distribution—Order of Priority of Magistrate's Judgments—Governed by Section 11661—Character of Evidence Required to Sustain a Nunc Pro Tunc Entry.

1. Under the rule that a motion for an entry *nunc pro tunc* must be sustained by clear and convincing evidence, a reviewing court is without authority to reverse a judgment overruling such a motion where there is no bill of exceptions embodying the evidence upon which the motion was overruled below.
2. Judgments rendered by a justice of the peace become a lien as of the date and in the order of the filing of the transcripts where such filing occurs during the term, and a decree of distribution giving them priority in the order of their filing will not be disturbed.

Smythe & Smythe, for plaintiff in error.

Flory & Flory, contra.

POWELL, J.

The order or judgment sought to be reversed in this action is an order overruling a motion filed in the court of common pleas for an entry *nunc pro tunc* of an order of distribution, entered in a partition case in which one George Fessler owned an undivided interest in the real estate sought to be partitioned and against which were numerous liens sufficient to exhaust his interest in such real estate.

The particular question complained of is as to the distribution of $192.83 balance remaining after the specific liens against said real estate had been paid and an allowance made to said Fessler in lieu of a homestead. In addition to the other liens were four judgments entered before justices of the peace, transcripts of which were taken and filed with the clerk of courts of this county. These four judgments were all filed during the January term of 1911, but at different dates. The total amount of the

judgments is largely in excess of the amount to be distributed. It seems that an entry had been prepared and approved by all of the attorneys, excepting the attorneys for one of the transcript creditors; that such entry was taken by the sheriff, and the order of distribution made by it was entered upon his partition ledger, and distribution of said sum was made by him in accordance therewith; that a year or two afterwards it was discovered that this entry had never been journalized or entered upon the journal of the court of common pleas; whereupon a motion was made for an order to be entered as of the date when such distribution was made, making distribution of said fund in a different manner than the same had been distributed. This motion is not with the papers in the case, but the transcript shows that such motion was presented and overruled.

The petition in error involves two propositions:

1. A motion for an entry *nunc pro tunc* must be sustained by evidence. In fact, our Supreme Court had held that the power of a court to make such entry should be exercised only upon evidence which shows clearly and convincingly that the action sought to be entered by a *nunc pro tunc* order was in fact taken. *Jackson* v. *Adamson*, 56 O. S., 397.

The entry overruling the motion shows that the same was submitted upon evidence, and the court found that the facts on which said motion was founded were insufficient and overruled the motion. There was no bill of exceptions taken embodying the testimony offered upon this motion, and it is urged upon the part of defendants in error that the court is without authority to reverse the judgment, upon the ground that the evidence upon which that judgment or order was entered is not before the court. We think this contention is well taken and that we are without authority to enter a reversal of this case upon the grounds stated in the petition in error.

It is contended however, that the facts appear upon the record and that they are stated in the briefs of counsel, and the real question between the parties is as to the manner of distribution of said fund. The sum to be distributed was rightly held to be applicable to the payment of the transcript judgments. It is contended by plaintiff in error that the sum should be applied

pro rata upon the amount of the several transcript judgments. and it is contended by the defendants in error that the transcripts became liens at the date of their filing because they were filed within term time, and the judgments should be paid in the order in which the transcripts were filed with the clerk; or, in other words, it is contended by plaintiff in error that the rule prescribed by Section 11665 of the General Code should control in making the order of distribution, while the defendants in error claim that the rule prescribed by Section 11661 of the General Code should provail.

We are of the opinion that, upon the facts as shown by the admissions of counsel and by their briefs to be undisputed, that Section 11661 furnishes the proper rule by which such distribution should be made, viz: that these judgments became liens at the date of their filing, because they were each filed during term time, and that in an order adjusting priorities of liens against said amount they should be ordered paid in the order of time in which they were filed.

The rule prescribed by Section 11665 relates to liens created by levy of an execution, and the rule as prescribed by Section 11661 relates solely to the attaching of liens by virtue of transcripts of judgments before justices of the peace having been filed by the clerk of courts, and this rule is applicable to the case at bar.

It is the opinion of the court, upon either contention, that there was no error in the order of the court of common pleas in overruling the motion for an order *nunc pro tunc*, or the claim of plaintiff in error to have said fund distributed *pro rata*, instead of in the order of the filing of the different transcripts. The judgment of that court will be affirmed at the costs of the plaintiff in error.

SHIELDS, J., and HOUCK, J., concur.

WAIVER OF CONDITIONS BY A LIFE INSURANCE COMPANY.

Circuit Court of Cuyahoga County.

THE NEW YORK LIFE INSURANCE COMPANY v. HENRIETTA KAUFMAN.

Decided, December 7, 1903.

Insurance—Condition as to Forfeiture for Non-Payment of Premium May be Waived.

An insurance company may waive any of the conditions in its favor in a policy, including a provision that a failure to pay a premium when due shall work a forfeiture of the policy, and such waiver may be proven by proving a known custom of its agent to deliver its policies before receiving the first premium, although the policy contains a provision that only certain officers can extend time of payments.

Garfield, Garfield & Howe, for plaintiff in error.
J. H. Sampliner, contra.

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

On the 8th day of January, 1900, Ignatz Kaufman gave his written application to the plaintiff in error for a policy of insurance upon his own life in the sum of $1,000 to be paid at his death to his wife, the defendant in error. A clause in this application reads:

"That the company shall incur no liability under this application until it has been received, approved, the policy issued thereon by the company, at the home office, and the premium has actually been paid to, and accepted by the company or its authorized agent during my lifetime and good health, except when the premium has been paid in advance to an authorized agent of the company, and a binding receipt on the company's authorized form has been given by such agent, the liability of the company shall be as stated in such binding receipt."

The agent of the company through whom this application was made was Max Stearn. He was an insurance solicitor acting for this company, soliciting and taking applications for policies,

delivering them to the branch office of the company here, from which they were sent to the home office in New York, and, when accepted, the policies were sent back to the branch office here, and from such branch office were delivered to him and by him delivered to the assured and the premiums collected.

This application was delivered by Stearn to the branch office, forwarded to and accepted by the company, and a policy issued bearing date of January 12th, 1900. This policy was forwarded by the company to the office in Cleveland where the application was made out, and Kaufman and Stearn both lived, on the 14th day of January, 1900, and was given to Stearn for delivery to Kaufman. Stearn took the policy to the place of business of Kaufman, found him busy and laid the policy on his desk, calling his attention to it. Nothing was said by either Stearn or Kaufman at this time about the payment of any premium and nothing was actually paid.

On the 23d day of January, 1900, Kaufman died, not having paid any part of the premium, and never having been asked to make any payment. Among other provisions of the policy, is the following:

"Only the president, a vice-president, the actuary or the secretary has power in behalf of the company to make or modify this or any contract of insurance or to extend the time for paying the premium, and the company shall not be bound by any promise or representation heretofore or hereafter given by any person other than the above."

The policy contained also the following clause:

"This agreement is made in consideration of the sum of forty-eight dollars and forty-eight cents ($48.48), the receipt of which is hereby acknowledged, and of the payment of thirty-seven dollars and ninety-eight cents ($37.98) on the 8th day of January, 1901, and of the payment of a like sum on the 8th day of January of every year thereafter during the continuance of this policy."

Upon the death of Kaufman, proper notices were sent and proofs made out and filed, and demand made for payment of the one thousand dollars. This was refused, whereupon the defendant in error brought suit against the company and recov-

ered a judgment for said sum. The purpose of the present proceeding on the part of the insurance company is to obtain a reversal of such judgment.

The claim made on the part of the plaintiff in error is, that the policy never took effect because no premium was ever paid. It relies upon the language of the application hereinbefore quoted. Of course, if the payment of the first premium was a condition precedent to the taking of the insurance, then the policy was not binding, unless such condition was waived. It is said that because of the language of the policy, first hereinbefore quoted, there was clearly no waiver by any person authorized to make such a waiver; the language being that,

"Only the president, a vice-president, the actuary, or the secretary has power in behalf of the company * * * to extend the time for paying any premium, and the company shall not be bound by any promise or representation heretofore or hereafter given by any person other than the above."

If there was any waiver here is it evidenced by the fact that Stearn, the agent of the company delivered the policy to Kaufman without asking for any payment; and that Stearn, who had been the agent of the company for more than twenty years, frequently delivered policies in this way without receiving the first premium at the time of delivery. It appears from the evidence that the company had a form of receipt which it took from persons to whom policies were delivered, and who did not pay the premium at the time of such delivery—this receipt showing that the policy was held for examination only. No such receipt was given in this case, nor was it asked for. It is clear that Stearn understood that the policy was in force from the time of its delivery, and that he had simply extended credit to Kaufman.

As has already been said, the testimony of Stearn shows that it was common practice for him to deliver policies without the cash premium being actually paid at the time of delivery; that this was known to Mr. Taylor, who was the manager of the company's business in this city, appears from his own testimony. It seems to have been the practice of the company to make out invoices of policies sent or put into the hands of the

several agents of the company, the agent being charged with the premiums. The rules of the company required that upon the delivery of a policy, either a receipt showing that the policy was taken for examination only should be taken, or the premium should be paid in cash. It is clear, however, that his rule was not uniformally enforced, and that such fact was known to Mr. Taylor, the manager of the Cleveland branch of the business. That a provision in the policy to the effect that no waiver can be made by the agent, may itself be waived, is held in numerous cases.

In the case of *Knickerbocker Life Insurance Company* v. *Phoebe A. Norton*, 96 U. S., 234, this language is used in the syllabus:

"An insurance company may waive any condition of the policy inserted therein for its benefit.

"As the company may at any time at its option give authority to its agents to make arrangements or to waive forfeitures, it is not bound to act upon declaration of its policy that they have no such authority * * * as denoting the power given by an insurance company to a local agent, evidence is admissible as to its practice in allowing him to extend the time for the payment of premiums and premium notes; and the jury upon such evidence may find whether he was authorized to make such an extension, and, if so, whether it was in fact made in the case on trial."

In the policy under consideration in that case, this provision appears:

"If the said premium shall not be paid on or before twelve o'clock noon on the day or days above mentioned for the payment thereof, at the office of the company in the city of New York (unless otherwise expressly agreed in writing) or to agents, when they produce receipts signed by the president or secretary, or if the principal of, or interest upon said policy shall not be paid at the time and the same shall become due and payable, then, and in every such case, the company shall not be liable to pay the sums assured, or any part thereof."

By an indorsement on the policy, it was declared that:

"Agents of the company are not authorized to make, alter or abrogate contracts or waive forfeitures."

The facts in this case were, that the assured, after paying various premiums, failed to pay in full the premium due on the 20th of April, 1875, but paid in cash, and gave for the balance, to-wit, $335, his two promissory notes, one due on the 20th of June, and the other on the 20th of July, 1875; each note contained a clause, declaring that if it was not paid at maturity, the policy would be void. The first note was not paid at maturity, but the claim was made that the agent of the company extended the time for payment of such note. The authority of the agent making such extension was denied, and the language of the policy itself, including the indorsement hereinbefore quoted, was relied upon as conclusively showing that the agent had no such authority. In the opinion, page 240, Mr. Justice Bradley calls attention to the provisions of the policy hereinbefore quoted, and then says:

"And these terms, had the company so chosen, could have been insisted on. But a party always has the option to waive a condition or stipulation made in his own favor. The company was not bound to insist upon a forfeiture, though incurred, but might waive it."

Without quoting further from this case, we regard it as an authority in point on the question under consideration.

In the case of *Insurance Company* v. *Florence Oliver*, 22 Texas Civil Appeals, 8, this language is used in the syllabus:

"Where a policy of life insurance provides that it shall not go into effect until the first premium has been paid in cash by the assured, and that no agent of the company has powers to waive this requirement, and it is shown that the local agent had frequently and for several years taken notes for the first premium, and that this practice was known to the company's general agent, and no disapproval thereof was shown, such waiver will be binding on the company."

In the case of *Berliner* v. *The Insurance Company*, 121 Cal., 451, this language is used in the syllabus:

"The general agent of a life insurance company may waive the payment of the first premium and deliver the policy and thereby make it a valid and substituting contract of insurance, notwithstanding the provision in the policy that it shall not

take effect until the first premium is paid while the insured is in good health * * * the possession of the policy by the insured or by the beneficiary is *prima facie* evidence of its delivery as a valid and subsisting contract, and the burden of overcoming the *prima facie* case made by the production of the policy by the plaintiff in an action to enforce it."

Attention has already been called to the fact that the policy itself acknowledged the receipt by the company of the first premium. This acknowledgment, it is conceded, is not binding upon the company, but is subject to be explained or denied; and to this extent the company itself denies the language used in the policy.

It would seem a great wrong to permit the company to be relieved from liability, if what was done by the agent was the customary method of transacting this business, and if the policy was delivered by Stearn to Kaufman under such circumstances that Kaufman had the right to understand that a temporary credit was given to him. As a matter of fact, it is probable that he never read the clause in the policy providing that none but the officers named in the clause could make or modify any provision contained therein, and that he never read the receipt for the first premium contained in the policy. But, however, this may be, we hold that it was proper to submit to the jury the question of whether there was a waiver as to the advance payment of the premium. This question was properly submitted to the jury. The charge properly stated the law applicable to the case.

Attention is called to the case of *MacDonald* v. *The Provident Savings and Life Assurance Society,* 108 Wis., 213. In this case a note was given for the first premium, and the payment of the same extended from time to time. Both in the application and in the policy it is provided that the policy shall not take effect until the first premium is actually paid. There was no acknowledgment in the policy of the receipt of the first payment. The agent had such receipt in his hands at the time he delivered the policy. He had taken a note from the assured when the application was made and when the policy was delivered, the note not being paid the agent retained the receipt.

The assured gave as a reason why he did not then pay the note, that he did not know that his wife would be satisfied with the policy. On this state of facts it was *held* that there was no waiver, but this is clearly distinguishable from the facts as above recited from the case now under consideration.

The case of *The Union Central Life Insurance Company* v. *Hook,* 62 Ohio State, 256, differs materially from the present case. In that case the policy had been in the hands of the assured for nine years, when, it is claimed, the agent agreed to an alteration in its terms as to the payment of the tenth premium. At the trial, the plaintiff was permitted to introduce evidence as to conversations had with the agent prior to the time the policy was issued. This admission of evidence was held to be erroneous. Evidence was further permitted as to conversations between the agent and the assured nine years after the policy was issued, by which it was sought to change the terms of the policy. The admission of this evidence was held to be erroneous, and the court in its opinon lays stress upon the fact that the policy had been so long in the possession of the assured that he must have known its terms, using this language on page 363:

"Under such circumstances the presumption is conclusive, in the absence of fraud and mistake, that he knew the contents of the instrument."

On page 265, this language is used in the opinion:

"We do not decide that there might not be estoppel by conduct, notwithstanding such an agreement, but that case does not arise here."

Neither this nor the case of *Travellers' Insurance Company* v. *Myers,* 62 Ohio State, 259, seem to us to be in conflict with the view of this case taken by the trial court and we hold that no error is shown by the record to have been committed by the trial court, and the judgment is affirmed.

SETTLEMENT UNDER A USURIOUS BOND EXECUTED BY A BUILDING ASSOCIATION.

Circuit Court of Cuyahoga County.

THE INDEMNITY SAVINGS & LOAN COMPANY v. CLINTON S. SPANGLER, ANNA B. SPANGLER, JOHN W. TAYLOR AND THE FULTON BUILDING COMPANY.*

Decided, November 30, 1903.

Vendor and Purchaser—Vendor Liable for Usurious Interest in Excess of Amount of Obligation Assumed by Vendee.

Where a building company which has given a bond at a usurious rate of interest together with a mortgage upon certain premises to secure its payment, sells the premises so mortgaged upon a land contract for a definite amount and later, in the performance of that contract, conveys the premises to the purchaser, and in its deed, stipulates that the purchaser assumes and agrees to pay a mortgage of a certain definite amount, such building company is liable to the purchaser for the difference between the amount which the purchaser agreed to pay, together with legal interest, and the amount called for by the usurious bond.

Dickey, Brewer & McGowan, for plaintiff.
McKisson & Curtis and *Weed & Miller,* contra.

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

This case comes into this court by appeal and was submitted upon the evidence and the admissions of the parties.

On the first day of May, 1896, the Fulton Building Company executed and delivered to the plaintiff, the Indemnity Savings & Loan Company, a bond, of which the following is a copy:

"CLEVELAND, O., May 1st, 1896.

"The Fulton Building Co. promises to pay to The Indemnity Savings & Loan Co., its successors or assigns, one hundred and twenty installments of twenty and 15/100 dollars each, one of which installments to be paid on the first business day of May, 1896, and one on the first business day of each succeeding one

*Affirmed without opinion, *Fulton Building Co.* v. *Spangler*, 72 Ohio State, 627.

hundred and nineteen months pursuant to the constitution and by-laws of said company and the conditions and stipulations in mortgage given to secure this bond."

This bond was secured by a mortgage of same date, upon said premises, and delivered by the Fulton Company to the Indemnity Company on the 17th day of September, 1896.

The Fulton Company entered into contract with the Spanglers, whereby they agreed to sell and convey to them the premises described in said mortgage, for the consideration of $2,800, payable $200 cash in hand and the balance, $2,600, as follows: To assume and pay a mortgage to the Indemnity Savings & Loan Company of $1,487.79, also a mortgage to John W. Taylor of $684 and interest, and the balance of $428.21 in sums of $27 or more at the option of said grantee, after deducting therefrom the payments and interest stipulated for in the above mortgages, together with interest thereon from this date at the rate of six per centum per annum, to be due and payable semi-annually on the first day of June and December of each year.

On the 21st of January, 1897, the Fulton Company conveyed by warranty deed the premises described in said mortgage and in said contract, to Clinton S. and Anna B. Spangler, in which the consideration expressed as $3,000 but which in fact was upon the consideration named in said written contract. It is stipulated in said deed that said premises are free and clear from all encumbrances whatsoever, except the mortgage to the Indemnity Savings & Loan Co. ($1,487.79) and the mortgage to J. W. Taylor ($684), both of which are assumed by the grantee, and the last half of the taxes of 1896.

Payments were made under this contract by the Spanglers to the Fulton Company directly until after the conveyances in January. Sometime after the conveyance a change was made by which the Spanglers paid directly to the Indemnity Company.

The original loan from the Indemnity Company to the Fulton Company for which the bond and mortgage were given was $1,550, and there was no other consideration for said bond and mortgage.

The Spanglers have paid to the Indemnity Company more than the $1,487.79 named in the contract and in the deed, with interest at six per centum, and there is no evidence whatever of any other consideration for said bond by assessment of dues, or otherwise.

Under the issues and the evidence submitted at the trial several propositions are to be considered: Between the mortgagor and the mortgagee there is no issue. The maker of the bond and mortgage, the Fulton Company, makes no claim of usury. Its claims are that whether the transaction is usurious or not it must be paid by the Spanglers who, as is claimed, in consideration of the conveyance to them by the Fulton Company assumed and agreed to pay the mortgage according to its terms. That company desires the bond to be paid in full, but insists that the Spanglers shall pay it. The Spanglers, however, insist that the mortgage and bond has been paid in full; that, legally, only the sum loaned and six per cent. interest can be collected, and that more than that has been paid to the Indemnity Company already. They claim further that if the mortgage must be paid to the Indemnity Company, the maker, the Fulton Company, must pay all that now remains due and relieve the premises conveyed to them from any lien by reason thereof.

So far as appears from the evidence, the bond, in the form above recited, was executed and delivered by the Fulton Company to the Indemnity Company for the sole and only consideration of a loan to it of $1,550 at the date of the bond, and it is evident as between the original parties to the bond that the transaction was usurious, and had the Fulton Company so answered as between it and the Indemnity Company, the court would be compelled to so hold. But, as no such issue was made, the transaction as between the original parties must be considered and treated as valid in all respects.

Must the bond be paid according to its terms by the Spanglers? The transaction between the Fulton Company and the Spanglers commenced with the making of the land-contract of May 1, 1896. We hold that that contract was competent as explaining the interpretation to be placed upon the deed and as evidence of the true consideration agreed to be paid by the

Spanglers to the Fulton Company. The Spanglers agreed to assume and pay a mortgage to the Indemnity Savings & Loan Company of $1,487.79. There was no mortgage of that description to the Indemnity Company. It is said that this sum was the present worth of such mortgage. It *was* its present worth upon a basis of interest at nine per cent. per annum, but upon a basis of six per cent. per annum the amount of the mortgage was several hundred dollars in excess of that. The Spanglers agreed to pay to the Fulton Company for said premises $2,800. With the other payments the $1,487.79 exactly equalled the $2,800 and this is all we think that the Spanglers were under any obligation or legally bound to pay.

There is no evidence in the case tending to show that the Spanglers had any knowledge of the mortgage or of the bond or of its terms at the time of entering into the contract other than as expressed therein. The exact amount to be paid by the Spanglers to the Fulton Company for said premises is definitely fixed by the terms of said contract, together with the terms of payment and to whom such payments were to be made. All these payments the Spanglers have made, together with interest at six per cent., as stipulated in the contract. We are of the opinion that no interpretation should be placed on this contract requiring them to pay more.

If the Fulton Company is desirous that the bond should be paid according to its terms without reference to any claim for usury, without reference to any claim that the contract is usurious, the excess called for by the bond in addition to the amount which the Spanglers stipulated to pay must be paid by it. It has made no contract, in our judgment, with the Spanglers by which they are to pay such excess arising out of the fact that the original contract was usurious.

The claim is made that the controversy arising, or that may arise, between the Fulton Company and the Spanglers, can not be settled in this action. We hold otherwise. If the payment of this bond was not assumed, as we hold it was not, by the Spanglers according to its terms but only a definite amount named in the contract and deed, then there was more due upon the bond, according to its terms, than the Spanglers had agreed

to pay, and the Fulton Company, being the maker of the bond and the mortgage, was a necessary party to the taking of an account upon the bond and mortgage, and being a necessary party, all controversy between it and the Spanglers necessarily could be settled in this one action.

Supposing the mortgage had been given to secure two separate bonds the payment of one of which was assumed by the grantees, the Spanglers; then, manifestly, on a foreclosure of the mortgage, the mortgagee, although having conveyed the premises, would be a necessary party to an accounting and that accounting would necessarily fix definitely the rights between the Fulton Company and the Spanglers.

The remainder due upon this bond according to its terms may be ascertained. Counsel can undoubtedly agree as to that amount. That amount, as the issues now stand, must be held to be a lien upon the premises described in the mortgage, which sum the Fulton Company is ordered to pay within sixty days from the first day of this term of court, in default of which said mortgage may be foreclosed and order of sale issue of said premises. The defendants, the Spanglers, may, however, to save the said premises from sale, pay said sum to the Indemnity Company, and if so paid by them, an execution may issue in their favor against the Fulton Company to collect the sum so paid by them.

ERROR PROCEEDINGS FROM THE PROBATE COURT.

Circuit Court of Cuyahoga County.

BERTINE ROBINSON PALMER v. ANNIE J. M. ROBINSON, AS EXECUTRIX OF THE LAST WILL OF WILLIAM ROBINSON, DECEASED.

Decided, February 23, 1903.

Practice—Common Pleas Court Can Not Reverse Probate Court in Error Proceedings where no Bill of Exceptions is Filed—Probate Court Without Power to Require Deposit of Special Fund with Court.

1. Where error is prosecuted from an order of the probate court to the common pleas, but no bill of exceptions is filed showing upon what evidence the probate court acted, it will be presumed that it acted upon proper evidence, and it is error for the common pleas court to reverse the order of probate court.
2. The probate court is without power upon the final settlement of an estate to order the deposit of a certain amount of money in the name of the court to await the outcome of an attempt to collect a note from the distributee.

A. W. Mayer and *B. Pearce,* for plaintiff in error.

W. C. Rogers, contra.

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

The defendant in error is the executrix of the last will and testament of William Robinson, deceased, and is also the widow of said deceased.

The plaintiff in error is a daughter of said defendant and, with her, is the only devisee and legatee under the will of said deceased.

Said executrix on the 15th day of October, 1901, filed, in the probate court of this county, the court in which the estate of said deceased was being settled under the will, what purports to be a final account of the administration of the estate of the deceased. On the 1st day of November, 1901, exceptions to this account were filed by the plaintiff in error. In said account the executrix charges herself with having received on account of

said estate as follows: "Received from sale of land of deceased, $5,055.00. Received from collection from distributive share, note of Bertine Robinson Dietrich, $511.50." Among the credits which the executrix claims in said account is one which reads as follows: Paid allowance to widow, judgment and interest, $1,950."

The exceptions filed to this account specify as one of the items excepted to, the item of $511.50 charged by the executrix to herself as a collection from distributive share, note of Bertine Robinson Dietrich. It should be said that Bertine Robinson Dietrich is the same person as Bertine Robinson Palmer.

Exception is further taken to the credit in the account hereinbefore quoted of "Year's allowance to widow, judgment and interest, $1,950." Other items are excepted to.

A hearing was had in the probate court upon this account and the exceptions in reference thereto.

The present defendant in error brought proceedings in error in the court of common pleas to reverse the judgment of the probate court. The probate court sustained the exceptions to the item of $511.50, both as to its being charged to the executrix and being taken from the portion to be distributed to the plaintiff in error. The court of common pleas reversed the probate court in *this* regard. There was no bill of exceptions filed in the court of common pleas, showing upon what evidence the probate court acted in making its order; and, without some evidence, it is difficult to understand how the court of common pleas determined whether or not there was error in the order made by the probate court. As a part of the transcript filed in the court of common pleas, there is a copy of the will of the deceased. By the terms of that will, certain real estate named is bequeathed to the widow of the deceased for the period of her natural life, and, at her death, said real estate is devised in fee to Bertine Robinson Palmer.

It is said in argument that the money with which the executrix charged herself as having received from the sale of lands, is the avails of the sale of *this* real estate thus bequeathed and devised. Without some evidence on the subject we do not know how that fact is found, though it is probably true, as there is a

credit taken by the executrix for the sum of $1,085.09 as the value of *her* life-estate in the real estate sold. No exception was taken to *this,* and we presume that there was *some* evidence before the probate court which disclosed *some* arrangement between the plaintiff in error and the defendant in error by which the value of this life estate was ascertained.

Looking to the will alone, we are unable to see how the plaintiff in error was entitled to any distribution during the lifetime of the widow—and the court of common pleas had only this will before it as evidence.

Attention is called to this because unless there is some distributive portion to go to the plaintiff in error, we fail to see how she could have been prejudiced by a charge being made by the executrix of this $511.50; but the common pleas court found that there was error in this behalf. Since neither the court of common pleas nor this court can know upon what evidence the probate court acted in making such order, the presumption is that there was some evidence introduced justifying the order made by the probate court, and it was, therefore, error for the court of common pleas to reverse such order of the probate court.

As to the item of $1,950 claimed for the year's support and interest, we are equally in the dark as to the evidence upon which the probate court acted.

We learn from the transcript that a certain amount was allowed by the appraisers to the widow for such year's support; that upon exceptions to the allowance made by the appraisers, the probate court fixed the allowance for the widow, at $1,400. Whether such allowance should draw interest up to the time when it was paid would depend on facts which were not disclosed to the court of common pleas by the record and are, therefore, not disclosed to us; and it must therefore, be presumed that such a state of facts was disclosed before the probate court as justified the order made by that court which was that the widow should be allowed interest on said $1,400 for the period of two years and no more. Certainly a state of facts may exist which would justify this order.

If the widow, being herself executrix, was negligent in the performance of her duties, either in converting real estate into money or in any way whereby she was responsible for the non-payment of this sum at a time earlier than it was paid, she should not profit by it by having interest upon it. If for two years of the time that elapsed between the time when the amount of this allowance was fixed by the probate court and the time when by proper diligence on her part it would have been paid; or, in any event, if two years elapsed after the expiration of one year from the giving of her bond during which two years there was no money to pay this allowance, and such want of money was, in no way, chargeable to her negligence, and then it would seem proper that an allowance should be made for two years, and if the rest of the time that elapsed before the payment was due to negligence on her part, it would certainly be an injustice to this estate to allow her interest for that delay in payment caused by her own negligent administration. In short, there are facts which may have existed, entirely justifying the order of the probate court. Those facts not being brought before the court of common pleas, that court erred in reversing the probate court in that regard.

A further order, however, was made by the probate court that "the sum of $350 out of any distributive share of said Palmer be, and is ordered to be, reserved and to remain in the registry of this probate court undistributed, subject to the order of the probate court, and to be deposited in the name of the probate judge, on interest, and to abide any recovery against said Palmer on said claim or note or to be ordered distributed to her with interest at the end of one year if no account is taken thereon or recovery had."

This order was reversed by the court of common pleas and, we think, properly so. We know of no authority of law by which the probate court had any jurisdiction to order such deposit of money to be made.

It is the order of this court, therefore, that the judgment of the court of common pleas be affirmed in so far as it reverses the judgment of the probate court as to the deposit of this $350. In all other respects the judgment of the court of common pleas is reversed and that of the probate court affirmed.

CHANGE OF BENEFICIARY IN MUTUAL BENEFIT SOCIETY.

Circuit Court of Cuyahoga County.

EVA K. DAUBER v. ELIZABETH DAUBER ET AL.

Decided, December 15, 1902.

Mutual Benefit Societies—Issuing a Certificate Naming Beneficiary of Class Not Mentioned in Constitution, Valid—Member May Change Beneficiary.

1. Where the constitution of a fraternal order states that the object of the endowment fund of the order is for the better and sufficient support of the widows and orphans of its members, but the laws of the state under which it is organized permit the payment of benefits to the mother of a deceased member, as well as to the widow and orphans, the fact that the order has issued to a member a certificate in which his mother is made beneficiary, after he had surrendered one in which his wife was named as beneficiary, will be construed as an exercise on the part of the order of the power granted by the state and as a waiver of the constitutional provision, and in case of the member's death the mother will be entitled to the insurance.
2. The naming of one as a beneficiary gives him no vested interest in the insurance fund of a fraternal order, as the right is reserved to the member to change his beneficiary at any time.

Kerruish & Kerruish, for plaintiff in error.
Thompson, Solders & Tilden, contra.

CALDWELL, J.; HALE, J., and MARVIN, concur.

The plaintiff, Elizabeth Dauber, brought this action in the court of common pleas of this county against the Independent Order of Foresters for the sum of one thousand dollars, the amount of a certificate of insurance issued upon the life of George Dauber, her son. The certificate she sets up was issued in 1899, and in it she was named as the beneficiary. The defendant brought the money into court and interpleaded Eva K. Dauber, the plaintiff in error, with Eliza Dauber, the plaintiff below, whereupon Eva K. Dauber came in to the case and claimed that when George Dauber first became a member of the

beneficial order, he made her the beneficiary in his certificate and she claimed that by reason of that fact and by reason of the fact that the constitution of the order made the fund payable to her, and by reason of other facts set up in her answer, she is entitled to the money in question.

The administrator of the estate of George Dauber, Willis White, claims that by reason of a change in the constitution of the order, made in January, 1890, after the certificate on which the action was commenced, was obtained, he is entitled to receive the funds.

Elizabeth Dauber obtained a judgment for this fund in the court below, and Eva K. Dauber prosecuted error in this court to reverse that judgment.

It appears as a fact in this case, that the first certificate that George Dauber obtained when he became a member of the order, was obtained about 1894, and that Eva K. Dauber was named as the beneficiary in that certificate, thereafter a new certificate was obtained, in which Eva and the mother Elizabeth were each named as beneficiaries, each to receive one-half, and soon after that certificate was obtained in May, 1899, it was surrendered and a new one taken in which the mother Elizabeth Dauber is named as the beneficiary.

The judgment of the court below was not only against Eva K. Dauber, but also against Willis E. White, administrator of the estate.

The administrator has filed no petition nor cross-petition in this court, and he abides by the judgment rendered in the common pleas court, so that the question of whether the money should be paid to him as administrator, is not raised in this hearing, unless it is raised in the petition of the plaintiffs in error. It appears from an examination of the petition, that that question is not raised, and hence is not before the court.

Article II of the Constitution states that "the object of this endowment fund shall be for the creation and maintaining of a fund for the better and sufficient support of the widows and orphans in the case of the death of a brother belonging to a court existing in the city of Cleveland."

The first claim made by the plaintiff in error is, that the constitution of the order limits the endowment fund to the support of widows and orphans and hence can not be made payable to the mother of the deceased, and that the certificate that was issued, making the mother of the deceased the beneficiary, is for that reason of no effect, and that nothing being accomplished by it and nothing in favor of the mother being accomplished by the one in which the wife and mother were made jointly beneficiaries, the original certificate, making the plaintiff in error the beneficiary, is in full force and for this reason she is entitled to the fund in question.

The statutes of this state, Section 3631, and especially subdivision 11 thereunder, point out who may be beneficiaries under a certificate of this character, and it is broad enough to include the mother; and the order being organized under this statute as defining its charter powers, had authority to make this certificate in favor of the mother.

If the constitution is to be read literally, as it is printed, instead of simply declaring a general purpose of the organization and made to read as though this particular purpose of benefitting widows and orphans, is intended to exclude all others who might be benefited under the state, then under this provision it might be said that he certificate would not be valid. But we think that the purpose of the provision in the constitution was simply to name a general purpose of the organization without undertaking to give it any definite limitation to the terms used, and, by issuing the certificate, making it payable to the mother, the order construed its meaning of this article. Then, even if the provision of the constitution is to be taken as literal and definite, it is a provision that could be waived by the order, and, notwithstanding that only widows and orphans are named, the order might make the certificate payable to any one designated in the statute; and, designating one within the statute but not within such literal meaning of the constitution, would be a waiver of the constitutional provision, and neither the plaintiff in error nor the order could object to the payment of the fund to the mother after such waiver had taken place

The next question raised by the plaintiff in error as to why the judgment should be reversed, is, that she had under the first certificate issued wherein she was named a beneficiary, such a vested interest in the fund that no change could thereafter be made without her consent. We think the authorities generally show, not only in this state but in other states, that the insurance is founded upon a contract wherein the assured reserves to himself the right at any time to change the beneficiary, and for that reason the beneficiary named in a certificate, until the death of the brother, takes nothing but a contingent interest in the fund, liable to be defeated at any time by the assured. This matter has recently undergone extensive discussion in the seventh judicial circuit court, wherein Judge Cook delivers the majority opinion of the court, and Judge Laubie gives a dissenting opinion. Many of the cases found in the books bearing upon this question, are cited in those opinions found in the Weekly Law Bulletin of October 27, 1902, page 618.

The opinion of *this* court approves the opinion of the majority in *that* case. The matter is so clearly discussed in those opinions that we could add nothing to them except to multiply the cases that bear upon the questions involved, which would be of no benefit to this case.

It is the judgment of the court that there is no error in the record before us, and the judgment of the court of common pleas is affirmed.

EXTENT OF JURISDICTION UNDER CHANGE OF VENUE.

Circuit Court of Cuyahoga County.

FLOY MILLS v. ROBERT MILLS.

Decided, November 10, 1902.

Jurisdiction—Effect of Change of Venue on Jurisdiction as to Existing Orders.

By the transfer of a case from the court of common pleas of one county to the court of common pleas of another county, the court in the county to which the case is transferred acquires exclusive jurisdiction of all matters pertaining to the case, including the enforcement of the orders already made in the case, as well as the granting of new orders and final judgment.

Walter C. Ong, for plaintiff in error.
L. Z. Tanney, contra.

HALE, J.; CALDWELL, J., and MARVIN, J., concur.

An action was pending in the court of common pleas of this county by plaintiff against defendant for a divorce. Alimony *pendente lite* had been allowed and the defendant ordered to pay a certain amount to the plaintiff during the pendency of the action. After this order was made, the case was transferred by order of the court, under statute, to Medina county for trial and determination. Up to the time that the order was made transferring the case to Medina county, all instalments of alimony falling due had been paid; there was no default on the part of the defendant in payment of alimony at the time of the transfer. After the transfer, proceedings in contempt against the defendant were commenced in the court of common pleas of this county. The question is, whether actions for contempt can be maintained in this county after the transfer, for a violation of an order on the part of the defendant in the payment of alimony.

Very little light or aid can be gathered from any decisions that we have been able to find, or which have been cited to us. But, after consideration such as we have been able to give in

the case, we hold that, after the transfer by the court of common pleas of this county to the Court of Common Pleas of Medina County, exclusive jurisdiction of all matters pertaining to the case, as well the enforcement of the orders made as the granting of new orders and judgment, was transferred to the Court of Common Pleas of Medina County. That court had jurisdiction to modify, abrogate, or enforce the order for alimony *pendente lite* then existing. Disobedience of the order which existed at the time of the transfer, after the transfer was made, was a contempt of the court having the jurisdiction to enforce the order, that order virtually becomes the order of the court to which the case is transferred and that court has full jurisdiction over existing orders and over the case, to make further orders.

This, of course, does not deal with the phase of the case as if there had been a default to obey the order of the Court of Common Pleas of Cuyahoga County prior to the transfer. Nor do we undertake to controvert the proposition argued by counsel that proceedings in contempt are *quasi* criminal and, to an extent at least, independent of the case in which the order was made for the disobedience of which the party is in contempt.

This was the holding of the court of common pleas, and the result is the affirmance of that judgment.

LIABILITY FOR INJURY IN ELEVATOR OF EMPLOYEE OF TENANT.

Circuit Court of Cuyahoga County.

THE COBB-BRADLEY REALTY COMPANY v. FANNIE HARE.

Decided, February, 1903.

Passenger Elevators—Liability of Owner Not Increased by Employment or Minor as Operator.

The liability of the owners of an office building to tenants in the use of its passenger elevators is that of a carrier of passengers, and such liability is not altered by the employment of a minor as an operator; hence, in an action by a tenant for personal injuries resulting from the negligent operation of an elevator, an allegation that the laws of the state make it unlawful to employ a minor, such as the one operating the elevator at the time of the accident, should, on motion, be stricken from the petition.

O. C. Pinney, for plaintiff in error.
Olds & Willet, contra.

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

The plaintiff in error was, at the time of the transaction complained of, the owner of a building known as "The Birmingham" located on Euclid avenue in the city of Cleveland, and maintained and operated therein for the accommodation of its tenants an electric elevator.

On the 22d of April, 1899, the defendant in error was employed by a tenant in that building and entered the elevator for the purpose of riding from the sixth to the first floor. She alleges in her petition that she was injured while thus in the elevator, by the carelessness and negligence of the employees of the plaintiff in error in operating said elevator.

She alleges that said elevator was negligently run by defendant's employee to the basement of the building and by the first floor and entrance to said building, where plaintiff desired to leave said elevator, so that the elevator struck the bottom of the shaft with such force as to severely injure the plaintiff's spine

and back, and, in consequence of such injury, plaintiff was confined to her bed for fourteen weeks and still is unable to sit up for over two or three hours at a time and is permanently injured and will suffer from such injuries to her back and pelvic organs the remainder of her life.

She then describes more specifically the injuries of which she complains, and adds:

"The plaintiff says that the defendant was further guilty of negligence in the premises in that it employed and permitted the operator of said elevator to operate the same, knowing that many persons would daily ride up and down in said elevator many times, said block or building containing many tenants of defendant many of whom employed a large number of persons at dressmaking and other pursuits; and knowing that said operator, John Neely, a boy about fifteen years of age, was inexperienced and incompetent to operate an electric elevator such as said elevator was, or by the exercise of ordinary care could have known him to be inexperienced and incompetent, although plaintiff did not know it."

She further alleges that the plaintiff in error was negligent in failing to keep the elevator in proper repair, and to provide the same with automatic stops or other devices in general use on elevators of that kind in Cleveland and elsewhere, such as would prevent said elevator running down below the first floor of said building.

The petition then alleges:

"Plaintiff says that the defendant was further guilty of negligence in that it employed and permitted said operator, a boy of fifteen years of age, and less than twenty-one years of age, to operate said electric elevator in the state of Ohio, said defendant being in said state, contrary to the laws of Ohio and contrary to Section 2575-91, Sub-Section 31*h*, of the Revised Statutes of Ohio, which is as follows: 'No person under twenty-one years of age shall be employed in running or operating any electric, steam or hydraulic passenger or freight elevators, and it shall be unlawful for any firm, company or person in the state of Ohio owning, operating, or having in charge any such passenger or freight elevator or elevators to employ a person under twenty-one years of age to run or operate any such elevator.'"

The answer denies substantially all the allegations of the petition and for an affirmative defense alleges that the building and the elevator at the time of this transaction were under the control and management of an independent contractor who alone was responsible for any negligence growing out of this transaction. Upon this proposition, however, under the charge of the court, the jury properly found in favor of the defendant in error.

On the trial, testimony was given by the defendant in error tending to show the claim made by her, and by the plaintiff in error tending to rebut any such claim.

Before answering the petition, the plaintiff in error filed a motion asking that various allegation of the petition be stricken from the petition, and, among others, the clause pleading the statute above quoted, which motion was overruled and an exception noted.

At the close of the evidence, upon the effect of this statute the court charged the jury as follows:

"It is claimed that the defendant company was negligent in that it employed a boy of the age of fifteen years and less than twenty-one years of age, to operate the electric elevator in contravention of the laws of the state."

He then read to the jury the statute above quoted and adds:

"The violation of this statute by the defendant, if you shall find that it was violated, is not in and of itself such negligence as will render the defendant company liable. It is simply the expression of the state, through its legislative body, of its policy with respect to the operation of elevators, and is evidence to be considered by you in connection with all the other evidence in the case. The mere fact of employing a boy under the age mentioned in the statute to which I have just referred, would not constitute negligence in and of itself."

To this charge an exception was noted.

In both the refusal to strike out from the petition, the statute pleaded and in this charge given to the jury, there was error.

The duty of the plaintiff in error to the defendant in error in the operation of the elevator was the same as that of a common carrier to a passenger—the highest degree of care must be the

measure of that duty. A failure in its performance would be negligence. The fact that the employment of a minor was prohibited by statute neither added to, nor detracted from such duty. If the duty was fully performed, there was no liability resting upon the plaintiff in error, whether the operation of the elevator was by a minor or an adult. Such liability arose only from the non-performance of such duty. We conceive it competent, however, to show who was operating the elevator at the time of the accident, his age, competency and the like, but the existence of the statute should have no weight in determining the liability of the plaintiff in error for negligence in the operation of the elevator.

We are dealing with the relation of the common carrier to a passenger and the responsibility of the plaintiff in error therein must be determined by the manner in which it performed its duty growing out of that relation.

The case of *Jacobs* v. *The Fuller & Hutsinpiller Co.*, 67 O. S., 70, sustains, we think, this proposition. That case, it is true, involved different facts. The relation of master and servant was *therein* considered, but certainly no stronger reasons existed for the conclusion of the consideration of the statute in *that* case than those existing for the exclusion of the statute in *this* case.

Again, on review of the evidence contained in the bill of exceptions, we are of the opinion that the damages awarded to the defendant in error were grossly excessive and for that reason the motion for a new trial should have been granted and, in not so ruling, there was error.

The evidence shows clearly that the disabilities under which the defendant in error now claims to be suffering, are not wholly due to the injuries which she received in that transaction.

We find no other prejudicial error apparent upon this record.

The judgment of the court of common pleas is reversed and the cause remanded for a new trial.

CONSTRUCTION OF AGREEMENT TO SELL LAND.

Circuit Court of Cuyahoga County.

JOSEPH KUNDTZ v. VAN DEBOE HAEGER & CO. AND JAMES W. EVENDEN, TRUSTEE.*

Decided, December 22, 1902.

Land Contracts—When Two Contracts for the Sale of One Parcel of Property are Regarded as One.

When a real estate company sells lots upon an installment plan and gives the purchaser a land contract signed by a trustee in whose name the title appears, in which the trustee agrees to convey upon the receipt of the final payment; and also gives the purchaser another contract signed by the company in which it agrees to convey the property to the beneficiary of the purchaser in case of the death of the purchaser before final payment has been made—both of the contracts are to be construed together as one contract, and the real estate company, by accepting payments after they were past due, waived any forfeiture provided for in the contract signed by the trustee.

G. H. Schaibley, for plaintiff.
Smith & Taft, contra.

CALDWELL, J.; HALE, J., and MARVIN, J., concur.

The plaintiff, Joseph Kundtz, brought this action for specific performance. The petition sets out that Van Deboe, Haeger & Company was the owner of a lot in an allotment; that James W. Evenden is trustee, held the title to the property, which lay in the hamlet of Rockport, county of Cuyahoga and state of Ohio, and was designated as *lot 112* on a certain plat of lots called Lenox Park; that they sold said lot to Agnes Kundtz, trustee, on the installment plan, payable weekly, until the full amount was paid, and that, when the amount was paid, she was to have a deed for the same. Agnes Kundtz was buying said lot as trustee for the plaintiff, Joseph Kundtz, and he claims in

*Affirmed without opinion, *Van De Boe, Haeger & Co. et al* v. *Kundtz*, 70 Ohio State, 485.

his petition that there was an agreement on the part of Van Deboe, Haeger & Company that if she died before the payments were made in full, a deed would be given to the plaintiff for the lot without any further payment, and sets up that Agnes Kundtz died and that the plaintiff made proper proof of her death to the defendant and demanded a conveyance of the property and that the defendant refused to convey the same. The answer claims that Evenden was trustee, holding the lands, not for his co-defendant but for other parties, and that he had placed the lands in the hands of his co-defendants to sell and dispose of the same. And the evidence shows that in undertaking to dispose of these lands and other lots thus turned over to them for sale they adopted the plan of selling the lots and giving therefor a land-contract not differing in any way from the ordinary land-contract which was signed by James W. Evenden, trustee, and, at the same time, Van DeBoe, Haeger & Company would enter into a contract with the purchaser of the lot, that, if she died before payments were made in full, the lot would be deeded to the beneficiary named by her without any further payment, although the same had not been paid for in full at the time of her death.

The plaintiff claims that these two contracts constitute one contract; that they together form part of the consideration that induced the purchase of the lot, and, being construed together as one contract, she claims that the defense set up is not good. The contract signed by Van DeBoe, Haeger & Company for the lot is as follows:

"This agreement made this 15th day of February, 1897, by and between Van DeBoe, Haeger & Company of the city of Cleveland, Ohio, of the first part, and Agnes Kundtz, trustee, of Cleveland, Ohio, of the second part:

"WHEREAS, the parties of the first part have advertised to deliver over free from further payments, a deed of property purchased from them at Lenox Park, upon certain conditions in the case of the death of the grantee of said property, and,

"WHEREAS, the party of the second part, being the purchaser of the lot, No. 112, in Lenox Park, wishes to avail herself of said offer, now, therefore, it is hereby agreed that in case the party of the second part shall die while her agreement for the purchase of the above-mentioned lot is in force and before said

premises are conveyed to her by deed, said party of the first part shall, under certain conditions hereinafter mentioned, have no claim for the payment of further installments on account of said premises, but shall convey the same without further consideration, at the special direction of party of second part, to Joseph Kundtz."

It is further provided and agreed that the conditions upon which said deed shall be given her, is as follows:

"1st. That said party of second part is the original purchaser, and not a transferee. 2d. That the payments on said lot shall not, at any time, be more than two weeks in arrears. 3d. That satisfactory proof of death of said party of second part shall be furnished. 4th. That said party of second part shall not have come to her death by reason of suicide, sane or insane. 5th. That the party of second part is in good health at the time of purchase.

"No alteration in the terms of this agreement will be valid unless signed by Van DeBoe, Haeger & Company and Agnes Kundtz, trustee."

We are satisfied that these two contracts were held out as an inducement to the party purchasing the lot; that they both entered as a consideration for the payment of the money paid upon the lot. The fact that the lot was owned by the trustee, James W. Evenden, can make no difference, for the evidence shows that he had turned over to his co-defendant the entire marketing of the lots, which they proceeded to do upon the plan set out, and he has, in a sense that will bind him, made himself a party to the method adopted by his agents. This makes the two contracts but one contract in fact; they become parts of one and the same contract. Hence, the defense set up herein, which is, that payments were not made promptly as required by that part of the contract signed by Van DeBoe, Haeger & Company, will vitiate the second part of the contract, although they were received upon the first contract, clearly creating a waiver on behalf of the trustee who made the land-contract, by reason of the money being received after becoming due; and the claim is that the same parties, Van DeBoe, Haeger & Company, held both of these contracts and they now make claim that although payments were made and received on the land-contract after

they were due, yet that can not be regarded as a compliance or waiver of the conditions of the second contract; in other words, Van DeBoe, Haeger & Company could take the money after due and apply it upon the land-contract and yet, by so taking it, they did not make a waiver of the insurance contract. The only way to make this seem plausible to the court is, as was contended by defendant, that these contracts are entirely separate and distinct, and that whatever was done under one, either by way of payments or waiver, could not, in any manner, affect the other. We can not subscribe to that doctrine.

The real facts of the case are that while the land-contract was signed by James W. Evenden, trustee, yet it is with the other defendant, and really their contract, until they have made the proper collections and turned them over to the trustee in lieu of the land, for the whole thing looks to *their* securing not only *the contract,* but also the deed, when the contract is paid up in full. So Evenden having signed the contract, amounts to nothing more than binding him to give the deed. The whole transaction was really in the hands of the other defendant and hence while, in form, the contracts appear to be made by different parties, yet, *in substance and in fact,* so far as the interest of the parties is concerned, they are both made by the same persons. Upon the death of the purchaser, Van DeBoe, Haeger & Company certainly did not expect to pay up the balance of the purchase-price of the lot; if they did, the whole transaction would be merely a gamble.

We think the plaintiff has shown his right to have his deed given to him without further consideration, and the prayer of his petition is granted.

QUALIFICATION STATEMENT FOLLOWING SIGNATURE ON NOTE.

Circuit Court of Cuyahoga County.

H. H. WYLIE v. THE KINGSLEY PAPER COMPANY.

Decided, November 5, 1902.

Bills and Notes—Promise of Agent, a Personal Obligation.

Where one signs a promissory note and after his signature adds the statement that he is signing it for another, he nevertheless becomes personally liable upon it.

O. J. Campbell, for plaintiff in error.
Carpenter, Young & Stocker, contra.

MARVIN, J.; CALDWELL, J., and HALE, J., concur.

The Kingsley Paper Company sued H. H. Wylie before a justice of the peace, upon two promissory notes. One of said notes reads as follows:

"$50.00. NOVEMBER 26, 1898.
"Two months after date I promise to pay to The German-American Ptg. Co. or order fifty dollars, value received, at their office.

"H. H. WYLIE,
for the Critic Pub. and Prtg. Co.

"No.———. Due Jan. 26."

The other note reads as follows:

"$50.00. NOVEMBER 18, 1898.
"Sixty days after date I, we or either of us promise to pay to the order of The German-American Prtg. Company fifty dollars at their office. Value received.

"H. H. WYLIE,
for the Critic Pub. & Prtg. Co.

"No.———. Due Jan. 17."

The only defense made to these notes was that upon their face they show that Wylie was not the maker of the notes and could not be held personally liable thereon; that each of the notes was

a note of the Critic Publishing & Printing Company. The court held otherwise, and judgment was given the plaintiff. This judgment was affirmed by the court of common pleas. It is sought here to reverse the judgment. We hold that the judgment was right, and must be affirmed.

The cases holding that commercial paper signed by one as agent, and as agent of particular persons, is the personal obligation of him who signed the paper are decidedly in point.

It is urged that it can not be claimed that the words following the signature of Wylie on these notes are simply a description of the person; but we think that the notes in this case are clearly written promises on the part of Wylie for the payment of the money. It is true he says that he promises to pay for this publishing and printing company, but it is clearly *he* who promises to pay. Suppose these notes read "I, H. H. Wylie, promise to pay for the Critic Publishing and Printing Company." Could there be any doubt that it would be the promise of Wylie, which he is bound to make good? We think not. And we think the language used in the notes sued upon is equally clear that Wylie promised to pay for the company.

PROSECUTION FOR MURDER IN THE SECOND DEGREE.

Court of Appeals for Hamilton County.

LEONARD GOINGS v. STATE OF OHIO.

Decided, December 13, 1915.

Criminal Law—Errors in Charge to Jury in Second Degree Murder Trial—Instruction as to Threats Where no Evidence of Threats Had Been Offered—Plea of Not Guilty Does Not Admit of a Charge on the Subject of Self-Defense—Misconduct by the Prosecuting Attorney.

1. In a prosecution for murder in the second degree an instruction to the jury, to the effect that threats made by the deceased against the defendant would not justify defendant in killing the deceased, constitute prejudicial error where there is no evidence that any threats were made.
2. A plea of self-defense admits the killing by the defendant but seeks to avoid the legal consequences by pleading and showing justification; and where a defendant does not admit the killing, but stands on his plea of not guilty and challenges the state to prove beyond a reasonable doubt that the killing was committed by him, an instruction to the effect that there was some evidence that the killing was by the defendant, but he claimed he was justified under the doctrine of self-defense, is highly prejudicial since it leaves the jury no option but to find that the killing was the act of the defendant, their task being only to determine whether it was in self-defense, which shifts the burden of proof and compels the defendant to prove his innocence by a preponderance of the evidence.
3. Where the circumstances seem to indicate that the crime was committed by either the prosecuting witness or the accused, the use by the prosecuting attorney of language in his argument to the jury which leaves in their minds the impression that the prosecuting witness had been tried and acquitted of the crime and had no motive to testify otherwise than the truth, leaving them to conclude that the defendant must be the guilty one, is misconduct of a prejudicial character.

Ed. F. Alexander and *Jas. B. O'Donnell*, for plaintiff in error.

John V. Campbell, Prosecuting Attorney, and *Walter M. Locke*, Assistant Prosecuting Attorney, contra.

GORMAN, J.

The plaintiff in error on July 20th, 1915, was indicted for murder in the second degree by the grand jury of Hamilton county, charged with "unlawfully, purposely and maliciously" killing one James Garner by shooting him with a pistol on May 4, 1914, at 554 George street, in the city of Cincinnati. On July 24, 1915, after trial, he was by a jury found guilty of manslaughter, and on July 26, 1915, was sentenced to the Ohio penitentiary. He has prosecuted error to this court and asks for a reversal of the judgment.

Briefly, the salient facts adduced at the trial, as shown by the record, are as follows: For about three years prior to May 4, 1914, Leonard Goings cohabited with one Violet Anderson, alias Gertrude Thomas, an open and notorious prostitute, in several parts of Cincinnati, and elsewhere. He had left her and gone to Indianapolis about a month or two prior to May 4, 1914, and while he was there she took up her abode in the tenderloin district of Cincinnati at 554 George street. Both Goings and the Anderson woman are colored.

On May 4, 1914, Goings returned to Cincinnati from Indianapolis, and on the same day the Anderson woman heard of his return and sent one of her friends to request Goings to visit her at her room on the second floor of the building No. 554 George street. He went to her room about four o'clock in the afternoon of that day, with Violet's messenger, and after a few minutes the messenger departed, leaving the Anderson woman and Goings alone in the room. These two are the only witnesses as to what occurred with reference to the killing of Garner.

Shortly after Goings arrived at the Anderson woman's room Garner, a large, strong young colored man, appeared at the house and asked two of the inmates on the first floor front of the house how he could get upstairs. He was directed to go to the rear of the house, which faced south on the north side of George street, and he would find the stairway. He walked back perhaps twenty or thirty feet, entered a side door and mounted the stairs which lead to a hallway running north and south on the second floor. He walked south through this hallway, which was dark

and unlighted, to the door of the Anderson woman. He knocked, and she came to the door, opened it, and asked Garner what he wanted. He asked if she did not know him. She said she did not, and ordered him away. He began to curse her and call her vile names and said something about his money. He went downstairs and into the side yard, where he continued to curse the Anderson woman, and she from the window talked back to him. She told him he had better stay down there, but if he must come up, then to come up. This is her statement before the coroner, but on the trial she says Goings told Garner that "if he must come up, to come up." Goings denies having spoken to Garner while in the yard. Garner came up into the hall, and while there was shot by either Goings or the Anderson woman. She admits having thrown two drinking glasses out into the hall at Garner. On the trial she testified that while she was at the door of her room trying to drive Garner away and throwing the glasses at him, Goings passed by her into the hall, saying, "Let me get down to him," and that when Goings got out into the hall she heard something like a slap, followed by a shot. Goings came back into the room and she says she asked him who shot, and he said "I did." She asked if he had shot him (Garner), and Goings said "No." She says she saw Garner come around the house and lean up against the wall, and she then said to Goings "Yes you did." He said, "Did I? What must I do?" and she told him to go to his home in Virginia. She says he told her he would throw the pistol into the vault in the back yard. She did not see Goings have a revolver nor did she see him shoot Garner. Garner died without making any statement.

Goings entered a plea of "Not guilty," and on the witness stand in his own behalf denied that he shot Garner, denied that he had or owned a revolver, and denied most of the Anderson woman's statements. He testified that she shot Garner from her door in the hall while he, Goings, was out in the hall trying to get Garner to go away; that she was very close to Garner when she shot him, and that Garner had struck him, Goings, with a dinner pail and knocked him down, and while he was down, she shot Garner; that she told him, Goings, to go away home so that he could not testify against her.

Goings went away that evening to Virginia, and was not arrested until more than a year afterwards at Dayton, Ohio. After the shooting, the deceased was taken to the city hospital, where he died that night. The police officers that evening searched the vault and fished up a thirty-two caliber revolver with one empty shell and two unexploded cartridges. Goings testified that the revolver belonged to the Anderson woman and was the one with which she shot Garner; that he had often seen it in her bureau drawer. Two other witnesses testified that she told them she had a revolver and would shoot. She was arrested after the shooting, and when questioned by the officers said a man named "Walter" did it. After being confined for quite a while and, as she said, cross-examined by the police and put through either the second or third degree, she said Goings did it.

There appears to be a direct conflict between her testimony and that of Goings, the only two who know what person fired the shot that killed Garner. The circumstances and probabilities appear to us to point as strongly to Violet Anderson as to Goings, as the slayer of Garner. Indeed, we think the probabilities are stronger in favor of the theory that the woman, rather than the man, fired the shot. Each, it is true, was equally interested in throwing the blame on the other; both were persons of bad repute, and each had strong motives for testifying against the other as they did, but a careful consideration of the evidence and circumstances will lead a reasonable person to the conclusion that the state failed to establish the guilt of Goings beyond a reasonable doubt. Assuming that Violet Anderson was entitled to equal credibility with Goings, nevertheless the attending circumstances, if carefully weighed and considered by twelve unbiased and disinterested men, were such that there must have existed in the minds of such a jury a reasonable doubt of Goings' guilt, and if that reasonable doubt had been resolved in his favor the verdict should have been "not guilty."

There are several errors claimed, by counsel for Goings, to have been committed by the court in the charge. In speaking of that provocation which would warrant the jury in finding the

accused guilty of manslaughter rather than murder in the second degree, the court said:

"The provocation to have the effect of alleviating the killing from second degree murder down into manslaughter must have consisted in this case of personal violence done, or attempted to be done by James Garner, nor can the threats which were alleged to have been made by Garner against the defendant be considered as reasonable provocation to reduce the killing from second degree to manslaughter."

This portion of the charge assumes, as we read it, that threats were alleged to have been made against Goings by Garner, and assumes that Goings would not be justified in killing Garner on that account, whereas there is no evidence of Garner having threatened Goings. In this part of the charge we think the court erred to the prejudice of the accused.

In several places in the charge the court assumed that Goings did the shooting; whereas Goings strenuously denied that he did, and there was no witness who testified that he did shoot the deceased. Violet Anderson only testified that *Goings told her he shot,* but did not hit Garner.

The trial court further charged the jury on the plea of self-defense, and while that part of the charge relating to self-defense appears to state correctly the rule of law applicable to self-defense, there was no claim or plea of self-defense made by Goings, nor was there any evidence, to our minds, tending to show a case of self-defense. The plea of self-defense in murder cases admits the killing by the defendant, but seeks to avoid the legal consequences by pleading and showing a justification. There can not properly be a case of self-defense unless the accused admits the killing. This plea is in the nature of a confession and avoidance and, when interposed, the burden of establishing it by a preponderance of the evidence is upon the accused.

In the case under consideration Goings did not admit the killing, but on the contrary was standing upon his plea of not guilty, and challenging the state to prove beyond a reasonable doubt that he fired the shot which killed Garner. Therefore,

when the court charged the jury, as he did, that there was some evidence tending to show that Goings shot Garner as a matter of self-defense, and then proceeded to charge the law of self-defense, it was in substance saying to the jury that Goings admitted the killing of Garner but claimed that he was justified under the doctrine of self-defense, which must be proved by Goings by a preponderance of the evidence. This in effect took from the consideration of the jury the question of whether or not Goings killed Garner, and left no option to the jury but to find as a matter of fact that he did kill Garner. They were, under this charge, required only to find whether or not this killing of Garner was done in self-defense, and on this issue they were told that the burden of proof rested not on the state, but on the defense. Under the evidence it was impossible for the jury to find that Goings killed Garner in self-defense, and, therefore, assuming the killing of Garner to be admitted by Goings by this plea of self-defense, and Goings having adduced no evidence to establish self-defense, the jury were bound to bring in a verdict of either manslaughter or murder in the second degree. Thus, this part of the charge was highly prejudicial to the accused, Goings, as it practically put upon him, in the eyes of the jury the burden of proving his innocence by a preponderance of the evidence.

In the argument to the jury the prosecuting attorney referred to the prosecuting witness, Violet Anderson, and commenting upon her and her testimony, said, among other things:

"Violet Anderson is free; she is clear of this trouble. * * * But, gentlemen, as their first counsel told you this morning, she is out breathing the free air—you can draw your own conclusion as to what has happened to Violet Anderson."

Counsel for defendant objected to this language, and asked the court to interpose, but the court overruled the objection. The language, we think, was calculated to leave the impression on the jury's minds that the prosecuting witness, Violet Anderson, had been tried and acquitted of the crime for which Goings was undergoing trial, and that she therefore had no motive in testifying to anything but the truth, whereas there was no evi-

dence tending to show that Violet Anderson had been tried or acquitted or that she was not under indictment charged with this crime or complicity in its commission. The jury seeking a victim might well have concluded that if the Anderson woman had been acquitted then Goings must be guilty, inasmuch as the killing of Garner was by either Goings or the woman. If she did not kill Garner, then of necessity Goings did kill him. We think this was prejudicial misconduct on the part of the prosecutor.

There are other errors in the record, but those pointed out are sufficient to require us to reverse the judgment, which is accordingly done.

JONES (E. H.), P. J., and JONES (Oliver B.), J., concur.

JUVENILE COURT WITHOUT JURISDICTION OVER CHILDREN OF PARENTS INVOLVED IN DIVORCE PROCEEDINGS.

Court of Appeals for Sandusky County.

CLEVELAND PROTESTANT ORPHAN ASYLUM ET AL v. HAZEL TAYLOR SOULE.

Decided, October 15, 1915.

Jurisdiction—Juvenile Court Act—Does Not Deprive Common Pleas Court of Jurisdiction Over Children of Parents Involved in Divorce Proceedings—Continuing Jurisdiction of the Common Pleas Court.

1. Sections 1647, 1648 and 8031, General Code, conferring on juvenile courts authority to determine cases involving delinquent, neglected and dependent children, do not supersede Section 11987, General Code, empowering common pleas courts to make orders for the disposition, care and maintenance of children of parents involved in divorce proceedings.
2. A court of common pleas, having made an order concerning the disposition of a minor child of parents involved in divorce proceedings, has continuing jurisdiction of such child, precluding a juvenile court from taking independent jurisdiction thereof. If the best interests of the child demand a change of custody the proper

procedure is by application to the common pleas court to modify its former order.

3. The principle, that the court first obtaining jurisdiction of a subject-matter retains exclusive jurisdiction and authority until final disposition, applies to jurisdiction of a dependent child, concerning which a common pleas court has made an order for the custody in divorce proceedings, and a juvenile court has no authority to make an order for the disposition of such child.

W. J. Mead, for plaintiffs in error.

Kinney, O'Farrell & Rimelspach and *E. C. Sayles,* contra.

RICHARDS, J.

This is a proceeding in habeas corpus brought in the court of common pleas to recover the custody of a child about eleven years of age. The court of common pleas granted the writ and error is prosecuted to that judgment. The case raises a very interesting question of jurisdiction as between the probate court and the common pleas court. No disputed matters of fact arise in the case. The important facts to be considered in determining the questions raised are simply, that in a divorce action pending between the father and mother of the child, the custody of the child had been awarded to the mother in the court of common pleas of this county on December 26, 1913. In pursuance of this decree of the common pleas court, the mother took and retained possession of the child. In May, 1914, proceedings were instituted in the probate court, acting as a juvenile court in this county, in which it was charged that the child was a dependent child by reason of the fact that it had not proper parental care and that its home was, by reason of neglect and depravity on the part of its parents, an unfit place for the child. On the trial in the juvenile court that court found and adjudged that the child was a dependent of about the age of eleven years, and that she was a ward of the court, and the court ordered that her custody be committed to the Cleveland Protestant Orphan Asylum, and that she be there cared for and educated until the further order of the court.

The authority vested by statute in the court of common pleas in an action for divorce is contained in Section 11987, General

Code, and empowers that court to make such order for the disposition, care and maintenance of the child, as is just. The order which was made in the court of common pleas antedates the order in the juvenile court and was made in direct conformity with the language of the statute. It is said, however, that the juvenile court law supersedes the order and decree made in the court of common pleas. The juvenile court proceeded under and by virtue of the authority contained in Sections 1647, 1648 and 8031, General Code. These sections confer ample authority upon the juvenile court to consider and determine cases involving questions of delinquent, neglected or dependent children. The later Section 8031, General Code, provides in substance, that, when a parent, through vagrancy, negligence or misconduct, is unable to support a minor child or neglects so to do, or habitually ill-treats such child, the probate court may issue a summons requiring the parent to appear and answer the complaint and if the court finds the complaint to be true and that it is for the best interests of the child to be taken from the parent, it may make an order to that effect and direct the placing of the child in a suitable orphan asylum or children's home or with some other benevolent society. We do not, however, understand that these sections operate to supersede the authority conferred on courts of common pleas to make proper orders for the disposition, care and maintenance of the children of parents involved in a divorce action before that court. It has long been held that the jurisdiction of the court of common pleas over the children of parents so involved is a continuing jurisdiction, and that the child becomes the ward of the court. This child was a ward of the court of common pleas prior to and at the time the proceedings were brought in the juvenile court. We think that the statutes conferring authority on any court in such matters must be read as limited to children not already provided for by some other court first having obtained jurisdiction. *Hoffman* v. *Hoffman*, 15 Ohio St., 427; *Rogers* v. *Rogers*, 51 Ohio St., 1.

A similar question has been before the Supreme Court on two recent occasions, the first being *In re Crist*, 89 Ohio St.,

33. In that case the probate court had appointed a guardian of the child after the decree awarding the custody of the child had been entered in the court of common pleas, and it was held that the child had become the ward of the court of common pleas and that the jurisdiction over its custody was a continuing jurisdiction and could not be affected by the subsequent appointment of a guardian in the probate court.

The question was again before the Supreme Court in the *Children's Home of Marion Co.* v. *Fetter,* 90 Ohio St., 110. In that case a delinquent child had become a ward of the juvenile court and had been committed to an institution under provisions of the General Code relating to that court. Thereafter proceedings in habeas corpus were brought by a parent of the child and it was held that the order of the juvenile court was effective and controlling and that the court assuming to take subsequent jurisdiction was without authority. This is but another enunciation of a principle of law that has been recognized from time immemorial, that the court first obtaining jurisdiction of the subject-matter retains exclusive jurisdiction and authority until final disposition, free from interference by any other tribunal. Of course, this principle has nothing to do with the question of convictions of minors for violations of any criminal statute. To hold differently than in accordance with the rule above stated would permit a defeated litigant, seeking the custody of a minor child in the common pleas court, to go immediately to the juvenile court and there re-litigate the question just determined in the common pleas court. It would be doing violence to known rules of procedure to assume that the General Assembly intended by the passage of the juvenile law to confer authority on the juvenile court to re-litigate matters already determined in another court, particularly in view of the fact that the orders as to the custody of children are continuing orders.

We see no reason why the order in the court of common pleas granting the custody of the child to the mother could not be modified in that court if conditions had so changed as to render such modification proper.

We call attention of counsel to the language of the Supreme Court in the closing paragraph of the opinon in *Bower* v. *Bower,* 90 Ohio St., 172. In that case the Supreme Court sustained the appealability of an order of the common pleas court determining the care, custody and maintenance of minor children, and in so doing affirmed the judgment of the circuit court and remanded the case to that court for such further orders from time to time, touching the custody and support of the children, as that court should deem just and proper.

We are entirely in accord with the eloquent tribute to the home as a place for rearing children, announced by Mr. Justice Brewer, found in *In re Bullen,* 28 Kan., 557. The only question, however, that is in this court is one as to the jurisdiction of the juvenile court under the circumstances disclosed in the record. The court of common pleas found that the order made in that court in the divorce case was unreversed and not modified and still in force, and that for this reason the juvenile court had no jurisdiction over the child as a dependent child. With that judgment we are in accord and the same will, therefore, be affirmed.

CHITTENDEN, J., concurs.

KINKADE, J.

I concur in the judgment of affirmance but I think it might well be placed on an additional ground than that mentioned in the opinion of Judge Richards, to-wit, that it is manifest in the record that the child in question is no longer a dependent child, if she were such at the time of the entry of the judgment of the juvenile court.

VACATION OF A JOINT JUDGMENT AS TO ONE OF THE DEFENDANTS.

Court of Appeals for Morrow County.

B. M. MEREDITH ET AL. v. THE BUTLER MANUFACTURING COMPANY

Decided, October 15, 1915.

Practice—Death of One of Joint Defendants After Submission—Joint Judgment Entered Without Personal Representative Being Made a Party—Vacation of Judgment as to Decedent's Estate Ground for Vacation as to the Remaining Defendants.

The vacation of a joint judgment as to one of the joint judgment debtors vacates it as to all, where the subject-matter of the action is such that the plaintiff could not have prosecuted several actions; and a trial court in such a case, a *prima facie* case having been tendered, should grant a vacation as to all the defendants but suspend the order pending a new trial on the merits.

Mitchell & Bruce, for plaintiffs in error.
J. M. Schooler and *Harlan & Wood,* contra.

HOUCK, J.

This is a proceeding in error prosecuted from the Common Pleas Court of Morrow County, Ohio.

The plaintiffs in error have filed in this court a supplemental petition in error, alleging that since the trial of this cause in the common pleas court, and since the same was partly heard in this court, the plaintiffs in error, Sarah J. Huntington, as administratrix of the estate of R. N. McMahon, deceased, filed their petition in the Common Pleas Court of Morrow County, Ohio, asking for a vacation of and suspension of a judgment formerly made and entered by said court in said proceedings below, and for leave to file answer therein, for the reasons set forth, and upon the grounds stated therein.

The common pleas court refused to grant the relief prayed for, but entered a judgment affirming the former judgment of

the court therein, save and except as to R. N. McMahon, and as to the judgment against him enjoined the plaintiff below from issuing an execution against or in any way attempting to collect said judgment, or any part thereof, from the estate of the said R. N. McMahon, deceased.

Plaintiffs in error claim that there is error in the record and proceedings in said common pleas court, in said supplemental proceedings, to their prejudice, in the following particulars, to-wit:

1. In refusing to vacate the judgment against all the plaintiffs in error, the defendants below.

2. After vacating the judgment against McMahon, the court's refusal to suspend the judgment against all of the defendants below, and set the cause down for trial.

3. The court's refusal to permit the plaintiffs in error, the defendants below, to file an answer which contained two new and additional defenses.

4. The modification of the original judgment without a trial.

Upon these grounds the plaintiffs in error seek a reversal of the judgment below.

The original action out of which this proceeding arises was commenced in the Common Pleas Court of Morrow County, Ohio, in December, 1909, by the defendant in error, the Butler Manufacturing Company against the plaintiffs in error, A. E. Bell, R. N. McMahon, since deceased, and others.

The issue was duly made, jury waived, and the cause was tried to the court, and judgment rendered against the defendants below for $2,650, with interest. A motion for a new trial was filed, heard and overruled, and error was prosecuted to this court, the petition in error alleging that after said cause was tried and submitted, R. N. McMahon, one of the defendants in said suit, died on or about the 4th day of November, 1912, and before judgment was entered; that no suggestion of the death of said R. N. McMahon was made in said court, and no personal or legal representative of said decedent was made a party to said action, but said case was tried and a joint judgment rendered against said R. N. McMahon and the other defendants in said cause,

after the death of said McMahon, and without his legal or personal representative being made a party defendant therein.

The petition in error came on for hearing in this court at the June term, 1913, and the above alleged error not appearing in the record, this court was without jurisdiction to hear and determine the same, and the cause was continued to give plaintiffs in error an opportunity to proceed under the provisions of Section 11631 of the General Code, or other similar provisions, to obtain their remedy.

This case is an important one, relating to questions of practice that are of vital importance to the bench and bar.

From an examination of the record we find that the original suit upon which this proceeding is based was founded upon a joint contract, and the judgment rendered therein in the trial below was a joint judgment, and therefore the only question presented to this court for determination is: Does the vacating of a joint judgment against one defendant and joint judgment debtor vacate it as to all?

Section 11631 of the General Code, provides:

"The common pleas court, or the circuit court, may vacate or modify its own judgment or order, after the term at which it was made: * * *

"(6) For the death of one of the parties before judgment in the action."

Under this section, and Sections 11636 and 11637 of the General Code, the successive steps required to vacate a judgment after term are as follows:

"1. An application filed in the original case, stating the ground of vacation and the defense, upon which summons shall issue, and no further pleading is required.

"2. Hearing on the application.

"3. If ground for vacation is found to exist, and a valid defense is averred in the application, the judgment shall be vacated, but the lien of the original judgment saved by suspending the order of vacation pending trial on the merits.

"4. A pleading setting up a defense, and a trial upon the issues made, as if no judgment had been rendered.

"5. The rendering of a judgment which shall either restore the old judgment or extinguish it, as the facts found on the trial demand."

In determining whether there is error in this record it is proper to inquire as to whether or not the plaintiff in the original action below could have maintained a separate action on the contract against each of the obligors, had they elected so to do, or was their sole remedy on the contract against them jointly?

There can be little doubt that the cases wherein it is proper to render a several judgment against one or more of the defendants in the suit, thereby leaving the cause to proceed against the others, are limited, as a general rule, to certain actions. The difficulty, however, is in determining whether these cases wherein such judgment is forbidden includes actions on joint and several contracts, on which the plaintiff might have elected to prosecute several actions. Some courts have held that they are confined to actions on joint contracts, when the plaintiff had no election as to the joinder of defendants, and therefore was compelled to bring a joint suit, and that his only remedy was such; others have held the contrary to be the rule.

We think that Section 11584 of the General Code will materially aid us in the proper determination of the question before us. The section provides:

"In an action against several defendants the court may render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper."

A fair construction of this statute, with the facts presented in this case, and applying thereto what seems to us to be the rule of law applicable to the same, should aid us in reaching a proper conclusion. A court in its discretion may render a judgment against one or more of the defendants, leaving the action to proceed against others, whenever it appears that the plaintiff might have demanded a several judgment on the contract if he had elected to sue the defendants separately. On the other hand, if the subject-matter of the action is such that the plaintiff

could not have prosecuted several actions, then and in that event his only remedy would be to demand a joint judgment. in a joint action, and in such case he can not have a several judgment against any of the defendants until the liability of each and all of the defendants has been determined upon final trial of all the issues in the case.

In the case at bar the vacating of the judgment against one of the plaintiffs in error, the defendants below, thereby vacated it as to all. This being so, and ground for vacation having been found to exist, and a *prima facie* defense having been tendered by the plaintiffs in error, the defendants below, the judgment as to all of them should have been vacated, and the order of vacation suspended pending a trial on the merits.

The judgment is reversed, and cause remanded to common pleas court for a new trial.

SHIELDS, J., and FERNEDING, J. (sitting in place of Powell, J.), concur.

ACTION FOR RECOVERY OF SECRET PROFITS FROM A PROMOTER.

Court of Appeals for Ashland County.

THE MARBLEHEAD BANK COMPANY v. S. A. RARIDON.*

Decided, October Term, 1915.

Corporations—Secret Profits Enjoyed by a Promoter—Extent of the Recovery which May be Had by the Corporation—Promoter Stands in a Fiduciary Relation—Application of the Statute of Limitations.

1. In an action by a corporation to recover the secret profits of its promoter, the recovery is limited to the profits actually made by him in dealing with the corporations or in transactions for the corporation.
2. In an action by a corporation to recover secret profits from its promoter, the promoter stands in a fiduciary relation to the corporation, and the action is one for a breach of duty, not for fraud, and does not come within the saving clause of the statute of limitations as an action for relief on the ground of fraud.

Mykrantz & Patterson, for plaintiff in error.
C. H. Workman, contra.

SPENCE, J. (sitting in place of Houck, J.).

It is difficult to tell what theory of the case was in the mind of the pleader when the petition was drawn, but stripped of much of its useless verbiage it seems to set forth the circumstances leading up to the incorporation of the Marblehead Bank Company, and certain transactions which took place after the incorporation of the company.

The amended petition avers that the defendant, S. A. Raridon, was the promotor of the bank company and had as his associate one W. C. Pollock; that they induced certain persons to become stockholders in the bank, representing to them that it would do a prosperous business in the village of Marblehead; that the banking company was incorporated under the laws of the

*Affirming *Marblehead Bank Co.* v. *Raridon,* 17 N.P.(N.S.), 27.

state of Ohio on the 14th day of March, 1907, and that on the 11th day of May, 1907, the defendant, Raridon, Louis St. Marie and others were elected directors, and that the stockholders or directors elected a cashier for said bank. Then the amended petition contains this averment:

"And that afterwards on May 11th, 1907, the stockholders who had subscribed for stock in said company, met and organized the same by electing directors and that said defendant was present at said meeting and falsely and fraudulently represented to the stockholders and directors of plaintiff that he had purchased for the company bank fixtures including four chairs, one directors' table, one side desk, one double desk, one single desk and table, check shelves, electric fixtures, vault doors and safe, and that said fixtures were of the value of $2,982.32; that all of the stockholders and directors of said company, aside from the defendant and the said Pollock, relied upon the representations of the defendant, in the entire organization, promotion and management of the bank at its inception."

The amended petition further avers the defendant while in charge and control of said bank caused certain certificates of stock of the cash value of $1,000 to be issued to himself and W. C. Pollock, and that they afterwards sold and transferred said stock to other parties, and that while defendant was in charge and control of the bank he made out a "deposit slip," and caused the cashier of the bank to give him credit on a checking account for $1,988.32, which money was later checked out of the bank by defendant, and further avers that it had no knowledge of the fact that defendant had taken a credit deposit subject to checking of $1,988.32 for expenses, furniture and fixtures until the year 1910, and had no knowledge as to what amount had been paid by defendant for furniture and fixtures or the real value of the same as furnished by defendant until the year 1910, and avers that the bank furniture and fixtures were not worth more than $1,000; that between May 10th, 1907, and July 16th, 1908, the defendant drew by check from the bank the amount of $1,988.32, at which date he closed his account with the bank and asks a judgment for $1,988.32 and interest.

The petition does not aver any collusion between the defenddant Raridon and the other directors of the bank, but alleges that Raridon was in charge of the bank for some time after its organization. If these allegations are true then the directors of this bank were guilty of gross negligence.

To this petition the defendant filed a demurrer, first, because the petition does not state facts sufficient to constitute a cause of action against the defendant; and, second, that the cause of action is barred by the statute of limitations or the action was not brought within the time limited for the commencement of such action.

The court of common pleas sustained the second ground of the demurrer and the case is here on error to the ruling of that court.

It was the evident purpose of the pleader to set forth a cause of action for the recovery of the difference between the actual cost or price paid by defendant for the furniture and fixtures furnished by him to the bank and the amount which he received from the bank for them.

The rule is well settled as stated in Vol. 1 of *Clark & Marshall's Private Corporations*:

"That the relation of promoters to the proposed corporation when formed, is a fiduciary relation, or a relation of trust and confidence, and for this reason it is well settled that they will not be permitted to take advantage of their position in order to make a secret profit out of their transactions on behalf of the proposed corporation or the corporators, or out of their dealings with the corporation or corporators. If they do so, they will not be allowed to retain their advantage or gain, but the transaction may be set aside in equity or they may be compelled to account or be held liable to respond in damages."

In *Yeiser* v. *United States Board & Paper Co.*, 107 Fed., 340, in the syllabus the court say:

"Promoters of a corporation who become stockholders therein assume a trust relation to the company and the other stockholders which binds them to act openly and in good faith in all matters connected with its organization, and the acquiring of

the property necessary for the transaction of the business for which it is organized and they will not be permitted to make a secret profit on the sale of such property to the corporation."

These principles of law are conceded by counsel for defendant in error, and the question is whether the averments of the petition make a case for recovery under these well established rules of law. The petition alleges that defendant represented to the stockholders and directors that he had purchased the furniture, fixtures and equipment for the bank and that they "were of the value of $2,988.32." That is not a statement or representation of a fact, but simply the expression of an opinion as to what they were worth. Waiving the form of allegation, the question is not what they were worth, but what is the difference between the amount paid for them by the defendant and the amount which he received from the company for them. The averment that the furniture, fixtures and equipment of the bank were worth only $1,000 is also the expression of an opinion as to value and does not fix the measure of recovery as the difference between that amount and the amount which the bank paid. $2,988.32, or $1,988.32.

In *Woodbury* v. *Loudenslager*, 58 N. J. Equity, 556; 43 Atlantic, 671, it is said:

"To go beyond restitution and decree the actual payment of a sum of money never received by the defendant by way of profit or otherwise, is to impose a penalty of a sort and in a fashion unknown to courts of equity, aside from causes of active fraud."

The rule is so well recognized that it would be idle to cite authorities to show that the amount which a corporation is entitled to receive from a promoter is the profits which he actually received in dealing with or for the corporation; in other words, his secret profit.

Speaking for myself alone, I do not think that the amended petition states facts sufficient to constitute a cause of action against the defendant and that the first ground of the demurrer should have been sustained by the common pleas court.

Counsel for plaintiff in error contend that this action is one for relief on the ground of fraud, and that the action was begun within four years after the discovery of the fraud. The amended petition avers that the bank company is a corporation incorporated under the laws of Ohio; that on May 11th, 1907, the stockholders organized by electing a board of directors and a cashier for said bank; that the defendant was present at said meeting and falsely and fraudulently represented to the stockholders and directors of plaintiff company that he had purchased for the company bank fixtures, enumerating them, and that "said fixtures were of the value of $2,988.32." Then follows a statement in regard to the defendant depositing $1,600 and withdrawing the same. This seemed to be his private funds and we are unable to see how it is connected with this case, but following these statements is this allegation:

"Plaintiff further avers that it had no knowledge nor did any of its directors or stockholders, except the said defendant and the said Pollock, have any knowledge of the fraudulent transaction of the defendant or had any knowledge that the representations made by him were fraudulent and false until in the year 1910."

If the petition sets forth a cause of action for relief on the ground of fraud, then the allegation that the fraud was not discovered until within four years of the time the action was begun, would be good as against a demurrer. In *Zieverink* v. *Kemper*, 50 Ohio St., 208, the court say (syllabus):

"When it appears from plaintiff's petition on an action for relief on the ground of fraud that the cause of action accrued more than four years before the action was commenced, a general averment in the petition that the fraud was not discovered by plaintiff until a time within four years before the action was brought is sufficient to bring the case within the saving clause of the statute of limitations for such actions, without specifically setting out when the discovery was made, or how it was made or why it was not made sooner."

We come now to the question as to whether this is an action for relief on the ground of fraud and comes within the saving

clause of the statute which provides that the cause of action shall not accrue until the fraud is discovered. In *Carpenter* v. *Canal Company*, 35 Ohio St., 307, Okey, J., says:

"These sections (now Section 11224, General Code) extend to causes of an equitable as well as those of a legal nature."

Waiving all questions as to the anomalous petition and assuming that it makes a cause of action for the recovery of the secret profits of a promoter, is such an action one for relief on the ground of fraud or is it one for breach of duty on the part of the promoter?

The petition alleges that the furniture, fixtures and equipment for the bank were sold by the defendant to the bank company on May 11th, 1907, and if there was any fraud practiced by the defendant it was at the time of the sale of the furniture to the bank, and the statute of limitations would begin to run against the bank from that date, unless there has been a toll of the statute by undiscovered fraud.

In *Clark and Marshall's Private Corporations,* Volume 1, page 325, it is said:

"To render the promoter of a corporation thus liable to account for secret profits made by him in the transactions on behalf of the corporation, it is not necessary to show that there was a fraudulent intent on his part. It is enough if the profits were made secretly, and without the consent of the corporators."

In *Pietsch* v. *Milbrath* (Wisconsin), 101 N. W., 388, second syllabus:

"The right of action against the promoters of a corporation to recover illegal profits made by them in buying for the corporation, at a price far in excess of its actual price, land on which they had obtained a secret option is one at law which is barred in six years from its accrual under Revised Statutes, 1898, Section 4222, and is not cognizable solely by a court of equity, within the exception of subdivision 7, which postpones the running of limitations until discovery of the right of action."

Thompson on Corporations, 2d Ed., Section 105, page 117:

"The liability of promoters for secret profits made by them in transactions between them and the corporation is not based on the theory of fraudulent intent on their part, but grows out of their relation to the corporation and the duty which they owe such corporation and the persons with whom they are dealing. They are clearly liable, even in the absence of fraud, on a mere failure to make full disclosures of their position and purpose. Their liability is fixed and the right to recover established when it is made to appear that such secret profits were obtained by them without the knowledge or consent of the corporation or its members. It is not so much the purpose of equity to visit him with a penalty for concealment as it is to require him to account for the profits actually made by reason of such concealment."

We have examined many other cases which bear more or less directly upon the questions here involved, but we think the cases cited are sufficient to illustrate the law as we understand its application in such cases as the one at bar. Our attention has not been called to any decisions to the contrary in this class of cases, and we have not been able to find any. We think on principle that these decisions are right. When cases are clearly within the provisions of the statutes limiting the time within which actions shall be brought, we have no power to refuse their enforcement, though they may work an occasional hardship.

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

SHIELDS, J., and POWELL, J., concur.

CLAIM OF TITLE THROUGH INNOCENT PURCHASE.

Court of Appeals for Hamilton County.

PHILA HAY v. FREDERICKA LEISER.*

Decided, January, 1915.

Indefinite Description—Does Not Bar a Claim of Title—Where the Public Records Afford Notice of Plaintiff's Rights.

A claim of title as an innocent purchaser of property at a public sale can not be based on the indefinite description contained in the deeds through which plaintiff asserts his claim, where the public records, plats and indexes pertaining to the parcel in controversy were sufficient to serve as notice of the rights of the plaintiff therein.

C. B. Matthews and *Harry T. Klein,* for plaintiff.
August H. Bode, Jr., and *Mitchell Wilby,* contra.

PER CURIAM (JONES [E. H.], SWING and JONES [Oliver B.], JJ.)

The claim of the defendant in this case is that she bought the property in question at a public sale, and that by reason of indefinite description in the deeds through which plaintiff claimed title she, the defendant, was an innocent purchaser of the property. The plaintiff, on the other hand, claims title and asks to have her title quieted.

We have carefully examined the evidence and considered the able briefs and arguments of counsel, and conclude that the public records, plats and indexes pertaining to the lot in question were sufficient to serve as notice to Mrs. Leiser of the rights of plaintiff in the lot in controversy. While the original deed for this lot to the trustees of the church did not definitely locate it, the fact that its boundaries were fixed, probably during the lifetime of John Brooks and certainly during the lifetime of Daniel Brooks, his son, and the church built thereon and occupied as such, and the entire lot fenced, fixed definitely the lines

*Affirmed by the Supreme Court without opinion, November 9, 1915.

of the lot, which have been ascertainable ever since. Possession thereof is shown by plaintiff and her predecessors in title to such an extent that while the deed to Mrs. Leiser was of the entire tract, including this lot, still, as stated above, there was no reason why the defendant purchaser at the sale should have been misled. We think, moreover, that it is shown by a preponderance of the evidence that at the time of the auction sale it was announced that the sale was made subject to the reservation of the church lot. A decree will therefore be entered granting the prayer of plaintiff's petition.

AS TO THE VALIDITY OF A CHANGE OF BENEFICIARY.

Court of Appeals for Licking County.

MUTUAL BENEFIT DEPARTMENT OF ORDER OF RAILWAY CONDUCTORS OF AMERICA v. MARY I. BLAND AND ELLA J. BLAND.

Decided, March Term, 1915.

Mutual Benefit Societies—Change of Beneficiary—Capacity of Insured to Make a Change—Claim of Undue Influence—Legal Right of Beneficiary to Make a Change.

1. The fact that insured, when fatally ill with tuberculosis, left his wife and went to live with his mother, and refused longer to support his wife and in some ways showed ill-will toward her, and caused his mother to be made the beneficiary instead of his wife in his certificate of life insurance, does not establish unsoundness of mind or memory on his part or the exercise of undue influence over him.
2. In making a change of beneficiary the insured exercised a right granted him under the rules of the order, as well as under the established rule of law that where the change is made substantially as provided for in the laws of the order or association, and to its full satisfaction and that of the insured, it is a valid change.
3. Where it appears that the beneficiary whose name has been dropped from a certificate paid certain of the assessments out of her own money, a court in ordering distribution of the proceeds of the certificate will direct that the amount so paid be restored to the one paying it.

Kibler & Kibler, for Edward M. Barrett, administrator.
Flory & Flory, for Ella J. Bland.

HOUCK, J.

The facts in this case are that David E. Bland and Mary I. Bland were husband and wife, being married on November 28th, 1900. He was a railroad conductor and had been in the employ of the B. & O. R. R. Company, as such, for a number of years prior to his death, which occurred on the 2d day of December, 1911.

On the 14th day of November, 1904, he took out a benefit certificate for $2,000, in the Mutual Benefit Department of Order of Railroad Conductors of America, whose principal office is located in Cedar Rapids, Iowa, naming as his beneficiary therein his wife, Mary I. Bland. It is alleged that prior to his death Mary I. Bland paid a number of the assessments thereon from her own money; that Ella Bland, the mother of the said David E. Bland, paid a number of the assessments to keep said insurance in force; that said benefit certificate remained in their home, and in their joint custody, until about one year before the husband's death; that on the 29th day of October, 1911, the said husband left their home in the city of Newark, Ohio, and went to the home of his mother, Ella J. Bland, where he remained until his death; that on the 4th day of November, 1911, the said David E. Bland, in writing, requested the said Mutual Benefit Department of Order of Railway Conductors of America to change the beneficiary in said benefit certificate from his wife to his mother, Ella J. Bland; that on the 8th day of November, 1911, he sent said certificate to said Order of Railway Conductors, and on the 10th day of November, 1911, it erased therefrom the name of Mary I. Bland, and inserted therein the name of Ella J. Bland, the mother of said David E. Bland, and returned said certificate to him, and the same was in his possession at the time of his death; that said wife did not consent to said change, and had no knowledge of same, until some time after the change was made; that David E. Bland was never married prior to his marriage with Mary I. Bland, who survived him as his widow; that

Mary I. Bland was a widow when she married David E. Bland, and had one son at the time of said marriage with David E. Bland, and that the son at that time was about nine years old.

After the death of David E. Bland claims for the payment of the $2,000, the amount of said benefit certificate, were made to the said Order of Railway Conductors, by both the wife and mother of decedent, each demanding payment, and claiming to be legally entitled to same. The said Order of Railway Conductors, being in doubt as to whom payment should be made, filed an interpleader, in the common pleas court of this county and paid the money, $2,000, into court, where the same now is in the possession of the clerk thereof.

This case is here for determination, on the second amended answer and cross-petition of Mary I. Bland, and the answer of Ella J. Bland thereto, and the evidence.

The said Mary I. Bland in her second amended answer and cross-petition, in addition to the above facts, alleges:

"That the said David E. Bland and Mary I. Bland were married on the 28th day of November, 1900, and lived together as husband and wife until the 29th day of October, 1911, at which time David E. Bland was mortally ill with tuberculosis, was weak in mind and body, and not sufficient mental capacity to transact ordinary business, was so weak in mind as to be unable to resist the influence and importunities of those around him, and that on the 10th day of November, 1911, Ella J. Bland and one Clifford T. Bland, a brother of said David E. Bland, wickedly contriving and conspiring to poison and alienate the mind and affections of said David E. Bland, for his wife Mary I. Bland, and for the sole purpose of preventing her from receiving any property or estate of the said David E. Bland, who was about to die, the said David E. Bland and Mary I. Bland, having no children, and for the purpose of obtaining for themselves the property and estate of the said David E. Bland, did poison his mind toward his wife and alienate the affection of said David E. Bland for the said Mary I. Bland, and by falsehood, deception and fraud caused the said David E. Bland to believe that this defendant was not faithful to and devoted to him, all of which was false as the said Ella J. Bland and said Clifford T. Bland well knew; that by said acts aforesaid of the said Ella J. Bland, and Clifford T. Bland, the said David E. Bland did attempt to change the beneficiary in said $2,000 benefit certificate

from Mary I. Bland, to Ella J. Bland, but that same was wholly void so far as David E. Bland was concerned, and the same was not the act, intention or purpose of said David E. Bland, and that by reason of said disease he was mentally incapable of doing same, and the same was the result of duress, coercion, deceit and fraud practiced upon him by the said Ella J. Bland and Clifford T. Bland, for the purpose aforesaid, and in fraud of the rights of Mary I. Bland; that said Ella J. and Clifford T. Bland by continual urging and solicitation actually overcame the will of the said David E. Bland and substituted their own in place of his, he being too weak in mind and body to resist same, and thereby caused him to make said attempted change in the beneficiary named in said certificate.

"By reason of the premises Mary I. Bland says that she is the real beneficiary under said benefit certificate; that the same was never changed, and that she is entitled to recover the said sum of $2,000 and prays that said attempted assignment and transfer of said certificate to Ella J Bland, be held to be null and void, and that the court order said money paid to her.'

The answer of Ella J. Bland to the second amended answer and cross-petition of Mary I. Bland, is a general denial of all the material allegations therein; and she specifically alleges that David E. Bland was of sound mind and memory and that he was not influenced or coerced into changing the beneficiary in the benefit certificate held by him in the Order of Railway Conductors, and that she is the real beneficiary and prays that said sum of $2,000 be ordered paid to her.

After the trial and decree in this case in the court below, Mary I. Bland departed this life, and Edward M. Barrett was appointed by the Probate Court of Licking County, Ohio, as the administrator of the estate of the said Mary I. Bland, and gave bond and is now qualified in the premises and this cause so far as Mary I. Bland's interest is concerned, is being prosecuted in the name of said administrator.

As we view this case, three questions are presented for determination by the court, two of them being questions of fact and one of law.

The questions of fact are:

First: Was David E. Bland of sound mind and memory and qualified to transact ordinary business on the 10th day of No-

vember, 1911, being the date of the change in the benefit certificate?

Second: Was David E. Bland unduly influenced to make such changes in the benefit certificate?

The question of law is:

Could David E. Bland, without the consent of Mary I. Bland, the beneficiary, change same to his mother, Ella J. Bland?

Coming now to the questions of fact, will state that the record of the testimony below was long and many witnesses were examined; but we have gone over it with care and attention, and while there is some conflict in the testimony, yet on the whole it is clear and convincing.

It does seem strange that a husband who had lived with his wife in comparative happiness for ten years would, when about to pass into the great beyond, become estranged from her to such an extent that he did not want her to have or possess any of his property; that he left his home and went to and lived in the home of his mother; that his former love and desire for his wife, at least in some respects, turned to hatred and ill-will.

True, there were in their married life some little differences, but nothing of a serious nature. He refused to pay the house rent; he refused to furnish her food and shelter; he was mortally ill with tuberculosis, which caused his death; he was weak in body and may have been somewhat disturbed in mind; he lived in the home of his mother and his brother, Clifford T. Bland.

Can it be claimed from these facts and what occurred at the home of his brother, as detailed by the witnesses, that David E. Bland was of unsound mind and memory, or that he was unduly influenced? We think not.

What is it to be of sound mind and memory and not unduly influenced, as understood and contemplated in law? If David E. Bland at the time he made the transfer of said certificate understood the nature, extent and scope of the business he was about to and did transact, and possessed that degree of mental strength that would enable him to transact ordinary business, then in law he would be considered a person of sound mind and memory.

The law does not undertake to test, by any specific method, a person's intelligence, nor does it attempt to define the exact quality of mind and memory one must possess to transact ordinary business. The rule does not require that high degree of capacity that a man's memory must be just as perfect as it ever was, or that his physical strength what it was, possibly, when in youth. David E. Bland may have been somewhat enfeebled in mind and body, but if he knew his surroundings and was able to and did grasp the situation, and was able to and did transact ordinary business at or near the time of the transaction in controversy in a proper and business-like way and manner then he would be of sound mind and memory as the rule of law requires.

Undue influence is just what the language implies. Any influence or act brought to bear upon a person entering into a contract or in the performance of a business transaction, taking into consideration the nature of the transaction and all the circumstances of each particular case, precludes the exercise of free and deliberate judgment.

The proof, as to undue influence, must be of such a character as to show the act was not the act of the person himself, but of some other person, and it must be clear and convincing.

If to the facts in this case, as established by the evidence, we apply the above well known principles of law, can it be properly claimed that Mary I. Bland has maintained and established her contention that David E. Bland was of unsound mind and memory and was unduly influenced at the time claimed by her? We think not.

It is claimed, on behalf of Mary I. Bland, that David E. Bland could not change the beneficiary in the benefit certificate without her consenting to same, and that it was changed without her knowledge or consent and is therefore null and void.

In the determination of this case it may be stated that the various rules of law which are applicable to ordinary life insurance cases do not apply here, because the laws, rules and regulations of mutual benefit associations, from which this case at bar comes are governed differently and under different laws from ordinary life insurance companies.

On page 100 of the constitution, statutes, rules of order, and laws governing the mutual benefit department, Order of Railway Conductors of America, being Exhibit "D," we find the following rule as to benefit certificates, their change, etc.:

"The applicant must designate in his application some person or persons wife, relative or legal representative, to whom benefits shall be paid in the event of his death, and the secretary shall enter such designated name or names upon the register of the department and also upon the certificate of membership. Any member desiring to make any change in the named beneficiaries may do so with the consent of the department by making request for such change on blanks provided for that purpose and returning the certificate for necessary correction, provided no benefits shall be made payable to any other than wife, relative or legal representative of the member."

We find from the evidence that David E. Bland complied strictly and absolutely with the above requirements, and that the change of beneficiary in the benefit certificate in question was done strictly in accordance with the rules and regulations of Order of Railway Conductors.

While David E. Bland not only complied with the rules and regulations of the Order of Railway Conductors in making the change of beneficiary in his benefit certificate he not only exercised a right given him under the rules and regulations of said company, but exercised a right given under established rules of law which principle is well known in Ohio, and we need but cite one authority, being the case of *Earley* v. *Earley,* 3 C.C. (N.S.), 71, which case was affirmed by the Supreme Court, O. S., page 562. The doctrine laid down in that case is certainly decisive of the question as to the right of the insured to change the beneficiary without the consent of the beneficiary. The second syllabus reads:

"While a change of beneficiaries in a mutual benefit society must be made in accordance with the laws of the society, yet when the change is made substantially as provided by the laws of the society to its satisfaction, and that of the insured, a new certificate being issued to the new beneficiary, and the old certificate canceled, although not delivered to the society, the first

beneficiary can not object to the manner of change because the change is made without her knowledge and not in strict conformity to the law of the society providing for the change of beneficiaries."

We, therefore, find the law and equities in this case in favor of the defendant, Ella J. Bland, and against the defendant, Mary I. Bland, and the administrator of her estate, Edward M. Barrett, but we find as alleged and claimed in the second amended answer and cross-petition of Mary I. Bland, that she in her lifetime paid some of the assessments on the insurance held in said Order of Railroad Conductors, and we believe that her estate should be reimbursed for such assessments so paid by her. The evidence is indefinite and uncertain as to the amount she paid, but we feel that the sum of $50 should be paid to the estate of said Mary I. Bland out of the fund now in the hands of the clerk of the common pleas court of this county in this case, and the court coming now to the distribution of said fund in the hands of said clerk of courts, hereby orders and directs said fund to be paid out and distributed by said clerk as follows:

First: To pay the costs of this case and taxes.

Second: To pay to Edward M. Barrett, as administrator of the estate of Mary I. Bland, the sum of $50.

Third: The rest and residue to be paid to Ella J. Bland.

SHIELDS, J., and POWELL, J., concur.

LIABILITY FOR RENT UNDER AN INVALID LEASE.

Circuit Court of Cuyahoga County.

ELIZA H. GREENE v. E. A. KLINE ET AL.

Decided, May 24, 1902.

Landlord and Tenant—Lessee of Premises Under Invalid Lease Liable for Rent While Sub-Tenant Holds Possession.

A lessee of premises under an invalid lease, who attempts to surrender possession, but who leaves a sub-tenant in possession of a portion of the premises, is liable for the rent during the time such sub-tenant remains in possession.

F. C. McMillan and *M. R. Dickey,* for plaintiff in error.

L. J. Grossman, contra.

HALE, J.; CALDWELL, J., and MARVIN, J., concur.

On the first day of May, 1896, the plaintiff and defendant entered into an agreement in writing by the terms of which the plaintiff leased to the defendant a portion of building at No. 226 St. Clair street in the city of Cleveland for a term commencing May 1st, 1896, and ending December 31, 1899, at a yearly rental of $650, payable monthly. After stating the terms of the lease, the plaintiff alleges in her petition—

"that on said May, 1896, the defendants and each of them went into possession and constantly retained possession thereof during the entire term of said lease and occupying the same likewise. The plaintiff avers that the defendants and each of them are indebted to her under said lease and for said premises for the rental thereof, for the months of May to December inclusive, for each of said months, being a total of $433.35."

This agreement in writing was not acknowledged and witnessed as required to constitute it a valid lease for the term named.

The answer admits the making of the contract, but alleges that it was invalid as a lease for the term named, because not properly acknowledged as the statute requires. The defend-

ant admits that he entered into and retained possession of said premises until the 30th day of April, 1899, and alleges that prior to the expiration of the third year he notified the plaintiff of his intention to vacate the premises at the end of that year, and that he did actually vacate said premises at said time. It is conceded that the rent was fully paid up to May 1st, 1899.

Issue is taken by the reply, upon these averments of the answer.

The case came on for trial before a court and jury; at the close of the testimony for the plaintiff, the court directed a verdict for the defendant on the ground that the lease was invalid to fix the duration of the term and that there had, in fact, been a surrender of the premises on the 30th of April, 1899, up to which date the rent was fully paid.

The first claim made in behalf of the plaintiff in error as a ground for reversal is, that this agreement in writing, although not acknowledged, became as valid as if acknowledged, for the reason that the defendant took possession of the premises thereunder. This claim can not be sustained. It is, as we understand, in direct conflict with the case of *Baltimore & Ohio R. R. Co.* v. *West,* 57 O. S., 161. Again, it is claimed that there was no surrender of the premises by the lessee on or prior to May 1st, 1899, and that by holding over into the fourth year the lessee became bound for the rent for the full term named in the writing. All the evidence produced on the trial of the case, related to this issue.

It appears that prior to April 1st, 1899, the defendant gave notice to the plaintiff that on April 30th he would surrender the premises to the plaintiff, and that the defendant did, in fact, on that day leave the premises; but it appears that prior to that time the defendant had sub-let to one William Lichtig a portion of said premises. Lichtig continued in the occupation of that portion of the premises leased to *him,* until some time in July or August, 1899. It is not disputed that a lessee who sub-lets a portion of the leased premises can not quit by surrendering possession of the part retained, so as to escape payment of rent for the whole. The duty rests upon the *lessee* to see that his tenant, as well as himself, vacates the premises. The defend-

ant claims, however, that his sub-tenant, after May 1st, became the tenant of the plaintiff, to whom, it is claimed, the entire premises were surrendered on the 30th of April.

It appears that in the rental of this building one William Williams acted as agent of the plaintiff.

On the trial, Mr. Lichtig was called as witness by the plaintiff in error and testified, in part, that:

"In the month of November or December, Mr. Kline introduced me to this Williams. * * * Later on he took me to Mr. Williams' office; Mr. Williams was not in, and we met him as we started to go down-stairs at the elevator. He said, 'Mr. Williams, this is Mr. Lichtig; he is going to occupy the premises until April 30th; I have rented him a part of it, and he would like to make arrangements with you beyond that time; if he intends to stay he would like to make some arrangement with you regarding the place.' Mr. Williams, I believe, had asked, 'Is he occupying the whole of it?' and Mr. Kline said, 'No, only a part of it,' and I believe the amount of rent that I was paying was also mentioned, and Mr. Williams says, 'Well, he can keep it providing you pay the difference; or words to that effect; and Mr. Kline and he had some argument, and we left him there. I went away. About four or five days before April 30th, I again went to Williams' office; wanted to see if I could not make some arrangement regarding this place, as I would rather have remained, on account of having the place there, and it would have been very inconvenient for me to move, but I didn't see Williams. Again, a day or two before April 30th, I saw Mr. Williams, and told him I would like to rent the place again, as my term of lease you might say, expired with E. A. Kline; that Mr. Kline told me that after April 30th, he had nothing to do with me, and Mr. Williams had remarked, 'I don't know; I have not got anything to do; I hold Mr. Kline responsible for that rent.' Upon that I went to work; I found that I could not find a place to move my things by the first of May, and I sent my check a day or two before May 1st—the same day that I met Williams I sent a check, and that check came back."

It would seem then, from the statements of this witness that the plaintiff, by the agent Williams, at all times refused to accept the surrender of the premises of Kline; that she never accepted Lichtig for her tenant. The duty rested *upon the lessee*, if he would escape the payment of the rent, to surrender the entire

premises covered by the lease or the contract. By leaving his sub-tenant in possession of a portion of the premises, he failed in the performance of that duty. While the holding over under the circumstances disclosed by the record, was not such as to constitute a valid lease for the fourth year or to the expiration of the lease, it was *not* such as to relieve the defendant from the payment of rent while the premises were occupied by *his* sub-tenant.

We hold that under the facts disclosed in this record, the defendant should respond for the rental of the premises at the agreed price for the time the same were occupied by his sub-tenant. We are also of the opinion that the allegations of the petition above quoted were sufficient to allow such recovery in the present action, and that the court erred in directing a verdict for the defendant.

The judgment of the court of common pleas is, therefore, reversed.

AFTER DISMISSAL BY THE PLAINTIFF NEW ACTION BARRED BY THE STATUTE.

Circuit Court of Cuyahoga County.

LAURA J. WHITE, ADMINISTRATRIX, v. THE CLEVELAND FOUNDRY COMPANY.

Decided, November 17, 1902.

Statute of Limitations—Dismissal of Pending Action on Motion of Plaintiff is Not a Failure in the Action.

Where an action which has been commenced in due time, is dismissed by the plaintiff after the time limited for the commencement of such action has expired, even though such dismissal was made to avoid being forced into a trial for which the plaintiff was unprepared, a new action for the same cause, thereafter commenced, is barred, though commenced within one year after the dismissal of the former action. Such dismissal is not a failure in the action within the purview of Section 4991, Revised Statutes.

Kerruish, Chapman & Kerruish, for plaintiff in error.
Gilbert & Hills, contra.

HALE, J.; CALDWELL, J., and MARVIN, J., concur.

The trial court sustained the demurrer to an amended petition filed by the plaintiff, and entered judgment for the defendant. The cause of action stated in the amended petition was barred by the statute of limitations, unless the case made falls within the provision of Section 4991, Revised Statutes:

"If, in an action commenced, or attempted to be commenced, in due time a judgment for the plaintiff be reversed, or if the plaintiff fail otherwise than upon the merits, and the time limited for the commencement of such action has, at the date of such reversal or failure, expired, the plaintiff, or, if he die and the cause of action survive, his representatives, may commence a new action within one year after such date, and this provision shall apply to any claim asserted in any pleading by a defendant. And if the defendant is a corporation, whether foreign or created under the laws of this state, and whether the charter thereof prescribes the manner and place, or either, of service of process thereon, and such corporation passes into the hands of a receiver before the expiration of said year, then service to be made within said year following such original services or attempt to commence the action may be made upon such receiver or his cashier, treasurer, secretary, clerk or managing agent, or if none of the aforesaid officers can be found, by a copy left at the office or usual place of business of such agents or officers of such receiver with the person having charge thereof, and if such corporation is a railway company, summons may be served upon any regular ticket or freight agent of said receiver, and if there is no such agent, then upon any conductor of such receiver, in any county in the state in which said railroad is located, and the summons shall be returned as if served upon said defendant."

The allegations of the petition relied on to bring the case within the terms of this statute, are:

"And the plaintiff says that during the July term for the year of 1897, this plaintiff as such administratrix commenced her action against this defendant in this court, setting forth the facts above alleged in language identical with the words of this complaint, asking the same relief herein demanded. That she was joined by the defendant, and after many delays and continu-

ances, at last on the first day of March, 1899, and by mischance said action came on hearing in said court in court-room No. 3, presided over by his Honor, Judge Lamson, then of this court, where a jury was assembled hurriedly, and at a time when plaintiff happened to be unprepared for trial, and could not prosecute said action—and of which fact said court became speedily aware—and that thereupon and in the midst of plaintiff's appeals for a postponement, by her attorney, said jury was ordered to be sworn and was sworn, in said action, and that thereupon, plaintiff by her attorney informed the court that he could not proceed with said case and would not prosecute the same; and there and then without question or prosecution thereof, and for want of it, and at the court's demand to proceed forthwith or submit to a verdict against her, plaintiff again by her attorney stated to the court her inability to proceed or to prosecute her action and thereupon insisted upon her right to have her cause dismissed for said reason, and without prejudice, which was thereupon immediately done and entered by said court."

Under pressure the court entered a judgment of dismissal without prejudice, which the plaintiff insisted upon—the language of the petition is "and thereupon insisted" (that is, the plaintiff insisted) "upon her right to have her cause dismissed for said reason without prejudice, which was thereupon immediately done and entered by said court."

A proper construction of this petition compels us to hold that the case was dismissed by the court without prejudice, on request of plaintiff's attorney.

The case of *Siegfried* v. *Railroad Company*, 50 O. S., 294, is decisive of the question here made. The record of that case shows that the action was dismissed on motion of the plaintiff without prejudice to a future action, and judgment rendered against the plaintiff for costs. The syllabus of the case reads:

"Where an action which has been commenced in due time is dismissed by the plaintiff after the time limited for the commencement of such action has expired, a new action for the same cause, thereafter commenced, is barred, though commenced within one year after the dismissal of the former action. Such dismissal is not a failure in the action, within the purview of Section 4991 of the Revised Statutes."

Under the facts alleged in the petition, there was no waiver on the part of the defendant of its right to insist upon the bar of the cause of action by the statute of limitations. The defendant having answered the original petition, the court might, in its discretion, have refused to grant the defendant permission to withdraw his answer and file a demurrer to the petition in order to avail himself of the bar of the statute; but whether such permission should be granted or withheld was wholly within the discretion of the court, and permission having been given to the defendant to withdraw his answer, the case stood as if no answer had been filed, and left the defendant at liberty, either by demurrer or by answer, to avail itself of the fact that the cause of action was barred by the statute of limitations.

We find no error in the record, and the judgment of the court of common pleas is affirmed.

CHANGE OF MATERIALS UNDER A BUILDING CONTRACT.

Circuit Court of Cuyahoga County.

THE CITY OF CLEVELAND v. W. A. WILSON AND THOMAS STRACK.

Decided, December 24, 1902.

Building Contracts—Contractor Entitled to Extra Compensation for More Expensive Materials—Practice—Exception to Refusal to Charge Before Argument Must Specify that it is as to Time of Charge.

1. Where a contractor is putting in concrete according to the specifications in his contract, and complies with a request of the one for whom he is performing the work to use a larger proportion of cement in mixing the concrete, this is in addition to his original contract, and he is entitled to recover for the additional cost of such concrete.
2. Where a party submits requests for certain charges before the argument of a case and takes exception to the court's refusal to give the charges as requested, but does not specify that his exception is to the refusal to charge at that time, no error results if the court in its charge after argument charges all of the propositions contained in the requests which it was proper to give.

N. D. Baker and *Judge Beacom,* for plaintiff in error.
Solders & Tilden, contra.

CALDWELL, J.; HALE, J., and MARVIN, J., concur.

The defendants in error had a contract with the city of Cleveland for the construction of a certain portion of the Walworth Run Sewer. The contract included the furnishing of material and the doing of work; and, in it, was the furnishing of concrete and putting it in place as forming a part of the sewer. The parties are at variance as to the meaning of the contract, and, while the petition sets up three causes of action, the only question for consideration by the court is as to the *first* cause of action therein, and it is not a question to be determined from the evidence in the case as a question of fact, but is a question of law. The contract between them is in evidence, and there is a dispute as to its meaning and proper construction. The contract provides that all stone and concrete shall be hard lime-stone, sand-stones, trap, quartizite, or granite; all stone shall be, in the opinion of the chief engineer, equal to the hardest stone from the quarries of Newburgh, Ohio; and broken stone must be that taken from massive ledge; and any stone which shows a tendency to break into flat pieces, will be rejected; the broken stone must be screened, so as to be free from all dust and fine material, and must not contain fragments larger than will pass through a 2-inch ring, or so small that they will pass through a ½-inch circular hole. On page 10 of the bill of exceptions is the following provision:

"Concrete shall be composed of natural cement mortar one part; broken stone, three parts; by measure."

Then there is a provision as to how it shall be mixed. On page 11 (quoting):

"The proportions, as above specified, are intended to produce concrete in which the mortar fills all the voids, and the proportions of mortar and broken stone will be so adjusted that when the concrete is rammed into place, free mortar will flush the surface."

On page 19, is this provision:

"The proportions of mortar, etc., when rammed in place, shall be such that free mortar shall flush to the surface; if such result is not obtained, the relative proportions of broken stone to mortar shall be changed so as to cause said result to be obtained."

The purpose to be reached was that when a considerable portion of the cement was put in place and allowed to harden, the whole would form a monolithic mass.

The plaintiff claims that he made and rammed in place a certain amount of cement and that he attained the result; that free mortar came to the surface, and, by so doing, he had fulfilled the standard required by the contract, and the *only* test that could be applied to the work to determine whether or not the contract had been fully complied with. The contract provides the manner in which the cement shall be rammed into place, the kind and size of instruments used for that purpose, and no complaint is made in this case in regard to the manner in which the cement was made or put into place or *rammed;* but, after a small portion was made, the city required the ingredients of the cement to be changed, making it 2¼ stone to one of cement; and the plaintiff claims that, by so requiring, the defendants in error did work for the city over and above that required by the contract inasmuch as the new ingredients added very much to the cost, and that it is entitled to be paid the difference in the cost, as the cement was to be mixed by the contract and as it was actually mixed in doing the work. The city claims that the change was made, and was one that it was entitled to have made under the terms of the contract, and as to whether the material and work was done according to the contract, was determined by the chief engineer and director of public works and from whose decision there can be no appeal.

As to this claim, the contract does not provide that the test of whether the mortar, when rammed in place as provided in the contract, leaves free mortar on the surface, shall be left to the engineer or to the director of public works. The *only* test

in the contract as to whether the material meets the requirements thereof, is, that it shall have free mortar flush to the surface. And this was a question to be determined by the jury. It can not be insisted in this case, that the jury were not warranted in finding under the testimony that the mortar flush to the surface would have been there if it was as first mixed and rammed. The only provision in the contract, upon this question, is that, if the mortar as is provided in the contract for it to be mixed, does not, when rammed according to the contract, have free mortar flush to the surface, then the ingredients may be changed so that that result will be obtained.

If the result *was* obtained as the ingredients were *first* mixed, then to require something more to be done would be requiring something more than the contract calls for. It would not be a change in the contract; it would be a modification in the sense in which those terms are used, but it would be requiring something to be done for which the party had not contracted, nor does the matter of notice and endorsement in writing apply to the matter of this kind under the terms of the contract, but it stands as though 500 feet of sewer was to be built and the city thereafter had required 100 feet more to be built. This would be an additional matter, not contracted for, and not contemplated by the first contract, and the party would have a right to recover it.

It is claimed on behalf of the plaintiff in error, that the trial court erred in refusing to give to the jury its requests to charge before argument. These requests were headed: "Whereupon counsel for defendants submitted to the court requests to charge the jury before argument"; and then follow the requests, all of which the court refused to charge except as he gave the first three, in substance, in the charge, after argument; and the counsel for the plaintiff in error said, "The requests asked to be given before argument were all refused and the defendant excepts to the refusal of the court to grant each of the same, numbered respectively from 1—9." If these requests were good law in the case, and they were made with the request that they be charged before argument, and the court refused to

charge them before argument, and an exception was taken to such *refusal,* then this ground of error would be well taken. There is no exception taken because the court did not charge at the *particular time* it was asked to do so, but simply an exception because the requests were refused entirely in the case.

It appears from the case of *The Village of Monroeville* v. *Root,* 54 O. S., 523, that to constitute error under Section 5190 of the Revised Statutes, as to charge before argument in a case, the record must affirmatively show that the court was requested to give such instructions before the argument, and that its refusal to do so was the subject of an exception. To do so means to charge that an exception was taken to a refusal to give the requests before *argument not* an exception to a refusal to give them *generally.* In the case just referred to it was said that it did not appear that it was desired that a request should be given before the argument. In the case under consideration, the request *did* show it.

For aught that appears in the case under consideration, the party may have been content that the court should give the *substance* of its requests in his charge, *after* argument, as the court did do; and there is no exception taken to the point that the court did *not* charge this law *at the time* it was requested to do so. We think this ground of error is not well founded. *The Cincinnati St. R. R. Co.* v. *William Jenkins,* 11 O. C. D., 130.

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

AS TO AMOUNT OF COMMISSION DUE FOR SECURING FUNDS FOR A CONTRACTOR.

Circuit Court of Cuyahoga County.

HARRY E. HAYES v. WALTER ALEXANDER ET AL.*

Decided, January 26, 1903.

Contracts—No Contract Obligation where Promisee has Option to Extend Operation of Original Contract.

Where a proposal is made to plaintiff that if he will procure $80,000 for a contractor to be used by him in the completion of a certain part of his contract, a certain commission will be paid to plaintiff, and for any amount secured or guaranteed in excess of $80,000 for the completion of the entire contract a like commission will be paid, plaintiff having procured the $80,000 and received his commission thereon, is under no legal obligation to furnish or guarantee funds for the completion of the contract, and has no lien upon bonds issued by the company for which the contractor is working and placed in trust to secure the payment of funds advanced or guaranteed to the contractor, nor any right of action against the company for wrongfully forfeiting the contract with the contractor.

Blandin, Rice & Ginn, for plaintiff.
Hoyt, Dustin & Kelley and *Kline, Carr, Tolles & Goff,* contra.

CALDWELL, J.; HALE, J., and MARVIN, J., concur.

This action was brought in the court of common pleas on July 22, 1901.

The petition sets up two promissory notes; one dated July 20th, 1901, for the sum of $550, signed by Walter Alexander and given to the plaintiff; the other note dated May 20th, 1901, for $26,635 made and delivered by Walter Alexander to W. J. Hayes & Sons, and sets forth certain bonds, five hundred in number, of $1,000 each, made by the Mississippi Valley Transit Company to the defendant, the Interurban Construction Company, which the Interurban Construction Company under the authority of the Mississippi Valley Transit Company turned

*Affirmed without opinion, *Hayes* v. *Alexander et al,* 71 Ohio State, 534.

over to Walter Alexander for the purpose of being pledged as security for these notes.

The petition avers that these notes are due and unpaid, and that the bonds are pledged for the security of the same, and the plaintiff asks the court to take an account of the amount due the plaintiff upon these notes and find that the bonds were pledged in payment of the same, and order said bonds to be sold in their entirety and that the plaintiff be paid the amount so found due him out of the amount realized and the balance turned over according to the rights of the other parties to the action.

On October 14th, 1901, an amendment was filed to the petition, in which it is averred that on the 1st day of February, 1901, the defendant, Walter Alexander, entered into a contract in writing with the defendant, the Inter-Urban Construction Company, by which Alexander undertook and agreed to continue and complete the construction and equipment of an electric railway for the defendant, the Mississippi Valley Transit Company, from a point in or near the city of East St. Louis in the state of Illinois, to and through the city of Collinsville, and thence to and through the city of Edwardsville, both in the state of Illinois. And by further averments it is stated that the Inter-Urban Construction Company was to pay Walter Alexander the entire cost of such construction and equipment and, in addition thereto, a further sum equal to 15% of such cost, which sum of 15% upon said actual cost was to constitute and be the compensation of said Walter Alexander for his services and work in the premises. That to enable Alexander to procure the money and means with which to carry on and complete said work he was to have the right and privilege to use the whole issue of the bonds of the said the Mississippi Valley Transit Company, being five hundred bonds of $1,000 each and now in the hands of the Park National Bank, being the same bonds in controversy in this case, and to pledge the same in their entirety for the purpose of enabling him to raise the money and to procure the labor and materials with which to carry out and complete the work under his contract. That these bonds were secured by the Mississippi Valley Transit Company upon all its rights, privileges and franchises and properties which it owned

at the time of the execution of said mortgage or which should thereafter be acquired by it, and the mortgage was recorded and was and still is a first lien upon all of said property in favor of the holders of said bonds. That in and by the terms of the contract the whole cost of the work so undertaken and performed thereunder, together with said 15% thereof, should be evidenced by the six-months note of the said the Inter-Urban Construction Company, payable and delivered to the said Walter Alexander and the payment thereof should be secured by a deposit with the pledge of all of said bonds. That the Mississippi Valley Transit Company had full knowledge of the contract and its contents between Alexander and the Inter-Urban Construction Company, and consented and agreed to all the terms and conditions of the same. That at the time of the execution of the contract between the Inter-Urban Construction Company and Walter Alexander and as a part of the same transaction and to enable the said the Mississippi Valley Transit Company to raise the money with which to pay for the construction of and equipment of its railway, the Mississippi Valley Transit Company entered into a contract in writing with Woodruff & Williams, a partnership doing business in Cleveland, which contract was also dated the 1st day of February, 1901. That, by the terms of this contract it was agreed that not later than thirty days before the maturity of the note which was to be given by the Inter-Urban Construction Company to Walter Alexander and secured by the pledge of said five hundred bonds as provided in said contract first-named, said Woodruff & Williams should procure for the said the Mississippi Valley Transit Company a note and loan of $300,000 due in six months, from date, bearing interest at six per cent. and to be also secured by a pledge of all of said five hundred bonds. That upon the consummation of said loan the said Woodruff & Williams should receive from the said the Mississippi Valley Transit Company $100,000 par value of the paid-up stock of the said the Mississippi Valley Transit Company and $12,500 in cash, and further, that said Woodruff & Williams should have, for fourteen months from the completion of said railway, an option to purchase all of said five hundred bonds at the rate of 85 cents on the dollar of their

face value, and if they should under said option purchase the same at that rate, they should have the further sum of $12,500 to be deducted from the purchase price thereof. That if the Mississippi Valley Transit Company should, within the said 14 months, pay to the said Woodruff & Williams the sum of $12,500, the said Woodruff & Williams should thereupon release and cancel said option, provided that at the time of such payment to them they had not already sold or contracted to sell said bonds. That the Inter-Urban Construction Company assented and agreed to all the terms, conditions and stipulations of the contract between the Mississippi Valley Transit Company and Woodruff & Williams. That shortly after the making of these contracts Walter Alexander applied to plaintiff to have plaintiff assist him in raising the necessary money and the means with which to carry out his contract with the Inter-Urban Construction Company; and it was shortly afterwards mutually agreed between the said Walter Alexander and this plaintiff that this plaintiff would, by endorsing the notes of the said Alexander and by guaranteeing the full performance of contracts by said Alexander for the purchase by him of materials to be used in the construction and equipment of said railway and by procuring others to so endorse and guarantee such contracts and payments thereby and, in that manner, to assist the said Walter Alexander to raise the money and procure the materials to carry forward the work and construction of his contract with the Inter-Urban Construction Company.

It was further agreed between Walter Alexander and the plaintiff that for such risk and such services so to be performed or secured to be performed by the plaintiff, the said Walter Alexander would pay to the plaintiff a sum equal to one-half of the 15% upon the cost of the construction of said railway, which was to be paid to said Walter Alexander therefor; and it was agreed between them that any sum thus earned or becoming due from the said Walter Alexander and all sums so guaranteed by this plaintiff should be secured to him by a pledge of all of said bonds of the Mississippi Valley Transit Company until said sums were paid and until plaintiff should be fully relieved from all liability upon, or on account of, said guaranty; and it

was also fully agreed between them that for any and all moneys actually advanced and paid by plaintiff to or on account of the said Walter Alexander for said work or to be used in carrying the same forward, the plaintiff should have 10% on all such payments or advances paid by him and that the same should also be secured to him by the pledge of all of said bonds as aforesaid. That at the time of making said agreement between him and Walter Alexander, the Mississippi Valley Transit Company and the Inter-Urban Company had knowledge of the same and they consented and agreed to the same. That at the time of making the last named contract between plaintiff and Walter Alexander and as a part of the same transaction and as a further inducement thereto, the said Woodruff & Williams also entered into a contract with plaintiff whereby it was agreed between them that plaintiff would assist Woodruff & Williams in negotiating and raising the loan of $300,000 and Woodruff & Williams agreed that for such services and assistance to be rendered by plaintiff, they would pay to him a sum equal to one-half of the amount that should be paid to them under the said contract between them and the Mississippi Valley Transit Company, less $10,000 of money they had actually expended and, to secure the plaintiff for the amount so agreed to be paid to him, he should have the five hundred bonds pledged to him therefor the same as they were agreed by the Mississippi Valley Transit Company to be pledged to Woodruff & Williams and that the Mississippi Valley Transit Company and the Inter-Urban Construction Company had knowledge of *this* contract and assented to the same. He says that he went forward in fulfillment of his contract with Alexander and endorsed notes for him to the amount of $80,000 to enable him to raise money for said work, and guaranteed the performance by him of a contract by him to purchase rails for said railroad, the cost of which rails would not be far from $25,000 and that Alexander expended in and about the work of carrying out his contract for the construction of said road, about the sum of $100,000.

It then avers the failure of the Mississippi Valley Transit Company. It also avers that neither the Mississippi Valley Transit Company nor the Inter-Urban Construction Company

had paid Alexander for said work or for any part thereof; nor have they given him any note for the same. The petition then sets up that in and about the work of the construction of said railroad by Alexander, he was seriously impeded and embarrassed by the failure of the Mississippi Valley Transit Company to secure and set over to him its right-of-way for said railroad as it had agreed to do and that it never did procure for him the right-of-way to connect said railroad at East St. Louis with the local electric railway in that city, as it had agreed to do. And he avers that such connections were necessary to complete that part of the road from East St. Louis to Collinsville; and he avers that, by such failure, the bonds did not have the value nor the financial market that they would have had had the company performed its duty under the contract. It then sets up that through one, H. W. Sebastian, moneys that were designed and agreed to be used between East St. Louis and Collinsville, were actually expended on that part of the road between Collinsville and Edwardsville, which also tended to diminish the value of the bonds.

It avers that at the time of making these contracts H. W. Sebastian was the vice-president and general manager of the Inter-Urban Construction Company, and that, on February 28th, 1901, he was appointed to be its superintendent of construction of said road, by the Mississippi Valley Transit Company and that, in these two capacities, he had the management and control of the work, and that he assumed to and did act, during all the time that the said Alexander was doing work under his contract, as the sole and exclusive manager of all matters and things pertaining to the work thereunder, for both of said companies, and assumed to dictate and control the use and expenditure of all money of said Alexander in and about the construction and equipment of said road.

Then it sets up a failure, on the part of both of said companies, or either, to obtain the franchise to property which it had agreed to procure, which failure on their part greatly delayed and embarrassed Alexander in carrying out the contract.

The petition further says that the Inter-Urban Construction Company had at a time prior to the Alexander contract, agreed

with the Mississippi Valley Transit Company to build said road and complete the same, and that it did a portion of the work and did not pay for the labor and materials it had bought and used in carrying on the work, and that persons who had furnished work and material under said contract were threatening to file mechanic's liens upon the road for the same and that this hindered and delayed Alexander in carrying on his contract, and diminished the value of the bonds.

The petition sets up that the Mississippi Valley Transit Company and the Inter-Urban Construction Company and the defendants, E. W. Clark, Sabin W. Colton, Jr., Edward W. Clark, Jr., Clarence M. Clark, C. Howard Clark, Jr., J. Milton Colton and Herbert L. Clark, partners doing business under the firm name of E. W. Clark & Company, conspired and confederated together for the purpose of defeating Alexander in the carrying out of his contract, and of depriving Woodruff & Williams and the plaintiff of all benefits and compensation to which they, or any of them, would be entitled upon the completion of said road, and that, in the carrying out of said conspiracy, under mere pretense the contract of Alexander was forfeited and that he was excluded from the completion of the same, and that thereby they undertook to defraud said Alexander and the plaintiff of all they were entitled to receive under said contract; and that, in furtherance of said conspiracy, they undertook to, and did, cancel the contract which Alexander had made with the Pennsylvania Steel Company, a corporation, to purchase from it 700 tons of steel rails which the plaintiff had guaranteed to the amount of $25,000 and that the Alexander contract was entirely canceled as a part of the said conspiracy. That said companies are both insolvent, and have turned over all their business matters to E. W. Clark & Company in furtherance of said plan and conspiracy. That the companies have placed it entirely beyond their power to now entirely fulfill said contract.

It says that if said contracts had not been so illegally terminated, he would have realized not less than $50,000 for his services and compensation in the matter; and he prays for an accounting of what he did and earned under said Alexander contract, and what he did have a right to receive under the same

had it not been unlawfully canceled, and that, for the amount found due him, he may have a lien upon said bonds and that said bonds may be sold by the Park National Bank, as trustee, for the payment of such sum and for the full amount the court shall find due the plaintiff, and he asks that the court may find that the Woodruff & Williams contract was unlawfully canceled and that the plaintiff has been injured and damaged and that the court will award him by reason of his equities in said contract, the amount he has lost thereby, which he asks the court to ascertain and determine, and asks to have the amount found due him on his contract paid from the sale of the bonds.

Walter Alexander was never served in this action.

E. W. Clark & Company answered, without denying that the Inter-Urban Construction Company entered into the contract with Walter Alexander, and that the Mississippi Valley Transit Company entered into the contract with Woodruff & Williams.

They deny all the other allegations in the petition set out.

The Mississippi Valley Transit Company answered, adopting largely the averments of the Inter-Urban Construction Company; so that the defenses of the two companies are substantially the same, the difference in their pleadings consisting mainly of the cross-petition of the Inter-Urban Construction Company.

The Inter-Urban Construction Company, in its defense, says it admits that it is a corporation duly organized under and by virtue of the laws of the state of Missouri. It admits that the said Park National Bank is a corporation duly organized under the laws of the United States; that it has an office in Cleveland, Ohio. Admits that Walter Alexander is a non-resident of the state of Ohio. Admits that on the dates mentioned in plaintiff's petition as dates of execution and delivery of the notes described in the plaintiff's petition, five hundred bonds of the Mississippi Valley Transit Company, of the par value of $1,000 each, mentioned in plaintiff's petition, were in the custody of the defendant, the Park National Bank, and are still in its custody; and admits that it has an interest in all of said bonds mentioned in plaintiff's petition. And, furthering answering, denies each and all and singular the statements and allegations set forth in plaintiff's petition.

For its second defense, it first sets up the contract that it made with the Mississippi Valley Transit Company, a corporation organized under the laws of the state of Illinois, by which it agreed to construct and equip and complete, ready for operation, for the said Mississippi Valley Transit Company, an electric railway commencing at a point in East St. Louis in the state of Illinois and terminating in the city of Edwardsville in the state of Illinois, and sets out the substance of the contract, and says that before work was commenced under said contract, there was to be deposited by the Mississippi Valley Transit Company said five hundred bonds with some trust company, upon such terms and conditions as might thereafter be agreed upon by the parties and, in carrying out said provision, the bonds were deposited with the American Trust Company of Cleveland, Ohio, and that the bonds are the same as those referred to in the petition. It says that it entered upon the construction of said railway and, after performing a part of the work, it entered into the contract with Walter Alexander, and the substance of that contract is set forth, and says that said contract required the said work to be completed not later than June 1, 1901, unless prevented by certain things set forth in the contract.

It says that Alexander had no authority to pledge the bonds, or any of them, for any other purpose or purposes whatever than for work and material in the construction of said road, and that the notes held by the plaintiff and set up in the original petition, were given by Alexander to the plaintiff or to W. J. Hayes & Sons for commissions due them from Alexander in what they did in and about furnishing of funds to said Alexander and becoming security for him; and it avers that the bonds were not issued nor pledged under the contracts set forth, for any such purpose, and that they could not lawfully be so used nor could they be pledged as security to Hayes for the guaranty of the contract for rails.

It sets out that W. J. Hayes & Sons countermanded and canceled the contract for the rails and that Alexander acquiesced in such cancellation, and that the rails were never made or delivered, and that there is no liability on the part of any one, on such order; and that there is nothing due Hayes & Sons from

Alexander nor from any one else for such guaranty, nor are Hayes & Sons liable to any one upon said contract of guaranty.

For a third defense, it sets out that said bonds were never delivered to W. J. Hayes & Sons as security for any claim they hold against any of the defendants, and that it never agreed to any such hypothecation.

For its fourth defense and cross-petition, it sets out that Woodruff & Williams have no claim or interest in said bonds or any of them. That on about March 4, 1901, Alexander and Woodruff & Williams made, executed and delivered to the firm of W. J. Hayes & Sons their eight certain promissory notes for the sum of $10,000 each, bearing date March 4, 1901, payable to the order of said W. J. Hayes & Sons four months after date, at the Park National Bank of Cleveland, Ohio; that each of said notes contained an agreement of pledge by which said five hundred bonds were to stand as security for the payment of said eight notes, and that the Park National Bank had full power and authority to sell, assign and deliver the whole of the bonds or any part thereof, at public or private sale, upon non-payment of any of said notes or the interest thereon, and, after deducting legal costs and expenses, to apply the residue or proceeds of said sale, to pay pro rata holders of said eight notes; that to secure those eight notes, Alexander deposited with W. J. Hayes & Sons the five hundred bonds before referred to. That upon March 4, 1901, Hayes & Sons endorsed in blank each and all of said eight notes and at the same time delivered the same and the bonds, securing the same to the Park National Bank. And thereupon, the bank discounted the notes, or procured the same to be discounted. That the bank had full knowledge when it received the bonds of all the conditions under which the bonds could be pledged, and had full knowledge that they were pledged for the payment of the eight notes.

That none of the notes were paid at their maturity by Alexander or by Woodruff & Williams or by the said W. J. Hayes & Sons. That they were held by innocent and *bona fide* holders for value. That the holders of the same were about to proceed to sell the bonds in order to satisfy the amount due them, and that thereupon it purchased said notes from the holders and

paid therefor the sum of $80,186,67, and that it is now the legal holder and owner of the notes. And that said eight notes constitute the only sum for which said bonds are pledged, and that, as such owner of the notes, it is entitled to the bonds, and that it may now terminate the trust of the bank and may have the full enjoyment of the bonds.

It further sets up that Alexander has wilfully failed to comply with his contract entered into with it, and that it was compelled to, and has entered upon the work of constructing and completing said railway; that the time for the completion of the same has been extended by the Mississippi Valley Transit Company, and that it has bound itself to complete said road, and that it is necessary that it should have the five hundred bonds to raise money to carry forward the work; and it prays for the bonds.

The facts set forth are so fully shown in the pleadings that any further statement of the same will not at this time be necessary further than to say that the Mississippi Valley Transit Company and Inter-Urban Construction Company are composed largely of the same persons. The former company is organized under the laws of the state of Illinois, and the latter under the laws of Missouri.

The first contract was entered into on August 22, 1900, between the construction company, as I shall hereafter denominate the Inter-Urban Construction Company, and the transit company, as I shall hereafter denominate the Mississippi Valley Transit Company, to construct the road referred to in the pleadings. It is not necessary to state in detail the provisions of this contract. It was for a consideration of $365,000, and that was the compensation for building complete, ready for operation, the railroad commencing at a point in East St. Louis to Edwardsville; and, upon the completion of the railway from a point where said railroad connects with a line of road of the East St. Louis Electric Railroad to the northern limits of Collinsville and along the route of survey of the party of the transit company, $168,000 in cash was to be paid; when the road between Collinsville and Edwardsville was completed, $168,000 more was to be paid.

This contract contemplated and provides that that part of the road between East St. Louis and Collinsville is to be first completed. The contract provides that these bonds to the number of 500 of $1,000 each, were to be deposited by the transit company with some trust company in the United States with such agreements and instructions as may be agreed upon, and such agreements and instructions should become a part of the contract.

The road was to be completed by January 1, 1901. The construction company proceeded with the work, but had not completed any part of the road by the time limited in the contract. There was no clause of forfeiture in the contract if the same was not completed by the designated time; and no cancellation or forfeiture of the contract was made; but this contract was thereafter recognized as existing and continuing when on February 1st, 1901, the construction company entered into the contract with Alexander, and the transit company with Woodruff & Williams, and these contracts were specifically approved by each of the companies.

On February 1, 1901, the construction company entered into the contract with Walter Alexander. *This* contract makes reference to the contract between the two companies in such manner that the company making the contract with Alexander and the other approving the same, must have understood that the contract between them was still in force. Alexander agreed in his contract to take up the work of construction of the railway in accordance with the provision of the contract so entered into between these two companies. Alexander's contract provided:

"Said party of the second part agrees to enter upon said work immediately and complete the construction of said road in accordance with said contract as fast as work can be prosecuted. All the work of construction of said railway is to be completed not later than June 1, 1901, unless prevented by strikes or excessively bad weather and unless on account of delays caused in the change of said machinery and over-head construction, and, should any delay occur on said account, the time for the completion of said work shall be extended not less than a period of time equal to the delay thus caused. In the event of a change in said machinery or over-head construction, such change shall be made within fifteen days from February 8, 1901."

The contract provided that the work done and contracts entered into for the same should be subject to the approval of the engineer and superintendent of the transit company; that is the contract between the two companies; and, under the Alexander contract, it was to be in accordance with the contract between these two companies, and the time was to be modified as set forth above.

Alexander's contract provided further that he was to save the transit company harmless from liens; that he was to pay all bills at the end of each month. But the contract makes no provision for its cancellation in case Alexander fails to comply with these provisions.

Alexander was to furnish all the funds and, to enable him so to do and to complete the work, he was to have the entire issue of the five hundred bonds, and he was to have 15% on the cost of the road as his compensation, and, when the work was completed, the company was to give him a note due in six months at 6% interest for the cost of construction, plus 15%, which note was to be secured by the entire issue of the five hundred bonds.

Strictly construing this contract, it would seem that it was not intended that he should have these bonds until the note just referred to was given to him. Yet the companies both knew that he had not the means to complete the road and that he could not procure them without these bonds and that the bonds would be of but little benefit to him unless he had power to pledge the same. The contract, therefore, provided:

"Said bonds are to be pledged as security for funds and for labor and material in the work under this contract to the said party of the second part or to any person whom he may designate, until said road is completed and accepted by the Mississippi Valley Transit Company, at which time the note of the party of the first part (Inter-Urban Company) to the party of the second part will be executed and delivered; the amount of said note to be the cost of said construction, plus 15% compensation to the party of the second part hereinbefore mentioned. In the event that said Alexander shall fail to pay all sums contracted for by him for funds to pay for labor and material for said work, the Inter-Urban Construction Company have the

right to pay such sum or sums and redeem said bonds from any pledge of same he may have made hereunder."

And the contract provided that the bonds could only be pledged in their entirety.

The persons who became interested in this contract in the way of carrying it out, or by being parties to it, were Sebastian, who was then the vice-president of the construction company; W. N. Warnick, a vice-president of the transit company; Alexander, and Williams of Woodruff & Williams, and Harry E. Hayes. The contract was modified before signed, at the suggestion of Hayes, but it is unnecessary here to notice the changes that were made, in the view that we take of this case; and, after such change was made, the contract was signed and was thereafter formally approved by resolution of the board of directors of the transit company. At the same time, February 2, 1901, the transit company executed and delivered to Hayes and Alexander a paper as follows:

"ST. LOUIS, February 2, 1901.

"We certify and guarantee that all franchises anl rights-of-way have been secured from East St. Louis, Illinois, to Edwardsville by way of Collinsville, except the following, to which the company has not yet secured the right-of-way," and the list attached includes Matthews' property, Wm. Craig's property and Louis Craig's property, but does not include the Bowman property. "We guarantee said rights-of-way will be secured at once and shall not cause delay in the construction of said railway. Some of the railway crossings have not been entirely secured, but are in the condition set forth in the opinion of W. M. Warnock in the possession of Hayes & Company.

"(Signed) C. F. BLANCKE, *President*,
"J. F. CONRAD, *Secretary*."

At the same time that the contract between the construction company and Alexander was signed, the transit company entered into a contract with Woodruff & Williams, which contract provides:

"The parties of the second part (Woodruff & Williams) agree to procure a loan of $300,000 for the party of the first part by a date not later than 30 days prior to the maturity of a certain note this day agreed to be executed by the Inter-Urban

Construction Company to one Walter Alexander; said loan to be procured upon the note of the party of the first part at one year, six per cent. interest, and to be secured by the entire issue of bonds for the party of the first part."

That contract provided that Woodruff & Williams were to have an option on all the five hundred bonds, at the rate of eighty-five cents on the dollar, for a period of fourteen months from the completion of the road.

2d. They were to have $100,000 of the stock of the transit company.

3d. They were to be paid $12,500 in cash.

4th. If Woodruff & Williams took or sold the bonds at 85 cents on the dollar, they were to have the additional sum of $12,500 cash to be deducted from the price of said bonds.

5th. If, before Woodruff & Williams sold the bonds, the Transit Company desired to do so, they had the privilege of cancelling the contract upon the payment to Woodruff & Williams of $37,500.

That contract was to be null and void if Woodruff & Williams failed to procure the loan of $300,000. Upon that contract, the construction company endorsed this language:

"The Inter-Urban Construction Company, acting by the authority of its board of directors, hereby gives its assent to the above and foregoing agreement.

"(Signed) Inter-Urban Construction Co.
"By H. W. SEBASTIAN, *Vice-President*,
"ALBERT G. BLANCKE, *Secretary*."

About this time, or just subsequent, Sebastian resigned as vice-president of the construction company, and became the superintendent of the transit company, and, thereafter, acted in behalf of both companies in the carrying out of the Alexander contract.

Under these contracts Williams might have negotiated the $300,000 loan from parties entirely outside of any of those named in this action and, with the money obtained on such loan, he could have pledged the five hundred bonds and, with the proceeds, have taken up the eight notes on which the bonds were pledged to the Cleveland bank; but, instead of doing this, he

acted in conjunction with Alexander and took part with Alexander in the negotiations with Hayes with a view to procuring the funds necessary to construct the road. In their negotiations just prior to the pledging of the bonds, they undertook to follow out the arrangement of the two companies, as expressed in their contracts, to first construct and put into operation that part of the road between East St. Louis and Collinsville, and then to proceed to construct the road between Collinsville and Edwardsville. The purpose of this arrangement was to give the bonds more value and a more ready market, as, after the completion of a part of the road they could certainly be better used to obtain the money for the other part.

The money necessary to complete the road from East St. Louis to Collinsville was estimated by all the parties concerned, at about $66,000 or $67,000. A part of the work on this division had already been done before Alexander undertook the work. Having this plan agreed upon as between Williams, Alexander and Hayes, it was arranged that they would proceed to obtain sufficient money to construct the first division. Thereupon Williams agreed with Hayes that if he would endorse the notes of Woodruff & Williams and Alexander for $80,000, they would pay Hayes 5% on $80,000, being a part of the 15% going to Alexander upon the completion of his contract. That proposition or contract, whichever it may be, is found in a letter signed by Woodruff & Williams and Walter Alexander, and addressed to W. J. Hayes & Sons, bankers in the city of Cleveland, and is as follows:

"*Gentlemen:* In consideration of your communication of this date, relating to the guaranty for the sum of eighty thousand ($80,000) dollars for us for the purpose of procuring funds to pay for labor and material to complete the line of the railroad of the Mississippi Valley Transit Co. between East St. Louis and Collinsville in the state of Illinois, and in consideration for said guaranty to be hereafter executed, we hereby agree to guaranty to your firm a sum equal to five per cent. (5%) of the amount so to be guaranteed; payment to be made pro rata as the same is procured on said guarantee.

"In witness whereof we have subscribed our names this the day and year first above written."

What the communication of W. J. Hayes & Sons was, that called forth this letter or proposition, does not appear in the evidence; and, whether this was in answer to a proposition, or merely a proposition in answer to an inquiry, does not clearly appear. The parties, however, thereafter treated it as the contract between them as to the $80,000 borrowed on the eight notes of $10,000 each of the bank and for which the bonds were pledged as collateral.

Williams first attempted to raise the money himself and after being unsuccessful, Hayes undertook to raise the money and it is claimed that his efforts in raising the money was something *outside* of the contract, as this contract or arrangement related only to the guaranty of the paper on which the $80,000 should be raised and, in consideration of Hayes undertaking to do more than this arrangement called for, another paper dated the same day, February 19th, was executed, which communication was directed to H. E. Hayes individually, and that communication reads as follows:

"*Sir*: In consideration of your communication of this date, relating to the guaranty for the sum of $80,000 for us for the purpose of procuring funds to pay for labor and material to complete the line of railroad of the Mississippi Valley Transit Company between East St. Louis and Collinsville in the State of Illinois, and in consideration of said guaranty to be hereinafter executed, we hereby agree to pay you a sum equal to two and one-half per cent (2½%) of the amount so to be guaranteed; payment to be made *pro rata* as the same is secured on said guaranty. We also agree to pay you a further sum of seven and one-half per cent. (7½%) on all sums above $80,000 on which we receive 15% provided for in a certain contract between the Inter-Urban Construction Company of St. Louis, Missouri, and Walter Alexander, bearing date of February 2, 1901.

"For a less sum than 15% on sums over $80,000 commission to be reduced proportionately.

"In witness whereof we have subscribed our names this day and year first above written."

What called for *this* communication, we do not know. It may have been the accepting of a proposition made by Harry E. Hayes, or it may have been in answer to an inquiry on the part

of Harry E. Hays as to what Woodruff & Williams and Walter Alexander would do if Hayes guaranteed more than the $80,000.

There is no evidence in the case that Hayes accepted this proposition, or ever assented to the same, except as he did go forward and furnish the $80,000 and beyond that he did guaranty the payment of $25,000 for the steel rails. But we find nothing in this to warrant us in saying that this proposition was made, or that it was an acceptance of a proposition made by Harry E. Hayes for a consideration to be paid to Hayes for himself procuring money. On the contrary, the terms are plain that it was simply for a guaranty.

At the same time, though dated February 20, 1901, Woodruff & Williams sent to H. E. Hayes the following communication:

"*Dear Sir*: In consideration of your co-operation with us in the matter of placing a loan of $300,000 on the bonds of the Mississippi Valley Transit Company, as provided in a certain contract between Woodruff & Williams and the Mississippi Valley Transit Company, dated February 1st, 1901, a copy of which contract is hereto attached, we propose as follows:

"After deducting the sum of $10,000 to re-imburse us for previous expenditures in connection with the transactions with the Mississippi Valley Transit Company which have culminated in the contract above-mentioned, we will share equally in the net commission providing for compensation for placing of said loan of $300,000 and share equally in the net profits that may accrue from the sale of the bonds described in said contract."

It does not appear from the evidence whether this was a mere proposition on the part of Woodruff & Williams to H. E. Hayes, or whether it was an acceptance of a proposition made by Hayes to them, nor does it appear, if it was a proposition, that it was ever accepted and acted upon by H. E. Hayes. There is no evidence that Hayes ever did anything in the matter of placing a loan of $300,000 on these bonds or ever agreed to do anything except that Williams was operating in conjunction with Alexander to aid Alexander in raising the money for the construction of the road, and did, while so operating, aid in securing for Alexander the $80,000 referred to. The evidence does not show that the $80,000 was ever to be, or was considered, a part of this $300,000 to be raised by Woodruff & Williams only as they co-

operated with Alexander in raising the $80,000 and, as the evidence reveals Woodruff & Williams were, on terms agreed upon between them and Alexander, undertaking to help Alexander to raise the money necessary for the construction of the road, and joined him in these communications pertaining to the $80,000 and additional money to be raised in his communication to Hayes. But this does not establish conclusively in this case that the $80,000 was to be regarded as a part of the $300,000. $68,000 might have been raised under the Alexander contract and enough more raised to complete the road by the benefit of the Hayes' guaranty; and yet, after that was done, Woodruff & Williams, through the aid of Hayes, might have raised the $300,000 and with it taken up all the money raised for the construction of the road and pledged the bonds for the same.

The $80,000 was raised in the same manner as set forth in the pleadings in the case, and the 500 bonds of the Transit Company pledged as collateral.

Hayes, in procuring the $80,000, did more than simply to guarantee the paper. He saw the Park National Bank and helped to negotiate the loan.

The plan arranged between these three parties was to use this money, or so much of it as was realized over and above commissions to the Bank as Trustee, and to Hayes, upon the first division of the road. And there was realized out of the $80,000 approximately $71,000, which was in excess of the amount estimated necessary to complete the first division.

March 4th, 1901, Sebastian, who was acting as we find, for the construction company and the transit company, appeared in Cleveland with the bonds which he was to either pledge for the money raised or to turn over to Alexander and have Alexander pledge the same; and Sebastian delivered to Hayes these 500 bonds and took from Hayes a receipt which had been prepared by the president of the Construction Company prior to Sebastian's departure from St. Louis for Cleveland. Much stress is laid upon this receipt but the point raised as to the same is a matter of no concern in the consideration we give this case.

It is claimed, however, that Hayes by signing the receipt, consented that all the money raised on the pledge of the bonds as

collateral, should be used in the payment of labor and for materials, and that no part of it could be used for the payment of commissions either to Alexander, Williams or Hayes. But as to the commissions that were taken out of this $80,000 we have nothing to do, in the view we take of this case—of which I shall speak more at length hereafter.

Upon this receipt being signed, the bonds were turned over to Hayes and Williams and they carried them to the Park National Bank and it received then under the trust agreement attached to the eight notes for $10,000 each, and thereupon opened an account in the name of Walter Alexander, trustee, crediting him with the proceeds of the discounts of the notes, $80,000 less 7 per cent. interest and $1,000 *bonus*—this *bonus* going to the bank for acting as trustee in making the loan and holding the bonds—making the net credit then entered to Walter Alexander's account $77,070.67, and the bank gave him a pass-book in which this credit was entered, and thereupon Hayes and Williams returned to where they had left Sebastian and told him what had been done and showed him the credit entered in the bank book. On the same day Walter Alexander drew his checks: one for $4,000, being 5% of $80,000, and one for $2,000, being 2½% on $80,000—making a total of 7½% on $80,000, to the credit of Hayes, and these checks were paid.

And it was there arranged and agreed that checks of Walter Alexander on this fund should be drawn by him, signed "Walter Alexander, Trustee," counter-signed by W. J. Hayes & Sons and Sherwin, in order that the purpose for which the fund was to be devoted, to-wit, the construction of the line between East St. Louis and Collinsville, should be carried out and that no part of the pledge should be otherwise used.

This arrangement was made between Hayes, Williams and Alexander. It does not appear from the evidence that Sebastion, when he was in Cleveland on March 4th, knew of this arrangement. As he was told all else that was done on that occasion, it is most likely that this arrangement was then communicated to him. The Park National Bank and Hayes would hardly enter into an arrangement of that kind unless it was agreeable to the companies at St. Louis, which were represented by Sebas-

tian. The evidence, we think, shows that this arrangement was, at least later, communicated to and acquiesced in, by Sebastian as well as other officers of both companies, and that the proceeds of the $80,000 used in the construction of the road was used with the acquiescence of the companies at St. Louis in the arrangement made that the money should be used on the first division. To carry out this arrangement, certain requisitions were to be made, all of which were thereafter made in the same form, which amounted to an order from Walter Alexander to the Park National Bank and W. J. Hayes & Sons directing them to pay H. W. Sebastian a certain sum of money named to be used to pay for labor and material to be used in the completion of that section of the electric road of the transit company between East St. Louis and Collinsville in the state of Illinois, and not otherwise.

These orders or requisitions were signed by Alexander, and counter-signed by Williams, and upon the one in evidence—and the evidence shows they are all alike—H. W. Sebastian endorsed the following:

"This certifies that the sum of $10,000 mentioned in the above requisitions will be used to pay for labor and material in the completion of that section of the electric road of the Mississippi Valley Transit Company between East St. Louis and Collinsville, and not otherwise."

A similar requisition, signed by Sebastian and Walter Alexander, is attached to a certain contract for purchasing the iron for the road between East St. Louis and Collinsville. And, in our judgment, the evidence is conclusive that these companies both knew of the arrangement to have the money raised and here in Cleveland applied on the first division of the road, and that they had fully consented that the same be thus applied.

Some question arose as to where the $15,000 should be used, and Hayes communicated with Sebastian and insisted that it be applied on the first division and Sebastian acquiesced in the request of Hayes, evidently recognizing the fact that that arrangement was assented to by his companies. During the time that work was progressing on this first division, on the 29th day of April, 1901, Hayes wrote to Sebastian that he and Alexander might proceed to make a contract for steel and other materials to

complete the road to Edwardsville, and wrote to him to refer the contract to him of "to us for guaranty and approval."

Thereupon Sebastian and Alexander proceeded to contract for 700 tons of iron with the Pennsylvania Steel Company, which contract was dated May 11th, 1901, and it provided that it should be guaranteed by Hayes on May 20th after the execution by Alexander of the notes guaranteeing Hayes against loss to the amount of the contract and evidencing his commission.

These two notes, thus issued to Hayes at the time of the making of that contract, are the ones set up in the original petition.

And for the rest of the material needed on the second division of the road, Sebastian, at least in part, contracted and did not ask Hayes to guarantee *these* contracts but guaranteed them himself, and he says that he did not deem it necessary under their arrangement to send these contracts to Hayes. But, upon reading Sebastian's evidence, we are at a loss to know *why* he should take upon himself financial responsibilities which he had a right to have assumed by Hayes. However, this matter is not very material except as we think it relates to what took place thereafter.

To pay for these materials contracted for and which, under the arrangement made, should have been sent to Hayes for his guaranty but which were guaranteed by Sebastian, moneys sent out to St. Louis to be used for the payment of labor and material on the first division were by Sebastian applied without the consent of Alexander, Hayes or Williams to the payment of claims arising entirely upon the second division. And here much of the trouble between these parties commenced. From this time forward Sebastian claimed that he had a right to direct the use of the moneys sent there out of the $80,000, to any part of the entire road, and claimed that he had never consented to any other arrangement.

This grew out of circumstances which, it seems to us, made it almost imperative upon Mr. Sebastian that he should change his base somewhat in regard to this matter. The company was about to lose certain franchises on that part of the road between Collinsville and Edwardsville. Evidently, having no money of its own with which to secure these franchises, it used the money sent there from Cleveland under this arrangement between Alex-

ander, Williams and Hayes and acquiesced in by Sebastian, if not agreed to. This, under the arrangement, the St. Louis companies had no right to do. It was at least an act of bad faith of such a nature that their previous conduct would have estopped them from doing it; and we feel warranted in saying that, under all the circumstances, it was a violation of what would amount to an implied contract obligation.

Immediately following this transaction, Sebastian commenced to find fault with Alexander; that he was not meeting his obligations as he was obliged to do under his contract, and that certain liens were about to be filed upon the road and that he was violating his contract in not having the road completed and that he was not furnishing money. Thereupon he called together his company and had Alexander's contract forfeited, and this, too, while a portion of the right-of-way between East St. Louis and Collinsville had not yet been procured by the transit company. He called for Alexander to produce some $7,000 and, because it was not produced on exceedingly short notice, this action was taken of forfeiting his contract.

Just prior to this forfeiture of Alexander's contract, the officers of the transit company were approached by parties who desired to buy the entire right and interest of the transit company in the road; and this matter was being somewhat considered at this very time, if not by the company itself, yet by certain individuals who were anxious to bring about a transfer of the road to another company; and we have no doubt from this entire evidence, that this was the beginning or, perhaps, the second step in the action of Sebastian in undertaking to transfer the funds intended for the first division to secure franchises on the second division; and this was followed up by the cancellation of the contract, no doubt, in view of accomplishing a transfer of the road.

We believe from the evidence, and so find, that Alexander was hindered and delayed in the carrying out of his contract by the failure of the company to obtain franchises and right-of-way over certain parts of the road in and near East St. Louis. Had these been obtained, as contemplated by the contract with Alexander and as Alexander was led to believe they would have been obtained, then it would have been much easier to obtain loans

One uncertainty in regard to the investment of funds in the road would have been done away with; and, if the right-of-way had been obtained, unquestionably Alexander would have had his road in operation between East St. Louis and Collinsville substantially as contemplated by the contract.

But a determination of the legal rights of Hayes in this action centers within a very few of the facts that we find to exist in this case, although they *all* bear somewhat upon the arrangement he had. His rights are to be determined by considering what arrangements and contracts were entered into between him and Woodruff & Williams and Walter Alexander. As has already been said, the communication of Woodruff & Williams and Walter Alexander on February 19, 1901, to W. J. Hayes & Sons, and also the one of the same date to H. E. Hayes, form the basis of any claim that the plaintiff has in this case. As has already been said herein, the court is unable to say whether these propositions form the basis of a contract or not; the second and third, in the order in which they have been taken, may amount to nothing more than propositions never accepted by Hayes. It nowhere appears in this case that they do amount to contracts. And, under such state of facts, we are inclined to take no stronger ground upon these communications than is taken by the counsel for plaintiff. Counsel say:

"Properly construed, these contracts obligated Hayes to guarantee $80,000 and aid Woodruff & Williams in procuring that sum. That the contracts did not obligate Hayes to furnish *all* the money necessary to complete the entire road, notwithstanding which we contend that Hayes was in position, actually stood ready, and was able and willing to procure the necessary funds to complete the road in its entirety along the lines and on the plan which all the parties at all time had in contemplation."

It is a little indefinite just what counsel means by saying that "Hayes was not obligated to furnish *all* the money necessary to complete the entire road." I suppose that claim is based upon the second communication, of February 19th, wherein it is said: "On all sums above $80,000 on which we receive 15 per cent.," etc., contemplating that he *might* furnish any amount above the $80,000 as may be claimed, or that he might guarantee, whatever

amount it might be, whether the whole or a part of the amount needed to complete the road, he should receive the commissions of one-half of the 15 per cent. on the amount guaranteed.

In another place in the brief of counsel for plaintiff it is said:

"The two contracts of February 19th and the one of February 20th with W. J. Hayes & Sons and Harry E. Hayes, construed together, as we have indicated in the foregoing statement, obligated Hayes simply to guarantee $80,000. This was his entire obligation and, having performed this obligation, he thereby became entitled to 7½% of any compensation or damages that Alexander would be entitled to receive, one-half of whatever Woodruff & Williams were entitled to receive after deducting $10,000. The agreement by Hayes to guarantee the $80,000 which he subsequently did, furnished the consideration for all that was provided in the contract for him to receive. The contract provided that for this guarantee, he was to receive 7½% on the $80,000, and also 7½% on all sums above $80,000. And it is quite unnecessary that he should have parted with any other consideration than the guarantee of the $80,000 in order to be entitled to receive therefor, to-wit, two things: 1st. 7½% on $80,000, and, 2d. 7½% on all sums above $80,000 going to Alexander. The only consideration for guaranteeing the $80,000, which he did, was sufficient consideration to support the entire contract."

We can not agree with *this* claim. If it is true that Hayes had no obligation except to guarantee the $80,000, then by contract relation made by these communications, he had no other obligation. And it is not claimed that there is any other contract or any other arrangement.

If he had refused to furnish or guarantee *after* the $80,000, none of the parties in this action could have had any claim against him for breach of contract. If Alexander and Williams had gone to other parties and raised the money necessary to complete the road, above $80,000, and he had got his commissions as he did on the $80,000, he would have had no claim against them for any breach of contract. If there was no contract beyond the $80,000, then merely guaranteeing the steel contract would not be under the contracts in contemplation, and if that was an acceptance on behalf of Hayes of the proposition of Alexander and the proposition of Woodruff & Williams to furnish money beyond the $80,000, it could not be construed into an

acceptance of any amount beyond the steel contract, and this seems to be the construction put upon the contract by the attorneys of plaintiff, for they say that these communications place no obligations upon Hayes beyond the $80,000; that he was under no obligations to contribute the entire sum, even if he contributed $5,000 or any other partial amount. We agree with this claim. And hence if he did guarantee the steel contract, he was obligated no further than that. Being obligated no further, he could get no commissions beyond that from Alexander and Williams. Not being entitled to any commissions beyond that from Alexander and Williams, he would not be entitled to recover from the defendants in this action. But as to the steel contract, that was canceled with his approval. His approval would be a waiver of any commissions he was entitled to. He can never be liable upon that guaranty to any one and, having allowed it to be canceled with his consent, he has waived any commissions that he would be entitled to on account of that guaranty.

In our minds, the case then stands this way: For the $80,000 Hayes got his commissions. For the $25,000 steel contract guaranteed by him, he is entitled to no commissions. Further than that, he has never accepted any contract; simply being ready and willing to accept, we think would not entitle him to commissions or damages, although prevented from so doing by the circumvention of the St. Louis companies, as long as he had not indicated to either Williams or Alexander or to the construction company or to the transit company his readiness and willingness to furnish additional moneys for the completion of this road. Had he communicated to Sebastian at the time he wrote to him to go ahead and make contract for the second division of the road, that he was now under an arrangement with Alexander and Williams going on to guarantee all contracts necessary for a full completion of the road, so that he would have known when he forfeited Alexander's contract, of Hayes' full connection with the Alexander contract, then the proposition quoted from the brief might be good law. But Sebastian had no notice—could have had none—of Hayes' intention to guarantee additional amounts beyond what he had guaranteed,

for no such arrangement existed. He had never accepted these propositions of February 19th and 20th beyond the $80,000 and beyond the guaranteeing of the steel contract. And if he had any intention to do anything more, he had never communicated it to any one; and, as to any additional amount, the contracts could never take effect until he had done something by way of complying with the terms, and even then the contract, according to his own construction, would be accepted by him only so far as what he then did.

It is the opinion of the court that the plaintiff had no contract arrangement with Alexander and Williams that would place the construction company and the transit company under any obligations to consider *his* relation to the road in cancelling Alexander's contract.

The most favorable light in which the plaintiff can be placed in this case, in our judgment, is, that he has no claim for any commissions on the $80,000. He has already received his commissions for that amount. Hence it is not necessary for him to retain the bonds as security for those commissions.

As to the guaranty he made for the steel rails—he has no claim; he assented to the cancellation of that contract; he is no longer bound by the same.

As to any further commissions, he has no contract relations for any. He did nothing that would imply an obligation to pay; and hence he has no right to have the bonds retained in the hands of the bank, as he has no claim and can have none in this case under the testimony and the law, which will entitle him to have the bank hold them as collateral for him.

Wherefore his petition is dismissed at his cost.

WHEN TRANSCRIPT MUST BE FILED ON APPEAL FROM PROBATE COURT.

Circuit Court of Cuyahoga County.

ANNIE J. M. ROBINSON, EXECUTRIX OF THE ESTATE OF WM. ROBINSON, v. BERTINE ROBINSON PALMER.

Decided, June, 1902.

Appeal from Probate Court—Time Within Which Transcript Must be Filed.

Under the provisions of Section 6409, Revised Statutes, where an appeal is taken from the decision of a probate judge, the transcript of the docket or journal entries and of the order, decree or decision appealed from, must be filed with the clerk of the common pleas court on or before the second day of the term of that court next after the undertaking or notice of appeal is given, and not of the term of court next after the expiration of twenty days allowed for perfecting the appeal.

W. C. Rogers, for plaintiff in error.
A. W. Mayers and *B. Pearce,* contra.

MARVIN, J.; CALDWELL, J., and HALE, J., concur.

This is a proceeding in error to the court of common pleas of this county. The plaintiff in error, as executrix, filed her final account in the probate court of this county on the 15th day of October, 1901. On the first day of November following, the defendant in error, who was interested in the estate, being a daughter of the testator, filed exceptions to such account. On the 21st of December following the court passed upon such exceptions, gave notice upon the account, and on the same day the executrix gave notice of appeal to the court of common pleas. On the 28th day of December, 1901, said executrix filed her bond for the appeal. The transcript from the probate court is dated on the 6th day of January, 1902, and was filed in the appellate court on the 10th day of January, 1902.

The January term of the court of common pleas for 1902 opened on the 6th day of January, 1902. It will be observed that

this is the same day as the date of the transcript from the probate court. The appeal was dismissed by the court of common pleas for want of jurisdiction, the court holding that the transcript from the probate court was not filed within the time provided by law. This proceeding is prosecuted to reverse such order of dismissal.

Section 6408 of the Revised Statutes, which provides for appeals from the probate court to the court of common pleas, is as follows:

"The person desiring to take an appeal * * * shall, within twenty days after making of the order, decision, or decree from which he desires to appeal, give written undertaking," etc.

Section 6409 provides that:

"The probate judge shall, upon the giving of the undertaking, or notice, as aforesaid, make out an authenticated transcript of the docket or journal entries, and of the order, decision or decree appealed from, which shall be filed with the clerk of the court of common pleas on or before the second day of the term of said court next after an undertaking or notice is given."

It will be observed in this case that the transcript was not filed until the 5th day of the term of the court of common pleas beginning next after the giving of the appeal bond. But it is said on the part of the plaintiff in error that, since she had, under the statute, twenty days from the time of the decision of the court in which to file her bond, what must be meant by the language found in Section 6409, "on or before the second day of the term of said court, next after an undertaking or notice is given," is, that such transcript must be filed on or before the second day of the term of the court of common pleas *next after* the expiration of the twenty days allowed for the giving of the bond for such appeal.

Plaintiff in error urges that the language of a statute does not necessarily control its construction, but that the real intention of the Legislature must be arrived at, even though to arrive at such intention the statute be not literally construed; and numerous authorities are cited in support of this proposition, and

such is, without doubt, the law. This rule is well expressed by Blackstone in the first volume of his Commentaries, at marginal page 59, in which he says:

"The fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject-matter, the effect and consequence of the spirit and reason of the law. * * * Words are generally to be understood to be in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use. * * * If words happen to be still dubious, we may establish their meaning from the context, with which it may be of singular use to compare a word or a sentence whenever they are ambiguous, equivocal, or intricate. * * * As to the subject-matter, words are always to be understood as having a regard thereto. * * * As to the effects and consequence, the rule is, that where there are words bearing either none, or a very absurd signification, if literally understood, we must, a little, deviate from the received sense of them. * * * But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it, or the cause which moved the Legislature to enact it."

It is urged, here, that to give the words of the statute requiring the transcript to be filed as early as the second day of the next term of the court of common pleas, when twenty days are allowed for the giving of the undertaking, is likely to result in absurd consequences.

To quote from the brief of the plaintiff in error:

"Certainly it would seem to be absurd and not contemplated by the Legislature, that a probate court may make a decision on a Saturday afternoon and because the party is prompt in filing a bond the same day that he should be required at his peril to file a transcript on the following Tuesday when he is unable to get the transcript from the probate court."

And in support of this claim we are cited to the case of *Lower* v. *Fischer,* 19 C. C., 627, a case decided by this court. There the statute considered, Section 6588, Revised Statutes, provides in express terms, that in an appeal from a judgment

of a justice of the peace to the court of common pleas the appellant may have thirty days from the rendition of the judgment in which to file his transcript and other papers with the clerk of said last named court; and it further provides that in case the appellant shall not file such transcript and papers within the time prescribed, the appellee may, at the term of said court *next after* the expiration of said thirty days, file a transcript. It will be seen that this statute is wholly different from the one under consideration in the present case and, in our judgment, the case last cited has no bearing upon the case at bar.

Our attention is called also to the case entitled *In re Talon's Application*, 25 W. N. C., 554. This was decided by the court of Quarter Sessions of Beaver County, Pennsylvania, and was upon the construction of a statute passed on the 14th day of February, 1889, relating to the election of constables. The language to be construed reads:

"That the qualified voters of every borough and township * * * in the commonwealth of Pennsylvania, shall on the third Tuesday of February next * * * vote for and elect a properly qualified person for constable in each of said districts, who shall serve three years."

From the report of the case it appears that the third Tuesday of February, 1889, was the 19th day of February, and the question was, whether an election for constable, under this statute, was to held on *that* 19th day of February, which was the *next* third Tuesday of February after the passage of the act. The question was, then, whether under the act an election for constable was to be held on the third Tuesday of the next February after the passage of the act, or on the *next third Tuesday* of February after the passage of the act. The court held that the intention of the Legislature was that the election should be held on the third Tuesday of the next February after the passage of the act, and uses this language in the opinion:

"With all deference to the views of those who hold different opinions, I think that the natural and obvious meaning of the words, 'third Tuesday of February next,' is the same as that conveyed by the expression, *third Tuesday of next February.* This is the view that would be taken by almost any intelligent

layman at once and I am pursuaded is the view that almost any lawyer would adopt if he confined himself to the plain popular meaning of the words before him."

In the same opinion *this* language is used:

"Statutes are to be read according to the natural and obvious import of their language. If the courts should give to phrases new, unusual force or strained interpretations; if they could insert a word here, or strike out a word there, all idea of conforming to the legislative intent would be lost."

In *City of Pittsburgh* v. *Kalchataler,* 114 Pa., 547, quoted in the opinion last named, this language is used:

"We think it always unsafe to depart from the plain and literal meaning of the words contained in legislative enactments, out of some supposed intent."

The case of *State* v. *Sasse,* 72 Wis., 3, cited in the brief of counsel for plaintiff in error, required a construction of Section 4680, Revised Statutes, of the state of Wisconsin. In that case the statute was so worded as that it might, without doing violence to the language used, be construed in two different ways, and so was unlike the statute being considered in this case. In *this* case there is nothing ambiguous in the words of the statute. The provision distinctly is, that the transcript shall be filed on or before the second day of the term of said court next after an undertaking or notice is given.

We fail to see that literal construction of these words can result in any absurdity.

Twenty days are allowed for the filing of the bond for appeal. The appellant may take all or such part of this time as he may desire in which to file such bond. In the present case the appellant chose to file the bond at the end of seven days from the making of the order by the probate court, and so made it necessary, if the statute was to be complied with, to file the transcript within a week thereafter. Had she chosen to do so, she might have waited until the opening of the January term before filing her bond and then she would have had until the second day of the next term after that in which to file her transcript.

To make this section mean what is claimed for it on the part of the plaintiff in error would require the introduction of words entirely changing the plain and clear language of the statute as it is. We see no reason for making such change. The language of the statute is not ambiguous. We find nothing in the context, the subject-matter, the effects and consequence, or the reason and spirit, of the statute, to require a construction other than such as is in accord with the clear and plain reading of the section, and we affirm the judgment of the court of common pleas. Since the foregoing opinion was prepared we find the same question decided the same way by the circuit court of the seventh circuit; opinion by Judge Cook, 47 Bulletin, 389.

AS TO AVOIDANCE OF JUDGMENT FOR LACK OF SERVICE OF SUMMONS.

Circuit Court of Cuyahoga County.

O. C. LAWRENCE v. LOUIS FOYER ET AL.

Decided, March 23, 1901.

Judgments—To Set Aside Judgment for Want of Service Evidence Must be Conclusive.

Where the defendant in an action seeks to avoid a judgment taken before a justice of the peace against him, in all respects regular as shown by the record, for the reason that no service of summons was served upon him, it must conclusively appear that no service was made.

Robert A. Castner, for plaintiff in error.
W. C. Rogers, contra.

HALE, J.; CALDWELL, J., and MARVIN, J., concur.

This case comes into this court on appeal. Lawrence prosecuted his action in the court of common pleas to obtain the cancellation of a judgment rendered against him in favor of the defendant before a justice of the peace on the alleged ground

that no service of summons was served upon him in the action in the justice's court.

The constable certified in his return on the summons that he served the same by leaving a copy at the usual place of residence of the defendant named in the summons.

On the trial the plaintiff, to establish his contention, called all persons residing in his family at the time of the alleged service of summons, and each testified that no copy of a summons was left him and that he had no knowledge that any such paper was left at the house.

The defendant, in support of his contention, called the constable, who testified that he made service as certified in the return, specifying the person with whom the summons was left.

A similar issue was determined by this court in *Schubert* v. *Wrackel* at a former term, in which we held that where the defendant in an action seeks to avoid a judgment taken before a justice of the peace against him, in all respects regular as shown by the record, for the reason that no service of summons was served upon him, it must conclusively appear that no service was made.

The evidence in that case was in all respects like the evidence produced in this action. We there held that the evidence offered was not sufficient to bring the case within the rule authorizing the setting aside of the judgment. That case was reviewed and affirmed by the Supreme Court.

Following that case, and, under the evidence, we feel compelled to dismiss the plaintiff's petition.

DEFECT OF PARTIES CAN NOT BE DETERMINED BY EXAMINATION OF BOND ATTACHED TO PETITION.

Circuit Court of Cuyahoga County.

THE FIDELITY & DEPOSIT COMPANY v. WALLACE I. KNIGHT, TRUSTEE.

Decided, June 21, 1901.

Pleading—Exhibits Not a Part of Petition.

Exhibits attached to a petition are not a part thereof, and where the petition states a good cause of action, the court can not, upon demurrer, examine a bond attached as an exhibit, to determine whether there is a defect of parties defendant.

C. L. Shaw, for plaintiff in error.
Wm. M. Raynolds, contra.

CALDWELL, J.; HALE, J., and MARVIN, J., concur.

The petition sets out that the plaintiff, Wallace I Knight, trustee for the benefit of the creditors of James M. Erwin, complains of the Fidelity & Deposit Company of Maryland, and, after making allegations as to its being a corporation, says that the plaintiff is the duly qualified and acting trustee for the benefit of the creditors of the said James M. Erwin; says that on or about May 25, 1897, said Erwin filed his deed of assignment in the insolvency court to one James K. Meaher for the use and benefit of his creditors under the insolvency laws of Ohio; that Meaher accepted the trust, and his bond was required in the sum of $2,000, with the defendant company as surety, and that the bond was approved; that Meaher entered upon the discharge of his duties as such assignee; that on or about the 29th of June, 1898, a motion to remove said assignee was filed by one of the creditors, and, thereupon, on the 29th day of July, 1898, said Meaher filed in said court his written resignation as such assignee of said estate, which resignation was accepted and said Meaher was ordered to file his final account within five days, and

said final account was not filed, and this plaintiff was appointed to qualify and serve as trustee for the creditors.

When the final account was filed, exceptions were taken to it; there was a hearing thereon, and the court allowed the exceptions in part and found there was in the hands of said Meaher as such assignee the sum of $331.05 belonging to the estate and he was ordered to turn it over to the plaintiff, and Meaher did not turn the money over, nor any part of the same, nor has the defendant accounted for the same.

Then the petition goes on to recite that the bond of said James K. Meaher, a copy of which bond is attached hereto and marked "Exhibit A," was conditioned: "That the said James K. Meaher will faithfully perform all the duties as such assignee according to law." That he did not pay over the money, to-wit, the sum of $331.05 so found in his hands, and so ordered by said court to be paid to plaintiff.

And this action was brought to recover that amount of money from the bondsmen.

A demurrer was filed to the petition and overruled; that was done on the 18th day of April, 1901. The journal entries show that on May 6, 1901, the case was presented to the court, and this was the action of the court:

"The plaintiff comes and the defendant is in default of answer, whereupon with the assent of the plaintiff, the court takes the account and finds that the defendant does owe the plaintiff as damages, the sum of $349.91. It is therefore considered that said plaintiff recover of said defendant his said damages and also his costs of this suit."

A motion was made by the defendant to set aside the default but that motion has been withdrawn, and the case stands in this court on petition in error to reverse the judgment for overruling the demurrer.

The ground on which it is claimed the court erred is that in looking at the bond, it is discovered that the bond is the joint bond of Meaher and the surety, the Fidelity & Deposit Company, and that Meaher not being made a party to the action, a demurrer to the petition on that ground was well taken and the demurrer should have been sustained instead of being overruled.

It has been decided by the Supreme Court of this state that, in determining the sufficiency of a petition, either as to parties or as to matter alleged, it is not proper for the court to look at an exhibit attached to the petition. Under this rule, we are not permitted to look to the bond that is attached to the petition, to determine the sufficiency of the petition as to parties or as to whether it constitutes a cause of action.

This being true, it leads us to the conclusion that an examination of the petition itself does not reveal a defective party nor does it fail to state a cause of action.

The petition in error in this court is, therefore not well taken, and the judgment of the court below is affirmed.

BUGGY STRUCK BY AUTOMOBILE AT STREET CROSSING.

Court of Appeals for Licking County.

ROBERT A. WHITE ET AL v. BRANDT G. SMYTHE.

Decided, October Term, 1915.

Negligence—Charge of Court with Reference to View of Premises where Accident Occurred—Effect of Allegation that Automobile Was Being Operated at an Unlawful Rate of Speed.

1. It is error to charge a jury that what they saw on a view of the premises was evidence to be considered in reaching a verdict, but in the present case the verdict is sustained by sufficient evidence without regard to the view of the premises and the charge was, therefore, not prejudicial.
2. In an action on account of injuries received from being struck by an automobile, it is error to charge the jury to the effect that if the machine was being run at an unlawful rate of speed at the time of the accident the defendant was guilty of negligence *per se*, but it is an error which does not necessitate a reversal of the judgment where the unlawful rate of speed was alleged in the petition as an affirmative ground of relief.

Fitzgibbon, Montgomery & Black, for plaintiffs in error.
Kibler & Kibler, A. A. Stasel and *L. C. Russell,* contra.

POWELL, J.

This was an action commenced by the defendant in error in the court of common pleas to recover damages alleged, by plaintiff in that action, now defendant in error, to have been sustained by him on account of personal injuries received in a collision between the plaintiff, riding in a buggy, and an automobile which was operated by the defendants.

The petition charges that at the time mentioned therein plaintiff, with two companions, was riding south on Sixth street in the city of Newark; that as he was about to cross Wilson street in said city, a street running at right angles to Sixth street, the vehicle in which he and his companions were riding was struck

by the automobile, or, as plaintiff describes it, by the locomotive engine, sometimes called an automobile, operated by the defendants, who were going west upon said Wilson street. Plaintiff then alleges the injury sustained by him and prays judgment against the defendants.

A number of acts or grounds of negligence are alleged and set out in the petition and it is alleged, among the general averments of the petition, that the defendants were driving said locomotive engine at a furious rate of speed, contrary to law and the ordinances of said city of Newark. It is specified among the separate and specific grounds of negligence that defendants were operating their machine at a rate of speed largely in excess of that permitted by law or the ordinances of the city. Numerous other grounds of error are alleged, but this particular ground is mentioned because of its connection with a part of the charge of the court. An answer was filed setting up two defenses, the first of which was in the nature of a general denial of all the material averments of the petition, and the second charging contributory negligence on the part of the plaintiff. To this defense a reply was filed denying such contributory negligence. Trial was had to a jury and a verdict was returned in the sum of $1,352.50 in favor of the plaintiff. A motion for new trial was filed by the defendants, setting out several grounds upon which new trial was asked and the same was overruled by the court upon condition that the plaintiff would remit all of said verdict in excess of one thousand dollars, as being excessive, which remittitur was entered and judgment rendered in favor of the plaintiff below for one thousand dollars.

Error is prosecuted by the plaintiff in error in this court, and it is especially urged on behalf of plaintiff in error that there are three sufficient grounds of error on which such judgment should be reversed and a new trial granted.

1. That the charge of the court relative to the subject of punitive or exemplary damages was erroneous and ought not to have been given in the circumstances in this record shown to exist.

2. That the court erred in giving the requests upon this subject asked for by the defendant in error.

3. That the court erred in charging the jury, who were sent to examine the grounds where the accident occurred, that they should determine from what they saw as part of the evidence in the case whether this part of the city was closely built up or not, in order to determine whether or not the defendants were operating their machine at an excessive rate of speed or at a rate greater than that permitted by law.

Further, it is contended that the court erred in its charge as to the rate of speed and in saying to the jury that if they found that defendants were operating their automobile at a rate of speed in excess of that authorized by law that this constituted negligence *per se*.

Other errors are assigned in the petition in error and were not waived at the hearing, but the court is of the opinion that there are no other errors apparent in this record that would justify a reveral of the judgment below.

Generally speaking, it has been held in Ohio that the view which a jury takes of premises is not evidence in itself, but is simply allowed or ordered by the court to assist the jury in applying the testimony as detailed from the witness stand. We think there was error in this part of the charge of the court. We think, however, that in addition, the charge of the court which limited the jury to a consideration of the premises as a part of the evidence only is modified by the fact that there was a large amount of testimony offered by plaintiff to show that at the place where the accident occurred the city was closely built up and that if defendants were traveling at a rate of speed in excess of eight miles an hour they were traveling in violation of the statutes of Ohio relative to motor vehicles. We have examined the record with reference to this testimony and are of the opinion that it is sufficient to sustain the verdict of the jury without reference to whether or not the court erred in its charge relative to such view of the premises.

With reference to the charge of the court that if the jury should find that the defendants were traveling at a rate of speed

in excess of that allowed by statute it would constitute negligence *per se*, the court is of the opinion that where the petition itself alleges this rate of speed as an affirmative ground of relief, as was done in this case, such charge is not such an error as would justify a reviewing court in setting aside the verdict and grant a new trial upon this ground alone.

It has been held to be the law in Ohio that the fact that the vehicle was operated at a higher rate of speed than that permitted by law was not in itself negligence *per se*, but was proper evidence to go to the jury to prove negligence on the part of the operator of such machine. This, however, has been largely modified and it has now been held as a part of the law of this state that "in an action for damages predicated upon the failure of such owner or operator to comply with the requirements of this statute (Section 1027), it is the duty of the court to instruct the jury that such failure is negligence *per se*." 89 O. S., 297.

In this case the court commented upon the rule laid down in the 38 Ohio State, 632, that "where a company was operating its cars in violation of a city ordinance at the time an injury was inflicted, while not sufficient *per se* to create a liability, is yet competent to go to the jury as tending to show negligence." So that the syllabus of that case must be read in connection with the facts there before the court. They recite that no reference was made to the ordinance in the petition in that case. The charge of negligence was that the company carelessly, wrongfully and with gross negligence ran and moved its cars, and in that case it is said the trial court rejected the ordinance fixing the rate of speed when tendered in evidence, but the Supreme Court held it to be admissible upon the ground that it tended to show negligence on the part of the company.

In this case plaintiff bases his right to recover in part, at least, upon the averments of the petition that defendants were operating their machine at a rate of speed in violation of both the ordinances of the city of Newark and the statutes of Ohio. When this is considered the court is of the opinion that it was not such error in charging that such violation was negligence *per se* as

would justify the court in reversing the judgment of the court below.

Aside from the questions of error in the particulars named, and aside from the question as to whether or not such errors were prejudicial, we have arrived at the conclusion, from an examination of this record, that substantial justice was done by the jury. In fact, the court is of the opinion that the court below ought not to have required a remittitur of the amount in excess of one thousand dollars to have been made; that the evidenced sustains the verdict in every particular; that the amount returned was not more than should have been returned as compensatory damages, and that if there was error on the part of the court in the charge relative to punitive or exemplary damages, it has no application to the facts as shown by this record. We are further of the opinion that the charge as to negligence is not erroneous when based upon the charge as made in this petition, but that the acts of negligence by which plaintiff was injured consisted in part of the violation of the statutes and of the ordinances. As to the error complained of relative to the action of the court in charging the jury that it should consider the view taken by them as part of the evidence, we think it is not sufficiently prejudicial to justify a reversal. We think that while the errors insisted upon were strongly urged to the court, even though such errors existed, substantial justice requires that this judgment should be affirmed and an order may be entered affirming the judgment of the court of common pleas. The court finds there was reasonable ground for presenting this petition in error and therefore affirms such judgment without penalty. The case will be remanded to the court of common pleas for execution.

SHIELDS, J., and HOUCK, J., concur.

VALIDITY OF A RELEASE.

Circuit Court of Wood County.

VIOLA COOK v. CHARLES COOK ET AL.

Decided, March 3, 1912.

Release—Consideration for—Finding in Court Below Supporting the Validity of a Release Will be Upheld on Review, When.

A finding in the court below against the claim that the release interposed as a defense was without consideration requires, in the absence of a bill of exceptions containing all the evidence, that the reviewing court assume the payments made prior to the execution of the release, the amount of which are not stated, were sufficient to warrant the judgment finding the release was sustained by sufficient consideration.

Stephens & Reed and *Ladd & James*, for plaintiff in error.
L. D. Hill and *J. E. Kelly*, contra.

RICHARDS, J.

Error to the Court of Common Pleas of Wood County.

In the court of common pleas Viola Cook brught suit against Charles Cook and Clara Cook to recover damages for the alienation of the affection of her husband, Claud Cook.

The ordinary and proper allegations constituting a cause of action in such cases were set forth in her petition. The petition alleges and the answer admits that the defendants are husband and wife, and that they are the parents of plaintiff's husband. Claud Cook. The defendants answered jointly, denying the allegations of the petition and setting up by way of a so-called second defense a release which they attach to their answer and which reads as follows:

"PRAIRIE DEPOT, O., March 21, 1911.

"We, the undersigned, Isaac Mills and wife, Mary Mills, and Viola Cook, daughter of said Isaac and Mary Mills, and wife of Claud H. Cook, in consideration of two hundred and fifty dol-

lars ($250) paid by said Claud H. Cook to Viola Cook, the receipt of which is hereby acknowledged, accept same in full settlement of all alimony assessed against said Claud H. Cook in favor of Viola Cook, and also release said Claud H. Cook from any and all claims whatsoever, for which we might have cause of action, and we also agree and promise that we will bring no further action for alimony against the said Claud H. Cook. We furthermore agree that we will bring no cause of action against Charles Cook and his wife, Clara Cook, or either of them singly, for alienating the affections of said Claud H. Cook from said Viola Cook.

"ISAAC MILLS.
"MARY MILLS.
"VIOLA COOK.

"Signed and acknowledged in the presence of
"D. W. CONGER.
"CAROLINE MEYERBECK."

To this answer the plaintiff filed a reply that admits that she signed the release, but avers in substance that she was induced to sign the same by false and fraudulent representations made to her by the defendants, and she avers further that the so-called release is without any consideration whatever. Upon the trial of the case a verdict was directed for the defendants on the ground that the release was a complete bar to the cause of action set forth in the petition. The parties made an agreed statement of facts, which is embodied in the bill of exceptions before us. The entire bill of exceptions embraces less than two pages and the material parts of it are in the following words, viz.:

"That upon the trial of said cause the court found that the release pleaded by the defendants, copy of which is attached to their answer, is a full and complete defense to the cause of action alleged in the petition of the plaintiff.

"It is agreed by the parties hereto that all the evidence pertaining to said release is as follows, to-wit:

"That plaintiff, Viola Cook, recovered from one Claud Cook, her husband, in cause No. ——— in the Court of Common Pleas of Wood County, Ohio, a decree for alimony in the sum of $400, to be paid $2 each week or settled by paying $300 in cash. That the defendants in this cause, Charles Cook and Clara Cook,

are the father and mother of Claud Cook. That the release pleaded by the defendants was prepared by them at their home in Prairie Depot, Ohio, and was taken by them to the home of plaintiff's parents in the city of Toledo, Ohio. That Wm. Conger, notary public, was called, who read the release in the presence of plaintiff, after which it was signed and executed. That the total amount paid was $250, which was paid by the check of Charles Cook and from his own funds. That a true copy of said release is hereto attached and marked Exhibit A and made a part of this bill of exceptions."

From the fact that the bill of exceptions does not purport to contain all of the evidence which was introduced, we are not at liberty to review the case upon the weight of the evidence. This principle has been heretofore determined in many cases in this state and I only stop to cite three of them, *Combes* v. *Miller*, 6 C. C., 446, which was affirmed by the Supreme Court without report; *C., H. & D. R. R. Co.* v. *Curtis*, 17 C. C., 554, and *Regan* v. *McHugh*, 78 O. S., 326.

It will be noticed from the bill of exceptions that the court does not find any evidence to sustain the allegations of the reply that the release was obtained by false and fraudulent representations made by the defendants.

The only other ground by which it is sought to invalidate the release is the contention made by the plaintiff that the same is without consideration. In approaching the determination of this question every intendment must be made in favor of the regularity of the judgment entered by the court below. The bill of exceptions recites that the plaintiff recovered a decree for alimony against Claud Cook, her husband, in the sum of $400, to be paid $2 each week, or settled by paying $300 in cash.

Whether that decree remained still in force at the date of the payment of $250 does not appear; neither does it appear from the record how much, if any, had been paid upon the allowance of alimony made by the court to the wife. The date of the decree is not given, and it may be, for all that appears in the record, that a considerable amount of the allowance had been paid.

Again, it is entirely consistent with the finding of facts in the bill of exceptions that the weekly payments of alimony had not yet accrued to the extent of $250.

In view of all these facts and circumstances, which are entirely consistent with the finding of facts contained in the bill of exceptions, we hold that the court of common pleas was entirely justified in finding, as it did, that a good and sufficient consideration existed for the release, which is set forth in the answer filed by the defendant.

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

WILDMAN, J., and KINKADE, J., concur.

INJURY TO TENANT DUE TO DEFECT IN PREMISES.

Court of Appeals for Hamilton County.

JOSEPH L. ROBERTS, CLARA B. SKAATS AND FANNIE F. GRIFFITH v. JENNIE FULTON.

Decided, January 3, 1916.

Landlord and Tenant—Sub-Tenant Injured by Breaking Through Floor —Liability of Landlord Can Not be Based on Covenant to Make Repairs.

The fact that a landlord has covenanted to make needed repairs on property leased as an entirety does not render him liable either to the lessee or to a sub-lessee on account of injuries received through failure to make such repairs.

E. S. Aston and *Clyde P. Johnson*, for plaintiffs in error.

Louis P. Pink, contra.

GORMAN, J.

The defendant in error, Jennie Fulton, recovered a judgment against the plaintiffs in error in the court of common pleas.

She was a tenant in the premises known as No. 698 West Fifth street, occupying two rooms on the second floor thereof. She rented her rooms from one James P. Bolger, and Bolger rented the entire premises from plaintiffs in error at a rental of seventy dollars a month. Bolger and his father before him had rented the entire building during many years prior to the time that the cause of action arose. There was no written lease between Bolger and the plaintiffs in error, nor was there a written lease between Jennie Fulton and Bolger. By verbal agreement between Bolger and plaintiffs in error, for whom Joseph L. Roberts acted as agent, they were to make certain repairs on the building, such as repairing the roof, the floors and the woodwork generally in the building, but they were to do no papering or whitewashing; those repairs were to be made by Bolger.

There was a hallway running along the two rooms occupied by defendant in error, and from this hallway there was an alcove, or small hall or vestibule, from which a door led into each of Jennie Fulton's rooms. The only means of access to her rooms was through the large hallway into the small hallway or vestibule and thence into her rooms, the small hall or vestibule separating the two rooms. They were evidently so arranged that the two rooms might be rented out separately.

On the night of October 31, 1912, about three months after Jennie Fulton became a tenant in these two rooms, she had occasion to leave her rooms for the purpose of getting water from the hydrant at the end of the large hall on the floor on which her rooms were situated. As she passed out of one of her rooms into the small vestibule and just before she reached the large hall she broke through the floor, on account of the want of repair of one of the boards in the floor, and a nail protruding between the broken boards ran into her heel and resulted in serious injuries to her. She was confined to the hospital and in her house for quite a long time, and at the time of the trial the injuries were still manifest and it was probable that she was permanently injured.

It is claimed by plaintiffs in error that no liability rests upon them upon the above statement of facts, being in substance the

facts established in the trial of this case, and that therefore the judgment in favor of the plaintiff below should be set aside and held for naught.

This court is of opinion that there was no legal liability resting upon plaintiffs in error to the defendant in error, and that she was not entitled to recover, upon the state of facts shown by the record in this case.

We think this case is controlled by the case of *Burdick* v. *Cheadle,* 26 O. S., 393. Mrs. Fulton was not a tenant of Roberts, she did not rent from him, and there was no privity of estate between her and the plaintiffs in error. She was a tenant of Bolger, and for any injuries which she received because of the neglect to keep the premises in repair she must look to Bolger, and not to Roberts, for damages or compensation. The case of *Burdick* v. *Cheadle* has not been overruled by the Supreme Court and appears to be the law of this state, whatever may be the rule laid down in other states. In that case it was held in the syllabus that:

"The defendant, being the owner of a lot of ground, erected thereon a storehouse, and afterwards leased the storeroom and agreed with the lessee to construct therein cornices, shelvings and fixtures, in a secure, safe, convenient and proper manner for the sale of dry goods and groceries, and to keep the premises in good order. The fixtures put up under the agreement were unsafe and insecure from the want of sufficient fastening to the walls of the building—all of which was known to defendant, who, on request of the lessee, refused and neglected to repair. Afterward, and while the room and fixtures were in the possession of the lessee, the shelvings fell and injured the plaintiff, who was, at the time, in the storeroom as a customer of the lessee. *Held:* The facts stated do not constitute a cause of action against the defendant and in favor of the plaintiff."

To the same effect is the rule laid down in the case of *Shindelbeck* v. *Moon,* 32 O. S., 264.

These cases were approved by the Supreme Court in the case of *Stackhouse* v. *Close,* 83 O. S., 339; the court, Johnson, J., on page 351, uses this language:

"A lessor of a building is not liable to the lessee or others lawfully on the premises, for its condition, in the absence of actual or constructive concealment, or of any agreement, or of the violation of a duty imposed by statute. *Shinkle* v. *Birney,* 68 Ohio St., 328; *Burdick* v. *Cheadle,* 26 Ohio St., 393; *Shindelbeck* v. *Moon,* 32 Ohio St., 267."

The circuit court of this county, the predecessor of this court, in the case of *Schradski* v. *Butler,* decided April 26, 1913, affirmed the judgment of the court of common pleas, upon the authority of the opinion announced by the trial court on a motion for new trial, reported in 9 Ohio Law Reporter, 127.

But it is contended by counsel for defendant in error that the case of *Stackhouse* v. *Close* holds that the owner of premises is liable in a case similar to the one at bar. The case of *Stackhouse* v. *Close* is one in which Close, the owner, had leased the entire premises to the United States Coaster Construction Company, which company had sublet part of the premises for lodge purposes, and the plaintiff in the case, Mrs. Stackhouse, was injured in an elevator while going to the lodge in the building.

We think that case can be distinguished from the case at bar in that Mrs. Stackhouse was a member of the public, a third person, while Mrs. Fulton was not a member of the general public, but was holding under Bolger as a sub-lessee. Furthermore, in that case it was held that because the landlord reserved the control of the elevator and the right to make all repairs, and stipulated that no alterations or repairs could be made by the lessee without the consent of the owner, the owner thereby rendered himself liable jointly with the tenant or lessee, under the provisions of Section 4238-1, Revised Statutes, which provides that:

"—It shall be unlawful for any person, society, firm, agent, representative of any private or corporate authority or society, or any committee, commission or board acting under any authority whatsoever, to erect, or cause to be erected * * * in the state of Ohio any structure, room or place where persons are invited, expected or permitted to assemble, or for the purpose of entertainment, judgment, amusement, instruction, betterment,

treatment or care, or to make any addition to or alteration therein which shall in construction, arrangement or means of egress be dangerous to the health or lives of persons so assembled—"

and the Supreme Court held that the owner, by requiring no alterations, changes or repairs to be made without his consent or supervision, thereby retained such control over the building, and especially the elevator, as rendered him liable to third persons who had occasion to resort to the building for any purposes whatsoever.

In the case of *Burdick* v. *Cheadle, supra*, at page 397, the court says:

"The general rule of law undoubtedly is, that persons who claim damages on the account that they were invited into a dangerous place, in which they received injuries, must seek their remedy against the person who invited them. There is nothing in the relation of landlord and tenant which changes this rule."

Applying this rule to Mrs. Fulton, under the facts disclosed by the record, it is apparent that she was a tenant of Bolger, in the building, not through any arrangement or agreement with the plaintiffs in error; she was invited and permitted to be there solely as the tenant of Bolger, and for any damages which she may claim on account of injuries received in the building she must seek for a remedy against the person who invited her there—Bolger.

It is true that the Supreme Court in this case of *Burdick* v. *Cheadle* has applied a different rule to third persons, the public generally, for it provides that:

"If they (the premises) be unsafe or unfit, it is the duty of the tenant to make them safe or to fit them for the intended use; and the landlord may reasonably expect that the tenant will do so."

And on page 396 the court says:

"But in case a landlord undertakes with his tenant to keep the premises in repair, having thus reserved the control to the extent necessary for making repairs, his duty to the public in relation to the property is not affected by the lease, and he remains responsible, under the doctrine of the above maxim, for defects arising from the want of repairs during the continuance of the lease."

The maxim above referred to is the well known one: "*sic utere tuo ut alienum non laedas.*" But this maxim applies, in the case of landlorad and tenant, to third persons who are strangers and not in the premises on invitation of the landlord.

In *Jones on Landlord and Tenant,* Section 592, this principle is stated:

"It may be stated as a general rule that a landlord, who has covenanted to repair, is not liable in tort for personal injuries resulting from the want of repair," citing numerous cases in support thereof, among others *Hanson* v. *Cruse,* 155 Ind., 176, and then proceeds: "Such injuries are too remote to be recovered as damages for the breach of contract, and the duties arising from the relation of landlord and tenant are not increased by such a contract in respect to the duty of the landlord to provide for the personal safety of the tenant."

And again, in the same section, the author says:

"Ordinary damages for breach of a general covenant to keep the premises in repair are the expenses of repair and the loss of the premises while the party contracting was in default."

Tiffany on Landlord and Tenant, Section 87, page 592 (10), lays down this rule:

"A question of difficulty has arisen in connection with a landlord's covenant to repair, as to whether the tenant can recover, as against the landlord, for an injury to his person or to his property on the premises, which would not have occurred had the landlord complied with his covenant. Such injuries resulting not directly from a breach of the contract, but from physical conditions existing apart from the contract, which the contract merely undertook to eliminate, can not well be regarded

as a proximate result of the breach of the contract within the contemplation of the parties at the time of the making thereof. To allow a recovery for such injuries is to allow a recovery as for tort on account of a breach of contract. As has been remarked, there is no more reason for allowing such a recovery against a landlord than against any other person, a carpenter or contractor, for instance, who fails to carry out his contract to repair the premises." Citing *Tuttle* v. *Gilbert Mfg. Co.*, 145 Mass., 169.

There will be found cases which hold that a landlord who has leased the entire premises and has covenanted to make repairs is liable to third persons—the public—but these authorities are few and far between, and the great weight of authority holds the contrary rule.

In the case of *Schradski* v. *Butler*, Butler rented the premises to the sister of Mrs. Schradski, who was a member of the household. Butler promised to repair, failed to do so, and as a result of the failure, Mrs. Schradski was very severely injured. The common pleas court held in that case that the landlord, Butler, was not liable to Mrs. Schradski for the personal injuries sustained.

Without multiplying the authorities, we think that the law of this state is well settled that the owner of property is not liable where he leased the entire premises to a tenant and agrees to make repairs upon the premises, either to the tenant or sub-tenants or sub-lessees of the tenant. The mere fact that the landlord agrees to make repairs, does not put him in control of the premises. It is true he would have the right to resort to the premises for the purpose of making repairs, but that fact does not give him control of the premises any more than he would have control of the premises because he would have a right to resort to the premises for the collection of rent, inspection of the same, or any other lawful purposes. Bolger, in this case, was in entire control of the premises, and Bolger himself could not recover for injuries he might sustain by reason of the defect in the premises resulting from failure of the owner to keep the premises in repair under his agreement, and surely his sub-

tenant or sub-lessee, Mrs. Fulton, would have no higher or better right than her immediate landlord—Bolger.

If the law were not so well settled in this state on this question it might be instructive and useful to consider the decisions in other states. But the court is of the opinion that this case, in all its phases, is controlled by the case of *Burdick* v. *Cheadle* and other cases cited.

For the reasons stated, the judgment below is reversed and the cause remanded for further proceedings.

JONES (E. H.), P. J., and JONES (Oliver B.), J., concur.

PAYMENT REQUIRED OF A TRACTION COMPANY FOR STRENGTHENING A VIADUCT IT NO LONGER USES.

Court of Appeals for Hamilton County.

THE CINCINNATI STREET RAILWAY COMPANY AND THE CINCINNATI TRACTION COMPANY v. THE CITY OF CINCINNATI.

Decided, January 10, 1916.

Franchise—Condition to the Advantage of the Municipality Enforcible —Notwithstanding it Does Not Inure to the Benefit of the Grantee —Traction Company Required to Contribute Toward Strengthening a Viaduct it Does Not Use.

The provision contained in the fifty year franchise granted by the city of Cincinnati to the Cincinnati Street Railway Company, that in the event the Liberty street viaduct should be reinforced by the city so as to make it safe for heavy vehicular traffic or electric cars the street railway company should be required to contribute $7,000 toward the expense thereof, was one of the conditions upon which the granting of the franchise was based, and the obligation thereby imposed upon the street railway company was neither abrogated nor in any manner modified by a subsequent ordinance providing for the removal of the car line from the viaduct to other streets and to which removal the street railway company consented.

Joseph Wilby and *George H. Warrington,* for plaintiffs in error.

Walter M. Schoenle, City Solicitor, and *Constant Southworth,* Assistant Solicitor, contra.

JONES (Oliver B.), J.

One of the many terms and conditions contained in the resolutions passed by the board of administration of the city of Cincinnati August 13, 1896, providing for the extension of routes and franchises of the Cincinnati Street Railway for a period of fifty years under the so-called Rogers law, was Section 18 of said resolutions, as follows:

"18. Whenever the city of Cincinnati and the county of Hamilton, or either, through its authorized officers, shall desire to reinforce the Liberty street viaduct, situated on Liberty street between Garrard and State avenues, so that it will be safe for the operation of heavy vehicular travel or electric cars over the entire structure, the said the Cincinnati Street Railway Company shall be required to pay $7,000 towards defraying the expenses thereof."

All the terms and conditions of said resolutions were accepted and agreed to by said company on the same day they were passed and a bond was then given for the faithful performance of all the provisions of said resolution.

In February, 1901, the Cincinnati Street Railway Company, with the consent of the city, leased to the Cincinnati Traction Company all of its properties, routes and franchises, subject to the terms and conditions of said resolutions of August, 1896.

Prior to September, 1909, the city, at an expense of much more than $7,000, to-wit, about $189,000, reinforced Liberty street viaduct so that it was safe for heavy vehicular travel. Demand was made by the city on the Cincinnati Traction Company for the payment of $7,000 toward this expense. This demand being refused, suit was brought in the action below against both of the plaintiffs in error, as defendants, for the recovery of said sum.

The county of Hamilton originally built this viaduct and it was afterwards taken over by the city some time prior to the passage of said resolutions, at which time horse cars were being operated over it as part of what was called the Seventh street route.

Similar answers were filed by each of the defendants, setting up two defenses:

The first defense was to the effect that said Seventh street route had been, under resolutions of the board of public service of the city agreed to by the traction company, changed so that it no longer extended from Liberty street over said viaduct to State avenue, but instead ran from the intersection of Dalton avenue and Liberty street to the base ball park at the intersection

of Findlay and McLean avenues. Since the construction of the necessary tracks the traction company has operated its Seventh street route over the new route, so changed, with its terminus at the base ball park, and no electric cars were ever operated over said viaduct. There are no street car tracks, nor is there any provision for them on said viaduct as reinforced by the city in 1909, but all tracks and rails were removed from the viaduct, as it existed in 1896, by the city or by the street railway company with the assent of the city, shortly after the date of the resolutions of August 13, 1896, and no tracks have been constructed thereon since.

The second defense in defandants' answer denied that the viaduct had been so reinforced by the city as to make it safe for the operation of electric cars over the entire structure, alleging that it was not safe for the operation of electric cars and heavy vehicular travel, and was unsafe for the practical operation of electric cars of the present type, and that to so operate would be dangerous to cars and passengers as well as to pedestrians using said viaduct.

A demurrer was sustained to the first defense of the answers, defendants each reserving an exception. Upon trial, plaintiff having offered evidence to sustain all of the allegations of the petition, defendants then offered evidence to prove the several allegations set out in the first defense of their respective answers, which had been stricken out by the sustaining of plaintiff's demurrer. This evidence was excluded by the court, to which defendants excepted and offered no further evidence, but requested an instructed verdict in their favor, on the following grounds:

"(1) That the plaintiff has offered no evidence tending to prove that the Liberty street viaduct has been reinforced so as to be safe for the operation of electric cars over its entire structure.

"(2) That the evidence shows that the city of Cincinnati and the defendants had agreed to abandon the use of the Liberty street viaduct for street railway traffic.

"(3) That no provision has been made or was ever made in the reinforcement of the Liberty street viaduct for the operation

of street railway cars; and that there has been a failure of the consideration stipulated to be paid by the defendants as set forth in paragraph 18 of the resolutions of August 13th, 1896."

The court charged the jury—

"that if you find from the evidence that this resolution, known as paragraph 18 of the franchise described, was passed and accepted by the Cincinnati Street Railway Company, that it thereupon became a binding contract between the two parties; and if the city of Cincinnati reinforced the Liberty street viaduct so that it was safe for heavy vehicular travel, these companies, the defendants herein, would be liable for the amount claimed, which they agreed to pay."

A verdict was returned for plaintiff, upon which judgment was entered.

Plaintiffs in error urge that a proper construction of clause 18 of the franchise resolution requires that as a condition of payment of the $7,000 the viaduct must not only be made safe for the operation of heavy vehicular travel. but also for electric cars. In other words, that the word "or" should be made to read "and."

This argument is based upon the idea that the reinforcement of the viaduct would be of no special benefit to the traction company unless its cars could run over it, and that it had no interest in the matter of its use for other heavy vehicular travel. Such an argument might well be used as an objection to the acceptance of the franchise clause in the form in which it was written. But it is one of the many conditions found in that franchise. Counsel for the traction company concede that it might have been drawn to provide for an absolute payment of $7,000 simply upon the acceptance of the grant, or at any particular time or on the happening of any particular event. It does so provide for the payment upon the reinforcement of this viaduct to be sufficient for either of two purposes. The traction company may have had no interest in any vehicular travel upon the viaduct other than the electric cars; the city, however, had an interest in such other vehicular traffic, and this condition was for the benefit of the city

and was therefore inserted in the alternative form in which we find it. If, as counsel contend, the present heavy type of electric car—which is considerably heavier than any other present form of "heavy vehicular travel"—was then in contemplation and must be provided for before the payment can be demanded, then the use of the words "heavy vehicular travel" would be superfluous.

The language as written does not make the continued use of the viaduct for street railway purposes a prerequisite to enforce payment. It is conceded that the route was abandoned and that the tracks were removed by the consent of defendants below. If by such change it had been intended to relieve the traction company from the payment required from it by clause 18, it might well have been so provided in the resolutions as one of the conditions of the change of route. The fact that this was not done must be construed to show that the parties to the agreement did not regard the continued use of the viaduct as in any way essential to the obligation to pay such a small part toward the repair of a structure that had been previously used by horse cars without, so far as is shown by the record, any contribution to its cost or maintenance by the street railway company. The proportionate share of cost, which may be charged against a traction company where a viaduct is constructed for the abolition of a railroad crossing at grade, is allowed by statute (G. C., 8892) to be so much greater a percentage that the small amount here provided could hardly be deemed to have been intended as the proper share of the necessary cost to be borne by the traction company for the continued use of the viaduct for electric cars during the life of the franchise.

The fact that the change of route, made with the consent of the traction company, has taken away its right to now occupy the viaduct makes it of no importance to it whether the reinforcement made has or has not so strengthened the viaduct as to support the operation thereon of electric cars.

In the construction of ambiguous language, both of laws and of contracts, courts have at times found it necessary to change the word "and" to "or" and *vice versa*. But no case will be

found which would authorize such change in the language under consideration. In fact, in the opinion of the court, the words used in clause 18 are clear and without ambiguity, and no occasion arises requiring interpretation of the language used, contrary to its plain meaning. *Slingluff* v. *Weaver,* 66 O. S., 621.

If there were any doubt in the matter as to the construction of this franchise condition, that most favorable to the city should be adopted. *East Ohio Gas Co.* v. *Akron,* 81 O. S., 33, 52; *Railroad Co.* v. *Defiance,* 52 O. S., 262, 307; *Cincinnati* v. *Cin. St. Ry. Co.,* 12 N.P.(N.S.), 305, 308 (affirmed by Supreme Court), 13 O. L. R., 83; *Detroit U. Rys. Co.* v. *Detroit,* 229 U. S., 39.

The duty of making this payment of $7,000 towards the expense of reinforcing this viaduct thus being one of the obligations imposed by the terms of the franchise, Sections 9102 and 3771 of the General Code forbid any release therefrom by the officers of the city.

Judgment affirmed.

JONES (E. H.), P. J., and GORMAN, J., concur.

QUESTIONS PERTAINING TO ATTACHMENT.

Circuit Court of Erie County.

MYRTLE CROSBY v. THE SANDUSKY GAS & ELECTRIC CO.

Decided, May 7, 1912.

Attachment—Question of Ownership of the Property Attached Can Not be Raised on Motion to Discharge the Attachment—Right to Exemption Not Acquired by Marriage, When—Waiver of Question as to Right of Appeal.

1. A claim by the defendant in a suit in attachment that the property attached belongs to another can not be determined on motion to discharge the attachment.
2. The marriage of the defendant, after the attachment is levied but before sale of the property, does not afford ground for the claim that the property is exempt from attachment.
3. Any question as to the right of appeal from an order of the justice of the peace discharging the attachment is waived by going to trial in the common pleas court on the merits without raising the objection.

R. B. Fisher, for plaintiff in error.
King & Ramsey, contra.

RICHARDS, J.

The Sandusky Gas & Electric Co. brought an action before a justice of the peace of this county against Myrtle Crosby to recover on an account for gas and electricity furnished to her for use in her residence. The action was accompanied by an attachment. Summons was issued on the 15th day of November, 1911, and was served on her the same day. Accompanying the summons was an order of attachment which was levied the same day on certain property claimed to be owned by her. One of the grounds for the attachment stated in the affidavit therefor was that the gas and electricity furnished were necessaries. Before issuing the order of attachment the justice took from the plaintiff in his court a bond in which it is recited that "We bind our-

selves to the defendant, Myrtle Crosby." etc. The bond is signed "The Sandusky Gas & Electric Co., E. A. Beckstine, Mgr."

The justice, by entry upon his docket, approved of this bond and the surety thereon. Myrtle Crosby was married on the day following the levy of the attachment issued against her, and thereupon moved to discharge the attachment for various reasons, among which are that the property was exempt from attachment, and that in fact it belonged to her husband. When the case came on for hearing in the justice court he discharged the attachment and rendered a judgment against the Sandusky Gas & Electric Co. for the costs made on the attachment, and judgment in favor of the company against Myrtle Crosby for the full amount claimed in the bill of particulars. I might say, in passing, that at no stage of the case was the amount sued for before the justice disputed by Myrtle Crosby. The Sandusky Gas & Electric Co. filed with the justice an appeal bond in the sum of $600, being twice the appraised value of the attached property, by which bond it undertook to appeal from the decision of the justice discharging the attachment and adjudging costs on the attachment against it.

On the trial of the case in the court of common pleas that court overruled the motion to discharge the attachment. Subsequent to the hearing of the case in the common pleas court on the merits, Myrtle Crosby filed a paper objecting to the jurisdiction of that court over her person.

The case is brought to the circuit court by a petition in error and a bill of exceptions containing all the evidence. The conclusions reached by us will be briefly stated. The claim made by the plaintiff in this court that the property attached belongs to her husband can not be investigated nor determined upon a motion to discharge the attachment. That principle was announced by the Supreme Court in *Langdon* v. *Conklin*, 10 O. S., 439, more than fifty years ago and has ever since been followed.

The marriage of the defendant on the day following the levy of the attachment does not entitle her to claim the property as exempt from attachment. *Selders* v. *Lane*, 40 O. S., 345; 2 C. C., 63; 13 C. C., 530.

Some contention exists as to whether the plaintiff in attachment before the justice had the right to appeal from the order discharging the attachment and adjudging the costs against it. Without determining that question, we are unanimously of the opinion that by going to trial in the common pleas court on the merits without having challenged the jurisdiction of the latter court the defendant waived any right that may have existed to deny the appealability of the action. The point appears to have been determined by the Supreme Court in *Drake* v. *Tucker*, 83 O. S., 97.

Finding no prejudicial error, the judgment of the court of common pleas will be affirmed.

WILDMAN, J., and KINKADE, J., concur.

CRIMINAL JURISDICTION OF JUSTICES OF THE PEACE IN HAMILTON COUNTY.

Court of Appeals for Hamilton County.

IN RE APPLICATION OF GEORGE HESSE FOR A WRIT OF HABEAS CORPUS.*

Decided, March 22, 1915.

Justices of the Peace—Without Criminal Jurisdiction in Cincinnati Township—Municipal Court Act Not Affected by Section 13423.

The special jurisdiction given to justices of the peace, police judges and mayors in criminal cases, conferred by Section 13423 as amended April 28, 1913, in no way modifies the Cincinnati Municipal Court act which gives to that court exclusive jurisdiction in Cincinnati township.

H. C. Bolsinger and *Pogue, Hoffheimer & Pogue*, for plaintiff in error.

Max Levy, contra.

*Affirmed by the Supreme Court, *In Re Application of George Hesse*, reported in 93 Ohio State.

GORMAN, J.

This is a proceeding in error to reverse a judgment of the court of common pleas discharging George Hesse from the custody of George L. Timberlake, a constable of Millcreek township, who held said Hesse under a warrant issued June 5, 1914, by Charles T. Dumont, a justice of the peace of Millcreek township.

The record discloses that Hesse at the time of his arrest was a citizen and a resident of Cincinnati township, and was charged with the commission of a misdemeanor in Cincinnati township—cruelty to animals. The sole question before this court is whether or not the justice of the peace had jurisdiction to issue the warrant.

Counsel for the complainant, Hesse, contend that under the provisions of the act creating the municipal court of Cincinnati, 103 Ohio Laws, page 27, Section 41, no justice of the peace outside of Cincinnati township had jurisdiction to issue the warrant under which Hesse was arrested. The section in substance provides, among other things, that no justice of the peace in any township of Hamilton county, outside of Cincinnati township, shall have jurisdiction in any criminal proceeding in which a warrant, order of arrest, summons, order of attachment or garnishment or other process except subpoena for witnesses, unless the offense charged shall be alleged to have been committed within said township where the warrant is issued. Section 43 of said act deprives justices of the peace of Cincinnati township of all criminal jurisdiction.

Counsel for the constable, Timberlake, maintain that by virtue of the act passed April 28th, 1913 (103 O. L., 539, 540), the jurisdiction of justices of the peace in Hamilton county in criminal cases was fully restored; that inasmuch as the act creating the municipal court was passed April 17, 1913, eleven days before the act of April 28, 1913 (103 O. L., 539), to the extent that it affects the jurisdiction of justices of the peace in criminal matters, the municipal court act has been repealed or modified by implication. There was no express repeal. The act of April 28, 1914, was an amendment to Section 13423, which had been a part of the General Code and the Revised Statutes for several years

This Section 14323 prescribed the jurisdiction of justices of the peace throughout the state as to many cases therein enumerated. Prior to the amendment of April 28, 1914, there was embraced in this section under sub-head thirteen classes of cases in which justices of the peace, police judges and mayors of villages were authorized to act. The act of April 28, 1914 (103 O. L., 539-540), added to this list of cases by amendment two additional classes of cases, sub-heads 14 and 15, to-wit, offenses for violation of the laws relating to weights and measures and short-weighing and measuring. Section 13423, as it existed before its amendment in April, 1914, was and still is of a general nature and applies to all justices of the peace in the state, and it is therefore claimed by counsel for the constable that, being a later law than the municipal court act, Section 41, it in effect, because of the conflict between the two laws, operated to impliedly repeal or modify Section 41 of the municipal court act. Now justices of the peace are no longer constitutional officers by virtue of the adoption of the new Constitution in 1912. See Article IV, Sections 1 and 9, and schedule. *State, ex rel Goodman,* v. *Redding,* 87 O. S., 388.

The office, since January 1, 1913, is purely statutory, and the Legislature has power to create or abolish the office, enlarge or limit the jurisdiction thereof. The act creating the municipal court of Cincinnati and prescribing its jurisdiction is a special act authorized by the Constitution, Article IV, Section 15. See *State* v. *Block,* 65 O. S., 370.

There is, therefore, no question of the validity of the two acts under consideration, the only question being whether both can stand because of their apparent conflict, and if they both can not stand, then has Section 41 of the municipal court act been repealed by implication? We are of the opinion that these two laws are not irreconcilable or in conflict, and that both are in full force and effect as valid expressions of the sovereign will of the Legislature.

The rule is well settled that repeals by implication are not favored, and this proposition is admitted by counsel for defendant in error to be true, and so true that no authorities need be cited in support thereof.

It is the duty of the courts to uphold and sustain all laws passed by the Legislature unless they are palpably and manifestly unconstitutional or in irreconcilable conflict with some other legislation on the same subject. It is also the duty of the courts, if possible, to reconcile any and all apparent conflicts, differences and inconsistencies in the laws so as to permit all the acts of the Legislature to stand and render none nugatory. See *Street Ry.* v. *Peace,* 68 O. S., 200; *Dodge* v. *Gridley,* 10 O. S., 178.

In this latter case the Supreme Court said:

"Where two affirmative statutes exist, one is not to be construed to repeal the other by implication unless they can be reconciled by no mode of interpretation."

This language was expressly approved in the case above cited, 68 O. S., 206.

The act creating the municipal court of Cincinnati is special, and applies only to Cincinnati and Hamilton county, whereas Section 13423 as amended April 28, 1914, is general in its operations and applies to all justices except where the act is limited by some special act. The Legislature having the power to limit the jurisdiction of justices of the peace either by general or special legislation, has expressly limited their jurisdiction in Hamilton county in the manner specified in the special act creating the municipal court of Cincinnati (Section 41). The provisions of this special act, even though enacted prior to the amendment of Section 13423, General Code, a general statute, modifies the provisions of that section so as to make part of the jurisdiction therein conferred on justices of the peace in general applicable to justices of the peace in Hamilton county outside of Cincinnati township. It stands as though Section 41 of the municipal court act were added on as an exception to the general Section 13423, General Code.

The Legislature, when it amended Section 13423, will be assumed and presumed to have had knowledge of the passage of the act creating the municipal court, and if it had intended to repeal or modify Section 41 of that act, doubtless it would have

done so in unequivocal terms. It did not expressly repeal this Section 41 of the municipal court act, and we are of the opinion that the provisions of this special act (Section 41) in Cincinnati township supersedes and takes the place of the more general provisions of Section 13423. See *R. R. Co.* v. *County,* 71 O. S., 454-457; *State* v. *Borham,* 72 O. S., 358, where the court on page 363 in commenting on a case similar to the one under consideration said:

"We are constrained to the conclusion that Section 1817 was intended by the General Assembly as an exception to the general provisions of 7146."

Furthermore it appears that the amendment to Section 13423 simply added two additional subdivisions to the statute and was not the enactment of new legislation. If this amendment had not been made, it would scarcely be claimed now that Section 41 of the special municipal court act had been repealed by implication. How, then, can it be claimed that a minor amendment to the section which had been in force for a long time, had the effect of repealing a special act which by fair interpretation may stand as an exception to the general provisions when it is apparent that the Legislature had no intention of repealing it?

For the reasons stated we are of the opinion that the justice of the peace, Charles T. Dumont, had no jurisdiction to issue the warrant in this case, and the judgment of the common pleas court is affirmed.

JONES (E. H.), P. J., and JONES (Oliver B.), J., concur.

PROSECUTION FOR KEEPING INTOXICATING LIQUOR IN DRY TERRITORY.

Court of Appeals for Belmont County.

HAROLD STEPHENS v. STATE OF OHIO.

Decided, June 23, 1915.

Intoxicating Liquors—Keeping of, in Dry Territory—Exception of the Statute as to Bona Fide Residence Not Applicable, When.

Where intoxicating liquor is found in considerable quantities in a room rented by the defendant in dry territory, and in which some of his other property was also found, the exception embodied in Section 6102, General Code, as to liquor kept in drug stores and *bona fide* private residences is not applicable, where the room was but six feet wide and eight feet long and was without bed or bedding.

Nathan H. Barber, for plaintiff in error.
Smith, Howard & Thornburg, contra.

HOUCK, J. (sitting in place of Pollock, J.).

This cause is here on error from the Common Pleas Court of Belmont County, Ohio. On the 10th day of July, 1914, the plaintiff in error, Harold Stephens, was charged in an affidavit filed before Mayor G. A. Colpitts, of Barnesville, Ohio, with a violation of the liquor laws of the state of Ohio.

The affidavit charges that the said Harold Stephens, from the 8th day of July, 1914, to the 10th day of July, 1914, both inclusive, at the village of Barnesville, county of Belmont and state of Ohio, did then and there unlawfully keep a place where intoxicating liquors were then and there kept for furnishing and giving away as a beverage; that the keeping of said place as aforesaid by the said Harold Stephens was then and there prohibited and unlawful, and contrary to Section 13225 of the General Code of Ohio, and against the peace and dignity of the state of Ohio.

The said Harold Stephens was arrested on said charge, taken before said mayor, and entered a plea of not guilty thereto. A trial was had, and he was convicted, and a fine and sentence imposed upon him by said mayor. A motion for a new trial was filed, heard and overruled. To the judgment of conviction and overruling of the motion for a new trial error was prosecuted to the court of common pleas of this county, and the judgment of the mayor was affirmed, and error is now prosecuted to this court to reverse the judgment of the common pleas court in affirming the judgment of the mayor.

Numerous grounds of error are alleged in the petition in error, but two grounds are relied upon in the brief of counsel for plaintiff in error, to-wit:

First, because the testimony is insufficient to sustain the judgment of the court.

Second, because the judgment is against the weight of the evidence and is contrary to law.

The evidence as disclosed by the record shows that the defendant below, the plaintiff in error, rented a room in a dwelling house occupied by Mrs. Fisher, in the village of Barnesville, Belmont county, Ohio; that said room had no windows in it, and that the next day there was found in said room that was rented by the defendant below, the plaintiff in error, ninety-three bottles of whiskey in three sacks, a whiskey barrel with a small door opening in the side, a coat and a note book therein with the name of Harold Stephens on the flyleaf, and a picture of the mother of plaintiff in error. The evidence shows that the book found in the coat belonged to the plaintiff in error, and that the coat was one worn by him at or about the time of his arrest and conviction.

The plaintiff in error claims favor under Section 6102 of the General Code of Ohio, which reads as follows:

"In a territory in which the sale, furnishing or giving away of intoxicating liquor as a beverage is prohibited, the keeping of intoxicating liquor in a room, building or other place, except in a regular drug store or in a *bona fide* private residence, shall

be *prima facie* evidence that such liquor is kept for unlawful sale, furnishing or giving away."

The evidence, as shown by the record in this case, discloses the fact that the plaintiff in error never occupied this room as a residence, and, as a matter of fact, the evidence discloses that there was no bed or bedding in the room, and that the room was about six feet wide and eight feet long, and without windows, and that from the location of the building and its surroundings it would not be a proper room to be used as a habitation.

Counsel for plaintiff in error maintain that the room was a *bona fide* residence of the plaintiff in error, and that therefore the section of the statute above referred to is applicable to the case at bar, and by reason thereof the plaintiff in error was not properly or legally convicted of the offense charged in the affidavit.

From an examination of the record, and relying wholly and entirely upon it, and applying the above section of the General Code thereto, we are of the opinion that the plaintiff in error, the defendant below, was properly and legally convicted under the facts as disclosed by the record; and there being no error in the record prejudicial to the rights of plaintiff in error, the judgment is affirmed, and the cause remanded for execution.

POWELL, J. (sitting in place of Metcalfe, J.), and SPENCE, J., concur.

ORDER FOR PAYMENT OUT OF SUM DUE CONTRACTOR.

Circuit Court of Cuyahoga County.

HENRY SOEDER v. THE CITY OF CLEVELAND ET AL.

Decided, March 20, 1902.

Assignments—Intent of Parties Governs—That the Fund out of Which an Order is to be Paid is Derived from Several Sources Not Material.

1. In determining whether an order, given by a contractor for the payment of a certain sum out of the amount due or to become due to him upon his contract is an assignment *pro tanto* of money in the hands of the drawee, the intent of the drawer and drawee is the determining factor.
2. Where orders are given by a contractor to parties who have furnished labor and materials for the performance of the particular work which he was under contract to perform for the drawee, there is a strong presumption that the orders so given were understood to be payable only to the extent that there were funds in the hands of the drawee which would become due the drawer.
3. The fact that the fund, from which a contractor directs the drawee to pay certain orders, consists of the amounts due him upon four several and distinct contracts will not prevent such orders being regarded as assignments *pro tanto* when such was the evident intention of the parties.

Solders & Tilden, for plaintiff.
Beacom, Baker & Carey, contra.

MARVIN, J.; CALDWELL, J., and HALE, J., concur.

This case was tried in this court on appeal. The facts are that one C. J. Hoffman entered into four several contracts with the city of Cleveland for the improvements of four streets in the city—Willett, West Cemetery, Wade Park, and West Clinton streets.

After proceeding with the work a considerable time, finding himself unable to carry out a complete contract, he assigned all his interest in the contracts to Henry Soeder. At the time of such assignment there were assignments which had been made

for the payment of work to be done under the contracts, to be made under estimate of the engineering department of the city.

A considerable amount of work on the several contracts had been performed for which payment had not been made at the time of the assignment of Hoffman to Soeder. Prior to the time of the assignment of the contract made to Soeder various accounts had been made out by parties who had furnished material and labor, and it is said that they became liens or prior charges upon the fund, and as to that no question is here made. But in addition to that orders had been given by Hoffman upon the director of accounts of the city for the payment of certain sums, and the questions here are with reference to such orders. These orders not having been accepted or paid at the time of the assignment of the contracts by Hoffman to Soeder, the question to be determined is whether they amount to an assignment for the amounts for which they were drawn, that is, an assignment of that part of the money owing to Hoffman upon the contract. One of these was made to one Henry C. Heman, and reads:

"April 1, 1899.

"DIRECTOR OF ACCOUNTS,

"*Dear Sir:* Please give Henry C. Heman voucher for $119.20 for labor and material furnished by him in making the approach to Willett Street Viaduct, and charge same against my next estimate and oblige,

"Yours truly,
"C. J. HOFFMAN."

On the part of Heman it is insisted that this is surely an assignment of $119.20 out of the moneys which would be otherwise payable at the next estimate to Hoffman.

The others are different from the one that has just been read, and each of the several other orders are practically the same. I read the one to B. & N. Rich because the reading of this latter will do for the reading of all the orders other than that of Heman:

CLEVELAND, OHIO, January 19, 1899.

MR. ROSSITER, Director of Accounts,
City of Cleveland,

Please pay to bearer, B. & N. Rich Co. ($141.35), one hundred and forty-one and 35/100 dollars, and charge the same to any estimate which may become due me.

Yours respectfully,
C. J. HOFFMAN.

Remembering that there are four several contracts that Hoffman had with the city, it is said that in any event this was not such a direction to pay out of a particular fund in any wise as to make this an assignment of any part of the money that would be due Hoffman upon the estimate.

The authorities are uniform that, where an order is made for payment out of a particular fund, such an order is an assignment *pro tanto* of money in the hands of the drawee to the payee of the order.

They are equally uniform that where the order is for the payment of a certain sum with the designation of a fund out of which a drawee may reimburse himself, and not an assignment of an amount to be taken out of the fund, except where the bill is for the entire amount owing by the drawee to the payee, such order is not an assignment.

The authorities are uniform in this, that the *intent* of the parties, the drawee and the payee, is to determine whether there is an assignment, an equitable assignment of so much of the fund as is necessary to pay the order, or that it shall be a bill of exchange so that, if accepted by the drawee, it would be payable at all events. A large number of cases have been examined: 62 O. S., 637; 45 Wis., 403; 42 Ind., 527; 44 Me., 496; 263 Mass., 6, and a case in 3 Nisi Prius Reports, 282, opinion by Judge Smith of the Superior Court of Cincinnati, and others we have examined, all make it clear that in some of the cases orders very similar to those of Rich's here, are held to be assignments. The *intention* of the drawee and drawer must govern in each instance.

If these several orders are to be treated as bills of exchange, then an acceptance, unqualified, of either of these would have held the drawee to the payment of the amount named in the order. If they are assignments, an acceptance would only have

required the payment of such as there was money applicable to the payment thereof.

In determining the *intention* of the parties here, one can not overlook the fact that Hoffman was under contract for the performance of particular work, for which he was to receive money, and that the parties to whom the orders were given were those who had furnished material or labor for the performance of that work; the conclusion seems almost irresistible that they must have understood, not that these orders, or most of them, were to be absolutely payable at all events, but only to the extent that a particular fund that would otherwise be payable to Hoffman should be in the hands of the drawee.

It is said, there being four contracts here, that in such an order as this drawn to Rich and others which are like it, there could not be a particular fund out of which it was necessary to be paid because there would be four funds. It is conceded as to Heman that that might be different, as it was for work done and labor performed in making the approach to the Willett Street Viaduct. But, as to any of these, if accepted, is it possible that the acceptor would have been liable for the amount? Could it have been so understood by the drawee and the drawer? One can hardly doubt that it must have been understood that nothing was to have been paid upon these except out of the fund which would otherwise be payable to Hoffman. This is strengthened by the fact that the orders were made upon municipal authorities who would have no right to bind the municipality by accepting such orders, beyond the amount which would otherwise be payable to Hoffman, and, in this connection, attention is called to the case of *Reeside* v. *Knox et al,* 2 Wharton, 233.

An order was made upon the Postmaster-General of the United States, which reads:

"*Sir:* On the first day of January, 1836, pay to my order $5,000, for value received, and charge the same to my account for transporting the U. S. mail, and oblige,

"YOUR FRIEND, J. R."

On page 238, in the opinion, Judge Gibson uses this language:

"The officer, being the public agent, would not have been liable on an absolute acceptance; and the government itself

would not have been liable, for it gave him no authority to bind it. The public officers may, doubtless, draw or receive bills to facilitate the business of their departments; but they would transcend their power, did they attempt to pledge the responsibility of the government as a merchant or a banker in the money market."

Now the reasoning there seems fairly applicable to this case. We should have no trouble with this case at all if the case of *Little* v. *Carran et al* had been disposed of. It is found in 40 O. S., 397, and is a suit brought by Little against Carran as endorser of a draft which reads:

"CLEVELAND, August 13, 1873.

"$1,125.

"On the 8th day of April, 1874, pay to the order of T. J. Carran, Esq., eleven hundred and twenty-five dollars and charge to my quarter's salary as city official solicitor, due at that time, demand and protest waived. Value received and place to account of W. C. Bunts.

"To S. T. EVERETT, ESQ., *City Treasurer.*

"*Endorsed*: THOMAS J. CARRAN."

Wm. C. Bunts died before April 8th, at which time this draft was to have been paid, and at which time the amount was to have been due him as solicitor of the city of Cleveland. Carran had endorsed this order to Little and Little brought suit upon it against Carran; and it was held in that case, by the Supreme Court, Judge McCauley delivering the opinion, that that was a *bill and not an assignment* of the amount of $1,125 out of the salary of Bunts.

As was said in the argument here it seems never to have been cited in any reported case.

In addition to that, stress is laid in the opinion upon the language used in the order, "demand and protest waived." The court say that it was clear that the drawer, Mr. Bunts, understood that he was himself liable for this as upon a bill, if it should not be paid by the drawee. It was not an assignment.

To the extent that the decision in this case is governed by the words "demand and protest waived," it differs from the case we have here.

We hold that these several orders each constitutes an assignment of the fund to the extent necessary to pay the several orders, and that they are not bills or to be treated as such.

COSTS IN UNSUCCESSFUL APPROPRIATION PROCEEDING.

Circuit Court of Cuyahoga County.

FREDERICK OHMENHAUSER v. W. S. KERRUISH.

Decided, March 23, 1901.

Costs—Attorney's Fees—Costs and Attorney's Fees Not Taxable Against Defendant Railroad Company in Unsuccessful Action for Occupation of Land.

Where an action is brought in the probate court under Section 6448, Revised Statutes, for the value of land used and occupied by a railroad company, and results in a judgment for the defendant company, attorney's fees and the costs in the case can not be taxed against the defendant company under Section 6438, Revised Statutes.

Hamilton, Hamilton & Smith, for plaintiff in error.

W. S. Kerruish, contra.

HALE, J.; CALDWELL, J., and MARVIN, J., concur.

In April, 1895, the plaintiff in error had an action pending in the probate court against the Nickel Plate Railway Company in which he sought to recover compensation for land which he claimed was occupied by that company for its right-of-way. The action was brought under Section 6448 of the Revised Statutes of Ohio.

At the commencement of the action Ohmenhauser was represented by other counsel, but on the 13th day of April, 1895, he employed Kerruish to take charge of and prosecute that action. A trial was had before that court, resulting in a verdict in favor of Mr. Ohmenhauser, for about six thousand dollars. This, on motion for a new trial, was set aside by the court. A second trial resulted in a verdict for the defendant, the railway com-

pany, upon which a judgment was rendered. Kerruish brought his action in the court of common pleas to recover for services so rendered. The defendant, the plaintiff in error, interposed to that claim, first, a general denial; second, a cross-petition in which he alleges that on the 2d day of March, 1896, he made a contract with the defendant in error, Kerruish, under and by the terms of which the defendant in error was then to take steps necessary to secure for him his costs, attorney fees and expenses incurred in the case to which I have above referred, which he negligently failed to do.

The reply denied the allegations of the cross-petition.

In submitting the issue upon this cross-petition to the jury, the court said:

"Defendant seeks to recover certain damages as set forth in his answer in this case, alleging that by reason of certain things that he was damaged in the sum of fifteen hundred dollars, and concluding his answer and cross-petition with a prayer for judgment for the sum of $299, with interest thereon, from the date stated by defendant in his answer and cross-petition.

"Now, gentlemen of the jury, as a matter of law, I desire to say at this point that under the statutory law of this state that the defendant would not be entitled to recover in damages for the simple reason that the facts in this case clearly show that it is not within the purview of the statute authorizing the allowance of attorneys' fees or expenses in the probate court for the reason that the suit was commenced by Frederick Ohmenhauser and not by the railroad company to appropriate the land in question and, therefore, I say to you, gentlemen of the jury, that in that regard the defendant in this case in the opinion of the court, is not entitled to recover a judgment in any way whatever under the allegations set forth in his answer and cross-petition in this case, and the evidence adduced in support of that allegation during the progress of the trial."

The pleadings filed in the probate court were not offered in evidence and there is no evidence from which we can definitely determine what issues were there made, or upon what ground the verdict and judgment in that case were based. It does not, therefore, affirmatively appear that this charge was erroneous, or at least prejudicial. If, however, the issues there made were as stated in oral argument then we are of the opinion that the

court correctly held that the statute, Section 6434, did not apply to the proceedings there had.

The plaintiff's action in the probate court was brought under Section 6448 and resulted in a verdict and judgment for the defendant, the railway company; and certainly nothing appears in the evidence in *this* case that would authorize the taxation of the costs, expenses and attorney fees in *that* proceeding against the railway company.

We find no error in this record, and the judgment of the court of common pleas is affirmed.

PROSECUTION OF ERROR TO POLICE COURT.

Circuit Court of Cuyahoga County.

S. S. CREADON v. STATE OF OHIO.

Decided, February 5, 1901.

Criminal Procedure—Leave to File Petition in Error in Common Pleas Court Not Necessary.

It is not necessary to obtain leave to file petition in error in common pleas court, to review the judgment of a police court in a criminal case.

Foran, McTighe & Baker, for plaintiff in error.
Harvey R. Keeler, contra.

HALE, J.; CALDWELL, J., and MARVIN, J., concur.

In this case the plaintiff in error, Creadon, was convicted in the police court for an offense under the statutes of the state upon the subject of gambling. He filed a petition in error in the court of common pleas, without leave. A motion was sustained dismissing this petition in error for the reason that it was filed without leave. This is the only assignment of error for which the judgment of the court of common pleas is asked to be reversed.

Section 7356 of the Revised Statutes of Ohio reads as follows:

"In any criminal case, including a conviction for a violation of an ordinance of a municipal corporation, the judgment or final order of a court or officer inferior to the common pleas court may be reviewed in the common pleas court; a judgment or final order of any court or officer inferior to the circuit court may be reviewed in the circuit court; and a judgment or final order of the circuit court or the common pleas court in cases of conviction of a felony or a misdemeanor, and the judgment of the circuit court in any other case involving the constitutionality or construction of a statute, may be reviewed by the Supreme Court, but the Supreme Court shall not in any criminal cause or proceeding, except when its jurisdiction is original, be required to determine as to the weight of the evidence."

Clearly under this section of the statutes, unless modified by some other statute, a judgment of the police court in a criminal case may be reviewed in the court of common pleas by petition in error filed without leave.

The following sections provide for the mode of procedure in prosecuting error authorized by this section.

We are unable to find any provision of the statutes limiting the effect of this section and requiring leave to be obtained before filing petition in error.

For error in sustaining the motion to dismiss said petition in error, the judgment of the court of common pleas is reversed and the case remanded.

MALICE MUST BE PROVED IN MALICIOUS PROSECUTION.

Circuit Court of Cuyahoga County.

THE HOPWOOD PROVISION COMPANY v. FRED. L. JOSLYN AND FRANK JOY.

Decided, May 20, 1901.

Malicious Prosecution—Malice Not to be Inferred from Want of Probable Cause.

In every action for malicious prosecution, malice is a necessary element to be proven as a fact and does not necessarily follow from the want of probable cause, though it may be inferred from it.

Smith & Blake, for plaintiff in error.

W. H. Polhamus and *W. C. Rogers,* contra.

HALE, J.; CALDWELL, J., and MARVIN, J., concur.

Prior to October, 1898, the defendant in error, Joslyn, had for a period of years been employed by the plaintiff in error. That employment ceased about the date named. Some two months subsequent to that date, Joslyn was arrested for the crime of embezzlement. He was charged with collecting $3.75 belonging to the plaintiff, and unlawfully appropriating the same to his own use.

At the close of the hearing before the justice of the peace issuing the warrant, he was discharged. Thereupon he commenced action in the court of common pleas, alleging that the plaintiff in error had instituted that prosecution against him maliciously and without probable cause. Upon the issues made by the pleadings trial was had, resulting in a verdict for the plaintiff in the sum of $2,500, for which, after the overruling of the motion for a new trial, judgment was rendered for the defendant in error.

Several errors are assigned:

1st. That the court erred in the admission and exclusion of evidence.

2d. That the court erred in its charge to the jury.

3d. That the damages awarded were excessive.

First. We find nothing in the rulings of the court upon the admission and exclusion of evidence requiring a reversal of judgment.

Second. An action for malicious prosecution will lie only when there is a concurrence of the following circumstances: first, when a suit or proceeding has been instituted without any probable cause therefor; second, the motive in instituting it was malicious; and third, the prosecution has terminated in the acquittal or discharge of the accused.

Upon the subject of *probable cause,* the charge is *without fault,* but the element of *malice* was substantially ignored. Until the instructions were given to the jury upon the subject of the assessment of damages, there was no attempt to define that term. However, the order in which the different propositions are stated to the jury is not very material if the *law* is correctly stated. Upon that subject the court, among other things, said to the jury:

"And if you should find in this case that there was no probable cause for the arrest of the plaintiff existing at the time, and if you find that the defendant corporation occasioned his arrest without probable cause, then you may assume that that corporation acted with what the law calls malice, and that does not necessarily mean what we ordinarily mean when we use the word *malice,* that is, an existence of hatred; but the law regards malice as being present in this kind of an action, where an arrest has been procured without reasonable cause."

From this the jury must have understood that malice followed as a legal inference, from a want of probable cause. If such be the correct interpretation, it was erroneous. The existence or non-existence of malice is always a fact to be found by the jury from the evidence submitted to them. The jury may, under certain circumstances, find the existence of malice from the want of probable cause, but it does not follow as a legal inference. There may be existing a want of probable cause without malice.

The proposition quoted, as it must have been understood and applied by the jury, was erroneous.

Third. Upon a careful review of the testimony as it appears in this record, we are also of the opinion that the damages awarded by the jury were excessive, and for that reason the motion for a new trial should have been granted.

As the case is to be remanded for a new trial, it is unnecessary to fix the exact amount of this excess.

For these two errors appearing upon the record, the judgment of the court of common pleas is reversed and the cause remanded for a new trial.

ACTION FOR SPECIFIC PERFORMANCE AGAINST PARENTS.

Circuit Court of Cuyahoga County.

ELIZABETH SCHROEDER AND FREDERICK SCHROEDER v. CHRISTIAN SCHULTZ AND JOHANNA SCHULTZ.*

Decided, June, 1901.

Evidence—Specific Performance—Circumstances Surrounding Parties to be Considered.

In an action brought against a parent upon an alleged promise to convey certain real estate to a child in consideration of the child's promise to live upon and improve the same, there being direct conflict in the evidence as to the making of the alleged promise, the facts and circumstances surrounding the parties, including the apparent scheme of the parent for parcelling his real estate among his various children, will be considered.

H. T. Cowin and *Alex. Hadden*, for plaintiffs.

W. H. Polhamus and *Jas. F. Wilson*, contra.

MARVIN, J.; CALDWELL, J., and HALE, J., concur.

This case comes into this court by appeal from the court of common pleas of this county.

The plaintiffs were married to each other on the 8th day of November, 1887.

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*Affirmed without opinion, *Schultz* v. *Schroeder*, 68 Ohio State, 690.

The defendants are husband and wife, and are the parents of the plaintiff, Elizabeth Schroeder.

The plaintiffs, ever since the 11th of May, 1888, have lived in a house built on a tract of land consisting of twenty-five acres, situated in Warrensville township in this county, the title to which is in the defendants.

The plaintiffs seek for a decree that the defendants shall convey said tract of land to the plaintiff, Elizabeth Schroeder. The plaintiffs claim to be entitled to this conveyance because of a promise which they say the defendants made to them in 1887, shortly after their marriage; that such promise was made upon condition that the plaintiffs should construct a dwelling-house upon said premises and make the same their home; and that they have constructed such dwelling-house, and performed, on their part, every condition to be performed to entitle them to the conveyance under the promises of the defendants. The defendants deny that such promise was ever made.

No question is made here but that if the plaintiffs were promised by the defendants a conveyance of the land upon condition that they make improvements and expended money thereon, and that they were put into possession of the premises under such promise, and have made improvements and expenditures upon which the promise was conditioned, the defendants would be estopped from refusing to make good their part of the promise. So that there remains only the determination of the questions of fact made in the case.

The defendants deny that any promise was ever made by them to convey the premises to the said Elizabeth. They say that although a dwelling-house, a barn and other improvements have been made upon the premises by the plaintiffs, they were made under a contract, not in writing, by which the plaintiffs, whenever they should give up possession of the premises, should receive from the defendants the amount of money expended by them for such improvements. They say that in 1895 an agreement was made between the parties as to the amount thus expended; that the plaintiffs agreed to give up possession of the premises, but that they failed to do so; that the defendants notified the plaintiffs at that time that they were ready to pay the

money which had been expended by the plaintiffs in improvements upon the premises, and have ever since been, and are now, ready to pay such sum of money.

The evidence in the case consists chiefly in the testimony of witnesses, though certain exhibits have been introduced.

There is great conflict in the testimony of the witnesses. Some of them are clearly mistaken in their testimony, or fail to remember certain things that took place, or think they remember some things which never did take place.

The defendants are the parents of five children, two sons and three daughters, all of whom are married.

At the time when the plaintiffs claim the promise was made to them, the defendants were the joint owners of other lands, one tract of forty-six acres, and the tract of which the twenty-five acres was a part—said tract containing in all, fifty-nine and three-fourths acres. In 1898 the defendants conveyed to their youngest son a parcel of twenty-six acres out of said tract of forty-six acres and conveyed the remaining twenty acres of said tract to their daughter Emma, reserving in each deed a life estate to themselves. At about the same time they conveyed to their oldest son, John, all of the fifty-nine and three-fourths acre tract, except the twenty-five acre parcel which is claimed by the plaintiffs in this action. In the deed to John no reservation of a life estate to the grantors is made. Since the marriage of their youngest daughter, she being the one to whom no real estate has been conveyed, the defendants have given to her some $800 in money, and the defendant, Christian Schultz, has endorsed the bank paper of the husband of their said daughter, to the amount of something like $2,000, no part of which has he ever been called on to pay, nor, so far as any evidence in this case shows, is he likely ever to be called on to pay it.

The conflict in the testimony is such as to make it entirely irreconcilable.

It is a painful thing to suppose that any of the witnesses deliberately stated what was not true; but we are forced to determine as best we can, what are the *probable* facts in the case.

The testimony of each of the plaintiffs is positive that the promise was made to them as claimed in the petition. The testi-

mony of both of the defendants is equally positive that no such promise was made. It is certain that under some arrangement between the parties, the plaintiffs entered into possession of the premises claimed, and expended upon them money; that they have remained in the occupation of the house ever since and, except to the extent that the defendants can claim that by reason of the fact that Christian Schultz manured about five acres of the land in the winter of 1894-95, the possession of the entire premises has been continuously in the plaintiffs from the month of May, 1888. This manuring of the five acres is easily accounted for by the fact that there was undoubtedly, as shown by the testimony of all, a disagreement between the plaintiffs and the defendants in the fall of 1894 or the winter following, and the plaintiffs contemplated leaving the premises.

At that time a statement was made up by the plaintiff, Frederick Schroeder, and handed to the defendant, Christian Schultz. By this statement it was made to appear that if the plaintiffs gave up the property, there should be paid to them as reimbursement for their expenditures upon the premises, the sum of $342.87.

This statement, however, is erroneous to the extent of at least $60, because if the defendants were to take the property, the amount, last named, for which Schroeder in his statement gave credit to Schultz, should not have been so credited, on the theory that Schultz was to pay back to Schroeder all that Schroeder had expended; the $60 item is for expenditures made by Schultz upon the house, as shown by the statement, and, if Schultz was to resume possession and be the owner, that $60 was expended by him for the benefit of his own property. The other items for which the said Schultz is given credit in the statement, are for personal chattels, and were properly credited.

Assuming that the statement rendered was correct in other respects, the balance really to be paid by Schultz to Schroeder would have been $402.87 instead of $342.87. This same statement showed that Schroeder owed to Schultz $350, and this would be correct, except as to the $60 item, if Schroeder remained upon the premises, but would have been but $290 if he left the premises.

The true balance, however, would have been as already stated, $402.87, which Schultz should have paid Schroeder if he gave up the premises. That this whole plan was abandoned is evident from the fact that the plaintiffs have remained in possession of the premises ever since.

From the feeling which has manifestly existed between the parties during all that time we are led to the conclusion that the defendants felt that the plaintiffs had rights in the premises which they could not take from them or they would not have permitted them to remain unmolested for the last six years.

Several witnesses testify that the defendant, Christian Schultz, has stated to them that he had given this property to Elizabeth, at the same time stating that he had given that property which he has since deeded to his son John to him, and that which he has deeded to his daughter Emma to her, and that which he has since deeded to his son Herman to him.

One witness, Mrs. Bartlett, whose appearance is calculated to impress us that she is telling the truth, and who apparently has no interest in telling anything but the truth, says that Mrs. Schultz told her that Elizabeth was to have these twenty-five acres.

It is true that the several children of the defendants, other than Elizabeth, testify that nothing was said to them about these gifts, and that the first they knew that they were severally to receive the parcels of land which were deeded to them respectively, was when they received their deeds in 1898. Still the entire conduct of the parties goes to show that there must have been some understanding that they were to receive the parcels which have since been deeded to them.

Emma and her husband expended some $1,400 in building a house upon the premises, of which Emma now holds a deed, and which they have occupied for a good many years. John and Herman have each had possession and occupancy for a considerable number of years of the parcels to which they now hold title; and we think it clear that the general plan of these defendants was to divide up their real estate in the manner claimed by the plaintiffs, and that they must have made some promise to each of the children that such division would be made. That being so,

they would naturally have made the promise to Elizabeth which she claims. If they did, the conduct of Elizabeth and her husband in expending money in the erection of buildings, putting out fruit trees, and other improvements, is naturally accounted for, and it is not easily accounted for on any other theory.

In 1897, some four years after the plaintiff, Frederick Schroeder, rendered the statement to his father-in-law, he gave a note to his father-in-law for $350, due October 15, 1897, which note is still outstanding. On the last-named date the defendants executed a mortgage to their son Herman for $500 which still rests upon the premises, and the debt incurred by such mortgage is still unpaid.

The evidence shows that Christian Schultz expended some money in the construction of the house and other buildings erected upon this twenty-five acres; the exact amount we can not determine. At the time of these expenditures, the feeling between the parties was that which would naturally be expected between those sustaining the relation to each other which these plaintiffs and defendants do sustain, and, without doubt, work was done and money expended by Schultz of which no accurate account was kept.

We have reached the conclusion that the most equitable disposition of this case which we can make and conform to the facts as we understand them, is to require that the defendants shall convey to the plaintiff, Mrs. Elizabeth Schroeder, within ten days from the entering of the decree in this case, the twenty-five acres of land, subject to the mortgage of $500 held thereon by Herman Schultz, thus putting the payment of this mortgage debt, interest and all, upon the plaintiffs and cancelling the note of $350 held by Christian Schultz against the plaintiffs. And a decree will be entered accordingly.

AS TO TIME FOR FILING MOTION FOR A NEW TRIAL.

Circuit Court of Cuyahoga County.

A. W. MOSKOWITZ v. SILAS AUERBACH.

Decided, June 10, 1901.

New Trial—Date for Filing Motion.

The time within which a motion for a new trial may be filed, dates from the rendition of the verdict and not from the overruling of a motion for judgment upon special findings of the jury.

Hile & Horner, for plaintiff in error.
Henderson & Quail, contra.

CALDWELL, J.; HALE, J., and MARVIN, J., concur.

This case is here on a petition in error to reverse a judgment of the court of common pleas. Special findings were submitted to the jury at the request of counsel, and answers were returned to the special findings, and a general verdict. Thereupon counsel for plaintiff filed a motion for judgment on the special findings, notwithstanding the general verdict against him. The court overruled his motion and, in overruling the motion, delivered an opinion which has been presented to the court and which has been published in one of the legal journals of the state. The complaint made, is that the court erred in overruling that motion.

We fully concur in the judgment of the court and in the opinion pronounced as printed and as presented to us.

The only other error complained of is that the court refused to permit the plaintiff to file a motion for a new trial. The plaintiff had a motion filed in time, which he thereafter withdrew, and after his motion for judgment on the pleadings was disposed of, he applied to the court to file his motion for a new trial. The time prescribed by statute for filing a motion for a new trial had then long passed and the court for that reason refused leave to file it. It is claimed this was error, and that the time for filing a motion for a new trial does not apply where a

motion for judgment on special findings is interposed; that where that is done, the motion for a new trial should not be filed until that motion is disposed of. We do not think this point is well taken.

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

AS TO VALIDITY OF CERTIFICATE OF ACKNOWLEDGMENT TO MORTGAGE.

Circuit Court of Cuyahoga County.

ATLANTIC REFINING COMPANY v. CARRIE S. WAGNER ET AL.

Decided, November 22, 1901.

Evidence—Acknowledgments—Certificate of Acknowledgment Entitled to Great Weight—Misdescription of Officer Taking Acknowledgment Not Material.

1. The certificate of an officer that he has taken the acknowledgment of a grantor is entitled to great weight; and the burden of proof cast upon those disputing the acknowledgment is not sustained by the evidence of the grantor and her husband that she did not acknowledge the instrument.
2. The fact that a certificate of acknowledgment describes the officer before whom an acknowledgment was taken as "a notary public" where as a matter of fact he was a justice of the peace and signed as such, does not invalidate the acknowledgment.

Carpenter & Young, for plaintiff in error.

Chas. B. Lang, contra.

HULL, J. (sitting in place of Marvin, J.); CALDWELL, J., and HALE, J., concur.

This case involves the validity of a mortgage upon which the plaintiff brought its action in foreclosure.

Carrie S. Wagner makes the defense that she did not appear before the justice of the peace whose certificate of acknowledgment is attached to the mortgage, and claims that therefore the mortgage is invalid. The mortgage was for $4,000 and was admittedly signed by Carrie S. Wagner and her husband, and ad-

mittedly acknowledged by the husband before the justice of the peace, in due form.

The property that the mortgage covered, belonged to Mrs. Wagner, was her property.

The question in the case is, whether the evidence offered in support of the defendant's claim is sufficient, under the rule in this state, to overcome the certificate of the justice of the peace and his testimony.

Another mortgagee is a party to the case, a Mrs. Bayer, whose mortgage in point of time is prior to the mortgage of the refining company, but was not left for record until *after* the mortgage given to the refining company; so that the mortgage of Mrs. Bayer is inferior to the mortgage of the refining company if the latter mortgage was properly executed and acknowledged.

The testimony in the case, stated very briefly, is about this: the defendant Mrs. Wagner and the other members of the family testified to her signature and that of her husband being attached to the mortgage at their residence; the acknowledgment purports to be taken before justice of the peace Griswold, who had an office down town. Mrs. Wagner claims she never appeared before the justice of the peace. In this she is supported by the testimony of her husband and son; the husband testifying they went before the justice of the peace and he attached the certificate of acknowledgment without Mrs. Wagner being present, and Mrs. Wagner testifies she did not go before the justice of the peace.

The certificate of the justice is in due and proper form, and he testifies that a woman did appear with Mr. Wagner before him, that he believed to be Mrs. Wagner, that her signature had been signed before she appeared and that he took the acknowledgment in due form.

We hold that as the defendant was attacking the mortgage, the testimony as offered before us was not sufficient to bring it within the rule laid down by the Supreme Court in the case of *Ford* v. *Osborne*, 45 O. S., page 1. The Supreme Court substantially hold there that the testimony of the husband and wife alone would not be sufficient to overcome the certificate of the

notary; that is practically the holding of that court, as there was no other testimony offered.

In this case, we have not only the certificate of the notary, but his testimony that a woman who appeared to be Mrs. Wagner came before him and made the acknowledgment.

The Supreme Court in the case to which I have referred, says there must be more than a preponderance of the evidence and that it must be clear and convincing.

The authorities everywhere are, that the certificate of the notary alone is entitled to great weight as evidence, it being the official act of the justice of the peace or notary; that the security of titles requires that such certificate shall not be lightly set aside.

If this were an ordinary question of fact, not controlled by such a rule as has been laid down by the Supreme Court, we might hold that the preponderance of the evidence was in favor of invalidating this mortgage, but we do not think the parties have come up to the rule laid down by the court.

Just a word in regard to the form of the certificate objected to; it reads: "Before me, a notary public," etc., and is signed "E. R. Griswold, Justice of the Peace."

We hold that this certificate in form is good; that the language "notary public" in the body of the certificate is merely descriptive and would not affect the validity. The certificate was prepared by the mortgagee and given to Mr. Griswold, and the words "notary public" were written in and, as they were not able to find a notary public at that time, he signed his name and title thereto.

The decree will be in favor of the plaintiff, and with this found, the parties agree on the priority of the liens.

SERVICE ON AN OHIO CORPORATION.

Circuit Court of Cuyahoga County.

AKRON ELECTRIC MANUFACTURING COMPANY v. H. H. HAMMOND.

Decided, January 20, 1902.

Corporations—Process—Service Outside County Can Not be Made upon Secretary.

Service of summons can not be made upon an Ohio corporation in a county, other than that in which its principal place of business is located, by serving the secretary of the corporation.

Harold Remington, for plaintiff in error.
O. C. Pinney, contra.

HALE, J.; CALDWELL, J., and MARVIN, J., concur.

The plaintiff is an Ohio corporation having its principal place of business in the city of Akron. The defendant is a resident of Cleveland.

The defendant commenced an action in the Court of Common Pleas of Cuyahoga County against the plaintiff and caused summons to be served upon the secretary of the plaintiff. Judgment was taken by default. After judgment, the plaintiff appearing for that purpose only, filed a motion to vacate the judgment and set aside the service of summons on the claim that the court acquired no jurisdiction of the action. This motion was overruled by the court; which action of the court is assigned as error.

The determination of the questions submitted depends upon the proper construction to be given to the statutes bearing upon the subject.

The service of a summons upon a corporation of the class to which the plaintiff belongs is regulated by Section 5041, Revised Statutes. Three modes are provided by that section for the service of summons upon a corporation, dependant upon the circumstances existing at the time of the service: 1st. Upon the president, or president or chairman of the board of directors

or trustees, or other chief officer. 2d. If the service can not be made as first designated, then upon the cashier, treasurer, secretary, clerk, or managing agent of the corporation. 3d. If service can not be made in either the first or second modes, then by leaving a copy at the usual place of business of the corporation.

Formerly actions against corporations of this class could be brought only in the county in which such corporation was situated or had its principal office or place of business, or in which such corporation had an office or agent.

April 16th, 1900, the Legislature amended this section by adding thereto the following:

"Or in any county in which a summons may be served upon the president, chairman or president of the board of directors, chairman or president of the board of trustees, or other chief officer."

It plainly was not the intention of the Legislature to extend the jurisdiction of the court outside of the county in which the corporation had its home, to cases in which any kind of service could be made upon the corporation, but only to those cases in which service could be made in the particular manner first provided in Section 5041.

Service in this case was not made in the manner thus provided.

The secretary, as is clearly indicated by the statute, is not "other chief officer of the corporation." If Section 5023 is to be construed entirely independent of Section 5041, the construction claimed by the defendant could not then prevail. The meaning of the term, "other general officer," is modified and limited by the particular designation of the officer upon whom service can be made, in the preceding clause. The general words are limited by the particular description preceding them and can only mean other general officers of the class specifically designated. This would exclude the secretary; nor would the result be different if the secretary did, in fact, perform the duties which the testimony, submitted on the hearing of the motion, tends to show he did perform.

The judgment of the court of common pleas in overruling said motion is reversed, and proceeding to render such judgment as should have been rendered by that court, the judgment of the court of common pleas is vacated, and the service of summons set aside and held for naught.

DETERMINATION AS TO WHICH OF TWO INNOCENT PARTIES MUST LOSE.

Circuit Court of Cuyahoga County.

MARY KEMPINSKI v. AUGUST DYCZKOWSKI.

Decided, November 22, 1902.

Judgments—When Assignee of a Judgment May Not Enforce it.

1. Where one of two innocent parties must suffer loss, it is put upon the one who by his act or failure to act has enabled a third party to create the situation which must result in loss to one of them.
2. Where the assignee of a judgment fails to give notice of such assignment, and does not record the assignment until the judgment creditor is in the process of collecting his judgment by having it set off against the claim of the judgment debtor in a suit in another county, such assignee can not collect the judgment from the judgment debtor.

Thomas Robinson, for plaintiff.
Henry Du Lawrence, contra.

CALDWELL, J.; HALE, J., and HULL, J. (sitting in place of Marvin, J.), concur.

This case comes into this court on appeal. I will not undertake to state the facts at all in the case any further than to say this: That the husband of Mary Kempinski got a judgment against the defendant for $299 and after obtaining that judgment in this county he went to Portage county to collect it out of certain lands that the defendant owned in that county, and the defendant made a set-off of the claim he had against him

amounting to about $1,200 so that the judgment was the difference between the two claims, making it equivalent to a collection of the judgment of the husband of the plaintiff. Now, afterwards, she brings this action on the same claim, claiming that the judgment her husband had obtained for $299, had been assigned to her before he undertook the collection of it and she put the assignment on record after the collection was in process, and she claims that notwithstanding he collected it and got it in full by way of cancelling the larger claim in part against him, she is now entitled to collect it again. The question doesn't turn upon how far an assignment of a judgment when placed upon the docket where the judgment appears, is notice to the parties. It is held in 48 Pa. St., 70, that it is not notice—it is not direct notice, nor is it constructive notice. Be that as it may, this case seems to present this plain proposition of law or equity that is often acted upon: where one of two parties must suffer by reason of the act of a third, if one is instrumental in bringing about or setting in operation that act of the third which makes one of the two innocent persons suffer, he is the one on whom the responsibility must fall.

The husband of Mary Kempinski had it in his power to collect this judgment, even after he assigned it to her, from the fact that she gave no notice to the defendant, and, in fact, if the defendant had paid it to him while she held the assignment, without any notice to him, she certainly could not have recovered. That is well settled law. But while he was in process of collecting it, she put her assignment on the docket where the judgment appeared.

Even admitting that that is a sort of constructive notice, it was during the trial and certainly after a time when the defendant had prepared to meet the plaintiff's claim, and we think that he was under no obligation to go continually during the trial of his case, to another county, in another court to search a record to see if an assignment had been made, had been put on after the action had commenced in which he appeared. This being true, the fault of the defendant, if any fault at all on his part, is very slight, while that of Mary Kempinski, the plaintiff,

in not giving notice of her assignment, is one that under the facts of this case ought to defeat her; she is the one that by not giving any notice of the assignment to her, made it possible for her husband to undertake to do just what he did in this case. That being true, if there are two innocent parties here, she is the one that ought to suffer. We hold that she can not recover in this case.

SLIGHT VIOLATION OF A BUILDING RESTRICTION.

Circuit Court of Cuyahoga County.

THE WINDERMERE REALTY COMPANY v. PAUL G. SEARLES.

Decided, June 21, 1902.

Covenants—When Substantial Compliance, Coupled with Neglect to Object to Breach of Building Covenant a Defense.

Where it appears that the plaintiff has had full knowledge of the facts and made no protest while the defendant was incurring expense in constructing a porch on his house in such a manner as to be a slight violation of a covenant not to build any part of the house nearer than 30 feet to the street line, and it also appears that other lot owners in the same allotment have violated the same covenant to the same, or a greater degree than the defendant, a court of equity will not enjoin the completion and maintenance of the porch.

M. B. Johnson, for plaintiff.
Smith & Taft, contra.

CALDWELL, J.; HALE, J., and MARVIN, J., concur.

This action was brought by the plaintiff to enjoin him from constructing his house nearer than thirty feet to the side of the street in front of the same. This is an allotment belonging to the plaintiff, in which it is selling lots, on which lots houses are being built, and, in its deeds to purchasers, it places a line thirty feet from the side of the street and requires every part of the building to be back of that line.

It appears from the evidence in this case that the defendant has allowed his porch to project over that line about two feet; the porch is twelve feet wide; when his attention was first called to the fact that he was over the line, his porch was about half completed.

The defendant shows that two other houses having the same restriction as to one, and the same restriction except as to the distance as to the other, have been built over the thirty foot line; that in the one case the porch extends over more than does the porch of the defendant, and in the other the party has brought his porch nearer the street some ten feet than the limitation prescribed in the deed, and it is said that that has been done with the consent of the plaintiff and that the plaintiff has made no objection to the porch on the other side of the street from the one that has encroached ten feet, and that, by reason of the fact that it allows the steps of the houses of nearly all that are built on the street, to be built entirely within the thirty feet, there is a waiver of the provisions of the contract contained in the deed and which is sought to be enforced in this action. That the other lot-owners on the street, aside from the plaintiff, are not seeking to take advantage of the mistake of the defendant in allowing his porch to project over the thirty foot line; but the plaintiff has other lots upon the street to sell and other houses to be erected, and this contract should be construed as any other contract.

If there has been a material violation of it and no waiver, it should be enforced. All that is required in the carrying out of contracts in this state is, that there shall be a substantial compliance with the terms of the contract. We would not like to say in this case that this is a substantial compliance with the contract, unless the plaintiff has itself so treated other non-compliances. If the plaintiff has treated other non-compliances as substantial compliance with the contract. we do not see why the courts should not so treat this.

Another rule applicable to the carrying out of all contracts is, that, if there has been anything near a substantial compliance, the court should not interfere if, by so doing, it will do much injury to the party violating the contract, and bestow no substantial benefit upon the party seeking to have it enforced.

Applying these rules to this case—there has been a violation of this contract, but, in two other instances, saying nothing of the steps of the houses, the plaintiff seems to have acquiesced in a greater violation of the same; it is said and admitted, that it has been done with the plaintiff's consent. This throws light upon what the plaintiff regards as a substantial variation from the contract.

In the cases referred to above, it was not regarded as a substantial variation, while, in *this* case, in less degree it is so regarded.

The evidence shows that the porch in question will be open, will not obstruct the view of other lot owners to any extent, and will be of no substantial injury to the plaintiff, but it will be of considerable injury to the defendant to enforce the covenant strictly, as it said that he can not cut down his porch two feet without greatly disfiguring and disproportioning the appearance of his building.

The greatest injury, perhaps, to the plaintiff would be that this might be a precedent for other persons projecting the porch over the line named in the deed. But, in this case the plaintiff made no complaint at all until the porch was about half completed and, if complaint had been made before the porch was built, undoubtedly the court would have been compelled to make the defendant keep back of the thirty foot line. And, in any case hereafter where the plaintiff did not stand by until the defendant had been to a large expense, seeming at least to give assent to what the defendant was doing, the court would feel at liberty to force the covenant in the deed.

One of the houses spoken of above has its foundation and roof of the porch projecting over the thirty foot line, but the posts supporting the roof of the porch are set back of that line, with which arrangement, so far as we learn in this case, the plaintiff seems content.

A porch projecting over a line for a few inches or a foot or two is not so serious an objection as though the main body of the house projected. It leaves the entire space substantially open to view and air and but very little disfigures the symmetry of the plan of building.

We hold in this case that the defendant shall place his posts back on the thirty foot line. The evidence shows that he can do this without materially injuring his porch and without expense; and, under all the facts and law as above referred to, we feel that this is as much as we should require the defendant to do, taking into consideration other violations of a like covenant, taking also into consideration that his attention was not called to the fact that he was over the line until his porch was half completed, and taking into consideration the fact that requiring him now to cut down, would be expensive and materially injure the appearance of his house, and that the damage to the plaintiff is substantially nothing.

Instead of granting the injunction prayed for herein, we simply order that the defendant place his posts back of the thirty foot line.

Without any intent in any way to forestall the plaintiff as to any action which he may have under a like covenant in any other deed, we make this decision entirely upon the peculiar facts of this one case, which are not intended to apply to any other with dissimilar facts.

VALIDITY OF SIGNATURE TO CHATTEL MORTGAGE.

Circuit Court of Cuyahoga County.

EDWARD HOBDAY v. LEWIS SANDS.

Decided, June 21, 1902.

Chattel Mortgages—Names—Mortgage Executed by Signing Correct Name Valid Though Mortgagor is Known by Another Name.

Where the owner of personal property is known by different names, a chattel mortgage executed by her and signed by her with her correct name but with a slight variation in spelling, is, when recorded, notice to a subsequent mortgagee of the property, though the name signed is not the one by which she was commonly known.

MARVIN, J.; CALDWELL, J., and HALE, J., concur.

Each of the parties of this action took a chattel mortgage upon the same property, both given by the same person who was the owner of the property. This mortgagor was a woman engaged in the keeping of a house of prostitution; she was known by different names. The mortgage to Sands was given prior to the giving of the mortgage to Hobday. Hobday got possession of the property. Sands brought suit in replevin. Upon a jury trial in the court of common pleas, Sands recovered. Hobday prosecutes this proceeding for the purpose of reversing the judgment of the court of common pleas. He claims, first, that the evidence shows that the mortgage given to Sands, was to secure a loan made by Sands to the mortgagor for the purpose of enabling her to carry on her unlawful business. This question was properly left to the jury, the court saying in its charge on that subject as follows:

"The defendant claims that the plaintiff, Sands, intended to assist in the furthering or extending a house of prostitution. and the question is for you to determine: gentlemen, did he intend in making this loan to assist this woman in the illegal act of keeping a house of prostitution? If he did, then the law will not aid him in such a matter and he can not recover in this case."

Upon the issue the jury found with Sands, and we hold that this was not so contrary to the evidence as to justify a reversal on that account.

The mortgagor signed the mortgage to Sands, with the name of "Inez Tozier." The mortgage given to Hobday was signed "Inez M. Clyne." It is not claimed that this last name was ever the true name of the mortgagor although it does appear that she was known for a time by that name. It does appear that her father's name was "Toser," and he testifies that the name of the mortgagor was Mary Toser. She herself testifies that her name was Mary Inez Tozier. This change of the spelling from Toser, as her father spelled it, to Tozier, as she gives it, is not very material—surely is not greater than many very respectable people change the spelling of the paternal name. We find some rather prominent people who spell the name of themselves Cooke, whose father spelled it Cook; Smythe, when the fathers spelled it Smith. A man, somewhat prominent in the literary world a few years ago, wrote his name Henri Browne, but admitted on the witness stand that in his boyhood days, his name was spelled Henry Brown.

It is probable from the evidence that the name Inez was taken by this woman after she left home. It is certain that the name Clyne was an assumed name. She was, however, very generally known by the name of Inez Clyne about the time when these mortgages were given. And, on the part of the plaintiff in error, it is urged that the mortgage to Sands being signed as it was, was no notice to those who should have dealings with the mortgagor, although the mortgage was properly filed and recorded.

Without doubt the purpose of the law in requiring these mortgages to be filed and indexed, is to give notice to the public of the existence of such mortgages, so that one making examination in the proper office may know whether property is mortgaged or not.

In the case of *Lessee of Simeon Jennings* v. *Robert Wood*, 20 Ohio, 261, it is held that, where the officer in recording a deed made by Lemuel Granger, mistook the name and wrote instead

Samuel Granger, such record was not notice that Lemuel Granger had conveyed away any property.

In this last named case there was no claim that the grantor had ever been known as Samuel Granger. It is true that the names, "Samuel," and "Lemuel," when written, look somewhat alike, and, as written by many persons, might look very much alike. But the two names are wholly distinct, and one looking for a conveyance made by Lemuel would not be likely to examine the index under the letter S.

But, in the present case, it is clear that this mortgagor was very generally known by the name of Inez, and, when the mortgage was given to Sands, she inquired what name she should sign, and was told to sign her true name, whereupon she did sign the name Inez Tozier. In the case of *Fallon* v. *Kehoe*, 38 Cal., 44, this language is used in the syllabus:

"If the true owner conveys property by any name, the conveyance as between the grantor and the grantee will transfer the title.

"The execution of a conveyance of land by the owner in his rightful name, though different from that in which he acquired it, when duly recorded, will operate as constructive notice of the sale and transfer of the title and will take precedence of a subsequently recorded deed to the same land executed in the name by which it was acquired."

See also the case of *Alexander Brothers* v. *Graves*, 75 Neb., 453.

We think no violence was done to any decision of the Supreme Court of Ohio by holding on this matter as the court below held, and that the authorities to which attention is last called and the reasons therefor, justify an affirmance of the judgment; and the judgment is affirmed.

DAMAGES FOR BREACH OF CONTRACT TO PURCHASE FLOUR.

Court of Appeals for Hamilton County.

DOMESTIC SCIENCE BAKING COMPANY v. SHEFFIELD-KING MILLING COMPANY.

Decided, January 17, 1916.

Damages—Measure of, in Action for Breach of Contract to Purchase Specific Personal Property—Provision for Liquidated Damages Must be Treated as a Penalty, When—Evidence Admissible as to the Amount of Damages Actually Sustained.

In an action under a contract for purchase and sale which has been breached and related to as common and stable an article as flour, a provision for ascertaining the resulting damages by a rule which would give an amount greater in excess of what was actually suffered must be treated as a penalty to be imposed rather than as liquidated damages, and the defendant in such a case should be permitted to show all the circumstances surrounding the making of the contract which would tend to disclose the real loss sustained.

W. A. Rinckhoff, Murray Seasongood and *Robert P. Goldman,* for plaintiff in error.

Stanley K. Henshaw, E. R. Donohue and *H. L. Hoidale,* contra.

GORMAN, J.

On the 5th of August, 1912, the parties hereto entered into a contract whereby the defendant in error agreed in writing to deliver f.o.b. the cars at Faribault, Minnesota, four thousand barrels of flour of one hundred and ninety-six pounds each, the defendant in error, the seller, to pay the freight from Faribault to Cincinnati. The flour was to be packed in jute bags of one hundred and forty pounds each. The price of the flour was $4.75 per barrel at Faribault. The deliveries were to be made between October 1, 1912, and March 1, 1913, via C., H. & D. Railroad. Payment was to be by draft with bill of lading attached, to be paid through the Market National Bank of Cincinnati. Shipments were to be made upon the order of the ven-

dee, the Domestic Science Baking Company.

The contract provided for damages which should be payable by the vendee in case of breach. In substance it was agreed in the contract to sell that—

"If the buyer fails to furnish directions for shipment within original contract time or prior to the date of expiration of extension, seller may, (1) extend contract limit thirty days, subject to carrying charges * * *; (2) ship the goods at his option within thirty days * * *; or (3) terminate contract, in which case the following is agreed upon as the basis of settlement, viz.: the actual difference between the highest closing price of No. 1 Northern wheat in Minneapolis on date of sale and date of cancellation as shown by the 'Minneapolis Market Record,' figuring four and one-half bushels of wheat for every barrel of flour, the buyer to reimburse the seller for carrying the wheat at the rate of one cent per bushel per month from the date of sale to date of cancellation, plus two cents per bushel for buying and reselling the wheat, and two cents per bushel to cover loss of profit, if any, and inconvenience to seller resulting from failure of buyer to take out flour as per contract."

There were other terms and conditions in the contract, but these are sufficient to present the questions which arose in this cause in the trial below.

The vendee, the Domestic Science Baking Company, ordered out and received 750 barrels of flour, but refused and neglected to order the remaining 3250 barrels, and refused to give directions therefor and breached the contract.

The action was brought by the defendant in error in the court of common pleas to recover the damages claimed to have been sustained under this contract by reason of the breach of the contract on the part of the plaintiff in error in refusing to order out the remaining barrels of flour.

Upon the trial of the cause below the trial court held that no evidence was admissible to show the market price of flour either at Faribault, Minneapolis, or at Cincinnati, but the parties, in the determination of the amount of damages which might be recovered, were limited to the rule laid down in the contract for determining these damages. Under this rule, allow-

ing the vendor the amount agreed upon under the contract, the damages for the failure to take the 3250 barrels of flour would amount to about $4,400. The Domestic Science Baking Company offered to show the market price of the flour in question at Cincinnati on the date of the breach of the contract, and further offered to show the market price at Faribault, Minnesota. The court refused to allow this to be done, and counsel for plaintiff in error, so the record discloses, stated that if it were permitted to prove the market price of flour at the time and place of delivery, when the breach occurred, the damages to the Sheffield-King Company would not exceed $500. In fact, it was claimed that the evidence would show, if admitted, that there was little or no damage resulting to the plaintiff below.

During the trial the Sheffield-King Milling Company waived its claim of two cents per bushel to cover the loss of profit, and the court instructed the jury to return a verdict in favor of the plaintiff below for $4,185.46, which included interest. If the plaintiff below had not waived its claim of two cents a bushel prospective profits, the amount of the verdict under the instructions of the court would have been nearly $4,500.

Plaintiff in error asks for a reversal of this judgment, upon the ground that the court erred in refusing to permit it to offer evidence tending to show the market value of the flour at the time of the breach and at the place of delivery; and for the further reason that the court refused to permit it to offer evidence tending to show the situation of the parties at the time the contract was entered into and all the surrounding circumstances.

The court below instructed the jury to return a verdict in favor of the plaintiff upon the theory that the provisions of the contract, for liquidation of damages, were agreed upon between the parties, and that no other rule of evidence is admissible to establish damages. The court also held that under the evidence there was no question of the breach of the contract, because the defendant below had refused and neglected to take the remainder of the flour.

We are of the opinion that the judgment should be reversed, and the case remanded for a new trial.

In this state the rule is well established that the measure of damages for the breach of a contract of sale of specific personal property is the difference between the market price and the contract price at the time and place of delivery. Section 844, General Code; *Cullen* v. *Bill,* 37 O. S., 236; *Nixon* v. *Nixon,* 21 O. S., 114; *Smith* v. *Lime Co.,* 57 O. S., 518.

It is true that parties may agree upon a sum as liquidated damages in case of a breach of a contract of this character, but courts will closely scrutinize such agreements for the purpose of determining whether or not the stipulation fixed is a penalty, or correctly represents the damages sought for the breach of the contract and which naturally flow from the breach.

The trial court was of the opinion that the rule laid down in *Doan* v. *Rogan,* 79 O. S., 372, should be applied to the instant case. In that case there was a contract entered into between four partners, and among other provisions of the contract was the following:

"That if either Seth H. Doan, Dudley J. Mahon or Conrad Roth shall sever his connection with the said temporary partnership or said corporation without the consent of Michael J. Rogan and within three years from this date, the person so offending shall pay said Michael J. Rogan the sum of one thousand dollars as liquidated damages."

The Supreme Court held in that case that this was a reasonable provision for liquidated damages, and in the second paragraph of the syllabus the court said:

"Whether a stipulation providing for liquidated damages for the breach of a contract is to be construed as liquidated damages or as a penalty, depends upon the intention of the parties to be gathered from the entire instrument. While courts will not construe contracts in a way authorizing recovery for liquidated damages simply because the parties have used that term in the agreement, yet where parties to a contract otherwise valid have in terms provided that the damages of the injured party by a breach on the part of the other of some particular stipulation, or for a total breach, shall be a certain sum specified as liquidated damages, and it is apparent that damages from such breach would be uncertain as to amount and difficult of proof, and the

contract taken as a whole is not so manifestly unreasonable and disproportionate as to justify the conclusion that it does not truly express the intention of the parties, but is consistent with the conclusion that it was their intention that damages in the amount stated should follow such breach, courts should give effect to the will of the parties as so expressed and enforce that part of the agreement the same as any other."

It will be noted that in the case just cited the damages would be difficult if not impossible of ascertainment. The amount of damages, if any, which could be recovered would be quite uncertain, and there was nothing unreasonable in providing that $1,000 should be paid as liquidated damages for the breach of the contract under all the circumstances of that case.

But in the case before us, flour is a common article or commodity, bought and sold throughout the length and breadth of the land, in every city, town and hamlet. It is perhaps as common an article of commodity as is bought and sold daily throughout the United States. It is common knowledge that flour has a market value which perhaps may fluctuate from day to day, from week to week, or from month to month, but it has a market value easy of ascertainment, and there is no difficulty in finding out what is the market value of any grade of flour made in any part of United States. If there is no market value at any particular point in the United States, then the market value of flour at the nearest point to that place may be taken and the cost of carriage between that point and the place where the market price is desired to be fixed would determine the market price in the locality where there are no quotations.

It appears to this court that there would have been no difficulty in determining the market value of this flour, either at Faribault, Minnesota, or at Cincinnati, and the excuse for fixing a sum as liquidated damages does not exist in this case. It was not difficult to ascertain the market price. The damages for the breach of the contract would be in no wise uncertain, and it would be entirely unreasonable to allow damages in a case of this kind, which would amount to almost eight times the real damage suffered by the vendor on account of the breach of the contract.

Taking these matters all into consideration we think the reasonable conclusion to reach is that the construction to be placed upon the language in this contract which undertakes to prescribe a rule for ascertaining the damages, is that it shows a penalty was provided, rather than liquidated damages.

Section 440, in *1 Pomeroy's Equity Jurisprudence*, page 728, in the note, states:

"Whether the sum mentioned shall be construed as a penalty or as liquidated damages is a question of construction on which the court may be aided by circumstances extraneous to the writing. The subject-matter of the contract, the intention of the parties, as well as other facts and circumstances, may be inquired into, although the words are to be taken as proved exclusively by the writing."

The court below should have permitted all evidence to be offered tending to show the situation of the parties at the time this contract was entered into, all the surrounding circumstances, and testimony as to the market value of the flour, and the question should then have been submitted to the jury not as to whether or not this was a penalty, but as to what the real damages were in the case.

In the case of *Mt. Airy Milling Co.* v. *Runckels*, 118 Md., 371, the first paragraph of the syllabus is as follows:

"In a contract the statement of the parties as to liquidated damages is generally regarded as a penalty unless the contrary intention is unequivocally expressed, so that harsh provisions will be avoided and compensation alone awarded."

In *Zenos* v. *Pryor*, 106 N. E. R. (Ind.), 746, the following rule is laid down in the fifth paragraph of the syllabus:

"Where contracts leave in doubt the question whether sums specified therein by the contracting parties to be paid in case of a default are intended as liquidated damages or penalties, the court favors that interpretation which makes such sums penalties."

It appears to the court that there is no reasonable or proper connection between the rule laid down in the contract, for ascer-

taining damages, and the actual damages that would result from a breach of the contract for the sale of the flour. Wheat was taken as the basis upon which to calculate the damages. Why not flour? Flour is just as common a commodity as wheat in the market, and the market price is just as easily ascertainable as that of wheat.

We do not deem it necessary to multiply authorities in support of the conclusion we have reached, that the provision for the ascertainment of damages in the contract under consideration shows that a penalty was to be imposed, rather than liquidated damages. Counsel for defendant in error have been specially diligent in citing numerous authorities in support of the contention that the ruling of the court below was correct. A brief of more than one hundred and fifty pages was filed with us, in which so many cases are cited that it appears to be an effort to "pile Ossa on Pelion" of adjudicated cases.

Many of these cases grew out of contracts to manufacture and sell certain articles, in which the measure of damages was difficult of ascertainment, no market price existing for the articles to be manufactured and sold. But in all cases in which the article sold was a common stable article sold in the market, having a well known or easily ascertainable market value, and where the parties undertook to fix as liquidated damages a sum largely in excess of the difference between the market price and the contract price, the cases have universally held that such stipulation would be treated as a penalty, rather than as liquidated damages.

We think substantial justice requires that the judgment in this case be reversed and the cause remanded to the court of common pleas for a new trial, so that the plaintiff in error may have an opportunity to show all the facts and circumstances surrounding the making of the contract, to show the market price of the flour at the time of the breach at the place of delivery, and all other facts and circumstances which would tend to show the real damage or loss that was sustained, if any, by the defendant in error.

Judgment reversed and cause remanded.

JONES (E. H.), P. J., and JONES (Oliver B.), J., concur.

PROSECUTION FOR FAILURE TO PROVIDE FOR CHILD.

Court of Appeals for Columbiana County.

WILLIAM ELEM v. STATE OF OHIO.

Decided, April 8, 1915.

Parent and Child—Knowledge of Child's Need Will be Imputed to Parent —Demand for Aid or Maintenance Not a Pre-requisite to Prosecution for Failure to Provide for Child—Section 13008.

A parent who is able by reason of property, labor or earnings to provide care or maintenance of his or her child under sixteen years of age, may be convicted of failure so to do without proof of notice that the child is in need or of a demand or request that such care or maintenance be provided.

George T. Farrell, for plaintiff in error.
William H. Vodrey, Prosecuting Attorney, contra.

HOUCK, J. (sitting in place of Spence, J.).

This cause is here on error from the common pleas court of this county, seeking to reverse a judgment of conviction, wherein the plaintiff in error, the defendant below, was convicted upon an indictment in which he was alleged to have failed, neglected and refused to furnish food, clothing, proper care and maintenance to and for his bastard child, the indictment and conviction being under favor of Section 13008 of the General Code, which is as follows:

"Whoever, being the father, or when charged by law with the maintenance thereof, the mother of a legitimate or illegitimate child under sixteen years of age, or the husband of a pregnant woman, living in this state, being able by reason of property, or by labor or earnings, to provide such child or such woman with necessary or proper home, care, food and clothing, neglects or refuses so to do, shall be imprisoned in a jail or workhouse at hard labor not less than six months nor more than one year, or in the penitentiary not less than one year nor more than three years."

The defendant below was tried and convicted. A motion for a new trial was filed, heard and overruled, and to the overruling of the same the defendant prosecutes error to this court, seeking a reversal of the judgment below.

Counsel for the accused contends that the evidence offered in the case does not show or prove that the accused is the father of said bastard child; and, further, that no demand or request was made at any time by any one for him to support or maintain said child, and therefore the verdict of the jury is against the weight of the evidence and contrary to law.

The statute in question was enacted by our Legislature for a purpose, and we think it is a proper and humane one, and is for the purpose of aiding and protecting communities and society to bring about the proper care and support of children by parents, whether they be born in or out of lawful wedlock, if the parent has the means and property for so doing, which the record shows the defendant possessed at this time.

Speaking from the record in this case, the accused associated with and kept the company of the prosecuting witness. He had sexual intercourse with her, and gratified his passions and desires, and is therefore not only morally, but legally responsible for his acts and conduct, which, in this case, resulted in bringing into this life a bastard child, and is chargeable for its maintenance and support if he is proven, under the evidence, applying the proper rules of law thereto, to be the father of said child. We have examined the record and the testimony. The defendant below was represented by able counsel, and he had a fair and impartial trial.

It is the claim of counsel for the accused that the judgment below should be reversed. We think there is but one proper and reasonable answer to this, in the face of the record and the law applicable to the case at bar.

It is a well established principle of law in this state that a father is bound to know when his child is in need of food, clothing, care and support. He, being the father, is not only required to, but in law is bound to know it, and the law does not require him to be notified of that fact. The father owes to himself and the public the duty of taking care of and supporting his child,

and the fact that no one called his attention to the needs of the child does not remove his moral, and his legal obligation as well, to his offspring, under the section of our statutes heretofore referred to.

It will be noticed that the statute under favor of which the accused was tried and convicted does not, by any terms therein, require that a demand or request shall be made upon the father for the performance of the duty enjoined and required of him in said statute. Nor, if effect is given to all the terms thereof, does it appear that such demand, or notice, or request, is required by implication.

We believe that these principles of law are sound; and applying them to the facts and evidence as disclosed by the record in this case, so far as this court is concerned, we are of the opinion that the defendant was properly and legally convicted, and that the verdict of the jury and judgment of conviction should stand, and that the defendant must atone to the offended law.

The judgment below is affirmed.

POLLOCK, J., and METCALFE, J., concur.

DUTY OF AN ELECTRIC RAILWAY COMPANY TOWARD PASSENGERS WHO ARE ATTEMPTING TO ALIGHT.

Court of Appeals for Licking County.

THE OHIO ELECTRIC RAILWAY CO. v. MARGARET J. VAUGHAN.

Decided, October Term, 1915.

Woman Injured While Attempting to Alight from Car—Duty of Conductor When Aware of Destination of Passenger—Degree of Care Required of Carrier While Discharging Passengers—Charge of Court.

In an action by a woman who was injured by the premature starting of a car from which she was alighting, a request by the defendant company for the special charge before argument, that if the jury found

"—that the car remained standing for a space of time sufficient for her to alight and then started, that there was nothing to

prevent her alighting while the car was so standing, that she remained standing on the platform step for that period of time, and then started to alight as the car started to move forward, and was thrown and injured thereby, she can not recover"—was properly refused, where the testimony establishes that the place where the accident occurred was a regular stop at which passengers were in the habit of boarding and leaving the cars, that the conductor knew the plaintiff desired to alight at that time and place and was encumbered with bundles, and there was testimony tending to show that she had started to alight when the car was started forward.

Fitzgibbon, Montgomery & Black, for plaintiff in error.
Jones & Jones and *B. F. McDonald,* contra.

SHIELDS, J.

This was an action commenced in the court of common pleas of said Licking county by the defendant in error, plaintiff below, to recover damages against the plaintiff in error, defendant below, for personal injuries claimed to have been sustained by the defendant in error through the alleged negligence of the plaintiff in error.

The petition of the plaintiff alleged, in substance, that on the 13th day of June, 1913, she being then a passenger on one of the defendant company's cars operating its line of street railway between Zanesville and Newark, Ohio, notified the conductor of said car that she desired to alight therefrom at what is known as the B. & O. crossing on East Main street in the city of Newark; that upon reaching said crossing said car stopped; that upon being notified by the conductor of said car that said car had reached said crossing, the plaintiff thereupon attempted to alight from said car and while in the act of so alighting and when on the steps of said car, said car suddenly and without warning started, throwing the defendant in error violently to the pavement, injuring her as set out in her said petition to which reference is hereby made.

In its answer filed to said petition the defendant company admits that the plaintiff was a passenger on said car at said time, but avers that if she sustained any injuries, her own negligence contributed thereto, first, in not availing herself of reasonable

time and opportunity given her to alight from said car at said place, and secondly, in attempting to alight from said car while it was in motion.

While we do not find any reply to said answer among the files in said case, it was conceded that one had been filed in the nature of a general denial of the allegations contained in said answer.

Said cause was submitted to a jury and a verdict returned for the plaintiff. A motion for a new trial was overruled and judgment entered on said verdict. A bill of exceptions was duly prepared and filed and a petition in error was filed in this court for a review of said judgment.

Said petition in error contains numerous assignments of error but the grounds of error insisted upon to this court were:

1. That the court below erred in giving certain written requests before argument in charge to the jury on behalf of the plaintiff below, and in refusing to give in charge to the jury before argument certain written requests in writing on behalf of the plaintiff in error, and for error of the court in its general charge to the jury.

2. That said court erred in its instructions to the jury in respect to the duty of the conductor of a car to look after passengers alighting from said car.

3. That the verdict of the jury is against the weight of the evidence and contrary to law.

Numerous requests appear to have been submitted in writing before argument both by the plaintiff and the defendant below with the request that they be given by the court in its charge to the jury, and it further appears that the requests so made by the plaintiff in error were so given, except the last found on pages 155 and 156 of the bill of exceptions, which action of the court in refusing to give said request in charge to the jury is assigned as error. It is apparent that if the requests submitted by the defendant in error, which were given by the court in charge to the jury, contained sound propositions of law, said request of the plaintiff in error was properly refused. Said request is as follows:

"If you find that the plaintiff was standing on the rear platform of the car for the purpose of alighting therefrom when the car was stopped, that the car remained standing for a space of time sufficient for her to alight, and then started, that there was nothing to prevent her alighting while the car was so standing, that the plaintiff remained standing on the platform step for that period of time, and then started to alight as the car started to move forward, and was thrown and injured thereby, she can not recover in this action, and your verdict should be for the defendant."

We think that the foregoing request was properly refused. It appears that the B. & O. crossing at this place was a regular stopping place where passengers were in the habit of getting on and off said defendant company's cars, where the conductor of the car in question knew that the defendant in error desired to alight from said car at said time and place, and where, as the testimony tends to show, said conductor knew that she started to alight from said car. If these conditions were found by the jury to exist, was not the conductor of said car called upon to exercise care, caution and diligence, to see to it that said car was not started until the defendant in error fully and safely alighted from said car, she being in the exercise of due care? And failing to do so, would not the defendant company, under such circumstances, be chargeable with negligence for which it would be liable? Counsel for plaintiff in error cite us to the case of *Transit Co.* v. *Holmes*, 67 O. S., 153, in support of their contention. In that case there was a conflict in the testimony both as to whether the conductor of the car had notice that the defendant in error desired to get off the car at a given place, and whether the defendant in error had not attempted to alight when the car was in motion, neither of which is shown to be the fact in the case before us, for here it is admitted that the car stopped at the B. & O. crossing, that the conductor of the car then notified the defendant of such fact, and the defendant in error testified that she immediately followed the conductor to the vestibule of the car and when she reached the steps of the car in the act of getting off, the car suddenly and without warning started and threw her to the pavement and injured her. Judge Davis in announcing the opinion in the case cited says:

As to the verdict of the jury being against the weight of the evidence, it is apparent that there is a conflict in the evidence, but there is evidence tending to support the claim of the defendant in error as made in her petition, and under the holding in the case of *Gibbs* v. *Village of Girard,* 88 O. S., 34, we do not feel at liberty as a reviewing court to disturb the finding of the jury.

Other assignments of error are made in said petition in error, all of which we have examined, and we find no such error in the record for which the judgment of the court below should be reversed.

Upon the whole case, we are of the opinion that substantial justice has been done between the parties hereto by the verdict rendered, and find no difficulty in reaching the conclusion that the judgment of the court of common pleas should be affirmed and it is so ordered.

HOUCK, J., and FERNEDING, J. (sitting in place of POWELL, J.), concur.

UNREASONABLE OCCUPANCY OF STREET WITH RAILWAY TRACKS.

Court of Appeals for Hamilton County.

CITY OF CINCINNATI v. PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY.

Decided, December 6, 1915.

Railways—Laying of Tracks in Streets—Occupation of Street by Five Tracks Unreasonable—Rights Acquired by Appropriation Limited to Such as Council Might Grant—Authority of City Solicitor to Institute Injunction Proceedings.

1. There is no power or authority in a municipal council to grant the right to a railway company, either by ordinance or agreement with the company, to occupy, incumber and use a street by crossing it with five tracks connecting with a railway yard and in reality becoming a part of the yard, particularly where access to the yard can be had without thus occupying the street; nor could the right so to do be acquired by appropriation.
2. There is ample authority in Section 4311 for the bringing by the city solicitor of injunction proceedings against the unreasonable occupation of a street with railway tracks, regardless of failure on the part of council to authorize him so to do.

Walter M. Schoenle and *Constant Southworth,* City Solicitors, for plaintiff.

Lawrence Maxwell and *Joseph Graydon,* contra.

GORMAN, J.

The plaintiff brought this action in the common pleas court to enjoin the defendant from laying railroad tracks across Ludlow street, one of the dedicated and improved streets of the city, and from obstructing said street; and it also asked for a mandatory injunction requiring the defendant company to restore said Ludlow street, its sidewalks and gutters, to their former condition. The cause is here on an appeal from a judgment of the common pleas court.

It is claimed by plaintiff in its petition that the defendant is proceeding to lay four or five tracks and switches across and in

Ludlow street from east to west between Front street and the Ohio river, and has in furtherance of said work torn up the boulders in the street, changed the grade of some portions of the street, destroyed the sidewalks and the west gutter and partly destroyed the east gutter of said street, and piled on said street large quantities of earth and other debris, thereby obstructing the street and rendering it unfit for public travel, and has otherwise damaged said street and materially interfered with and impaired its usefulness; and that this has been done and is being done without legal right or authority and in violation of the rights of plaintiff and the public in and to said Ludlow street.

The defendant by an amended answer denies that it has unlawfully occupied said street; but says that its occupation of said street and its right to lay tracks across the same is lawful by virtue of certain ordinances and resolutions of the council of the city of Cincinnati adopted January 1, 1864; May 16, 1879; April 23, 1906, and especially by virtue of an ordinance adopted July 17, 1905, number 984, which ordinance in substance granted permission to defendant company to construct and maintain three tracks and switch leads for two additional tracks across Ludlow street south of Front street, said three tracks and the leads running from three separate points from the west side of said Ludlow street and converging toward a common point at the southeast corner of Front and Ludlow streets and connecting with the track at present laid in the center of Front street at a point one hundred and fifty feet east of Ludlow.

Defendant avers that it accepted said ordinance August 11, 1905, and has complied with and is now ready and prepared to comply with the provisions thereof.

By reply the plaintiff challenges the validity of said ordinance and denies that it is binding upon the city of Cincinnati, and denies the power or authority of its council to grant the defendant the right to lay said tracks.

The evidence adduced on the hearing in this court shows that the tracks to be laid across Ludlow street are to connect certain yards of defendant with a connection track in Front street, which has been laid in said street for more than forty years.

While the ordinance purports to grant the right to lay five tracks across the street—three tracks and two leads—it is claimed that but four tracks are intended to be laid at this time. A plat offered in evidence shows that not only will these four tracks be laid across the street, but there will also be placed in the street two switches whereby cars may be switched or shunted from any one of these four tracks onto any one of the other three. It also appears that just west of Ludlow street and to be connected with these four tracks across the street, is located a railroad yard of the defendant occupying a whole block, from Ludlow on the east, to Broadway on the west, and from Front street on the north to Giffin street on the south; that there are at present four tracks in said yards, and the purpose of extending these four tracks into Ludlow street and constructing switches therein is to utilize all of the space in said yard for storage tracks, instead of placing switches within the yard limits. If these four tracks and the two switches can not be laid in Ludlow street then in order to use said yard provision must be made within the limits of the yard property for switches and leads, thereby curtailing the capacity of defendant's yard. Indeed, it is manifest that these tracks and switches proposed to be laid in Ludlow street are but a continuation of the four tracks in defendant's yard, and if permitted to be laid the entire width of Ludlow street will become as much a part of defendant's yard as that portion thereof west of Ludlow street in which its four tracks are laid; so that under whatever guise the grant to lay these tracks was made, they are really intended to be used for and as a part of defendant's yard. The switching and shunting of cars into this yard and upon the four tracks now therein must necessarily take place more or less in Ludlow street and east of the street, and if this should be done to any considerable extent the use of the street at this point will be very materially impaired.

It was shown by the evidence that Ludlow street is one of the main arteries of travel leading to the river. In the past, when a ferry line plied between Cincinnati and Newport, the boats landed at the foot of Ludlow and there was a great deal

more traffic on this street than now, but now there is considerable traffic in the street south of Front street, and likely to be much more in the future if the street can be kept open, clear and free from obstructions, because of the fact that the government of the United States proposes to maintain at all times a nine-foot stage of water along the entire river front of Cincinnati, and the river at the foot of Ludlow street is a desirable and unusually advantageous place to tie up boats for loading and unloading and for repairs. It further appears that there is no access to the river by any street east of Ludlow for a distance of about two miles, and that an impairment of the use of this street would be a material hindrance to river traffic.

It is claimed by the city solicitor that the council had no power or authority to grant, by ordinance or otherwise, the right to defendant to lay these tracks, and that being the only claim of right which the defendant asserts, if this contention be sound, then the defendant company is a trespasser in this street when it undertakes to lay these tracks under no other claim of right than is given by this ordinance.

It is further claimed by the city's counsel that even if the council had the authority or power to grant permission to lay these tracks, nevertheless the use proposed to be made of the street by means of these tracks is such as to practically exclude therefrom the traveling public and renders such use unreasonable and therefore not permissible. If the council had the power to grant this permission to lay these tracks, it must be by virtue of some statute, for it is a well settled principle of law that municipal corporations (and of necessity their councils) have such powers and only such as are expressly granted or which are necessarily implied in order to enable them to carry into effect the express grants of power.

By the provisions of Section 3714, General Code, the council shall have the care, supervision and control of public highways, streets, etc., and shall cause them to be kept open, in repair and free from nuisance. But this grant of power to council does not carry with it the power to grant a right to a railroad company to occupy or incumber and use the streets of a municipality.

Louisville & Nashville Railroad Company v. *City of Cincinnati,* 76 O. S., 481. As was said by Summers, J., in deciding this case, on page 497:

"Public streets, squares, landings and grounds are held in trust for the public, and being so held they are, for the uses for which they were dedicated or acquired and subject to the property rights of abutting owners, under the absolute control of the legislative power of the state. In this state the care, supervision and control of public highways, streets and grounds in cities is delegated to the council, but notwithstanding this delegation of general power over them, the state, now and since 1852, has in express terms delegated to cities the power to grant to railroad companies the right to occupy or incumber and use them, or in express terms has made the right subject to agreeing with the municipal authorities as to the manner in which they are to be occupied, so that the general power of care, supervision and control, that has been delegated does not carry with it the power to grant such right, and a grant by the council of a city of permission to occupy the streets and public grounds does not confer such right."

Counsel for defendant has failed to point out any statute which authorizes council to grant permission to lay these tracks, and since such permission can not be granted under Section 3714, General Code, we are compelled to examine further to see if there exists any statute which authorized council to make this grant.

If power has been conferred on council to grant permission to lay tracks in a street or across a street, or to agree upon the terms and conditions upon which this may be done, it appears to us it must be sought for in the provisions of Sections 8763 to 8766 inclusive (formerly Sec. 3283, R. S.). In substance these sections provide that if in the location of any part of a railroad, etc., it be necessary to occupy with a surface or elevated track, etc., any public road, street, etc., the municipal corporation or public officers owning or having charge thereof, and the company, may agree upon the manner, terms and conditions upon which it can be used and occupied. If the parties are unable to agree thereon, etc., the company may appropriate so much thereof as is necessary for the purposes of its road, in the

manner and upon the terms provided for the appropriation of the property of individuals.

In the case of *Rockport* v. *Railroad Co.*, 85 O. S., 73, the Supreme Court held that under the above sections—then Section 3283, Revised Statutes—in the words of Judge Donahue, announcing the opinion of the court, on page 82:

"It necessarily follows that the railway company can acquire no further rights by appropriation than the village council could grant by ordinance or contract."

Furthermore, the court in this case just cited said on pages 84, 85 and 86, in so many words, that a railroad company is not authorized to appropriate a part of a street, for all of its purposes, but that under the above cited sections (formerly Section 3283, R. S.), its right to appropriate a portion of a street is limited to the location of any part of the railroad itself, not for the purposes of a yard or approaches to a yard. On this point the court uses this language on the pages above referred to:

"Section 3283, Revised Statutes" (now Sections 8763 to 8766, G. C., inclusive), "under favor of which these proceedings were brought, does not authorize the appropriation of streets for any and all purposes incident to the operation of a railroad, but only for the location of any part of the railroad itself. In this respect it differs materially from Section 3281" (now 8759-8760, G. C.), "authorizing the appropriation of private property for depots, workshops, roundhouses and water stations. In the construction and location of the main line of road a railroad company can not but meet with conditions that are beyond its control, as, for instance, the crossing of streets and highways, and, therefore, notwithstanding that the crossing of these streets and highways may interfere somewhat with the public travel by foot passengers and ordinary road vehicles, yet the Legislature has recognized the fact that of necessity the railroad company must be given the right to cross the same, not merely because it also furnishes a mode of public travel, but because it would be impossible to construct railroads if such rights were not granted. But in the location and establishment of its yards, depots, workshops, roundhouses and water stations, the railroad company can largely guard against these contingencies and it is very evident that Section 3283, Revised Statutes" (now 8763-

4-5-6, G. C.), "intends to require that it should do so, otherwise the language of that section would not be different from the language found in Section 3281, Revised Statutes" (Sections 8759-60, G. C.), "Section 3283 does not in terms authorize a railroad company to condemn or appropriate public streets or roads for these purposes, and all statutes granting to corporations the right of eminent domain, which is an attribute of sovereignty, must be strictly construed. (*Currier* v. *M. & C. R. R. Co.*, 11 O. S., 228; *Atkinson* v. *M. & C. R. R. Co.*, 15 O. S., 21; *Platt* v. *Penn. Company*, 43 O. S., 228; *Ravenna* v. *Penn. Co.*, 45 O. S., 118.) Without recourse to this rule of construction it clearly appears that Section 3283 applies only to the railroad itself if it should be found necessary in the location of the same or any part thereof. All these other things that are incident to and undoubtedly absolutely necessary to be maintained by a railroad company for the purposes of operating its road are not included in the term railroad as used in this section; for if depots, workshops, roundhouses and water stations could be constructed upon public streets, it would amount to an absolute abandonment and destruction of the public rights therein. It is equally clear that railroad yards are not within the contemplation of this statute, and that it is not intended thereby to authorize a railroad company to construct its yard over and across or along streets and highways, either with the consent of the municipal authorities or by appropriation of the same."

In this case from which we have quoted at length the court had under consideration the question of the power of a railroad company to appropriate by condemnation proceedings the right to lay, maintain and operate, in addition to its two main tracks then constructed and maintained thereover, five additional side-tracks or turn-outs along, upon and across Settlement road and Linndale road, two streets of the village of Rockport, Ohio, at the place where said roads intersect. In the trial court it was shown that these additional five tracks were to be used for egress and ingress to the railroad company's yards for the purpose of switching cars from one track to another, for making-up and separating trains of cars and for the storage of cars. The trial court on the preliminary hearing found that the appropriation sought to be made was an unreasonable interference with the rights of the public in the use of the highways and would be

destructive of the public use of said highways, and that the appropriation was not necessary for the purpose of plaintiff's railroad, and thereupon dismissed the railroad company's petition to appropriate. The judgment of the trial court in thus disposing of the railroad company's petition was sustained by the Supreme Court, which in doing so employed the language above quoted.

Now, if we apply the principles enunciated in this case to the facts in the case at bar, we have a situation almost identical with the Rockport case, with these differences: In the Rockport case the railroad company already had two main tracks upon and across the streets, which tracks were a part of its main railroad line, and it was seeking an easement for five additional tracks on the streets on what it claimed to be its right-of-way, whereas in the case at bar the railroad company has a main track, being the Front street connection track, across Ludlow street, and is seeking the right to lay these four or five additional tracks so as to be able to reach its yards west of Ludlow street, and to switch in the street, and to make up and break up trains in the yard and on this street. In other words, these tracks are to be used solely as a part of the railroad company's Front street yard.

If there be any difference between this case and the Rockport case it would appear that there is less need for an easement across Ludlow street than there was across the streets in the Rockport case. The tracks are to be used in connection with the Front street yard and *not as a part of the main line* as was said in the Rockport case.

We are therefore clearly of the opinion, following this Rockport case, that the railroad company has not the power or authority to appropriate an easement for these tracks across Ludlow street for the purposes for which they are intended to be used. Nor could the railroad company acquire by agreement with the city council through an ordinance or otherwise that which it could not acquire by condemnation proceedings, for, as was said by the court on page 82 of the Rockport case:

"The property (the street) having been devoted to a public purpose, the principle obtains that the public use is the domi-

nant interest in the street, and *the village authorities could not grant any right to the railroad company under the provision of Section 3283, Revised Statutes, that would* be destructive of these rights or *amount to a material or substantial interference with the same,"* etc.

In *Railroad Company* v. *Defiance,* 52 O. S., 262, the Supreme Court in discussing the powers of council to grant a right to lay tracks in or across a street under Section 3283, Revised Statutes, says (p. 309):

"The object of the appropriation is to acquire such use of the street, etc., as could have been granted by agreement; and no greater use can be obtained in the one mode than in the other; the right acquired in either is limited to the use of so much of the street as may be necessary for the purposes 'of *the railroad.*'"

To the same effect are: *L. S. & M. S. Ry. Co.* v. *Elyria,* 69 O. S., 414; *Ravenna* v. *Penn. R. R. Co.,* 45 O. S., 118; *Railroad Co.* v. *City,* 76 O. S., 481.

It is also manifest from the evidence in this case that the proposed use of Ludlow street for these switches and tracks would constitute a material interference with the public use of the street, on account of the number of these tracks and switches and the movement of cars thereon; and in view of the fact that access to the railroad company's yard can be had from Front street, as shown by the evidence, we conclude that this proposed use is so unreasonable that even if there were power to appropriate or to grant the use by council, a court, hearing an application to permit these tracks to be laid, or an objection by the city authorities to prevent the laying thereof under an alleged grant from the council, should restrain the laying thereof.

It is urged by defendant's counsel that the city solicitor had no authority to bring this action without being authorized so to do by the legislative body (the council) of the city. It is extremely unlikely that the city council, after endeavoring to give away the city's street to the defendant company, would call upon the solicitor to take legal steps to prevent the doing of that which it had given permission to do. We think Section

4311, General Code, affords ample authority for the solicitor to bring this action regardless of the will or wishes of the council, and that in so doing he is exercising the high prerogative lodged in him by the Legislature to restrain the abuse of the corporate powers of the city and to prevent the execution or performance of an alleged contract in contravention of the laws.

These proceedings were brought in the same manner and under like circumstances shown to have existed in the case of *Cincinnati* v. *L. & N. R. R. Co.*, 76 O. S., 481, where no question was made of the solicitor's right to bring the action on behalf of the city.

We are satisfied that a mandatory injunction is the proper remedy to restore Ludlow street to its former condition. *Cincinnati* v. *L. & N. R. R. Co.*, 76 O. S., 481.

The judgment of this court is that the prayer of the petition be granted at the costs of the defendant.

JONES (E. H.), P. J., and JONES (Oliver B.), J., concur.

LIBEL AFFECTING ONE IN HIS TRADE RELATIONS

Court of Appeals for Mahoning County.

THE G. M. MCKELVEY COMPANY v. DAVID M. NANSON.

Decided, October 18, 1915.

Libel and Slander—To Publish that One Has Suddenly Gone Out of Business—Not Libelous per se.

A publication by a tradesman is not libelous on its face, where to the effect that Mr. N had "suddenly decided to retire from the tailoring business," coupled with the announcement to the trade that his entire stock had been purchased for cash.

Hine, Kennedy & Manchester and *Mr. Conroy*, for plaintiff in error.

Kennedy & Mumaw, contra.

HOUCK, J. (sitting in place of Spence, J.).

This is a proceeding in error, by the plaintiff in error, seeking to reverse a judgment of the court below in favor of the defend-

ant in error, in an action brought by him against the said plaintiff in error for libel.

The article complained of was published in two newspapers of general circulation in the city of Youngstown, Ohio, and in the form of circulars sent to citizens of said city, all of which was done at the instance of and under the direction and authority of the plaintiff in error.

Said article complained of is as follows:

"Mr. Nanson, a well known high-grade custom tailor of this city, and perhaps a personal friend of yours, suddenly decided to retire from the tailoring business. Desiring to turn his stock quickly into cash, asked us to name a price for the entire stock. The greater part of this stock being fall and winter goods, he naturally expected a good price, but finally accepted our offer."

The plaintiff below complains of the words: *"Mr. Nanson suddenly decided to retire from the tailoring business."*

At the request of counsel for plaintiff below the court charged the jury that said words were libelous *per se.*

While the petition in error alleges other grounds of error, the only one urged by counsel in argument was that the court erred in charging the jury that said words were and are libelous *per se,* and therefore it is only necessary, for a proper determination of the case, to pass upon this one ground of alleged error.

Let us classify libels according to their objects:

1. Libels which impute to a person the commission of a crime.

2. That which has a tendency to hold a person up to scorn and ridicule, and to feelings of contempt, or impair one in the enjoyment of general society.

3. That which has a tendency to injure one in his office, trade, calling or profession.

The words complained of in the case at bar, if libelous, come under the third definition.

Is the expression here complained of libelous within itself?

A distinction exists between libel and slander. In libel the written or printed words are of necessity attended with more deliberation, and hence may be said to be indicative of stronger malice than oral words, and therefore calculated to do greater

wrong and much more harm. In passing, we might add that written or printed words are libelous in all cases where, if spoken, they would be actionable; and they may be libelous, and at the same time, if spoken, would not be actionable. Our Supreme Court in the case of *Cleveland Leader* v. *Nethersole,* 84 Ohio State, page 118, has laid down the rule as to what constitutes libel *per se.* The court say:

"To constitute a publication respecting a person libelous *per se,* it must appear that the publication reflects upon the character of such person by bringing him into ridicule, hatred or contempt, or affects him injuriously in his trade or profession."

To say of a person that he has suddenly gone out of business does not in any way reflect upon his character, or bring him into ridicule, or indicate hatred or contempt, or injury to his trade or profession, so far as the plain meaning and import of the words and language are concerned. If this be true, then how can they be libelous *per se?*

In order that words shall be libelous *per se,* as disparaging a person in his trade or business, they must be of such a character as would prejudice him by impeaching either his skill or knowledge or attacking his conduct in such business. The words in the publication complained of, in order to be libelous *per se,* must have had a tendency to render the defendant in error contemptible or ridiculous in public estimation, or to expose him to public hate or contempt, or hinder virtuous persons from associating with him, or accuse him of crime punishable by the laws of our state, or charge him with conduct the natural or ordinary result of which would be to prevent him from engaging in and pursuing his vocation, trade or calling, or in some way depriving him of the earnings thereof, and which he otherwise would have obtained. Quoting from the case of *Cleveland Leader* v. *Nethersole, supra,* Judge Spear on page 130 says:

"Although the distinction between a libel upon a person and a libel upon that which is the property of a person is somewhat nice, and although in many cases the distinction is not easy to demonstrate, it often being difficult to apply the settled rules of law to the particular facts of the case, and although the de-

cisions illustrating the subject are not altogether consistent one with another, yet the rule seems to be well established to the effect that while by the law of libel defamatory language is actionable without special damage when it contains a damaging imputation against one as an individual, or in respect to his office, profession or trade, it is not actionable when it is merely in disparagement of one's property unless it occasions special damage."

We do not think the words complained of are libelous upon their face; and we believe we are sustained in this conclusion by a long line of authorities not only in our own, but other states. To hold otherwise would be to set aside and hold for naught the decisions upon this subject which have been considered to be the law for many years.

Taking this view of the case, we find error in the record prejudicial to the rights of the plaintiff in error, and therefore find the judgment of the court below erroneous, and that it should be reversed.

The judgment of the common pleas court is therefore reversed, and the cause remanded for a new trial.

POLLOCK, J., and METCALFE, J., concur.

APPROPRIATION BY ONE MUNICIPALITY OF LAND LYING WITHIN ANOTHER MUNICIPALITY.

Court of Appeals for Hamilton County.

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

Decided, January 17, 1916.

Municipal Corporations—Appropriation of Property for Park Purposes —Park Area May be Enlarged by Appropriation of Contiguous Lands Although Lying Wholly Within Another Municipality.

A municipality may enlarge its park area by appropriating contiguous lands notwithstanding they lie wholly within the limits of another municipality.

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*Affirming *Cincinnati* v. *Ziegler et al*, 16 N.P.(N.S.), 169.

Michael G. Heintz, for plaintiff in error.

Walter M. Schoenle, City Solicitor, and *Saul Zielonka,* Assistant Solicitor, contra.

GORMAN, J.

The defendant in error brought proceedings in the court of insolvency against the plaintiff in error and others to appropriate property for the extension of the Bloody Run boulevard for park purposes between the cities of Cincinnati and Norwood, and to fix the value thereof.

A part of the property of plaintiff in error, lying outside of but contiguous to the city of Cincinnati and within the limits of the city of Norwood, was appropriated. A jury was impanneled which, after a hearing, assessed the damages for the property taken and damages to the residue at $7,080, and a judgment was entered upon the verdict awarding the property to defendant in error upon the payment of the condemnation money. Error is prosecuted to this judgment.

It is claimed, first, that the verdict is against the weight of the evidence in that the amount of compensation assessed is totally insufficient.

The record fails to show that the verdict is so manifestly against the weight of the evidence as to warrant a reviewing court in setting it aside. The verdict appears to us to represent a fair value of the property taken and damages to the residue; in fact, the jury might well have returned a much smaller verdict and it would have done justice to plaintiff in error under the evidence adduced.

Secondly, it is claimed that the city of Cincinnati had no power or authority under the law to appropriate this property (which lies wholly within the city of Norwood, although contiguous to the city of Cincinnati) for parkway and boulevard purposes.

Section 3677, General Code, among other things, confers special power upon municipal corporations to appropriate, enter upon and hold real estate within their corporate limits.

"2. For parks, park entrances, boulevards, market places, and children's playgrounds."

It further provides that such power shall be exercised for the purposes and in the manner provided in Chapter 1, Division III, relating to the appropriation of property by municipalities, Sections 3677 to 3697 inclusive.

Section 3678 provides that in the appropriation of property for any of the purposes named in the preceding section (3677) the corporation may, when reasonably necessary, acquire property outside the limits of the corporation.

It will therefore be seen that the power and authority to acquire by appropriation proceedings property for park and boulevard purposes outside the municipality, when the same is reasonably necessary, is expressly granted.

But it is contended that the construction to be given to these two sections should be that the property outside the municipality which may be appropriated is property not within the limits of another municipality, but only such property as is wholly outside the limits of any municipality.

Such a construction would in effect read into Section 3678 language not therein, and would in effect constitute judicial legislation and a usurpation by the court of the functions of the Legislature.

The Legislature has created all municipal corporations either by special laws under the Constitution of 1802 or by general laws under the Constitution of 1851; and it is elementary that the creator can destroy. It, the Legislature, may, unless there be constitutional inhibitions, merge two or more municipalities, transfer the territory or a part thereof from one municipality to another, abolish all the officers of a city or village, or create new or additional officers; in fact, it can add to or take from municipalities their political rights and functions almost at will. *State, ex rel,* v. *Cincinnati,* 52 O. S., 419.

We can see no reason why the Legislature might not provide in specific terms that one municipality may appropriate property within the limits of another municipality, provided the property to be appropriated is for authorized public purposes such as parks and boulevards. While the statute, Section 3678, does not in specific terms provide that the appropriation of property within the limits of another municipality may be made,

it does provide that property outside the municipality may be appropriated, and in the appropriation the municipality exercising the power of eminent domain is not limited to the taking of property wholly outside of any other municipality.

This right to appropriate property for public purposes by one municipality, within the limits of another, was upheld in the case of the *Application of the Mayor and Aldermen of the City of New York to Acquire Title to Certain Lands for Public Parks, etc.*, 99 N. Y., 569, and in the case of *Matter of Lands in the Town of Flatbush*, 60 N. Y., 398. In the last case the city of Brooklyn appropriated lands for park purposes within the corporate limits of the towns of Flatbush and Newlots, and its right so to do was upheld by the court of appeals.

The plaintiff in error has had a fair and impartial trial of his cause, and has had the benefit of the judgment of twelve jurors and the trial court as to the fair market value of his property taken and damages to the residue. The power and authority of the city of Cincinnati to appropriate this property is undoubted, and we find no errors in the record of the trial prejudicial to plaintiff in error.

The judgment of the court of insolvency is therefore affirmed.

JONES (E. H.), P. J., and JONES (Oliver B.), J., concur.

POWER OF PUBLIC OFFICER TO REDUCE EMPLOYEE IN RANK.

Circuit Court of Cuyahoga County.

STATE OF OHIO, EX REL CHARLES LYLE, v. C. W. LAPP, DIRECTOR OF POLICE.

Decided, December 24, 1901.

Public Officers—Power Given to the Head of a Department to Remove an Officer Includes Power to Reduce Rank.

The power conferred by Section 1545-24, Revised Statutes, upon the head of a department of a municipal corporation to remove or suspend any officer or employee of that department, includes a power to reduce in rank as it is the exercise of a power of the same inherent nature as the power granted.

Lamson & Mathews, for plaintiff.
Beacom & Babcock, contra.

MARVIN, J.; HALE, J., and CALDWELL, J., concur.

The State of Ohio, ex rel Charles Lyle, against C. W. Lapp, Director of Police of the City of Cleveland, is a proceeding in mandamus.

The relator was a sergeant on the police force of the city of Cleveland.

The defendant is now director of police of said city of Cleveland, which position he has held since the 5th day of April, 1901. For two years immediately preceding the incumbency of Director Lapp, the office which he now holds was held by one Michael Barrett.

On or about the 2d day of November, 1900, certain charges and specifications were made, in writing, against said relator as such sergeant of police. These charges and specifications were filed with the director of police. Notice of the filing of such charges and specifications, and the time when the relator would be brought to trial thereon, was duly given the relator.

On or about the 20th day of November, 1900, a trial of the relator was had upon such charges and specifications before a tribunal composed, as provided by law, of the mayor of said

city, the president of the city council and the director of law of the city.

The trial resulted in a finding, on the 28th day of January, 1901, that the relator was guilty of the charges, and thereafter, on the 9th day of February, 1901, said Michael Barrett, as such director of police, pronounced sentence against the relator, that he be, to quote the language of the petition herein, "removed from his said office of sergeant and reduced to the rank of patrolman in the department of police of said city."

On the 24th day of May, 1901, the relator demanded of the defendant that he be reinstated in the position of sergeant. This demand not being complied with, he filed his petition in this action on the 19th of June, 1901, praying for an order of the court commanding the defendant to restore him to his former position of sergeant.

On the part of the defendant it is urged that there was such laches on the part of the relator in commencing this proceeding as should bar him from the relief sought. Without going into a discussion of this question, we hold that, under the circumstances in this case, the relator did not so sleep upon his rights as to deprive him of the right to a full hearing upon the merits of his case.

The time between the removal of the relator from office or the reduction in rank, to the time of the beginning of the action, was four months and ten days. Within four months he had made the demand upon the defendant to be restored, and we hold that he forfeited nothing by the delay.

This brings us to the consideration of the question made by the plaintiff, as to whether the director exceeded the authority vested in him, when he made the order reducing the relator from the rank of sergeant to that of patrolman.

The trial of the relator was had under the provisions of Section 1545 of the Revised Statutes, sub-section 24 of which reads:

"The head of any department may, by written order giving his reasons therefor, remove or suspend any officer or employee of such department, provided the same shall not be done for political reasons, and such written orders shall be recorded in

the records of the department and a copy thereof filed with the mayor, and provided that no member of the police, fire or sanitary police force shall be removed or reduced in rank, except for cause, to be assigned in writing after due notice, and a public hearing, if demanded by the accused, before a tribunal composed of the mayor, who shall be chairman thereof, the director of law and the president of the city council, but the head of the police, fire or sanitary police force, as the case may be, may suspend the accused pending the hearing of the charge preferred against him."

It will be noticed that the authority given the director by this section, is to "remove or suspend any officer," etc.

The argument on the part of the relator is that the director could do nothing but "*remove*" absolutely from the force, or suspend the officer, found guilty upon the trial, and that neither of these two things was done; and that, therefore, the order actually made was a nullity.

On the other hand, attention is called to the language in a later part of the section, which reads: "Provided that no member of the police, fire or sanitary police force shall be removed or reduced in rank except for cause," etc., and the claim is made that the Legislature must have understood that authority had been granted the head of this department to "reduce in rank," or those words would not have been used in this proviso. To this it is answered that Sections 1930-31, Revised Statutes, are in full force as to the city of Cleveland as well as in other parts of the state, and that provision is made in these sections for reduction in rank of members of the police force who belong to the detective branch of service, and that, therefore, this provision is made, that the section may apply to the entire force—the section under consideration, 1545-24—including the detective branch.

It should be borne in mind, however, that these later sections, 1930-31, are upon a subject entirely distinct from the general provisions in reference to the police force of this city, and this being so, are not in conflict with legislative enactment in Section 1545, sub-section 24, which should include a reduction in rank as well as a dismissal of such officer entirely from the police force.

It has been held in several of the states that authority given to remove an officer from his position necessarily carries with it the authority to suspend an officer. It is not claimed that this was a suspension, but that, because of certain authority given to remove from office, it necessarily carries with it the right to suspend. In *State, ex rel Brison,* v. *Lingo,* 26 Mo., 496, proceeding was in the nature of *quo warranto* on relation of the circuit attorney charging the defendant with unlawfully exercising the office of superintendent. Bryson had been superintendent of the workhouse, and an order had been made suspending him from the performance of his duties. The court, discussing the statute under which the action was taken, says, on page 499: "The power to remove necessarily includes the minor power to suspend."

In the case of *Shannon* v. *City of Portsmouth,* 54 N. H., 183, the charter of the city of Portsmouth empowered the mayor and aldermen to remove constables and police officers. By a vote of the mayor and aldermen, the plaintiff, a constable and police officer, was suspended from the duties of his office on the police force, and from that time was not permitted to perform the duties of the office, although he was ready and offered to do so, until he was afterwards re-instated. It was held that he could not recover for services during the period of his suspension; and, on page 184, in the opinion, the court says:

"It does not seem to require any argument to show that the power to remove must include the power to suspend."

In the case, however, of *State, ex rel Tyrrell,* v. *Common Council of Jersey City,* 25 N. J. Law, 536, one who was a member of the city council claimed relief because the council had by resolution instructed the clerk of the council not to call his name in calling the rolls—had instructed the president of the council not to appoint him upon any committee, and the court say that that was, in effect, a suspension of this officer from the performance of his duties; that the action of the council in directing the clerk not to call the name of this member, and in directing the president of the council not to appoint him upon any committee, was, in effect, a suspension of such councilman

from his office, and the court, in speaking of that, holds contrary to the holding in Missouri and New Hampshire, that the power to expel, if the council had power to expel, did not carry with it the power to suspend.

But this language is used in the opinion, on page 544:

"It only remains to be considered, whether the action of the common council in resolving that 'the president of council be directed not to appoint Tyrrell on any committee, that the clerk do not call his name among the list of names in any action, vote, or proceeding of the council, and that he be not allowed to take part in any debate on any question which may come before the board of aldermen, is warranted by law. We think it entirely clear that it is not. This proceeding amounts to a suspension of the relator from the exercise of his official duties as a member of that body. It leaves his constituents unrepresented and without remedy. Expulsion creates a vacancy that can be supplied by a new election. Suspension from the duties of the office creates no vacancy; the seat is filled, but the occupant is silenced. The charter vests no such power in the council; it would be extraordinary if it did. The power is to expel, not to suspend.'

"In the case of *Gregory* v. *Mayor, Aldermen and Commonalty of New York*, 113 N. Y., 416, a similar holding to that in the New Jersey case to which attention has just been called, is made. Judge Peckham delivered the opinion and holds that the power to expel or remove from office, does *not* carry with it the power to suspend; holding as the court in New Jersey held, but he gives the reason, on page 419:

"Whether the power to remove includes the power to suspend, must, as it seems to us, depend, among other things, upon the question whether the suspension in the particular case would be an exercise of a power of the same inherent nature as that of removal, and only a minor exercise of such power, or whether it would work such different results that no inference of its existence should be indulged in, based only upon the grant of the specific power to remove. We think it is apparent that the two powers can not always be properly respectively described as the greater and the less, and, consequently, it can not always be determined, simply upon that ground, that the suspension is valid because there was a power to remove. The power to remove is the power to cause a vacancy in the position held by the person removed, which may be filled at once, and if the duties are such as to demand it, it should be thus filled. The power to suspend causes no vacancy and gives no occasion

for the power to fill one. The result is that there may be an office, an officer and no vacancy, and yet none to discharge the duties of the office."

Continuing in the same line of reasoning, the court held, as already said, that the power to remove does not carry with it the power to suspend, and the reason here given by Judge Peckham is, that it is not an exercise of the same power, that is, an exercise of a power of the same inherent nature as that of removal. The power to suspend causes no vacancy; the power to suspend, when exercised, leaves no vacancy in the office that can be filled and, therefore, leaves the duties of the office to be performed by no one. It is because it is not an exercise of power of the same inherent nature as that of removal, but minor in degree, that the power to remove does *not* carry with it the power to suspend.

Applying that reasoning to the case before us, it would seem to result in holding that since the reduction in rank, the removal of one from the position of a sergeant and, in the same order, constituting the person so holding the position of sergeant, a patrolman, is an exercise of a power of the same inherent nature as the power to remove, and only a minor exercise of such power; and, therefore, the reason why the power to remove in the opinion of Judge Peckham and the New Jersey court does not carry with it the right to suspend, does not exist in a case where it is a reduction in rank. But there is another reason why, in our judgment, the order made in this case was not a nullity.

The relator held his office from which the director of police, under the section already read, had power, after a trial, conviction, etc., and proper proceedings, "to remove" (in the express language). To remove from what, except from the office which the party held. He did remove him from that office. Another section provides that the head of the department may appoint to office, and he did appoint this man, in the same order, is true, a patrolman; and the only complaint he makes here, is that he was not *absolutely* removed from the force.

It must be remembered that this order is made for the protection of the officers. The purpose of the order is to protect the officers who have once got upon the police force or in the other departments of the city government. It is to protect them that this order was given.

Suppose the words were left out of this section, "reduced in rank," and the section read, "Provided the same shall not be done for any political reasons, * * * no member of the police force or sanitary police force shall be removed from office except for cause to be assigned." Supposing it read that way, omitting the words "reduced in rank"?

The provision is that one shall not be removed for political reasons, whether an officer of the police force, or of any political department. Suppose the words "reduced in rank" were omitted, and the director should, for political reasons, reduce one in rank without any trial, simply and purely in the exercise of arbitrary power, and purely for political reasons had issued an order that one, who was a captain of police, should be reduced to the position of patrolman: is there any doubt that the captain could appeal and say "You have undertaken to remove me from office without a trial in violation of that statute?" It seems to be clear that protection would be given to the officer, under this statute.

The result is, we hold that the action of the director in issuing the order reducing the officer in rank, was in the exercise of the power conferred upon him, and the petition is dismissed at relator's costs.

FIDUCIARY MUST ESTABLISH FAIRNESS OF TRANSACTION.

Circuit Court of Cuyahoga County.

A. H. ATWATER, AS GUARDIAN OF WINNIFRED JONES, IMBECILE, v. CHARLES P. JONES ET AL.*

Decided, January 30, 1902.

Fraud and Duress—Burden Upon Fiduciary to Show Fairness of Transaction.

If it appear that a fiduciary or confidential relationship exists between the parties to a transaction, or if it be established by evidence that one of the parties possessed a power or influence over the other, or that one was of very weak mind by reason of sickness or mental decline, the burden of proof lies upon the party filling the position of active confidence or possessing the power or influence, as the case may be, to establish, beyond all reasonable doubt, the perfect fairness and honesty of the transaction.

C. F. Morgan and *C. W. Fuller,* for plaintiff.
Foran, McTighe & Baker and *Henry & Couse,* contra.

CALDWELL, J.; HALE, J., and MARVIN, J., concur.

This action is before us on an appeal from the judgment of the court of common pleas. The action was commenced by A. H. Atwater, as guardian of Winnifred Jones, an imbecile, against Charles P. Jones, a son of Winnifred Jones, and Ida M. Jones, the wife of Charles P. Jones, and the Euclid Avenue Savings & Banking Company; it grew out of these facts:

Winnifred Jones owned two parcels of property; one on Broadway in the city of Cleveland, on which were two houses, in one of which she lived with her husband during his lifetime; the other one on Marcelline avenue in the same city. The husband of Winnifred Jones died in 1896, and, not long thereafter and in the same year, she went to make her home with her son, Charles P. Jones, who resided in the property owned by her on Marcelline avenue.

*Affirmed without opinion, *Jones et al* v. *Atwater, Gdn.*, 70 Ohio State, 421.

In 1896 proceedings were commenced in the probate court to have a guardian appointed over Winnifred Jones, claim being made that she had become an imbecile. About January 5, 1899, those proceedings were terminated by the appointment of Ida Jones, the wife of Charles P. Jones, as trustee to care for the property and person of Winnifred Jones. Before this action was taken the probate judge had determined, and so announced to the attorneys in the case, that he could not appoint a guardian for Mrs. Winnifred Jones, as he did not regard her so far demented by reason of her sickness and age, that he should interfere by appointing a guardian. About the time that this was announced to the attorneys, Winnifred Jones made a deed of all her property, which consisted of the two parcels of real estate above referred to, to Charles P. Jones, reserving in the deed, to herself a life estate, and the consideration of the deed was that Charles P. Jones should support her during her life.

In the early spring of 1899 proceedings were again commenced against Winnifred Jones to have her declared an imbecile, which proceedings terminated in the summer of that year by the appointment of A. H. Atwater as her guardian, and in said proceedings she was declared an imbecile by the probate court of this county. Not long after the guardian was appointed, Winnifred Jones, upon the request of the guardian, went to live with her daughter, Lillie M. Kunker, and, in 1901, died; and after her death this action was revived in the name of Mrs. Emma Barkwell and Lillie M. Kunker.

The action, as originally brought by the guardian of Mrs. Winnifred Jones and as it has been tried in this court, is to set aside the deed of conveyance by Winnifred Jones to her son, Charles P. Jones. After this deed was executed, seven hundred dollars was borrowed on this property from the Euclid Avenue Savings & Banking Company and secured by a mortgage on the property, the papers being executed by both the grantor and the grantee in the conveyance spoken of.

The ground on which the deed is asked to be set aside is, that Winnifred Jones, at the time she executed the same, was incapacitated from doing business on account of great mental

weakness, and that there was fraud practiced upon her by her son, Charles P. Jones, and his wife.

Sometime after the execution of the mortgage to the bank, Charles P. Jones transferred these two parcels of real estate to his wife.

Winnifred Jones had, in 1896, at the time of the death of her husband, after paying the funeral expenses, some seven hundred dollars in the bank and had that amount of money when she went to live with Charles P. Jones and his wife, and, during all the time she lived there, she received the rent from the two houses on the Broadway property, they residing in the other property. At the time of the transfer, or at least at the time of the mortgage from the bank, none of this personal property remained.

The evidence in this case shows, to the entire satisfaction of our minds, that Mrs. Winnifred Jones at the time of the execution of this deed was incapacitated from transacting any business, by reason of mental decline or great mental weakness, although not actually amounting, perhaps, to insanity or imbecility. The doctor who attended her in her last illness describes her disease as hardening of the arteries and testifies that it is one of that nature which is quite likely to be attended with mental weakness and imbecility; that the disease must have been in progess for a number of years, and that the weakening of the body under this disease had been attended by a like weakening of the mind; this testimony of the doctor accords fully with the testimony of the other witnesses. There are but very few witnesses who make the mind of Mrs. Winnifred Jones normal for a person of her years up to the time of her death. Some noticed a marked change soon after the deed was made, while others had observed this weakening of the mind, as well as of the body, from 1896. This testimony all harmonizes, with the exception of the few I have spoken of, to the end that she had a physical ailment that was constantly growing upon her (and which finally terminated in death), that brought upon her great physical weakness, and that attending this disease was a decline of the mind. The time when different witnesses noticed this decline varies, as I have just said,

some placing it as early as 1896, and some later; and her daughter-in-law, Mrs. Charles P. Jones, claims, in her evidence, that she did not notice it until after the deeds were executed to her husband; but the evidence, as a whole, is conclusive that the weakening of the mind and the body had been going on together for a number of years, and is conclusive that her mind had become weak to such an extent that at the time of the deeds being made by her to her son, she was entirely incapacitated from the transaction of business of that character.

It is important, always, in a transaction of this kind, to determine what consideration passed between the grantor and the grantee. She transferred to her son this property, reserving to herself a life estate, and the only consideration for the deed was that he was to give her support during her life.

The evidence clearly shows in this case that Charles P. Jones, from 1896 down to the time the deed was made to him, earned no money of any consideration whatever, and this was well known to his mother; nor did he, after the making of the deed, earn any money. Whether he is incapacitated from earning money or not, does not appear in the case, nor is any good reason given why he did not during that time work and earn money. So when the mother made the deed to the son, she must have known that he was unable to support her if he continued according to his past life; and that he did not intend faithfully to carry out his part of the contract fully appears from the fact that after the deed was made, he did nothing towards earning a living either for himself or his mother, and that not long after it became necessary to borrow money, which, we have no doubt, was used for their mutual support, and the mortgage that was given on the property put in hazard her life estate.

At the time this contract was made it was evident to the son that his mother was very weak, both physically and mentally, and that her decline had been going on for some time and at that very time was seeming to gather force by reason of her disease and her years, and he knew that she could live but a very short period of time; at least, no one who knew her and her condition could form an honest expectation of life beyond a very few years.

The property he received is worth, by fair estimate, as shown by the testimony in the case, six thousand dollars. So if there was not an entire failure of consideration in the transaction, there was at least a very inadequate consideration. We think it fair in this case to say that in the mind of the grantee at the time the deed was made, as shown by his conduct prior thereto and thereafter, there was no consideration whatever. The action of the parties after the deed was made, in every way shows that it was his intention to live upon this property by borrowing money or by exhausting the rents, to which he had no right in law.

It appears, then that this conveyance was made by a grantor who was incapacitated at the time, and was without consideration in fact. That being found, it follows that the conveyance must be set aside.

Considerable was said during the argument of the case, as to whether actual undue influence or fraud must be shown in this action, and upon whom was the burden of proof. While this question is not essential to the decision of this case, still we are inclined to say something upon this question.

It has been said that fraud is never presumed, but must always be proved. It is not meant by that, that the fraud must be proved by direct evidence, for a party who commits a fraud always covers up his proceedings in a way that it is difficult, if not impossible, in nearly all cases, to prove the very act or the very intent of the party who has committed the fraud. Therefore, it is always proper to prove fraud by circumstances, and actual fraud is inferred in nearly all cases by the circumstances proved, and the burden of proving fraud is, in most cases, upon the party who avers it. Hence it is laid down in *Wait on Fraudulent Conveyances*, Section 271:

"In general the obligation of proving a fact rests upon the party who substantially asserts the affirmative of the issue. With the possible exception of conveyance to the wife by a husband, the burden of proof in cases where the instrument is valid upon its face, generally rests upon the creditor to show a fraudulent intent or absence of consideration. A creditor may succeed under the statute in New York simply by proving a fraudulent intent. If, however, the vendee, having the burden

thus cast upon him, shows that valuable consideration was paid for the transfer of the property, then proof of the vendor's fraudulent intent is insufficient; there must be evidence of a fraudulent intent on the part of the vendee, or that he had notice of the vendor's design. Where a strong doubt of the integrity of the transaction is created, the duty of making a full explanation, and the burden of proof to sustain it, rests with the insolvent."

This, we think, expresses the rule as to fraud generally. But it is claimed that this rule does not apply where the parties stand in a fiduciary relation, where there is confidence.

Bigelow on Fraud, Vol. 1, at pages 261-2, says:

"When a party complaining of a particular transaction, such as a gift, sale, or contract, has shown to the court the existence of a fiduciary or a confidential relation between himself and the defendant, and that the defendant occupied the position of trust or confidence therein, the law raises a suspicion or, it is said, a presumption of fraud; a suspicion or presumption, arising as a matter of law, that the transaction brought to the notice of the court was effected through fraud, or what comes to much the same thing, undue influence by the opposite party, by reason of his occupying a position affording him peculiar opportunities for taking advantage of the complaining party. Having special facilities for committing fraud upon the party whose interests have been entrusted to him, the law, looking to the frailty of human nature, requires the party in the superior situation to show that his action has been honest and honorable."

Further on, it is said:

"For the protection of the former (weaker) person the law raises a suspicion or presumption that the transaction between the parties has been effected through undue and illegal means by the latter—that the party in the superior position has used that position to the injury of the party in the inferior situation; and this suspicion or presumption must be overcome if the transaction be impeached, before the superior party in the situation can retain the benefit received."

There are many cases cited both in the briefs of counsel and in the text-books from which I have quoted, showing that this rule is adhered to strenuously by courts of equity, and it is

upon the principle that, in order to bind a party, there must be a full and free consent. Consent is an act of reason accompanied with deliberation; and, in transactions in which one of the parties is not as free and voluntary an agent as the other, or does not apprehend the meaning and effect of what he is doing, it wants the very qualities which are essential to the validity of all transactions. There is no legal consent except that which is given with reflection and with knowledge, without restraint or surprise; and anything that takes away this reflection or judgment will nullify consent, and it is on this principle that courts of equity say that when a person who, from his state of mind, age, weakness or other peculiar circumstance, is incapable of free discretion is induced by another to do any act which may tend to the injury of himself or his representatives, that other shall not be allowed to derive any benefit from his improper conduct. And it is upon this principle that contracts of idiots, lunatics, and other persons *non compos mentis*, or persons in a fiduciary relation, where one has a great advantage of mind or position over another are deemed invalid in a court of equity; but the mere fact that a person is of unsound mind or is in confinement will not *per se* call upon a court to interfere, especially where the transaction was for his own benefit and if he knew what he was doing. Upon this same principle, if it appear that a fiduciary or confidential relation exists between the parties to a transaction, or if it be established by evidence that one of the parties possessed a power or influence over the other, or that one was of very weak mind by reason of sickness or mental decline, the burden of proof lies upon the party filling the position of active confidence or possessing the power or influence, as the case may be, to establish, beyond all reasonable doubt the perfect fairness and honesty of the transaction.

Then, when it was made to appear in this case that Mrs. Winnifred Jones was, at the time she made this deed, of old age, sick and in a mental decline and her mind had become very weak it would, from such facts, devolve upon the son to show by clear and convincing eveidence that the transaction was fair and voluntary on her part and that no undue influence was

used to bring about the conveyance. When there is added to this the fact that the contract was one in which he got by far the best of the bargain and which amounted to a conveyance to him for no consideration that he intended at the time to render, as shown by his subsequent conduct, the contract is void in the sense that it may be avoided by reason of such facts, and the burden of showing that it was fair and without any restraint is upon him.

In other words, great mental weakness, and an unfair consideration, where the parties stand in a fiduciary relation, will avoid the contract, and, under such circumstances, the law raises the presumption that the transaction was brought about by the undue influence of the vendee.

The defendants, Charles P. Jones and his wife, have failed to sustain themselves under this burden of proof. The whole transaction was brought about without any one being present who was specially interested on behalf of Mrs. Winnifred Jones and who was not also interested in behalf of the defendants.

Under the circumstances that existed in this case it has been held that in order to make a conveyance of this character good, it is necessary that the aged parent should have counsel and advice from one who is in no wise interested on behalf of the grantee. That was not done in this case. A great deal of formality was gone through with in obtaining the deed, and much was done that it is difficult for the court to understand why it was done, except on the ground that there was an apprehension on behalf of those who were obtaining the deed that possibly it might not be good because of the condition of the grantor's mind; and the grantees absenting themselves from the room while all this formality was going on, can be explained in this case, in no other way, or at least it is not explained; and the only rational inference to be drawn from it is that they were under apprehension that her capacity might be questioned and it would be well that they should not be present while the deed was being made.

There is an entire failure on the part of the grantee and his wife to show that there was no fraud, no undue influence, and

that they were in no way to blame for the obtaining of the deed.

It is claimed on behalf of the two daughters, who are the real plaintiffs in this case, that the seven hundred dollars borrowed at the bank should be taken from the interest of Charles P. Jones in this property as heir; and that claim is made upon the ground that he used the money for his own benefit. The evidence is not clear as to who used this money. There is some evidence that, in our minds, tends to show that some portion of it was used to pay debts which Winnifred Jones owed—how and when those debts were contracted does not appear—and if this conveyance is set aside, it is not unfair to the defendants that they should be rewarded in some way for the care they gave to their mother while she lived with them.

On the other side, it is claimed that they really absorbed the seven hundred dollars she had left after paying the funeral expenses of her husband, and absorbed all the rents from the time of the death of her husband until the borrowing of the seven hundred dollars and have absorbed the rents since that time until a receiver was appointed in this case; but just how that money was used by the defendants is not made clear by the testimony in the case.

We think it clearly appears that very much, or all of this money, was used by them and that they have been amply rewarded in the use of that money for any service they gave to their mother, both before and after making the deed.

It is our judgment in this case that the deed of this property in which Winnifred Jones conveyed to Charles P. Jones, be set aside as void, and that the wife of Charles P. Jones having given no consideration for the deed to her from her husband, that deed also be set aside. The plaintiffs are to pay one-half the costs of this action, and the defendants, Charles P. Jones and his wife, are to pay one-half of the costs. The bank's mortgage remains a lien on the entire property.

VALIDITY OF LAW REGULATING LOCATION OF LIVERY STABLES.

Circuit Court of Cuyahoga County.

EMMA B. MALONE v. MARY M. PORTER ET AL.

Decided, June 21, 1902.

Constitutional Law—Boarding Stables—Law Requiring Consent of Nearby Residents to the Building of a Boarding Stable, Valid.

Section 2672-105, Revised Statutes, providing that before one can secure a license to build or operate a livery or boarding stable in a residence neighborhood in certain cities he must secure the written consent of the property owners and lessees within a distance of 300 feet from the proposed building, is not a delegation of legislative power and does not discriminate in favor of a certain class, but is a valid exercise of the police power and is constitutional.

Noble, Pinney & Willard, for plaintiff.
Blandin, Rice & Ginn, contra.

CALDWELL, J.; HALE, J., and MARVIN, J., concur.

This case was appealed from the common pleas court, and involves the establishing of a boarding-stable and the right to build one on the lot of the defendant in the action. The action is brought by the plaintiff to enjoin the building of the same. It involves Section 2672, sub-divisions 104 and 105.

Sub-division 104 provides that keeping, maintaining, or conducting any livery, sale or boarding-stable without a license therefor, to be obtained as set forth in the statute, is prohibited in a city of the second grade of the first class.

Sub-division 105 provides as to the building and construction and keeping of the same under the rules and ordinances of the city in reference to the business, and *this* provision is found in Section 105: "provided, however, that if such applicant desires to carry on such business in a part of such city which is wholly or principally devoted to residences and buildings of the dwelling-house class occupied as homes, and in a building or buildings situated upon premises not at the time of such ap-

plication used in such business, it shall be unlawful to grant such certificate unless such applicant shall secure the written consent thereto of any and all owners and lessees of residence or dwelling-houses within a distance of three hundred feet from the premises upon which said business is to be carried on, and shall satisfy the board that such written consent has been secured."

The defendants seek to establish a boarding-stable on East Prospect street in the city of Cleveland, which street is principally and almost entirely devoted to residences and buildings of the dwelling-house class and occupied as homes, and is one of the principal residence streets of the city of Cleveland; the houses being of an expensive and ornamental character, and the street being kept up in a very cleanly and neat manner by its residents.

The business is one that the defendants seek to establish and they had commenced the building of the barn intended for the purpose of a boarding-stable, when this action was brought to enjoin the building of the same and of carrying on the business therein of a boarding-stable. The defendants did not secure the written consent of the owners and lessees of residences or dwelling-houses within a distance of three hundred feet from the premises upon which said business was to be carried on, nor did they obtain a license from the city for the purpose of this building or business.

It is admitted in this case that if these sections of the law are constitutional, the defendants, not having complied with the same, have no right to establish their business on the street, but if the act is unconstitutional, then they claim that they have the right to establish the same without obtaining consents and without the license provided for in the law.

This raises the question of the constitutionality of the law, and it is claimed that the law is unconstitutional:

1. Because it is a local law.

2. Because the provision of obtaining consents within the prescribed distance from the barn sought to be established is an unwarranted provision of the law, and unconstitutional because

it delegates to the citizens residing within the prescribed distance the right to determine what the law shall be.

3. Because the provision is unreasonable and discriminates between persons desiring to establish a business on the street and those having a business already there.

First. As to the law being unconstitutional because it is a local law on a general subject. The law is one applicable in cities of the second grade of the first class and, as such, applied at the time of its passage to but one city in the state, but which *might,* at any time thereafter, apply to more than one, or to many. This class of legislation has frequently been upheld by the Supreme Court and, as we understand the decisions, that court has never held a law of this character to be a local law—that it applies to all of a class, which class may include more than one city. This legislation we understand is constitutional. The Supreme Court adheres to its ruling that cities may be classified and, as long as the classification is extended to more than one, with a possibility of many that shall belong to that class, that classification is warranted by the Constitution. There are many decisions upon this question in the Supreme Court Reports, which were reviewed carefully upon the hearing of this case and which we have examined, and we believe they warrant us in holding that this law is a *general* law.

Second. Is the law unconstitutional for the reason that it delegates legislative powers to the citizens whose consent is to be obtained? In our judgment there is no legislative power delegated. The power delegated pertains entirely to the execution of the law; to the carrying out of its provisions; and, when the stable is established under the law, it is done by virtue of the law and not by reason of the consents of the lot owners.

This question has been the subject of much litigation in the courts and it would be impossible to undertake to give all the authorities bearing upon this question, but we believe this general rule to be established: that if the power is delegated to say what the law shall be, it is unconstitutional; but if the power delegated pertains only to the execution of the law, to the mode and manner of carrying it out, then it is constitutional.

The matter of determining when a law shall go into effect in a certain community, or as to a certain property, has been many times before the courts. 43 Ga., 421; 70 Cal., 35; 41 Miss., 737; 51 Miss., 735; 42 Ind., 547; 19 Fla., 563; 64 Ala., 300.

Some of these cases pertain to the regulation of the sale of intoxicating liquors; they prescribe that before a person shall engage in that business he shall have the consent, in some cases, of the adjoining property owners, if the community is given to residence purposes; in other cases, of the persons who live in the ward or township in which the business is sought to be established, and, in other cases, of a certain number of those who live in the vicinity, describing the territory covered. The same rule applies as was applied in 19 Fla., 563; 69 Ala., 300; 118 Ind., 41.

In this latter case the law provided that the depot-master was to say where hacks should stand around the depot. It was held constitutional. A case of the same nature is found in 27 Minn., 363. The same ruling has been applied to auctions (28 Iowa, 96), and to camp-meetings (120 Ill., 567).

In 116 Mo., 248, it was sought to make the same ruling apply to a livery stable, and the court held the law to be unreasonable, and that it gave a right to exclude the livery stable from every part of the city and hence from the city entirely. While the court recognized the right to regulate stables, yet a law that would exclude them entirely from the city upon the will of the people, would be unreasonable, in that such stables were necessary for persons residing in the city and for persons residing out of the city and coming in.

The matter was before the Supreme Court of Illinois in 162 Ill., 494. That law was much like the one under consideration in this case and the mere fact that it arose under an ordinance instead of under a statute, would make no difference. The municipality gets its authority to legislate from the Legislature, and any law made by the Legislature that is unconstitutional, would be unconstitutional if made by a municipal corporation. This law was upheld as not delegating legislative power and as not being unreasonable.

In commenting upon the 116 Mo., *supra*, the court draws a clear distinction between the two ordinances, in that the Missouri ordinance, or the St. Louis ordinance, was such as to exclude stables from the city entirely, at the will of the people, while, in the Chicago case, it was only to exclude them from certain neighborhoods given over to residences. This feature of the law is not unconstitutional, nor is it unreasonable. It seems to us that it would occur to any one that the excluding of livery and boarding-stables from a neighborhood given over to fine residences is not an unreasonable thing to do. But this law does not seek to exclude them entirely from such neighborhoods. It gives the party a right to establish his business on any street in the city, but, before he can do so, he must have the consents of certain of the property owners around his property, and that provision is certainly not unreasonable.

It is claimed, in the next place, that the law is unconstitutional because it extends to one class of citizens rights which it excludes others from enjoying unless the consents named in the statute can be obtained.

The law is a police regulation, intended to save the people from the vicinity of such a stable the annoyance that invariably arises therefrom, and, as such a regulation, it is much like the regulation in regard to fire limits, which is also a police regulation, pertaining to fires; while the law under consideration is a police regulation pertaining to health and comfort—both of the same nature.

There are many cases to be found in the books, where limits have been established within a city, where no frame building can be erected, without undertaking to disturb the frame buildings within the territory prescribed already erected and made of wood.

Such laws have been held constitutional, and the principle underlying them is, that while the city may prescribe regulations of this nature in regard to health, fire and crime, and other matters of like nature, it may not, in prescribing such regulations, destroy property already existing, unless such property has become a nuisance and can be declared to be such. The party already in business and the one who seeks to go into and

establish a business in prohibited territory are persons of a different class; they stand upon different rights and upon different facts, and the distinction is one clearly recognizable by law.

The same principle has been applied to camp-meetings (120 Ill., 567, and many other cases, that might be cited). Camp-meetings are permitted, by law, to exclude all persons from establishing business during camp-meeting on property not only owned by the camp-meeting, but on property owned by persons who seek to establish the business, and yet excepting from the law those persons who have a regularly established business within the prescribed territory; and the business, within the facts and the difference in the situation of the parties, is so different a thing, sufficient in magnitude to place them in different classes.

Many other examples of the rule under consideration might be cited, but we see no profit in doing so.

It is our conclusion that the law is constitutional, and that the defendants, not having complied with the same, are not entitled to erect their boarding-stable, nor to use their property for such purposes, because they have not complied with the law.

The injunction sought in this case is made perpetual.

LACHES IN AVOIDING FORFEITURE OF A LEASE.

Circuit Court of Cuyahoga County.

THE ARMY & NAVY HALL COMPANY v. F. A. BECKWITH ET AL.

Decided, March 10, 1902.

Forfeiture—Tenant May Lose Right to Avoid Forfeiture by Laches.

Where a tenant has acquiesced in a forfeiture of his lease for a period of three months, during which time portions of the premises have been leased to other lessees and by them sub-leased, it is then too late to ask the aid of a court to avoid the forfeiture.

Meyer & Mooney, for plaintiff.

Goulder & Holding, White, Johnson & McCaslin and *Brady & Cashman,* contra.

HALE, J.; CALDWELL, J., and MARVIN, J., concur.

Under the issues in this case we are called upon to say whether the forfeiture or attempted forfeiture of a lease shall be set aside and the lessee restored to its rights under the lease.

The lease bears date of April 1, 1892, and was by C. S. Britton and others to the Army & Navy Hall Company for a period of twenty-five years at a rental specified in the lease.

The lease contained this clause:

"*And it is mutually agreed* by the parties aforesaid, for themselves, their heirs, executors and administrators, successors, and assigns respectively, that if at any time the rent, taxes or assessments aforesaid, or either of them, or any part thereof, shall be in arrear and unpaid for the period of thirty (30) days after becoming due, or if any of the covenants and agreements shall not be performed as herein stipulated to be performed by the second party, the first party, their heirs, assigns, executors or administrators, at any time after such delinquency shall have occurred shall have full right without demand of payment or notice, to enter upon the above described premises, and take possession thereof, and bring suit for and collect all rents, taxes and assessments which shall have accrued up to the time of such entry, and from thenceforth this lease shall become void to all intents and purposes whatever, at the election of the

first party, and all improvements made on said premises shall be forfeited."

The taxes falling due on June 20, 1899, and the rent becoming due July, 1899, were unpaid, and on the 28th day of July, 1899, prior to the expiration of the thirty days in which the lessors might enter upon the premises, this notice was served upon the lessees:

"You are hereby notified that unless you pay to us on or before August 8th, 1899, the amount of rent due or which shall become due before that date, together with all taxes and assessments upon the building occupied by you under the lease of April 1st, 1892, we will upon that day take possession of said building under the terms of said lease."

On the 28th of August, 1899, the lessees having taken no notice of the notification already referred to, *this* notice was served upon them:

"You having failed to pay the rental for the months of June and July, 1899, and the last half of 1898 taxes in accordance with the terms of our lease to you, dated April, 1892, recorded May 20, 1892, Vol. 16, p. 20, Cuyahoga county records, and said defaults having continued for more than thirty days, you are hereby notified that on account of said breaches, we, under and by virtue of the authority given by said lease, elect to and do hereby declare said lease forfeited and by virtue of the same authority, we take possession of said premises and all improvements thereon."

This notice was served upon Mr. Hessler, who was then president of the Army & Navy Hall Company.

It was contended on the part of the lessees, that Mr. Hessler offered to pay the rent by check. That is denied by Mr. Britton, who served the notice. Looking at the testimony of the two, we are satisfied that something was said about a check by Hessler to Britton, but there was no offer to give to Britton his check; in terms no tender made, and the parties separated under such conditions as, we think, the tender of the check should have no particular significance in the determination of this action.

On the 28th day of August Britton took possession of the leased premises and has ever since been in possession thereof.

Some twenty days or more after the attempted forfeiture of this lease by Britton, the directors of the Army & Navy Hall Company held a meeting in which the subject-matter of the forfeiture of this lease came up for consideration. The chairman stated that all efforts to sub-let or sub-lease the hall under the company's lease were futile, and that the owner had taken possession of the property by reason of the failure of the company to pay the rent of the months of July and August and the half-year's tax due in June. It was moved by Conrad and seconded by Barnes that G. D. Barnes be authorized to sell the chairs in the lower hall and such other property as he can sell for the benefit of the Union Loan & Building Company, which held a mortgage thereon. The formal statement was prepared by the secretary and by vote of the directors sent to the post.

The Army & Navy Hall Company was a corporation. The Army & Navy Post was a different organization.

The Army & Navy Hall Company held the lease and it had sub-let to the Army & Navy Post certain privileges under that lease, and this is the statement that was authorized to be sent to the Army & Navy Post:

"It is with regret that the directors of the Army & Navy Hall Company notify you that the lease of the Army & Navy Hall Company has become forfeited to the owners of the property and they have taken possession thereof owing to the unfortunate fact. It was found to be impossible to dispose of it or sub-let it without the owners' consent, which could not be procured. The owners consent that the post can retain possession of the upper floor until January 1st and thereafter, if desired, upon such terms as may be made between the post and Mr. C. F. Britton, who was one of the owners and the managing owner."

Now it will not be disputed that, if after this attempted forfeiture of the lease by the lessors, the Army & Navy Hall Company had given express consent to the forfeiture and turned over voluntarily the possession of these premises to the lessors, the court would not interpose to set aside the forfeiture thus consented to.

On the 14th day of September, 1899, twenty days after this forfeiture, the owners of the building leased a portion of the

premises to one Wood for a term of five years from October 1st, 1899, to September 30th, 1904, at a stipulated rental. This lease on the 4th day of October, 1899, was assigned to the Calumet Company by Wood and that company immediately took possession of that portion of the premises assigned to it, and expended in alterations some five thousand dollars in fitting up the premises for the business it proposed to prosecute thereon.

On the 14th day of December, 1899, the owners of the building, Britton and others, leased to the Retail Grocers' Association a portion of the premises that was covered by this lease, for a period of one year, and, on the 5th day of January, 1900, the Army & Navy Hall Company, the original lessees, took a lease for a portion of the premises from the Retail Grocers' Association.

The Army & Navy Hall Company took no steps to prevent any of these contracts on the part of the owners of the building or in any way to interfere with the lessors or the owners of that property until some time in December. Then the matter was agitated in meetings of the Army & Navy Hall Company, and, on the 2d day of January, 1900, that company undertook to make an account of the rents received by the owners of the building after the attempted forfeiture of the lease and made a tender of the remainder claimed to be due the lessors.

On the 5th day of January, more than three months after the attempted forfeiture, this action was commenced. At that time the owners of the building had made new leases to other lessees; these lessees had sub-let portions of the property rented to them—all this had been done without the slightest attempt to interfere on the part of the Army & Navy Hall Company.

These transactions, in legal effect at least, are equivalent to an express consent on the part of the Army & Navy Hall Company to the forfeiture of that lease. While courts are supposed to be adverse to forfeitures and will seize upon the slightest circumstance to avoid forfeiture, we know of no case in which courts have set aside a forfeiture in favor of a party who has expressly consented to the same.

We feel compelled to dismiss this petition.

The decree of the court will be for the defendants.

RIGHTS OF THE VENDEE UNDER A RESCINDED CONTRACT.

Circuit Court of Cuyahoga County.

CATHERINE GALAGHER v. SAMUEL E. DETTELBACH.

Decided, 1902.

Quasi Contract—Vendee May Recover Purchase Money Paid Under a Voidable Contract.

Where a vendor elects to rescind a contract which is voidable under the statute of frauds, the vendee may maintain an action to recover from the vendor any purchase money which he may have paid under the contract without alleging that he himself is ready and willing to perform.

James F. Walsh, for plaintiff in error.
Carpenter & Young, contra.

HALE, J.; CALDWELL, J., and MARVIN, J., concur.

The court of common pleas sustained a general demurrer to the petition and gave judgment for the defendant.

It is alleged in the petition that the defendant, on the 23d day of October, 1897, entered into a verbal contract with the plaintiff by the terms of which the defendant sold and agreed to convey to the plaintiff for the consideration of $2,475 certain described real estate, and that on said day the plaintiff paid to the defendant, on the agreed purchase price, the sum of $300. That the defendant elected to rescind said verbal contract, and, on the 6th day of April, 1898, conveyed said real estate to another and refuses to repay to the plaintiff said sum of $300.

This petition, we hold, states a cause of action.

One who has entered into a verbal contract for the purchase of real estate, voidable under the statute of frauds, and paid a portion of the purchase price, may not himself elect to rescind the contract, refuse to perform the agreement on his part, and by action recover the amount paid by him, the vendor making no default.

If, however, the vendor elects to rescind the contract or refuses performance on his part, and puts it beyond his power

to convey the real estate in accordance with the terms of the verbal agreement, the purchaser may recover the money paid.

It being alleged that the defendant elected to rescind the contract, and conveyed the premises to another, it was unnecessary, to constitute a good cause of action, that the petition should contain the further allegation that the plaintiff had performed, or offered to perform, the contract on his part.

If the defendant has received from the plaintiff money upon a contract voidable at his election and has elected to avoid the contract, he should refund the money so received.

The judgment of the court of common pleas is reversed, and the cause remanded for further proceedings.

MISTAKE IN A MECHANIC'S LIEN AS TO THE OWNERSHIP OF THE PROPERTY.

Circuit Court of Cuyahoga County.

O. T. LAPHAM v. FENTON E. SPINK ET AL.

Decided, February 5, 1901.

Agency—Mechanic's Lien—Agency May be Implied—Mechanic's Lien Valid Though Affidavit Does Not State True Owner of Property.

1. An agency may be implied from the relationship and dealings of the parties, and where a son has permitted his father to have charge of certain property, collect rents, make repairs and alterations, without protest on his part, an agency to purchase materials for other repairs and alterations will be presumed.
2. An affidavit for a mechanic's lien which states that the ownership of the property is in someone other than the real owner, does not thereby make the lien invalid when the property is properly described.

Frank Higley, for plaintiff.
E. J. Thobaben and *A. W. Myers,* contra.

CALDWELL, J.; MARVIN, J., and HALE, J., concur.

This case is in this court on appeal. Lapham brought an action to foreclose a mechanic's lien on certain property of which the defendant is owner.

The evidence as presented, raises two questions for consideration, and these are questions of law as well as of fact:

First. Did the plaintiff furnish the materials for the building upon which he seeks to enforce his lien, under a contract with the owner?

Second. Did the plaintiff so perfect his lien that he is now entitled to a judgment in this case?

In the lifetime of Mrs. Spink, who was the wife of R. E. Spink and the mother of Fenton E. Spink, this property was in her name and by the records she was shown to be the owner of the same; she died and Fenton E. Spink became the owner of the property subject only to the dower of his father, R. E. Spink.

R. E. Spink took upon hismself, with his son's consent, the entire management of the property and all improvements that were made upon the same from time to time, and collected and used the rents for his own purposes. While thus managing the property, he at one time made improvements upon the same by way of building a porch to the house, and contracted for the lumber and labor necessary for the erection of the same, with his son's knowledge and acquiescence. Later and about the time that Lapham furnished material, R. E. Spink again made improvements upon the property. Those improvements consisted in laying walks from the street to the house, and steps to approach the house, and in making certain changes inside of the house.

The son knew that the father was about to make these improvements, and made no objection and in a very mild manner advised his father that he did not think that the changes inside of the house were necessary.

A mechanic's lien was taken by the party who did the stone work, which lien the defendant has since paid.

Lapham, for the lumber and material that he furnished for the inside work, took a lien for such material, and that lien he here seeks to foreclose.

Under the statute of our state it is necessary that the party who is about to perform work or furnish material for an improvement of property of this nature, must have a contract with the owner; and the contention in this case is, that there was no contract with the owner; and that is based upon two propositions: first, that R. E. Spink was not the agent of the owner; second, that the defendant never assented to his making improvements upon the property.

The contract required by the statute is such a contract as may arise out of the facts, and need not be shown at all times by an express agreement.

That R. E. Spink contracted for this lumber for the improvement of this property, there can be no question, and, as we understand, no question is made upon that point. But it is contended that R. E. Spink was not the agent of the defendant.

To prove the fact of agency it often becomes necessary to show how the principal and one who is alleged to be his agent have acted toward each other.

In this case R. E. Spink had entire control of this property. He rented it; he collected the rents; he used them as he saw fit, with the consent of his son, and entered into such contracts as to the property, both as to renting and repairs, as to him seemed proper, and the son acquiesced at all times in such dealings on the part of his father.

We have no doubt but that under the circumstances the father was the agent of the defendant; although they might not have understood that relation to exist between them, yet in law that was the relation they sustained to each other.

It is said that R. E. Spink had no authority to bind his son in making the improvements that he made upon the property and that they were made without his knowledge and consent and, therefore, outside of any authority the agent had.

This contract of agency may be express or implied, and the question of the agent's authority may also be express or implied. A very common way of showing that one who is said to be the agent of another had authority to do the act in question, is to show that prior acts of a similar nature had been done by the agent and approved by the principal.

In this case we find that R. E. Spink had built the porch without any consultation with his son, and had bought the lumber, had overseen the work and had paid for the same out of the moneys belonging to the son. To all of this the son made no objection, but acquiesced in the same. The father contracted for the stone work at the same time that the present lien was created. The son knew that the father was making the contract; he knew that the stone was being furnished; he assented to the same being done and thereafter paid the lien that was taken upon the property for that work.

At the same time that the stone work was being done, the plaintiff was furnishing lumber for the improvement of the house; the son knew that the father contemplated doing the work; he did nothing more than to advise against it. After the father's death he went on and completed the work, and for such purpose obtained other material from the plaintiff.

Under all this testimony, taking into consideration that it was a dealing between the father and the son, we think that the son acquiesced in the improvement that was being made and at the time of his father's death made no objections to Lapham by reason of the fact that he had furnished material for such work, but, on the contrary, ordered more material from Lapham to complete the building. We think that the plaintiff has made out his case in this regard and that he has established the fact that he furnished the material under a contract with the owner. Of course, what one does by an agent, he does himself.

The second question is: Was this lien so perfected as to now bind the property and enable the plaintiff to foreclose it against the defendant?

R. E. Spink in his lifetime bought the lumber that went into the property. Fenton E. Spink had inherited the property from his mother some years before these improvements were made.

When Lapham came to file his lien, he looked at the records and found that that property stood in the name of Mrs. Spink, and thereupon he made out his affidavit and lien, naming her as the owner of the property.

The statute does not require that in the affidavit that is filed to perfect the lien, the owner shall be named.

The statute of this state, as in many others, seems to regard the perfecting of the lien as a proceeding *in rem* against the property, and if the property is properly described and the other requisites of the statute are complied with, it is all that is contemplated to be done to perfect the lien.

If this contract was with the defendant, as we have found it was, then he is liable for this lumber, and notwithstanding he was not named as the owner of the property and another was named, because the property was described as required by the statute, we think, as against the defendant, the lien is good.

These statutes are now quite universally regarded by the courts as remedial in their nature, and are liberally construed, and the rule is that if anything is named by the statute as a condition precedent to the obtaining of a lien, such as furnishing the material under the contract and with the owner, that that must be complied with; but that, in taking the steps to perfect the lien upon the record, no error will be regarded as defeating the lien, unless it is such as is prejudicial to the owner.

The error here complained of in no way prejudices the owner of the property.

If such a mistake should be made and innocent parties should obtain an interest in the property, or a lien upon the same, without actual knowledge, questions of a different nature would arise, which it is not necessary to consider in this action.

We think, under the law and facts of this case, that the plaintiff has shown himself entitled to the relief which he asks and, in fact, the defendant does not seriously object to this, except that he thinks there was not fair dealing with his father on the part of Mr. Lapham; but the court is satisfied that the account is a just one and the plaintiff is entitled to the relief he prays for in his petition, at the cost of the defendant.

INEFFECTUAL ATTEMPT TO RESERVE IN A DEED THE POWER OF ALIENATION.

Court of Appeals for Paulding County.

ANNA B. SMALLEY v. DANIEL W. SMALLEY ET AL.

Decided, January 8, 1916.

Deed—Placed in Escrow and Delivered After Death of Grantor—Right Reserved by Grantor to Sell and Convey—Language of the Exception Held Ineffectual to Impair the Estate Conveyed.

Where in a deed of conveyance of real estate, language is employed by way of condition or exception, reserving to the grantor the power of alienation of the estate conveyed, such repugnant language will, on grounds of public policy, be denied effect.

Hooper & Lenhart and *Waters & Bayliss,* for plaintiff.

F. P. Spriggs, P. W. Stumm and *A. N. Wilcox,* contra.

CROW, J.

In this cause, which is here on appeal from the Court of Common Pleas of Paulding County, Ohio, plaintiff seeks to recover and have aparted to her the undivided sixth of certain real estate situate in said county.

The essential facts are the following: On June 16, 1900, Daniel F. Smalley, a widower, died intestate, leaving plaintiff, and the other parties to this action, his sole heirs at law and next of kin. On August 11, 1893, said decedent, by a deed in due form, acknowledged and witnessed, conveyed the premises described in plaintiff's petition to certain of his children not including plaintiff and others, the deed being in the following language, omitting the acknowledgment:

"Know all men by these presents, that I, Daniel F. Smalley, an unmarried man of the county of Paulding, Ohio, the grantor in consideration of one (1) dollar and other considerations to me paid by Amariah P. Smalley and Daniel W. Smalley, the grantees, the receipt whereof, is hereby acknowledged, do hereby

bargain, sell and convey to said grantees and their heirs and assigns forever, the following real estate, viz., situated in the county of Paulding and state of Ohio, and known as the north half of the southeast quarter of section eighteen, township two (2), north of range two (2) east, containing eighty (80) acres of land the same more or less but subject to all legal highways together with the privileges and appurtenances to the same belonging, with the following exceptions, that said grantor reserves full control and use of said premises during his natural life, with full power to sell and convey said premises, the same as if this deed had not been executed, but in case that said grantor becomes deceased, then the title to said land to rest absolutely in said grantees, their heirs and assigns.

"To have and to hold the same to the said grantees, their heirs and assigns forever, grantor hereby covenanting that the title so conveyed is clear, free and unincumbered and that he will warrant and defend the same against all claims whatsoever, except the conditions above set forth."

This instrument was, as soon as acknowledged, left by the grantor with the scrivener, P. W. Stumm, to be delivered by him upon the death of the grantor.

No control of the deed was reserved at the time of such placing it in the hands of the scrivener.

After the death of the grantor, pursuant to said unconditional direction by the grantor, the depositary of the instrument, Mr. Stumm, delivered it to the grantees, who caused the same to be duly recorded.

Two questions arise upon the facts, and in behalf of plaintiff it is claimed that the correct solution of both requires the avoidance of the deed and a decree of partition in her favor.

1. It is first urged that the placing of the deed in escrow with the scrivener, and his subsequent disposal of it as above recited, do not constitute a valid delivery.

Whatever may be the law in other states, this point has been clearly settled in Ohio, in favor of such delivery, by the decisions of the Supreme Court in the following cases: 34 O. S., 610, and 37 O. S., 132.

The above decisions, with which we are unanimously in full accord, have become a rule of property.

2. Is the instrument effective at all as a conveyance of lands, in view of the presence in the granting clause, of language immediately following the description, to-wit:

"with the following exceptions, that said grantor reserves full control and use of said premises during his natural life, with full power to sell and convey said premises, the same as if this deed had not been executed, but in case that said grantor becomes deceased, then the title to said land to rest absolutely in said grantees, their heirs and assigns."

Of course, no claim is made that the reservation of the life estate in favor of the grantor, could not be properly made.

But it is insisted that the language of the exception which preserves to the grantor the full power to sell and convey, as well as the exception following the warranting clause, renders the deed ineffectual, for the reason that an attempt is made to reserve to the grantor an estate (in fee simple) equal in character and duration to that purporting to have been conveyed.

Many of the early rules of interpretation of deeds, which had to do with the formal parts, such as the granting, habendum, and tenendum, clauses, have by the uniform holdings of the courts of several states, including those in Ohio, yielded to the one which now requires construction by reference to all the language, generally characterized as "by the four corners."

However, at the threshhold of the interpretation of the deed in issue herein, lies the rule requiring a deed to be construed most strongly against the grantor. This is also a rule of property in Ohio. 15 Ohio, 196, 200; 7 Ohio State, 37, 42.

Another applicable canon of interpretation closely allied to if not included in the one just mentioned, requires that if the instrument be susceptible of two interpretations, one of which will pass the title, and the other will not do so, the former will be adopted.

The controlling question in the case at bar is the following: where, by the terms of a conveyance of real estate otherwise free from doubt, the whole of the estate sought to be conveyed is, by an exception, reserved in the granting clause to the grantor,

does such irreconcilable repugnancy exist as must render the instrument nugatory?

Were the language reserving to the grantor of the deed here in question, full power to sell and convey the premises the same as if the deed had not been executed, absent from the conveyance under consideration, no one would claim that the remainder in fee simple, subject to the reserved life estate, would not pass to the grantees.

But this language can not be disregarded.

Either it must result in complete destruction of the attempted conveyance, or it must be adjudged of no force as against the title which would pass were it not employed.

Manifestly the grantor intended three things by this instrument: first, to convey a fee simple title to the grantees; second, to reserve an estate for life, to himself; and, third, to engraft on the fee simple title a right in himself, which might take from the grantees every attribute of the title the grantor was investing in them.

By the language itself, the grantor made the reservation essential and entirely repugnant to the very nature of the estate he had conveyed.

With much diligence we have endeavored to find a case in Ohio on this precise question, where a deed was in issue. In 36 Ohio State, 506, the principle is applied in the case of a will, where restraint of alienation was attempted. At page 515, the learned judge asserts the rule to be the same by deed as by will, and indeed no reason can be perceived for any discrimination in the application of this rule. The restraint is void as against public policy. And, as stated in the case last cited, the owner of property can not transfer it absolutely to another, and at the same time keep it himself. He may restrain or limit its enjoyment by trusts, conditions or covenants, but can not take from a fee simple estate its inherent quality and still transfer it as such estate.

While in the case just referred to, the restraint sought to be imposed was on the power of the devisee to alienate, the principle will apply as well where by exception in a deed a grantor

would undertake to restrain alienation by language reserving to him the power to deprive the grantee of the title sought to be conveyed.

This subject is admirably covered is the recent and very valuable work, Ruling Case Law, at page 1094 of Volume 8.

We entertain no doubt concerning the correctness of the rule there so clearly stated and abundantly supported by the notes to which it refers, which harmonize with the Ohio case referred to.

We hold, therefore, that the quoted language of the exceptions in the case before us, is ineffectual, so far as it undertakes to impair the estate in fee simple subject to the reserved life estate.

KINDER, J., and ANSBERRY, J., concur.

CLAIM BARRED BY JUDGMENT IN FORMER ACTION.

Court of Appeals for Licking County.

PERRY FEAZEL v. JACOB FEAZEL.

Decided, October Term, 1915.

Res Adjudicata—Conclusiveness of a Former Judgment—Not Only as to What Was Determined—But as to Matters Which Might Have Been Litigated in the Same Action.

Where testimony as to the claim now in suit was offered and went to the jury in a former trial, in which the present plaintiff was defendant and the present defendant was plaintiff, a reviewing court must assume there was a determination as to that claimed and the principle of *res adjudicata* applies, notwithstanding the answer in the former suit was a general denial and no affirmative relief was sought and no claim presented with reference to the account on which recovery is sought in the case at bar.

Kibler & Kibler, for plaintiff in error.
Fitzgibbon, Montgomery & Black, contra.

HOUCK, J.

This is a proceeding in error prosecuted from the Common Pleas Court of Licking County, Ohio; the parties stand here in the same position as in the court below.

The cause was submitted to the common pleas court upon the question made by the pleadings in the case as to whether or not the plaintiff is estopped, and whether the claim in the petition is *res adjudicata* by reason of the allegations and matter set forth in the answer of the defendant. Said cause being submitted to the common pleas court upon the following stipulation and agreement between the parties hereto:

"That the question of *res adjudicata* and of estoppel shall be submitted to the court upon the pleadings in the case of *Jacob Feazel* v. *Perry Feazel,* heretofore tried in the Court of Common Pleas of Delaware County, Ohio, being case No. 6821, the pleadings in this case and the bill of exceptions in said Delaware county case."

The common pleas court rendered a judgment in favor of the defendant, and a reversal of this judgment is sought by plaintiff in error.

The plaintiff brought suit in the common pleas court against the defendant asking for a judgment against him in the sum of $1,061.25, alleged to be due him for board and lodging, etc., furnished by plaintiff to the defendant between August 17, 1910, and July 10, 1912, being the time defendant lived in the home of plaintiff in Delaware county, Ohio.

An answer was filed to the petition pleading, among other things, the defense of estoppel and *res adjudicata* in this, to-wit: that all of the matters, things and questions involved in said suit had been fully tried, determined and adjudicated between the parties hereto in a suit which was tried in the Common Pleas Court of Delaware County, Ohio, on the 17th day of October, 1915, and a final judgment rendered therein.

Two questions are presented in this case:

First. Is the cause of action set forth in the petition in this case in any way connected with the case tried in Delaware county

wherein Jacob Feazel was plaintiff and Perry Feazel was defendant?

Second. Was the cause of action in plaintiff's petition in this case submitted to and passed upon by the jury in the Delaware county case, notwithstanding the charge of the court in said case?

The stipulation and agreement upon which this cause is submitted, among other things, provides that the bill of exceptions in the Delaware county case shall be considered by the court. We have examined the same with some care, with a view of ascertaining the facts that were presented in that case that would be applicable and proper in the determination of the questions involved in this case and especially with reference to the charge of the court.

The bill of exceptions discloses that practically all of the items set out in the petition in the case at bar were charges made within the time that the defendant lived in the home of the plaintiff and, speaking from the record, they were submitted to the jury in the trial of the case, and it is not within the province of a reviewing court to say they were not considered by the jury in arriving at its verdict. The record shows that the plaintiff had no contract of any kind with his father for care, support, board, etc., and therefore the charge of the court was proper and right when the court charged the jury: "There is no claim made in the answer for any compensation for board or anything else." This was a correct and proper instruction to give to the jury in the light of the testimony of the plaintiff himself.

We think it is a well settled principle of law in this state that when a matter has been finally determined in an action between the same parties by a competent and proper tribunal, the judgment is conclusive, not only as to what was determined, but also as to every other question which might properly have been litigated in the case.

True, the answer in the Delaware county case was a general denial and no affirmative relief was sought, and no claim presented therein with reference to the items set out in the petition in the case at bar, but evidence was offered in the trial of the

case upon these items which went to the jury and, so far as a reviewing court is concerned, the jury took these items into consideration in arriving at its verdict.

Our Supreme Court has declared, as a well settled principle of law, that when the facts which constitute the cause of action or defense have been, between the same parties, submitted to the consideration of the court and passed upon by the court, they can not again be the proper subjects for action or defense, unless the finding and judgment of the court is opened up and set aside by proper authority. This principle of law extends still further in quieting litigation. A party can not relitigate matters which he might have interposed, but failed to do in a prior action between the same parties or their privies in reference to the same subject-matter, and if he fails to introduce matters for the consideration of the court that he might have done, he will be presumed to have waived his right to do so.

Relying upon the record in the Delaware county case and pleadings submitted, and applying thereto the well known principles of law applicable to the questions presented in the case at bar, a majority of the court is of the opinion that the judgment of the common pleas court is right and should be affirmed.

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

ACTION BY REAL ESTATE BROKERS FOR COMMISSIONS.

Court of Appeals for Hamilton County.

GORDON W. DURRELL AND THE KAUFHOLD REALTY COMPANY v. STATIA B. REYNOLDS, INDIVIDUALLY AND AS EXECUTRIX AND TRUSTEE OF THE ESTATE OF E. B. REYNOLDS, DECEASED.*

Decided, January 24, 1916.

Agency—Real Estate Broker Entitled to His Commission—Where a Purchaser Ready and Willing and Able to Take the Property is Produced—Regardless of the Fact that the Contract of Purchase is in a Farm Which is Unenforceable.

The fact that a contract of purchase of real estate, procured by a real estate broker, was imperfectly executed, is not ground for refusing the judgment in favor of the broker for the amount of his commission, where the purchaser produced stands ready and is able to take the property at the agreed price, notwithstanding the infirmity in his contract of purchase.

Hunt, Bennett & Utter, for plaintiffs in error.
Powell & Smiley, contra.

JONES (E. H.), P. J.

The plaintiffs below, Gordon W. Durrell and the Kaufhold Realty Company, sued the defendants, Statia B. Reynolds, individually, and Statia B. Reynolds, as executrix and trustee of the estate of E. B. Reynolds, seeking to recover the sum of $1,800 for services in *finding a purchaser* for certain real estate belonging to the E. B. Reynolds estate.

The plaintiffs are real estate agents and on April 18th, 1913, were employed by defendants by written contract as follows:

*Reversing *Durrell et al* v. *Reynolds et al*, 16 N.P.(N.S.), 486.

"CINCINNATI, O., April 18th, 1913.

"G. W. DURRELL AND THE KAUFHOLD REALTY CO.

"I hereby agree to sell the following property viz: Situate on the south side of Sixth St. between Main and Sycamore Sts., at the south-west corner of Sixth and Langdon Alley, being forty two (42) feet front on Sixth St., by a depth of one hundred and thirty-nine feet, ten inches, to an alley, with the improvements thereon, for the sum of Sixty Thousand ($60,000) Dollars, payable Cash and authorize you to procure a purchaser for the same and agree to pay you a commission of three per cent. on the amount for which said property may be sold. I guarantee the title good, and will convey by deed of General Warranty. Except as to taxes and assessments due after June 20, 1913. In consideration of your efforts to find a purchaser, I agree that you shall have the exclusive right to sell said property for 30 days; give you written notice withdrawing the same. It is further agreed that you shall be entitled to your commission if the property is sold during the existence of this contract by you, or the undersigned, or any other person, at any price acceptable to the undersigned.

"(Signed) STATIE B. REYNOLDS,
"Executrix of E. B. Reynolds Estate.

"Cincinnati, O.

"..... hereby accept the agency for said property on the terms above stated."

On the same day the plaintiffs procured a purchaser who indorsed upon the above contract the following:

"CINCINNATI, O., April 18th, 1913.

"We hereby agree to purchase the above described property at the price and upon the terms above stated.

"(Signed) ESTATE OF L. B. HARRISON,
"C. L. HARRISON ET AL, *Trustees.*"

Mr. C. L. Harrison who signed the agreement to purchase was one of three co-trustees for the L. B. Harrison estate. The evidence shows that he and his co-trustees were at all times ready, able and willing to take the property and in all respects perform their share of the contract.

The seller refused to convey the property to the Harrison estate, and then refused to pay the agent's commission, making

the claim that the contract of sale secured by the agent was unenforceable; in other words, that because it was signed by one of the trustees only it could not be specifically enforced. This claim was made and such defense interposed in the trial below and in argument here, notwithstanding the uncontroverted fact that Mr. C. L. Harrison was ready and able at all times to comply with the terms of the contract individually, and that the evidence plainly shows that he was authorized to sign the contract, or at least he together with his co-trustees were not only able but ready and willing at all times to comply with its terms.

To support her claim defendant in error relies upon *Pfanz* v. *Humburg et al*, 82 O. S., 1. The cases are similar in that each is an action by a real estate agent for his commission. In every other respect they differ. Throughout the opinion points of difference are commented upon as if the learned judge had in mind this case and was differentiating between them. To show how essentially different the facts are we quote in full the syllabus:

"P., a real estate agent, accepted the following proposition:

" 'CINCINNATI, OHIO, May 2, 1905.

" 'JOHN PFANZ, *Agent:* I hereby authorize you to sell for me the following described real estate, located at 2241 Flora Place, for the sum of three thousand five hundred ($3,500.00) dollars on the following terms: title to be perfect, free and unincumbered, payments to be cash, and I agree to give you sole authority to sell the same for the period of ten days, and agree to pay you for services when the property is sold.

" 'MAGDALENA HUMBURG,

" 'WILLIAM HUMBURG.'

"P. procured one who said he was willing to take the property at said price, and he paid the agent $9.75, for which the agent gave a receipt, and turned the payment over to the vendors; but no written contract of purchase was entered into, nor was possession taken by the alleged purchaser, who afterwards refused to take the premises or complete the purchase by entering into an enforceable contract.

"*Held:* That the condition in said contract of employment, 'to pay for services when the property is sold,' has not been complied with by the agent and he is not entitled to recover commission."

The case at bar is one in which the plaintiffs seek to recover for procuring a purchaser, and that is what they were employed for. But in the case cited, Price, J., in the second sentence of the opinion says:

"The petition shows that the right to compensation depended upon a completed sale."

Again, on page 11:

"This agency contract was not to merely procure an able, willing and ready purchaser, but the owners agree to *pay for services when the property is sold.*"

And, to show further the ground upon which that case was determined, see page 13:

"* * * the owners agree to pay the agent for services when the property is sold. It is not averred in the petition, nor is it established by any evidence introduced by the agent, that a sale was made."

Also, see page 12:

"The plaintiff in error, through his counsel, makes the proposition, that 'where the real estate agent finds a purchaser who is ready, willing and able to take the property at the stipulated price, no written contract of purchase signed by the prospective purchaser is necessary to enable the agent to recover his commission.'

"As a general rule, we may assent to it, but it can not be used to determine every case, especially in a case where the contract of agency is specific and clear as to the condition upon which commission can be recovered. Nor do we intend to hold that as a general rule it is a part of the agent's duty to enter into a written contract with the purchaser for the sale of the property."

These are only a few sentences from the opinion, but they are sufficient to show that the case from which they are taken differs so widely from this case in every material point that it can not be relied upon here, unless it be to support the agent's case, as we think the opinion does.

There seems to be no case reported in Ohio where the precise question here presented was determined. That is probably due to the fact that the issue here involved is simple, and one in the solution of which the mind at once turns to and dwells upon the principles of justice and fair dealing which lie at the foundation of our system of jurisprudence and which have served as landmarks in its growth and development.

Mrs. Reynolds employed the agent to find a purchaser for her property. The agent found the purchaser, and it was through no fault of the purchaser or agent that the sale was not consummated. Mrs. Reynolds failed to give title and to make a deed. She now says she is not liable for the commission because the contract which the agent procured was unenforceable. Unless the purchaser refused to take the property or she was otherwise prejudiced by the alleged defect in the contract, how can Mrs. Reynolds take advantage of its infirmity? What had that to do with the failure to consummate the sale? The record shows it had nothing to do with it, but on the contrary that it was through the refusal of the owner to comply with her contract that the sale failed. A person can not be permitted to take advantage of his own wrong, and the authorities relied upon by defendant in error do not uphold her contention.

The main case cited and one that seems to be a leading case is that of *Wilson* v. *Mason,* 158 Ill., 304. This was a suit by a real estate broker for his commission for finding a purchaser or effecting a sale. It differs materially from the case at bar. The purchaser, alleged to have been procured, refused to take the property. The validity of the contract, as a matter of course, became an important subject of inquiry. The purchaser procured refused to take the property and the only way he could be compelled to do so was by a suit for specific performance of the contract; hence, the validity of the contract became an element, and a controlling one, in determining the right of the agent to a commission. If the contract was unenforceable the agent had rendered no service of any value to his employer and should not recover. Such were the facts, and so the court decided in that case. But Justice Magruder, who delivered the

opinion, began the discussion on page 309 with some general observations with which the claim of the broker in the instant case are in accord. He says:

"The duty of a broker who is employed to sell real estate, is to find and produce to the vendor a purchaser, who is ready, willing and able to complete the purchase as proposed. This he must do before he is entitled to any commissions. If the vendor rejects the purchaser so produced, the broker is bound to show that such purchaser was willing, ready and able to perform the contract according to the proposed terms. If the principal accepts the purchaser thus presented, either upon the terms previously proposed or upon modified terms then agreed upon, and a valid contract is entered into between them, the commission is earned. In such case, the broker has earned his commission although the sale is never actually completed, if the failure of the purchaser to complete the sale results from the inability of the vendor to make a good title, and without fault on the part of the broker."

In Ohio the cases are few touching even remotely upon the question here presented. It is interesting to note that practically the precise question was decided by the Superior Court of Cincinnati in *Heintz* v. *Boehmer*, 4 N. P., 226.

While it may be said that this case is not authority and not to be necessarily followed here, it has not been reversed and has remained the law of this state. The syllabus is as follows:

"In a suit for recovery of a commission for the sale of real estate, the failure of the owner to incorporate into the contract with the intending purchaser, found by the agent, provisions which make it binding, does not militate against the agent's right to recover."

And in the opinion, in commenting on an instruction given the court say:

"In any view of the case, this instruction was misleading inasmuch as it was intended to make the right of plaintiffs to recover depended absolutely upon the right of defendant to enforce specific performance against Muhlhauser. But the instruction is clearly erroneous when we consider that plaintiffs

were not employed to effect a binding contract for the purchase of the property, and that the plaintiffs did not in fact act as the agents to defendant's intestate in executing the contract, but that the contract was signed by Maria Agnes Boehmer herself. Her failure to effect a binding contract, can not militate against the rights of plaintiffs, since their duty was performed and their commission earned when they found a purchaser ready and willing to buy, and brought the parties together. The duty of effecting a binding contract then devolved on, and, in fact, was assumed by Maria Agnes Boehmer herself. It was for her and not the plaintiffs, to incorporate in the contract such provisions as would make it binding notwithstanding the existence of the mortgage.

"The court in its general charge to the jury proceeded upon the assumption that the plaintiffs were bound, and, in fact, assumed to execute the contract of sale, and that they could not recover unless a binding contract was made. This was error."

There are many cases in other states bearing upon and upholding the right of the broker to recover in this case. First, we cite *Buckingham* v. *Harris,* 10 Colo., 455, quoting from the syllabus the following:

"A real estate broker is entitled to his commission when he has procured a party ready to purchase on the owner's terms, though he has not made a binding contract for the sale of the real estate with such person."

In *Mooney* v. *Elder,* 56 N. Y., 235, the lengthy syllabus is instructive and pertinent here, but we refrain from quoting from it. We, however, take from pages 241 and 242 of the opinion this apt language:

"The plaintiff was entitled to his commission upon the production of a purchaser ready and willing to purchase the property, although through the default of the defendant a sale was never effected. There was nothing showing but that the contract might have at once been consummated, had the plaintiff been ready to give a deed and put the purchaser in possession. The defendant having declared to the plaintiff that he had sold the property, and when called on to pay the commission based his refusal to pay, not upon the ground that a valid contract for the

sale had not and could not be made, but upon the ground that he had withdrawn the property from market before the sale was made, can not now shield himself from liability on the former ground. Besides, the evidence shows, *prima facie*, that the purchaser was ready and willing to purchase when the verbal contract was made, and there is nothing appearing subsequently in conflict therewith. The court would have been warranted in holding that the commissions then became due, although the conveyance was not made until some time afterward."

We will refer to but one other case, viz., *Holden* v. *Starks*, 159 Mass., 503, wherein the syllabus is in part as follows:

"If A, acting as the authorized agent of B, makes a contract of sale of B's land to C, who pays to A a part of the purchase money, and who for a long time afterwards is able, ready and willing to take the property and pay for it the price agreed, and is prevented from doing so by B's refusal to carry out the contract, A is entitled to compensation from B for making the sale, although C could not have been compelled to carry out his contract, if he had chosen to set up the statute of frauds."

This case was tried to a jury in the common pleas court, and counsel for both sides asked for an instructed verdict. The court thereupon withdrew the case from the consideration of the jury and treated the issue as one at law. Thereupon judgment was rendered in favor of defendants. This was error of law, as we have tried to show.

The judgment is reversed, and there being nothing left in the present state of the case but the question of law discussed above, this court will render the judgment that should have been rendered by the court below.

JONES (OLIVER B.), J., and GORMAN, J., concur.

STREAM POLLUTED BY PUMPINGS FROM A COAL MINE.

Court of Appeals for Perry County.

THE STANDARD HOCKING COAL COMPANY v. MARY A. KOONTZ.

Decided, November 19, 1915.

Measure of Damages—In Action for Pollution of Stream Running Through a Farm—Actual Damages Only Can be Recovered.

Where water pumped from a coal mine and discharged into a running stream is so impregnated with sulphuric acid as to pollute the stream and a neighboring well to such an extent that live stock will no longer drink therefrom and the water from the well is rendered unfit for domestic purposes, the damage sustained by the riparian owner is measured by the permanent injury to his land as shown by its diminished rental value or the cost of installing another sufficient water supply.

T. M. Potter and *George A. Fairbanks,* for plaintiff in error.
C. A. Donahue and *T. B. Williams,* contra.

HOUCK, J.

This is a proceeding in error prosecuted from the common pleas court of this county, asking that the court below be reversed in a judgment rendered in favor of the defendant in error, the plaintiff below, against the plaintiff in error, who was the defendant below. The suit was for alleged damages to the farm of the plaintiff below.

The petition in substance avers that the plaintiff is the owner of a farm of one hundred and fifty-eight acres, located in Perry county, Ohio; that running through said premises is a natural stream of water and that prior to the grievances complained of, as hereinafter set forth, this stream had been used by her for the purpose of watering stock and that it was the only available stream for that purpose; that on said premises were dwelling-houses and a barn; that there was a valuable well of water which was used for domestic purposes; that the defendant owned and

operated a coal mine north of said plaintiff's premises and nearby said stream of water; that defendant made an opening into said mine through which water was pumped therefrom and found its way into said stream above referred to, and that said water so pumped into said stream was highly inpregnated with sulphuric acid, and that it polluted the water in said stream flowing through the land of plaintiff and it found its way into said well on the premises of plaintiff and rendered the water therein useless for domestic or any other purposes, and by reason thereof said farm had become less valuable and her rents and income therefrom had decreased; that she expended large sums of money in an effort to secure suitable water and by reason of the same has been damaged in the sum of $2,000, and for which sum she prays judgment.

The defendant filed an answer to the petition which was in the nature of a general denial. Upon the issue joined the cause was submitted to a jury and a verdict rendered for the sum of $280 in favor of the plaintiff. A motion for a new trial was filed. heard and overruled, and a judgment rendered on the verdict. The plaintiff in error seeks a reversal of this judgment and in its petition in error sets forth a number of grounds of alleged error, but its counsel in oral argument urge but two of them, namely: first, that the court erred in not giving to the jury requests Nos. 2 and 3, which were in writing, and were requested to be given by defendant below before argument; second, that the court erred in its general charge to the jury.

Taking up the first ground of alleged error, to-wit, that the court erred in its refusal to give requests Nos. 2 and 3 before argument, will say that we have examined these requests and while we are of the opinion that as abstract propositions of law they are sound and should be given in such a case, where the facts involved in the case warrant the application of such principles of law as are contained in said requests Nos. 2 and 3, but on an examination of the record and the evidence disclosed therein, we are of the opinion that the facts in the case at bar do not warrant the application of the principles of law as set forth in

said special requests Nos. 2 and 3, and that the court below did not err in refusing to give the special requests hereinbefore referred to.

Coming now to the second ground of alleged error, that the court erred in its general charge to the jury, will say that counsel for plaintiff in error complains and contends the court's charge to the jury with reference to the measure of damages was not the law applicable to the case at bar. That part of the charge to which special objection is made is as follows:

"Now, the claim here is that the stream was polluted; that the stream in a state of nature was uncontaminated, but by the discharge of sulphur water from this particular mine of defendant the stream was contaminated, and as it passed the place where it passed over her land it was rendered useless for the purpose of watering the herds and cattle she may have had and the well was totally destroyed for domestic purposes.

"That allegation the defendant denies and the burden of proof then is on the plaintiff. If you find that the well was polluted, that the well was in fact destroyed, and if you go further and find that it was done and contributed to either in whole or in part on the part of the defendant, you will go further and inquire what, if any, damage has been sustained upon the part of the plaintiff.

"Now, the plaintiff can only recover, if she recover at all, her actual damages, and she can only recover upon the claims specifically set forth and complained of in this petition. Now, she claims that the rental values of her premises were diminished and that the value of her farm for rental purposes was largely reduced. You have the evidence upon that proposition. This action was commenced on April 4th, 1914, and she sues for diminished rental value for the three years before the commencement of this action. In addition to that, gentlemen, the plaintiff is entitled to recover for any inconvenience and for any actual and necessary expenses incurred by her by reason of the pollution of this stream and the pollution of this well, as set out in the petition, by the defendant, if you in fact find that the defendant did so pollute the stream and well.

"Now, when I say she is entitled to actual and necessary expenses incurred by reason of the pollution of this stream and by reason of the well, that does not mean that she could extend beyond what was necessary to install water on the land."

We think it will be conceded as a fundamental and a well established principle of law that an owner of land has the right to enjoy the soil itself and the incidents thereto in its natural state unaffected by the tortious acts of a neighboring land owner, and where the land is located in such a way that a natural stream of water passes through it, the owner of the land, as a riparian owner, is entitled, as an incident to his estate, to the natural flow of the water of the stream in its accustomed channel, undiminished in quantity and unimpaired in quality.

We further think that it is a sound principle of law that in an action for damages to real property testimony is admissible to show the exact character of the injury suffered, whether of a permanent or irreparable nature, or of the sort susceptible of repair, so that the property may be restored to its original condition. If the testimony shows the former to be the nature of the injury, the measure of damages is the difference in value of the property before and after the injury. If an injury susceptible of repair has been done, the measure of damages is the reasonable cost of restoration plus the reasonable compensation for any loss of the use of the property between the times of injury and restoration, unless such cost of restoration exceeds the difference in values of the property before and after the injury, in which case the difference in values becomes the law.

The court is of the opinion that the principles of law hereinbefore referred to are well established in this state and we think we need refer to but one case, which is found in the 79th Ohio State, page 263, being the case of *Straight* v. *Hope*. The second syllabus reads as follows:

"An upper owner of lands upon such stream who operates them for underlying petroleum by pumping it and the salt water with which it is commingled into tanks, and after the petroleum rises withdrawing the salt water from beneath and discharging it by gravity into the stream, is liable in compensatory damages for such substantial injuries as may be sustained by a lower proprietor in consequence of the water in the stream being thereby rendered unfit for the use of the live stock and destruction of the grass with which it comes in contact, although such

is conducted with care and is the only known practicable mode of developing the mineral resources of his lands."

It is urged by the plaintiff in error that under no rule of damages was the plaintiff below entitled to recover for anything, save and except the diminution in the market value of the property. We do not agree with counsel for plaintiff in error in this claim. We think that the measure of damages in the present case includes the permanent injury to the land, the diminution in rental value and the cost of installing another supply of water. In other words, the recovery is limited to the actual damages incurred in the premises as shown by the evidence.

We have examined, with some care, the charge of the court, and we have no hesitancy in saying that we find it to be a clear and concise statement of law governing the facts pertaining to the issues in the case, and that it fully and completely covers all of the questions involved therein.

Viewing the case as we do, and finding the recovery to be the result of proof offered, tending to show the actual damages sustained by the plaintiff below, and finding no error in the record prejudicial to the rights of the plaintiff in error, there is but one thing for the court to do; and that is to affirm the judgment below, which we now do.

SHIELDS, J., and POWELL, J., concur.

AS TO PAYMENT OF ACCRUED TAXES ON PROPERTY APPROPRIATED BY A MUNICIPALITY.

Court of Appeals for Hamilton County.

CITY OF CINCINNATI AND WILLIAM A. HOPKINS, TREASURER, v. FRANCES D. JONES AND FRANK J. JONES, HER HUSBAND.*

Decided, March 29, 1915.

Appropriation—Proceedings by a Municipality for the Acquiring of Land—Title Passes, When—Taxes Which Have Become a Lien May be Deducted from the Compensation Awarded.

1. In an appropriation of property by a municipality title does not pass until full compensation has been paid or secured to be paid.
2. A lien for taxes is not divested by condemnation proceedings, and taxes which have become a lien on the property appropriated on the date the title passes may be deducted from the compensation awarded.
3. A county treasurer is a mere ministerial officer charged with the duty of receiving taxes, and is in no way a necessary party to an appropriation proceeding.

Walter M. Schoenle, City Solicitor, and *John V. Campbell,* Prosecuting Attorney, for plaintiff in error.

DeCamp & Sutphin, contra.

GORMAN, J.

This is a proceeding to reverse a judgment of the Court of Insolvency of Hamilton County.

On December 11, 1911, the council of the city of Cincinnati duly passed a resolution declaring its intention to appropriate certain real estate of the defendants in error on Burnet avenue in said city, to public use for hospital purposes, and thereafter the said council passed the necessary ordinance directing the appropriation of said property to proceed. Thereafter, an application was filed in the Insolvency Court of Hamilton County, on January

*Motion for an order directing the Court of Appeals for Hamilton County to certify its record in this case, overruled by the Supreme Court, July 2, 1915.

27, 1912, to assess the compensation for said property, and such proceedings were thereafter had that on June 10, 1912, the jury returned a verdict assessing the value of the property of defendant appropriated at $28,200. On this verdict a judgment was duly entered September 28, 1912, finding the proceedings regular and according to law and that the defendants, Frances D. Jones and Frank J. Jones, were the owners of said real estate and the several interests therein, subject to such claims of the auditor and treasurer of Hamilton county, for taxes * * * as may be finally adjudged payable out of the compensation adjudged therefor; the verdict was confirmed, and the city of Cincinnati was ordered to pay the clerk of the court, or to said defendants or their attorney the amount of the compensation assessed for the use of said Frances D. Jones and Frank J. Jones, and to the treasurer of Hamilton county and the auditor of Cincinnati the taxes which were unpaid and a lien on the property; and that upon payment as aforesaid the city of Cincinnati shall be entitled to all the interest and estate in and to the possession of said lots and lands, and that an order issue to the sheriff to put the city of Cincinnati in possession of said property and said interests. The city was adjudged to pay the costs. Thereupon, on the same day, September 28, 1912, the city paid to Frances D. Jones and Frank J. Jones $27,700 of the compensation money, and $500 it paid to the clerk of the court to await the order of the court as to the payment of the taxes on the property for the year 1912. On final hearing on the question of the payment of the taxes for the year 1912, the court of insolvency held that no part thereof should be paid out of the compensation money awarded for the property, and that on distribution the treasurer of Hamilton county was not entitled to receive any sum on account of the taxes on said property for the year 1912 and which amounted to $357.50, but that the entire compensation awarded by the jury and the court should be paid to the defendants in error.

To this judgment on distribution the city of Cincinnati and the treasurer of Hamilton county excepted, and have brought the case into this court claiming that said judgment or order of distribution was erroneous, and that the court should have or-

dered said taxes for the year 1912 paid out of the sum awarded for the property.

The right of the municipality to take or appropriate private property for public purposes is derived from the provisions of the Ohio Constitution, Section 19, Article I, Bill of Rights, which among other things provides that for private property taken for public use, when not taken in time of war or other public exigency imperatively requiring its immediate seizure, or for the purpose of making or repairing roads, etc., a compensation shall first be made in money or secured by a deposit in money.

The case under consideration, therefore, required compensation to be either paid or secured in money before the property could be taken or appropriated.

The legislation authorizing council to proceed to appropriate the property is found in Sections 3677 to 3697 inclusive, of the General Code. The property was not appropriated by the adoption of the resolution declaring the intention to appropriate, nor by the adoption of the ordinance directing the appropriation to proceed. A reference to Sections 3679 and 3680, General Code, discloses that council is thereunder authorized to declare the *intent* to appropriate and not to appropriate; and the ordinance to be passed is one directing the appropriation to proceed.

We are of the opinion that no appropriation can be made or fully completed, such as the one made in the case at bar, until there has been full compensation paid or secured to be paid for the property. In this case the appropriation was not completed until September 28, 1912, when the money was paid over by the city. Up to that date the title to the property vested in the defendants in error, and did not pass to the city or vest in it until September 12, 1912. Section 3691, General Code; *Wagner* v. *Railway Co.*, 38 O. S., 32, 36; *Garvin* v. *Columbus*, 5 N. P., 236.

This conclusion would appear to be unquestioned, if we consider that by the provisions of Section 3697, General Code, the municipality has six months within which to decide whether or not it will take the property at the valuation fixed by the jury.

If it fails to pay the assessed value or to take possession of the property within six months from the date of the assessment of the value, its right to make the appropriation on the terms of the assessment shall cease, and the judgment and order of the court shall cease to be of any effect, except as to costs, which must be paid by the municipality whether it takes the property or not. The defendants then, being the owners of the property and having the title thereto up to September 28, 1912, were they liable for the taxes for the year 1912, and were these taxes a lien on this property on that date when the city became vested with the title thereto?

Under Section 5671, General Code, the lien of the state for taxes levied for all purposes, in each year, shall attach to all real property subject to taxation on the day preceding the second Monday of April, annually.

If this property on the day preceding the second Monday of April, 1912, was the private property of the defendants in error, as we have found that it was, then there appears nothing in the record to indicate that it was not subject to taxation. It was not exempted from the payment of taxes. But did the lien attach on that date for county, city and school taxes, as well as for taxes purely for state purposes? We think the question must be answered in the affirmative, under the decision of the Supreme Court in *State, ex rel Donahey, Auditor,* v. *Roose, Auditor,* 90 O. S., 345. On page 351 the court says:

"It is further insisted on behalf of respondent that by reason of Section 5671, General Code, this tax can not be legally levied for the year 1913 because that section provides that 'The lien of the state for taxes levied for all purposes in each year shall attach to all real property subject to such taxes, on the day preceding the second Monday of April, annually.' This same objection would apply with equal force to all taxes levied for state and local purposes and made after the date preceding the second Monday of April each year. The fact is that practically all levies, especially those for local purposes, are made after this date. Section 5627, General Code, directs the county commissioners at their March or June session to determine the amount to be raised by taxes. Section 5646, General Code, directs the township trustees to determine on or before the 15th

day of May annually the amount of taxes necessary for all township purposes, and Section 5649-3*a*, General Code, directs that on or before the first Monday in June of each year the county commissioners of each county, the council of each municipality, the trustees of each township, each board of education and all other boards or officers authorized to levy taxes within a county, except for state purposes, shall submit or cause to be submitted to the county auditor an annual budget; and under the provisions of Section 5649-3*b*, as amended February 16, 1914, the budget commissioners are not required to complete their work until the third Monday of August. While Section 5671, General Code, fixes the date in each year that the lien of the state for taxes shall attach, yet it by no means follows that this requires that the tax levy shall be made on or before that date. In fact, all the legislation upon that subject is in direct conflict with such a construction. On the contrary it is clear that the amount of such taxes is to be subsequently determined and such assessment then relates back to the date at which the taxes became a lien. This question is fully discussed and the correct conclusion reached in the case of *Loomis, Trustee,* v. *Von Puhl et al,* 2 N.P.(N.S.), 423."

The decision referred to by the Supreme Court and approved by it was rendered by Judge Hollister when on the common pleas bench of this county, and an examination of the decision will disclose that it does fully discuss the question under consideration and the conclusion reached is in accord with the opinion of the Supreme Court in the above entitled case.

But it is claimed by counsel for the defendants in error that the rule applicable to judicial sales is the proper rule to apply in condemnation proceedings in making an order as to the payment of taxes, and the cases of *Haglen* v. *Cohen,* 30 O. S., 436; *Markley* v. *Whitmore,* 61 O. S., 587, are cited in support of their contention. These decisions were rendered under a construction of Section 5692, General Code, which provides that when land, held by tenants in common, is sold upon proceedings in partition, or real estate is sold at judicial sale, or by administrators, executors, guardians or trustees, the court shall order the taxes and penalties and the interest thereon against such lands, to be discharged out of the proceeds of such sale.

Now it will be observed that condemnation proceedings do not come under the provisions of this section, and we do not feel that we would be warranted in extending the provisions of this section to condemnation proceedings. Such proceedings are purely statutory, and it can not be said that appropriation proceedings involve the judicial sale of lands. There is no sale by order of court in condemnation proceedings and it would amount to judicial legislation to hold that by analogy the provisions for the payment of taxes in cases of judicial sales should be applied to proceedings to appropriate lands for public uses. Therefore, we are of the opinion that the rules laid own in these cases cited by counsel for defendants in error do not apply.

As to the point that the county treasurer was not made a party to the proceedings until after the money was paid over, we are of the opinion that it was not necessary that the county treasurer should have been made a party at any stage of the proceedings. He was simply the ministerial agent of the state to receive the taxes, and it was the duty of the court to see that the state taxes were paid out of the proceeds on distribution, and the lien for taxes is not divested by condemnation proceedings. *Lewis on Eminent Domain,* 3d Ed., Section 524; *State* v. *Mo. Pac. Ry. Co.,* 75 Neb., 4; *State, ex rel Trust Co.,* v. *Godfrey, Aud.,* 20 C. C., 649.

The city of Cincinnati was entitled to have the property appropriated clear and free of all encumbrances including the lien for taxes which had attached when it took possession of the property. It was entitled to have what it bargained for under its proceedings to appropriate—an absolute fee simple title, clear and free of liens and encumbrances. *In re Sleeper,* 62 N. J. L., 67.

If it were required to pay the taxes in addition to the condemnation money, then it would be paying for the property more than the amount awarded to the owners by the verdict of the jury. The property could not be placed on the exempted list when the city acquired it on September 28, 1912, until it had first satisfied the then existing lien for the taxes for the year 1912.

We are therefore of the opinion that the court of insolvency erred in not ordering the taxes for the year 1912 to be paid out of the funds in the hands of the clerk held to determine the question of the payment of the taxes; and for such error the judgment is reversed and the judgment which that court should have rendered will be entered in this court.

JONES (E. H.), P. J., and JONES (Oliver B.), J., concur.

OWNERSHIP OF LAND TAKEN IN NAME OF ATTORNEY OF THE CORPORATION WHICH ENTERED INTO POSSESSION.

Court of Appeals for Licking County.

HARRY H. BAIRD v. THE JEWETT CAR CO.

Decided, October Term, 1915.

Title—Land Purchased by Attorney But Used by Corporation—Stock Issued to Attorney Claimed to Have Been in Payment for the Land.

A purchase of land by one who in other matters was acting as the attorney and agent of a corporaton which at once took possession of the land, will be regarded as having been made for the corporation notwithstanding title was taken by the attorney in his own name, where the corporation thereafter issued stock to the attorney in an amount in face value somewhat exceeding the price of the land and remained in undisputed possession for more than ten years without any claim having been made by the said attorney on account of the land or any attempt to collect rent for its use; and an action to recover possession of the land, brought by one to whom it was conveyed by the said attorney and who had full knowledge of all the circumstances surrounding its purchase by the attorney will be dismissed and title established in the corporation.

Fitzgibbon, Montgomery & Black, for plaintiff.
Kibler & Kilber and *Flory & Flory,* contra.

POWELL, J.

This cause is in this court by appeal from the judgment of the court of common pleas.

The plaintiff filed his petition in that court alleging that he was the owner of certain described lands in fee simple, and entitled to the possession thereof, and that the defendant, which is a corporation organized under the laws of West Virginia, unlawfully keeps him out of possession thereof.

Plaintiff prays judgment for the recovery of possession of said lands, and all other proper relief.

To this petition an answer and cross-petition was filed in which the defendant admits that it is a corporation under the laws of West Virginia, and in possession of the real estate in the petition described, and denies each and every other allegation therein contained.

For cross-petition the defendant alleges that in December, 1901, it employed one Frederic M. Black, as its attorney and agent, to purchase for it the real estate described in the petition, which was then owned by one Samuel F. Van Voorhis, and furnished him with the sum of $2,500 of the capital stock of defendant, with which he was to purchase said lands, and which he received for that purpose; that with the said stock or the proceeds of the sale of same, said Black purchased the said real estate of said Van Voorhis for the price of $2,300; that, without the knowledge or consent of defendant, he caused the legal title to said real estate to be taken in his own name; that on the date of the conveyance from Van Voorhis to Black, viz., on or about the 23d day of October, 1903, it obtained possession of said real estate, and ever since then it has had sole and exclusive possession of the same under said transaction and contract of purchase, and has used the same as a part of its manufacturing plant.

It is alleged that $1,000 of the $2,500 of capital stock of defendant so furnished said Black, was issued by it, at Black's request, to the plaintiff Baird to reimburse him for money furnished at the request of said Black towards the purchase of said real estate, and it avers that there was no other consideration for the sale and delivery of said stock to the plaintiff Baird, and the residue of said stock, in the sum of $1,500, was issued by defendant to said Black on or about the said time on account of said transactions, and on no other account. It is further alleged

that Black and wife, on the 4th day of December, 1911, conveyed said real estate to plaintiff for the pretended consideration of $1, but it avers that plaintiff, at the time, had full notice and knowledge of the rights of this defendant in the premises, that it was in possession under claim of full title thereto in equity, and that Black had no title, and that plaintiff acquired no title under said deed, and is not entitled to possession of said real estate as averred in the petition, but that on the contrary it was entitled to have the deed for said real estate from Black to Baird canceled and set aside, and its title thereto quieted against any right, title or interest that plaintiff might have therein, and prays accordingly.

For a second cross-petition defendant adopts all the allegations and averments of its first cross-petition, and alleges that there was no consideration for the execution of the said deed from Black to plaintiff, which is recorded in Volume 218 of the deed records of this county, at page 309, and further alleges that it has performed all the conditions on its part to be performed in the purchase of said real estate, and is entitled to a conveyance therefor.

For reply to the two cross-petitions, plaintiff admits that defendant is in possession of said real estate, and that on the 4th day of December, 1911, Black and wife executed a deed to plaintiff for said real estate and denies each and every other allegation in said two cross-petitions contained, and prays judgment as in the petition.

Trial was had on the issues thus joined and an appeal taken to this court, where the cause was heard on a transcript of the evidence offered in the court of common pleas, supplemented by some additional oral testimony.

It will be observed that the issue and the only issue presented for determination is the ownership of the lands described. Black's rights are not before the court in any way save as his testimony tends to throw light on the question in controversy. The evidence offered is very conflicting in many particulars, but there is such a preponderance in the main evidentiary facts as to convince the court with practical unanimity of the correctness of the conclusion reached.

To state the claims of the parties a little more concisely than they are stated in the pleadings, we have the plaintiff with the legal title to the lands in controversy, by waranty deed from Frederic Black and wife of date of December 4, 1911, and claiming the right to immediate possession of the same.

The defendant is in possession of said lands and had been so in possession some eight or ten years when the petition was filed. It claims to own the lands in controversy by an equitable title, arising from the fact that it furnished the purchase price of the same to the said Frederic M. Black as its agent, to purchase said lands in its name and for its benefit; that said lands were so purchased by Black for its benefit from Samuel F. Van Voorhis, who is stipulated to be the common source of title to both parties, and that Black took the legal title in his own name, without its knowledge or consent. The purchase price claimed to have been advanced by defendant was $2,500 of its capital stock at its par value, $1,500 of which was issued to Black individually and $1,000 to plaintiff at Black's direction, to credit upon money advanced by him at Black's request on the purchase price of said lands from Van Voorhis. Both parties claim to own the lands in dispute, and are contesting to determine which of their respective claims is the stronger, as a party claiming disputed lands must rely on the strength of his own title and not on the weakness of his adversary. Black's own claims are probably the most important in the whole transaction, but they are not before the court, only as they become competent and relevant as testimony throwing light on the subject of dispute between the parties to this action.

Black admits the receipt of the $1,500 of stock and the issue of $1,000 more to Baird, that was not paid for in any other way than by credit to him on money advanced on the purchase price of said lands from Van Voorhis, but he claims that the issue of $1,500 to him was on his own account, and in payment of an account held by him against the defendant, and that he had subscribed for the said stock with the distinct understanding and agreement that it was to be paid for by credit upon the account due him from the car company for services rendered. This is denied by the defendant.

The whole controversy grows out of the double agency, or dual relationship of Mr. Black to this transaction.

The undisputed evidence shows that Black was, at the time possession of the land was taken by defendant, its general agent and attorney. His account for services, and the testimony generally shows this to be true. Possession of said lands was taken by defendant almost immediately after the execution of the deeds by Van Voorhis, and has been retained by it ever since that date without objection by Black or claim by him for rents.

This is the most significant and determinative fact in the whole record, and is the principal basic fact for the conclusion reached by the court. "Possession is nine points of the law" in cases of this kind. Without pursuing the discussion further, it will be sufficient to say that, from the whole evidence, we find that Black acted as the agent of defendant in the purchase of the lands in controversy; that his purchase was for its use and benefit, and that defendant is the owner in equity of the same, and entitled to the relief prayed for in its cross-petitions. We find also that the plaintiff took title to the premises with full knowledge of the facts in relation thereto, and in addition to this he was bound, as a matter of law, to know the rights of the party in possession at the time he so took title to the premises in dispute.

The petition will be dismissed and a decree entered for defendant on its answer and cross-petitions as prayed for. Exceptions may be noted.

SHIELDS, J., and HOUCK, J., concur.

CONTRACT OF SALE REPUDIATED BY BILLING AT ADVANCE IN PRICE.

Circuit Court of Cuyahoga County.

THE STANDARD TOBACCO & CIGAR COMPANY v. LEOPOLD LOEB & COMPANY.

Decided, January 20, 1902.

Contracts—Plaintiff May Not Recover Upon a Contract Which He Has Repudiated.

Where a vendor ships goods to a vendee and bills the goods so shipped at a price in excess of that specified in the contract of sale, and refuses to correct the invoice or recognize the existence of a contract to sell at the price actually agreed upon, he thereby repudiates the contract made, and if the vendee refuses to accept the goods there can be no recovery even at the agreed price.

Gilbert & Hills, for plaintiff in error.
Brewer, Cook & McGowan, contra.

HALE, J.; CALDWELL, J., and MARVIN, J., concur.

The plaintiff in error, hereafter designated as plaintiff, is an Ohio corporation having its principal place of business in the city of Cleveland, Ohio.

The defendant in error, hereafter designated as defendant, is a partnership doing business in the city of Philadelphia, Pennsylvania.

The cause of action upon which the defendant obtained a verdict and judgment, is as follows:

"Plaintiffs for their cause of action say, that they are partners under the firm name and style of Leopold Loeb & Company, doing business in the city of Philadelphia and the state of Pennsylvania; that the defendant is a partnership organized and doing business under the laws of Ohio; that there is due plaintiff from defendant on an account, a copy whereof is hereto attached, marked Exhibit A, and made a part hereof, the sum of $584.76, with interest thereon from the 11th day of May, 1895; that said account is for goods sold and delivered as set forth in said Exhibit A, and that the same is now fully due and unpaid."

Reference to the exhibit discloses the fact that the cause of action was for fifteen cases of Little Dutch Tobacco sold by the defendant to the plaintiff at and for the price of eleven cents per pound to be delivered f.o.b. Philadelphia; the total weight of the fifteen cases being 5,316 pounds; payment to be made five months from date of sale.

The answer was a general denial and, upon the issues thus made, the case went to trial.

The contract was made on November 16, 1894, and the goods shipped by the Baltimore & Ohio Railroad Company January 10, 1895.

It appears from the bill of exceptions that the alleged purchase of this tobacco by plaintiff was made by its agent, Henry E. Boesger, at the place of business of the defendant in Philadelphia.

The contract, if made, was for fifteen specified cases of tobacco then in the warehouse of the defendant, which were designated and examined by the plaintiff's agent. It was subsequently discovered that one of the cases, then designated, had been previously sold, for which another case was substituted by the defendant.

The plaintiff claims that the defendant not having delivered to the common carrier the identical cases sold, had not complied with their contract, and for that reason could not recover in this action.

This would be true unless the plaintiff had, before the shipment, consented or waived its right to object to such substitution. Whether such consent or waiver had been given was a question of fact to be determined by the jury. Upon this subject the jury were properly instructed. The evidence from which the jury found that such waiver had been made, was by no means conclusive, but was such that the verdict should not be disturbed and the judgment reversed for the reason that such finding was not supported by sufficient evidence. Whether the title passed to the purchaser before it had an opportunity to examine the goods substituted, is another question.

It further appears from the record that the defendant on the 10th day of January, 1895, delivered to the Baltimore &

Ohio Railway Co. fifteen cases of tobacco, one of which was the case substituted as above stated, to be shipped to the plaintiff in Cleveland. At the same time the defendant wrote to the plaintiff, enclosing an account of the tobacco at eleven cents per pound. This letter bears date January 10, 1895, and reads as follows:

"Enclosed please find invoice for fifteen cases of *leaf* tobacco shipped today by B. & O. R. R. as per order of Mr. Boesger.

"Thanking you for your order, and soliciting your further patronage, we are,

"Yours truly,

"LEOPOLD LOEB & Co.

"P.S.—Sample sent by express prepaid.

"L. L. & Co."

On the receipt of this letter and invoice, the plaintiff replied as follows:

"CLEVELAND, OHIO, Jan. 13, 1895.

"MESSRS. LEOPOLD LOEB & Co.,

"Philadelphia.

"*Gentlemen*: Mr. Boesger reported these goods bought at seven cents. Correct the bill, or they will be subject to your order."

To this letter, there was no reply.

On the 17th of January, 1895, the plaintiff again wrote to the defendant:

"The fifteen cases of Little Dutch are at the depot awaiting the reply to our letter regarding the price."

On the 18th of January, 1895, the defendant, in answer to the plaintiff's letter of the 17th, wrote:

"We sold the Little Dutch to Mr. Boesger at eleven cents per pound marked weight. Knowing Mr. Boesger to be hard of hearing, we told him distinctly and as loud as we could talk, the price above mentioned, in presence of three people. Had the price been seven cents, we would not charge you eleven cents, as we do not do such business."

On the 19th of January, 1895, the plaintiff, answering this letter, wrote to the defendant:

"Mr. Boesger reported the purchase of the Little Dutch at seven cents per pound and so entered it on stockbook. We can not use the tobacco at price billed, and would only accept it at the price named, seven cents.

"The shipment is at your disposal. We will refuse it."

One of two propositions is true: Either the minds of the parties did not meet upon the terms of the contract of sale and there was no contract made by them; or one of the parties was insisting upon a contract known not to have been made, for, manifestly, no contract was made without the knowledge of both parties.

The jury found that the minds of the parties did meet and an agreement was made for the sale of the tobacco at seven cents per pound.

The court, in substance, charged the jury that defendant was entitled to a verdict if they found the parties agreed upon the price of the tobacco at either eleven or seven cents per pound.

It is not doubted that if one sues for goods sold, delivered to, and accepted by the purchasers at an alleged contract price, and the evidence shows that the contract price was less than that alleged, a recovery may be sustained at the less price.

It is established by the verdict of the jury that the defendant sold this tobacco for seven cents per pound and then shipped to the plaintiff, under an assumed contract of eleven cents per pound, and so notified the plaintiff by bill rendered and, on request, refused to correct the bill rendered and insisted that the contract price was eleven cents. The plaintiff then refused to receive the tobacco and so informed the defendant.

Under all the circumstances of this case we think the plaintiff was fully justified in refusing to receive the tobacco.

It is said that the tobacco, under the terms of the contract, was to be delivered by the seller f.o.b. Philadelphia, and when so delivered, the title passed to the plaintiff, and, thereafter, the rights of the parties must be settled in accordance with the contract.

In general, a delivery to a carrier for account and risk of the consignee, is, in law, a delivery to the latter and a contract of

sale complete by such delivery; but to pass title to the purchaser by such delivery it must be in exact compliance with the terms of the contract. A delivery to the common carrier under some other contract than the one made, was not a delivery to the plaintiff. Quantity, quality and price are essential elements of a sale, and a shipment of tobacco, varying in any of these essentials from the contract made, was not a shipment under such contract.

By shipping at eleven cents per pound, the defendant repudiated any other contract. Especially is this true since the defendant expressly denied that a contract had been made at seven cents, or that a shipment had been made at that price before the shipment of goods reached the plaintiff.

The plaintiff denied that a contract of sale had been made at eleven cents.

The plaintiff was right in this claim; the defendant was wrong.

A reference to the correspondence will show that the defendant in most express terms repudiated the contract made, and insisted upon one entirely different. The result of this was to release the plaintiff from its contract. The defendant was the first to refuse performance of its contract, and thereafter was in no position to enforce it against the plaintiff. Had the defendant accepted and relied on the contract actually made, there would have been no contention between the parties.

The whole controversy arises out of the attempt of defendant to enforce a contract never made. But whether the claim made by the defendant was, in fact, a repudiation of its contract and should so be held as a matter of law, it is quite clear that such claim fully justified the plaintiff in refusing compliance on its part.

Again, it seems to be definitely settled that if fifteen cases of tobacco ordered by the plaintiff of the defendant, to be shipped f.o.b. and of a certain quality, without any specification or designation of the goods purchased, the title would not pass on shipment until the purchaser had an opportunity of inspecting the goods.

In this case the goods actually purchased were not delivered to the purchaser. Other goods were substituted for one case of tobacco purchased; this was done without any express agreement of the part of the purchaser. The most that can be claimed in behalf of the defendant is that there was a waiver by plaintiff of the right to object to such substitution. But surely the plaintiff had the right to examine the substituted goods, that it might determine for itself whether the goods substituted were of the same quality as those purchased, before title passed to it under the contract.

It would, therefore, seem unjust and unreasonable to hold that the title to this property passed to the plaintiff by delivery to the common carrier under the circumstances disclosed in the evidence. The defendant should not be permitted to repudiate the contract made, refuse the offer of the plaintiff to comply fully with the exact terms of sale, and then, when beaten in this wrongful attempt to enforce a different agreement than the one made, be permitted to recover on a contract which it had expressly repudiated. Our judgment is that upon this subject the charge of the court was misleading and, therefore, erroneous. We find no other error in this record.

The judgment of the court of common pleas is, therefore, reversed, and the cause remanded for further proceedings.

KNOWLEDGE OF DIRECTOR OF AFFAIRS OF COMPANY.

Circuit Court of Cuyahoga County.

N. P. BOWLER v. ROBERT GARLAND, JOHN W. GARLAND AND CATHERINE G. BAILEY, PARTNERS TRADING UNDER THE NAME AND STYLE OF THE GARLAND CHAIN COMPANY.

Decided, March 18, 1901.

Corporations—Director Chargeable with Notice as to Financial Condition of Company and Its Business.

A director of a corporation is conclusively presumed to have knowledge of the financial condition of the company and of the existence and non-performance of a contract of the company which he has guaranteed; he, therefore, can not defend an action upon such guaranty, upon the grounds that he was not given notice of default on the part of the company until it had become insolvent, or that the time for the performance of the contract had been extended without his knowledge or consent.

White, Johnson, McCaslin & Cannon, for plaintiff in error.
Louis J. Grossman, contra.

CALDWELL, J.; MARVIN, J., and HALE, J., concur.

On the 6th of June, 1895, the Garland Chain Company entered into a contract by which the Cady Manufacturing Company agreed to furnish two machines for making chain—one for making Eureka chains, and one for making pump chains. The machine for making pump chains was furnished, and this litigation does not pertain to that machine.

For the Eureka chain machine, $1,010 was to be paid. It seems that this was not a known machine, but it involved invention, and there seems to have been some doubt in the minds of the contracting parties as to just how soon the machine could be furnished.

The contract provided that the party to receive the machine was to pay at certain times certain money upon the contract and, if the machine was not furnished according to the contract, then this money was to be paid back, and N. P. Bowler guaranteed

the fulfillment of the contract as to paying back the money, in the following words:

"I hereby guarantee that in event of a non-fulfillment of this contract as relates to machine for making Eureka chain, that all money paid in advance on the machine for making the Eureka chain will be returned."

The Eureka Chain Company was insisting upon a more speedy fulfillment of the contract, and the time in which the contract was to be completed had passed, and the parties were corresponding in regard to the matter; the Eureka Chain Company insisting upon having the machine, and the other party delaying, until finally on the 18th of June, the Cady Manufacturing Company sent this telegram:

"Working hard on machine. Probably thirty days. Have written."

And on the same day they wrote this letter:

"The way it looks to me now, I have no doubt but we will be able to fully complete the machine inside of thirty days from date. We think, in fact, we know you will be repaid for all of your vexation and worry when you receive this machine and get it running in your shop."

And on June 18th, 1896, the Garland Chain Company answered the above telegram as follows:

"Your telegram is just received. This telegram is about the twelfth promise you have made of precisely the same nature. We will give you thirty days now to complete the contract and in case the same is not then in such shape that we can know definitely you are working on it with some progress, we will put the matter in the hands of another party and see why a person can enter into a contract without regard to its terms or conditions."

Mr. N. P. Bowler was the grandfather of Mr. George H. Bowler, and he was an owner of stock in the company, and the evidence shows that he was a member of the board of directors, but rarely attended the meetings and knew nothing of the progress being made on the machines.

It is claimed that the evidence shows that at the time the machine should have been completed in November, 1895, and for months afterwards the Cady Manufacturing Company was solvent, and had notice been given Mr. Bowler at that time of the failure of the Cady Manufacturing Company to fulfill its contract, that he could have saved himself from the loss upon his guarantee. And it is claimed he got no notice of such failure to comply with the contract until after the Cady Manufacturing Company had become insolvent, and that whatever he must pay upon this contract, will be a loss to him as he can never make it good with the company. It is claimed from this evidence that Mr. Bowler was discharged:

First, by failure to notify him of the default of the company;

Second, by the extension of time, or rather, as it is called, *the making of the new contract* in June, 1896, at which time the Garland Chain Company made an offer to the Cady Manufacturing Company to extend the time thirty days;

Third, it is claimed that there was error on the part of the court trying the case, in rulings upon the evidence, to the prejudice of the plaintiff in error; and,

Fourth, that even if Mr. Bowler is liable, the judgment was for too large an amount.

I will consider these complaints in the order in which I have named them.

The first is, that Mr. Bowler was prejudiced by not being notified of the failure of the Cady Manufacturing Company to perform the contract within the time limited by the contract, and that by delaying to serve him with such notice until the company became insolvent, he is discharged from his obligation.

Although Mr. N. P. Bowler was a director in the Cady Manufacturing Company he did not attend the meetings of the company except on very rare occasions, and did not have any notice of the solvent or insolvent condition of the company, nor have any notice of the non-fulfillment of this contract.

This was a matter that pertained from first to last to the duties of the directors of the company. It was not a mere matter of business, as shown by the books of account of the com-

pany, but pertained to a contract made by the company and hence, presumed to be made by the directors of the company, and they were charged with the duty of seeing that it was fulfilled, and of knowing when it was fulfilled. The question to be considered under this head is whether Mr. Bowler must be held to have knowledge of this class of business which pertained to the duties of the directors of the company.

In *Merchants' Bank* v. *Rudolf*, 5 Neb., 527, 540 and 541, the judge delivering the opinion quotes this language from *Morse on Banks and Banking* at 90 and 91, and especially on page 115:

"Whatever knowledge a director has, *or ought to have*, officially, he has, or will be conclusively presumed at law to have, as a private individual. In any transactions that the bank, either on his separate account, or where others are so far jointly interested with him that his knowledge is their knowledge, he and his joint contractors will be affected by this knowledge which he has or which he ought, if he had duly performed his official duties, to have acquired." Citing *Lyman* v. *U. S. Bank*, 12 How., 225.

Then, applying the law to the case before the court, the court say:

"Rudolf and Deck were co-partners and as such signed the note in question. It is a settled rule that notice to one member of a firm is sufficient to bind all the other members. Rudolf was also an active member of the board of directors of the bank and it was his duty to know whether this note was paid or not. The conclusive presumption is that, as a director, he knew it was not paid; this knowledge is chargeable to him as a private person, and also as a member of the firm of A. C. Rudolf & Company."

In *Martin* v. *Webb*, 110 U. S., 7, in speaking of how far the bank was bound by the conduct of its officer, the court say:

"When during a series of years or in numerous business transactions, he (the officer) has been permitted without objection and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority to represent the corporation that he has acted in conformity with instructions received from those who have the right to control its opera-

tions. Directors can not, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the conditions of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect officers of the bank, and to make declarations of dividends. That which they ought, by proper diligence to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

In *German Savings Bank* v. *Wulfehuhler,* 19 Kans., 60, the first paragraph of the *syllabus* is:

"A person who holds the office of director and vice-president of a bank and at the same time has private and personal dealings with the bank, is conclusively presumed to know (so far as the same affects his said personal dealings), the general condition and management of his bank, and to know everything of importance that occurs therein, either at the time it occurs, or soon thereafter."

The court, on page 63, at the bottom, use this language:

"While we assume, as a matter of fact, that the defendant knew nothing of the condition or management of said bank, yet still as a matter of law we think we must presume that he knew all about these matters. He was a director and the vice-president of the bank, and it was his duty to have such knowledge, and, therefore, the law will conclusively presume that he had it."

And as dealing very directly upon the knowledge of solvency and insolvency so far as that may be involved, I refer to the case of *Lowry Banking Company* v. *Empire Lumber Company,* 91 Ga., 624, where this language is used:

"As it is the duty of the directors of a corporation to be informed of its condition with reference to solvency or insolvency, they are to be treated as having that knowledge when a mortgage upon its assets is executed with their assent or by their authority." *Lane & Co.* v. *Bank of West Tennessee,* 9 Heiskell, 419-437.

In *Greenville Gas Co.* v. *Reis,* 54 O. S., 549, the court say:

"A director of a corporation dealing in its property on his own account, is chargeable with notice of the action of the board of directors as to such property, whether he was present or not at the meeting which took such action."

In this case, a bond was delivered by the board of directors to the president of the corporation in trust for sale, and it was held that the president had no right to convert such a bond to his own use in payment of a claim due him from the corporation. He assigned this to two parties, one of whom was a director and the other a stockholder in the company issuing the bond; the action taken by the corporation in placing the bond in the hands of the president was not known to Reis and he was not present at the meeting when the action was taken by the board of directors and hence he claimed that he stood in the light of an innocent purchaser for value and without notice of the trust. It seems that they had taken this as collateral security to indemnify them against loss as sureties of John Dover, to whom the bond had been transferred. Shuffleton was a director, and Reis was a stockholder, and the record shows that Mr. Shuffleton was not present at the meeting at which the resolution was passed authorizing the issuing of the bonds, and the court holds that that does not aid him. The court says:

"When it comes to dealing in the property of a corporation, the director is charged with notice of all that has transpired at the meetings of the board of directors. He is not allowed in such case to plead ignorance or want of notice or knowledge."

And in laying down the law of the case, the court cited 19 Beav., 97, the substance of which is:

"As regards the directors of a company the case stands on a totally different footing from where it does where the party is a stockholder. A person, when he becomes a director, accepts a trust which he undertakes to perform for the benefit of the company. If in the due performance of that trust, he must necessarily have acquired certain knowledge, it appears to me but fit that he should be charged with the knowledge of those facts which it was his duty to have become acquainted with. It

is merely saying that a person shall be held to know that which it was his bounden duty to know. It appears to me that Mr. Brown was bound to know what took place at the meetings of the board of directors, of which he was a member."

And Mr. Brown in that case was held to have such knowledge.

There are many other cases in which this doctrine has been laid down and applied to the facts in the case; and from this law we are satisfied that, in law, Mr. N. P. Bowler must be held in this case to have had knowledge of the existence of this contract, of its non-performance, and of the correspondence that took place in regard to its non-performance after the time in which it was to be performed by the terms of the contract; and that he must be presumed to have knowledge of the financial condition of the company at all times involved in this litigation, and according to these authorities, this presumption is one that is conclusive upon him, one that he can not deny; and if this is the law of the case, then the errors complained of as to the rulings of the court on the introduction of testimony are immaterial, as they can in no way affect the conclusion of the law to be drawn in the case at bar. But it is contended by Mr. Bowler that there was an extension of time, which extension took place without his knowledge and without his consent.

The above authorities lead us to the conclusion that, in law, Mr. N. P. Bowler *did* have notice as to the continuance of the time for the fulfillment of the contract, and there is plenty of law which we have seen and examined, going to show that if he is present or not present at the meeting in which a board performs an act and he does not show that he did not assent to that act and that he was not present, that the presumption will be that it was by the *assent of the entire board:* and upon these authorities, we are of the opinion that if there was an extension of time in this case, it would be no defense to Mr. Bowler and that he would be presumed to have assented to the same.

Although this business was not transacted by the board of directors, yet if it was making a new contract, or an extension of a contract, or an extension of time in the contract already made, it is the business of the board of directors, and while they

may delegate the authority to do that business to other officers of the company, yet, in law, they are presumed to have done it themselves, and whatever knowledge they, or any one of them, would have obtained in the performance of that business, they will be charged with such knowledge in questions arising out of the same. If there was a new contract in this case, and supposing that the directors themselves had made that contract, then each director, whether present or not at the time of taking such action, would be presumed to know what was done at that meeting, and this is a conclusive presumption and, if nothing to the contrary is shown, it will be presumed that all the directors assented to such action and, if Mr. Bowler assented to the continuing of the time of the fulfillment of this contract, either by an extension of such time, or by a new contract, we think the law is that he will be held to have assented to such extension of time. But we fail to see any agreement in the evidence for an extension of time. I have referred to the correspondence relating to such extension as is claimed—and this contract or this extension was entirely in correspondence—and I have made such reference in view of what I now have to say.

First a telegram was sent, suggesting that thirty days would be time enough to complete the contract. To that the Garland Chain Company answered that they were willing to give them an extension of thirty days in which to complete the contract. There is nothing in the evidence to show that the Cady Manufacturing Company had asked for thirty days, nor is there anything showing that they agreed to complete the contract in the thirty days. All that we find is suggestion that thirty days would be sufficient, and an offer to give that thirty days; nothing so direct as to show that the Cady Manufacturing Company had anywhere bound itself to complete the contract within the thirty days, nor to show that they had even asked for an extension of thirty days. Hence, under that state of facts, when the Garland Chain Company offered to give the thirty days, in order to make a binding contract it would be necessary for the Cady Manufacturing Company to accept that proposition. We see no acceptance in the bill of exceptions of that proposition. nor anything that may imply an acceptance.

The evidence complained of was introduced as bearing upon the question of notice, and, as we hold that N. P. Bowler had notice, as a conclusion of law, from facts not disputed in the record, such errors, if there were any, are not prejudicial.

There is an error in the judgment of the common pleas court in that Mr. Bowler is charged with too much interest. The testimony in the case shows that the Garland Chain Company was doing all it could to have this contract fulfilled, long after the time of expiration of the contract by its terms, the 6th day of November, 1895, and they made no demand upon Mr. Bowler, or anything that could be construed as a demand, until the fall of 1896, nor is there anything in the record to show that before that time they made any call for the return of the money they had paid and hence the money would not be due until about that time. December 8th, 1896, the Garland Chain Company wrote a letter to N. P. Bowler in which they say that they have been informed of the assignment of the Cady Manufacturing Company and ask for the return of the money paid to it. Up to that time the Garland Chain Company was exercising patience with the Cady Manufacturing Company and trying to get the machine, instead of having the money returned, and, until then, there was no notice to any one that they demanded the return of the money, and interest should commence to run on the amount advanced by the Garland Chain Company from the 8th of December, 1896, and the judgment of the court below is modified so as to exclude all and any interest prior to that date.

With this modification the judgment of the court below is affirmed.

AS TO WHETHER A LAW IS OF A GENERAL NATURE.

Circuit Court of Cuyahoga County.

STATE OF OHIO, EX REL DANIEL GINDELSPERGER, v. ROBERT C. WRIGHT, AUDITOR.

Decided, June 25, 1904.

Constitutional Law—Law to Compensate an Individual Not a Law of a General Nature.

Laws passed in the fulfillment of an obligation of the state or any of its agencies to an individual with respect to past transactions, are not laws of a general nature controlled by Section 26 of the Constitution of Ohio.

C. A. Neff, for plaintiff.
C. W. Stage, contra.

HALE, J.; WINCH, J., and LAUBIE, J. (sitting in place of Marvin, J.), concur.

It appears from the petition that prior to August 7, 1899, the jurisdiction of the Cleveland City Board of Elections by statute extended to the entire county of Cuyahoga. In the case of *Wilmot et al* v. *Buckley et al* this statute extending the jurisdiction of the city board beyond the city limits was held by the Supreme Court to be invalid. Thereupon, on the 7th day of August, 1899, deputy state supervisors were appointed for the county of Cuyahoga by virtue of a statute under which deputy state supervisors were appointed for all the counties of the state, with the exception of Hamilton and Cuyahoga counties. These counties were excepted from the operation by the terms of that statute. The deputy state supervisors draw such compensation as was then provided by the statute for deputy supervisors throughout the state. This compensation was entirely inadequate for the services required to be performed in Hamilton and Cuyahoga counties.

On the 10th day of April, 1900, the Legislature of the state passed an act providing for the additional compensation to be paid to the supervisors of these two counties. The state super-

visors of Hamilton county draw the additional compensation provided by that act without objection. The state supervisors of Cuyahoga county were less fortunate. Objection was made to the receipt of the additional compensation provided by that act, and sustained by the Supreme Court. That court held that the act by which it was attempted to provide such additional compensation was unconstitutional, for the reason that it was not passed by two-thirds vote of the two houses of the Legislature.

On the 23d of April, 1904, an act similar in all respects to the act of April 10, 1900, was passed by the Legislature, and by a two-thirds vote. That act is in terms as follows:

"*Be it enacted by the General Assembly of the State of Ohio*:

"SECTION 1. That each of the deputy state supervisors for the conduct of elections in Cuyahoga county, appointed, qualified and acting as such prior to August 6, 1900, for services rendered by them prior to August 6, 1900, shall be paid, in addition to the sum already allowed to them by law, the sum of $800, to be paid out of the county treasury of Cuyahoga county as other county expenses, upon vouchers approved by the deputy state supervisors of elections for Cuyahoga county, and the county commissioners of said county shall make the necessary levy to meet the same. And the clerk of said deputy state supervisors, elected, qualified and acting as such prior to August 6th, 1900, for services rendered during the same time, shall be paid the sum of $100, to be paid out of the said county treasury as other county expenses, upon voucher approved by the deputy state supervisors of elections for Cuyahoga county and the said county commissioners shall make the necessary levy to meet the same."

The petition shows that the relator, during the time covered by this statute, acted as one of the deputy state supervisors for Cuyahoga county; that he has demanded of the auditor a warrant upon the county treasury for the sum named in said statute, which the auditor refused and still refuses to draw. The object of this petition is to compel the issuing of such a warrant to the relator.

This act attempts, as did the act of April 10, 1900, to provide additional compensation for deputy state supervisors serving in Cuyahoga county prior to August 6, 1900.

We reached the conclusion in our investigation of the act of 1900, that the claim made by the relator and others was just and reasonable; that the Legislature was fully justified in providing for the additional compensation, if it could be done legally. The only specification on which the former act was declared to be unconstitutional was that it had not been passed by a two-thirds vote. That objection does not lie against the present law. It was passed by a two-thirds vote.

First, it is said that this act is obnoxious to Article XIII, Section 1 of the Constitution, which provides that the General Assembly shall pass no special act conferring corporate power.

It is a sufficient answer to this objection, that the county upon whom the burden of paying this claim sets is not a corporation, and the transaction not within the terms of the clause of the Constitution above quoted.

Again, it is said that the act is obnoxious to Article II, Section 28 of the Constitution, being retroactive.

Again, it is said that it is obnoxious to Article II, Section 26, which provides:

"All laws of a general nature shall have a uniform operation throughout the state, nor shall any act, except such as relates to public schools, be passed to take effect upon the approval of any other authority than the General Assembly, except as otherwise provided in this Constitution."

Article II, Section 28, reads:

"The General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state."

These two sections are immediately followed by Section 29 of Article II, which reads:

"No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered, or the contract entered into; nor shall any money be paid on any claim, the subject-matter of which shall not have been provided

for by pre-existing law, unless such compensation, or claim, be allowed by two-thirds of the members elected to each branch of the General Assembly."

It is manifest that Section 29 provides for a definitely defined case not controlled by Sections 26 and 28. It provides for extra compensation to an officer, to a public agent, to a contractor. In each instance it is manifest that the Constitution was intended to confer upon the Legislature power to grant extra compensation to the individual for services rendered. or contracts entered into. Such object can only be attained by a special act.

Laws providing compensation for services of an officer undoubtedly are laws of a general nature and should have a uniform operation throughout the state. Laws passed in the fulfillment of an obligation of the state or any of its agencies to the individual with respect to past transactions are not laws of a general nature, controlled by Section 26. With the restriction that the act must be passed by a two-thirds vote of the Legislature, it becomes, when so passed, a binding act. It is difficult to see why an act, passed for the purpose of compensating an individual for services rendered the state should be held to be a law of a general nature. The very nature of the transaction forbids such holding. The subject-matter covered by the statute is a single transaction between the state and the individual and in no sense a law of a general nature. If this law is not an act of a general nature and not retroactive in its operation, then it is a valid enactment.

The demurrer to the petition is overruled.

OBTAINING MONEY UNDER FALSE PRETENSES FROM ONE ENGAGED IN AN UNLAWFUL BUSINESS.

Circuit Court of Cuyahoga County.

NATHAN ZUCKERMAN v. STATE OF OHIO.

Decided, November 24, 1905.

Criminal Law—That One Paying Money Under False Pretenses Was Engaged in Unlawful Business Not Material—That Representations as to Present Fact is Coupled with One as to Future Performance Immaterial—Evidence of Like Representations to Others Not Admissible.

1. That the person from whom money was obtained by false pretenses was engaged in an unlawful business and that the money paid was for the purpose of securing immunity from police prosecution, is no defense to a criminal prosecution for obtaining the money by the false pretense that the defendant was an officer of the law.
2. In a criminal prosecution for obtaining money by false pretenses it is immaterial that the false representation as to an existing fact is coupled with a representation that the one making the representation will perform some service in the future.
3. Evidence that one accused of obtaining money by false representations, had made like representations to other persons from whom he had attempted to obtain money, is not admissible.

MARVIN, J. (orally); WINCH, J., and HENRY, J., concur.

Zuckerman was prosecuted in the police court of Cleveland under Section 7076, Revised Statutes, for obtaining money under false pretenses. He filed a petition in error in the court of common pleas, and upon hearing there the judgment of the police court was affirmed. Petition in error is filed here, seeking to reverse the judgment of the two lower courts. The affidavit upon which Zuckerman was prosecuted charged him with having obtained from one Fanny Weinstein $10; that she was about to engage in an unlawful nefarious business in this city, and that Zuckerman falsely represented to her that he was an officer, to-wit, a chief of detectives, and that he would be able to protect her from prosecution if she would pay him $25, and that she paid him $10 of that sum of $25, of which $5 was paid at the

time of the first conversation and $5 more on the next day; that Zuckerman was not such officer as he represented, and could not protect her.

It is urged, first, that it was not an offense for which Zuckerman could be prosecuted; that the representations were made to one who was seeking protection for the carrying on of an unlawful business, and that the obtaining money from such a one upon the representation that he could protect her would not be a violation of the statute, which reads: "Whoever by any false pretense, with intent to defraud, obtains from any person anything of value," etc., "shall, if the value of the property or instrument so procured, sold, bartered or disposed of, or offered to be sold, bartered or disposed of, is thirty-five dollars or more," and then follows the punishment.

We do not understand the law to be as claimed here. We understand that to obtain money by false pretense from one engaged in an unlawful business to be as much a crime as to obtain it from anybody else. One may not be relieved from prosecution for larceny because the party from whom he steals the money is himself a thief. One may not be relieved from the crime of murder because the one whom he killed was himself a murderer. The fact that this woman was engaged in an unlawful business and that she sought to be protected in that does not relieve Zuckerman from prosecution when he obtained money from her by the false representation that he was an officer. True, she could maintain no action against him to recover the money, but that does not determine whether a crime has been committed by him.

It is said, further, that this money was obtained for a thing to be done by Zuckerman in the future, to-wit, protect her from interference of the police in the carrying on of her unlawful business. But the evidence is that he represented at the time he talked with this woman, Fanny Weinstein, that he then and there was an officer and would be able to protect her, and in addition to that, that he would protect her. Is it to be said that because of the thing one says he will do and a part of the false representation that he made is that he will do something in the future, that that will relieve from crime when a part of the

thing that he says is then and there an existing fact when it is not? It seems to us that one might as well say that, if, on alighting from a train at the depot, one should come up and say, "That is my coach which stands there; you give me fifty cents and I will get your trunk and take it to the hotel," and you give him the fifty cents. It is true, you do so on the representation of two things. One is because he says "That is my coach" and the other is because he says "I will carry your trunk to your hotel." You give him the fifty cents on the representation that it is his carriage. These illustrations might be multiplied to show that where the representation is of an existing fact and one says he will do something in the future one is not relieved from prosecution.

We hold that the objection to the affidavit in either of the regards to which attention has been called is not sound.

A large number of objections were made to the introduction of evidence and exceptions taken to admissions of evidence. We do not stop to consider all of these, but we do stop to consider the ruling of the court upon the admission of certain testimony given by Fanny Grosstein and Edith Green. Each of these witnesses testified that she was engaged in the same nefarious business with the prosecuting witness and each was permitted to testify over the objection of the defendant that Zuckerman had solicited from her money and made the same representation to her which it is said he made to Weinstein.

It is insisted on the part of the defendant in error that, under the authority of *Tarbox* v. *State,* 38 O. S., 581, this was admissible. In that case the syllabus has on this subject only the following:

"3. Where in a trial upon an indictment it becomes material to prove, upon the part of the state, that a conspiracy existed between persons jointly indicted, evidence that the same persons were, shortly prior to the time of the alleged crime, engaged in a conspiracy to commit crimes of a like character, is competent."

The court, in speaking of that, says:

"Did the court err in admitting evidence of similar offenses by the same parties, shortly prior to this time in Detroit? We

think not. If admissible for any purpose there was no error in refusing to exclude it. We think it was competent for the purpose of showing a conspiracy between the defendants, and also to show knowledge of the falsity of the representations at the time when made. The court in its charge instructed the jury to consider it for no other purpose, and no exception was taken to the instruction."

Upon the strength of that case it is urged that it was competent to show by Fanny Grosstein and Edith Green that Zuckerman had made the same false representations to them. It seems to us that it was clearly erroneous to admit that evidence. The ground upon which such evidence was admitted is to show knowledge of the one charged with crime that his pretenses were false, because it is necessary to show that one not only made false representations, but that he knew they were false at the time he made them, and that he made them for the purpose of deceiving. But here there was no occasion to introduce the testimony of anybody for the purpose of showing that Zuckerman knew it was false. If he made the representations, he knew they were false; there is no occasion to prove by anybody else that he knew they were false. If a woman such as Solomon speaks of, "whose mouth is full of deceit and whose lips speak lies continually," thinks she can prop up her case by bringing in others of the same character to support what she says—that is passed upon in the case of *Barton* v. *State,* 18 Ohio, 221. Barton was tried for horse stealing. On the trial of the case the court held that it was error to permit evidence to go to the jury that just before defendant committed this crime he committed another larceny. On page 223 this language is used by the court:

"Another error assigned is the admission of evidence going to show that the defendant had committed a larceny the night previous to the day on which he is charged with committing this offense.

"This, we think, was clearly erroneous. It is never admissible to prove that a person has previously committed a crime of a similar character, to show that he committed the criminal act for which he is on trial; and although the court, in this instance, says that the evidence was only admitted for the purpose of

showing the intent with which the defendant got possession of the property, yet we do not see any connection between the two transactions, that would enable any legitimate conclusion to be drawn as to that fact. The only conclusion that we can see, that could be fairly drawn from the evidence, would be that the defendant intended to steal the horses and other property with which he was charged, because he was a thief, and had just before stolen a sum of money."

In *Farrer* v. *State,* 2 O. S., 54, Farrer was prosecuted for administering poison to one whereby death resulted and the court permitted evidence that she had administered poison to other people, and put it upon the ground that it was admitted that she knew this was poison. The Supreme Court in discussing it, says, page 74:

"The state is bound to prove the scienter, because money is so skilfully counterfeited, that there is no one who is liable to be deceived by it. No presumption whatever of guilty knowledge arises from the bare fact of passing a counterfeit coin or note, unless, which is but seldom the case, its baseness is apparent, and the person receiving it is a fit subject for imposition.

"But how is it with respect to the nature of arsenic? Is it not undeniable, that the fact is almost, or quite, as well known, to people generally, that arsenic is a deadly poison, as that a dagger, or a gun, is deadly weapon? I think it is," etc.

Then he says:

"The effect of such testimony is obvious. It comes upon the accused without any notice whatever; it finds him without any preparation to meet it, and unable, perhaps, from that very want of preparation, to rebut it, however innocent he may be; it convinces the jury that he was the poisoner in the particular case under consideration, though it was admitted for no such purpose; and this conviction, charge what the court may as to the proper effect of the testimony, hangs with a deadly weight upon the prisoner's defense."

We think it was clearly erroneous to admit the testimony of those persons whose names have been given. For that reason the judgment is reversed and the case remanded.

CONTEST OF WILL—ADMISSIBILITY OF DECLARATIONS OF TESTATOR.

Circuit Court of Cuyahoga County.

WILLIAM BOEPPLE v. ANNA M. MELLERT ET AL.

Decided, November 7, 1900.

Evidence—Wills—When Declarations of Testator Admissible.

Declarations of a testator, made before or after the making of the will, if made near such time, are admissible to prove the state of mind of the testator, but not to prove the fact of undue influence.

CALDWELL, J.; MARVIN, J., and HALE, J., concur.

This action is brought in this court on a petition in error to reverse the judgment of the court of common pleas, in which court the will of the mother of the plaintiff in error was set aside.

The testatrix had several children living at the time of her death. She left her property to her son William, the plaintiff in error, by will, and the action in the common pleas court was brought by the disinherited children to set aside the will.

The plaintiff in error says the court erred in its charge to the jury. We find no error in the charge.

The plaintiff in error says the verdict is against the evidence. The verdict is the *only* one the jury could be, in any way, justified in finding.

The grounds in the petition for setting aside the will are: *first,* mental incapacity; *second,* undue influence on behalf of William.

Complaint is made of the court below in that it erred in its ruling on the admission of testimony. This complaint pertains mostly to the declaration of the testatrix made both before and after the making of the will; but being made near the time of making the will, there is no just cause of complaint by reason of remoteness.

Complaint is also made of rulings as to the evidence of a family quarrel, wherein the court allowed William's rough treatment of his father to be shown.

It is the rule that in an issue of undue influence the relations of the members of the family to each other may be shown.

The contestants, to make their case out, undertook to show that William, to get the will as he wanted it in his favor, excluded the other members of the family from the mother; then brought her under his influences, and overcame her free agency in making her will. This plan of his involved three steps: (1) excluding by violence all other members of the family from his mother; (2) by such violence and other means bringing his mother completely under his control; (3) thus overcoming her mind, and procuring the will as he wanted it and not as she might wish to make it.

While these three propositions are so blended as to show one continued line of conduct to reach his ultimate purpose and are to be considered for the purpose of determining the materiality of the abuse of his father, and the court so considered it, it clearly appears that such testimony was entirely competent.

It is claimed that the court erred in admitting certain declarations of the testatrix for the purpose of proving the fact of undue influence.

The court followed the true rule of law in regard to such declarations in its charge to the jury; and, if the court erred in its rulings on the admissibility of such declarations, it was not because the court did *not* know the rules of law, but it was because the court erred as to what the admissions *tended* to prove. The law is, that declarations of the testatrix, made *before* or *after* the making of the will, if made *near* such time, are admissible to prove the state of the mind of the testatrix, but are *not* admissible to prove the fact of undue influence. If the declarations tend to prove both the fact of undue influence and the state of mind of the testatrix, *then* the court *must* admit the testimony and instruct the jury that it can consider the declarations only so far as they tend to prove the state of mind of the testatrix. The trial court impressed upon the jury in a very clear and emphatic charge, the true rule as to how far it could use such evidence. When these rules are borne in mind, it will be seen that the trial court's rulings were correct. The only one as to which

there can be any question, is what the testatrix said about why the revolver came to be in her bed. This testimony *tends* to show that she had such fear of William, that she was afraid to move it—which would be mental state; or that he had so far overcome the natural affections of her heart for her other children, that she was willing and ready, in her then mental condition, to keep the revolver in her bed for the purpose of keeping the children out of her sick room.

Which ever of these propositions would express her feelings, would *tend* to prove her state of mind towards her *other* children, and for that reason the testimony is admissible. And the court, having guarded the jury as to how far and for what purpose it could use such testimony, in a manner that the jury could not possibly have misunderstood, it seems to us that the trial below was a fair one; that the proper judgment was entered under the evidence in the case; and that there was no error on the part of the court, either in the charge or in the admission or rejection of testimony, and the judgment is affirmed.

GOODS FORWARDED UNDER A PRIVILEGE OF PURCHASE LOST IN TRANSIT.

Circuit Court of Cuyahoga County.

A. JACOBS v. MORITZ KOLLANDER.

Decided, March 21, 1900.

Bailment—When Bailee Not Liable for Loss of Goods to be Returned Upon Demand.

Where goods are sent to a prospective purchaser from which he is to select such as he desires to purchase and return the others to the owner upon demand, and the prospective purchaser elects not to keep any of them, and after waiting a reasonable length of time ships the goods to the owner without demand having been made, he is not liable for the loss of the goods in transit.

Kerruish, Chapman & Kerruish, for plaintiff in error.
E. Joseph, contra.

HALE, J.; MARVIN, J., and CALDWELL, J., concur.

Kollander is in the jewelry business in New York; Jacobs is in the same business in Cleveland. An uncle of Kollander applied to Jacobs to have him buy goods from his nephew in New York. Jacobs intimated that if he could have the goods to look over, he might buy them. The uncle of Kollander wrote to him, and upon receipt of the letter Kollander sent the goods to Jacobs with a writing which is claimed constitutes the contract between them. The substance of the letter is that Kollander sent the goods to Jacobs, and Jacobs was to look them over and what he concluded to buy he was to take, and any or all that he did not want to buy, he was to deliver to Kollander upon demand. Jacobs received the goods, did not wish to purchase any of them at the price named, and after holding them about a week, sent them back to Kollander in New York, by express. The goods were stolen from the express company at Pittsburg. Fifty dollars, a mere nominal value, was paid on the goods by the express company.

Kollander brings this action to recover from Jacobs the value of the goods stolen; and it is claimed that Jacobs did not comply with the contract in that he did not hold the goods until they were demanded from him by Kollander. Jacobs claims that he performed the contract. The contract is silent as to when the goods were to be returned or when they should be demanded. They were a class of goods that were liable to be stolen from Jacobs unless he went to the expense of keeping them in some safety deposit vault or other place of security.

This contract is to be construed, not that Jacobs was to keep the goods for any considerable length of time, but as meaning that he was to be ordered to return them to New York as soon as he had an opportunity to examine the goods and determine how much of them he wished to retain. The silence of the contract upon the time that he was to retain them, made it the duty of the court to say to the jury that he was to retain them a reasonable length of time, and the jury should have been instructed that if he retained them a reasonable length of time for Kollander to ask for their return, and he (Kollander) neglected

to ask or demand their return, then Jacobs was justified in returning them without demand, and if the jury found that they were retained by Jacobs a reasonable length of time before he returned them, then he would not be liable under the agreement made between them. This the court neglected to do, but treated the contract as though Jacobs was to retain the goods until a demand was made upon him for their return, however long that might be, and this was error for which the case is reversed.

ESTATE INHERITED BY A WIDOW WHO DECLINED TO TAKE UNDER THE WILL.

Circuit Court of Cuyahoga County.

GEORGE MARCH, EXECUTOR OF THE WILL OF OTIS F. MCCLENTIC, v. JENNIE MCCLINTIC ET AL.

Decided, January 14, 1907.

Wills—Where Widow Rejects Provisions of Will, Property Willed to Her is Not "Undisposed Of"—Widow Not Entitled to a Distributive Share in Proceeds of Real Estate Converted Into Personalty in Violation of Terms of Will.

1. Where a testator has, by two different items in a will, made specific bequests to his widow, who is also his next of kin, and by a later item gives her an interest in all the residue of his estate not already disposed of by the will; upon the widow's election not to take under the will, the property specifically given to the widow by the first two items of the will is not thereby transferred to the class of property mentioned in the will as property not otherwise disposed of, but is to be treated as intestate property and as such inherited by the widow as next of kin.
2. A widow who has rejected the provisions made for her in her husband's will and elected to take under the law, is not entitled to a distributive share in the proceeds of real estate, which by the terms of the will was not to be sold until her death, but which, upon order of the probate court has been sold before that time.

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

This suit is brought under favor of Section 6202, Revised Statutes, and is for the purpose of obtaining from the court directions to the executor, for the disposition of the estate of the testator, now in his hands.

Otis F. McClentic, who was a resident of Cuyahoga county, Ohio, died testate on or about the 10th of June, 1904. He left no lineal descendant. The defendant, Jennie McClintic, is his widow. By his will, which was duly admitted to probate, the plaintiff was designated as executor, and letters testamentary were issued to him, under which he is now acting in the settlement of the testator's estate.

A considerable number of bequests of money are made in the will to designated persons, and these have all been paid out of the personal estate. There remains of the personal estate left by the testator about ninety thousand dollars. Besides this personal estate the testator left certain real estate, none of which came to him by descent, devise or by deed of gift from any ancestor, so that had he died intestate, the widow would have inherited all of such real estate, under Section 4159, Revised Statutes.

One tract of the above-mentioned real estate constituted the homestead of himself and his wife.

All of this real estate has been sold by the executor under an order of the probate court. It is suggested that there was no lawful authority in the probate court to order this sale, but in the view taken of the case, this is immaterial here.

Item 7 of the will reads:

"I give, devise and bequeath to my wife Jennie and her heirs the homestead in which I now reside, situate on the west side of what is called Franklin street in Chagrin Falls township, Cuyahoga county, Ohio, and is the same property purchased from Chas. A. Wales."

Item 8 of the will reads:

"I will, give and bequeath to my wife Jennie and her heirs all of the household furniture of every kind, nature and description contained in my house, or of which I may die possessed."

Item 9 of the will reads:

"For the purpose of furnishing and providing my wife Jennie with a home, care, comfort, support and maintenance, in such a way, manner, and at such place as she may choose and deem best during the remainder of her life, I give, devise and bequeath to my wife Jennie all of the residue and remainder of my property of whatever kind and wheresoever situate, and I hereby direct that she invest and keep invested in such safe and reliable interest-bearing securities as she may deem best, my personal estate, and at any time she deems best so to do is hereby authorized to change the securities or any part thereof in which she has invested any of my personal estate. I direct that my wife first use the interest and income arising from my personal and real estate for the purposes herein mentioned, and if from the remainder of my personal and real estate during her life the interest and income arising shall be insufficient for the purposes herein specified, then I hereby authorize and direct my wife to use such part or the whole of the remainder of my properties as she may deem necessary to fully carry out the purpose as herein specified and provided. It is my wish, and I so direct, that my wife fully and freely use and enjoy the use of the remainder of my property for the purpose herein specified without annoyance or hindrance of any person."

Item 10 of the will reads:

"At the death of my wife, any part of my estate mentioned in item IX herein, then remaining unconsumed by my wife, I direct my executor to convert into money and to distribute the same, share and share alike, between my nephews and nieces, the children of my brother, Franklin J., and of my deceased brothers, and sisters, to-wit: William, John, Charles, Albert Lucius, Martin, Lucinda and Abigal."

The widow rejected the provisions made for her in the will, and her rights are, therefore, fixed by Section 5964, Revised Statutes, which provides that where she fails to elect to take under the will, she shall retain her dower and such share of the personal estate of the deceased consort as she would have been entitled to by law, in case he had died intestate, by sections of the statute fixing the order of descent and distribution, in case of intestacy.

Attention is first called to item 7 of the will, already quoted.

It is clear that the widow takes nothing under this item, which in terms bequeaths to her the homestead. It is also true that

she takes nothing under item 8, which bequeaths to her all of the household furniture of every kind contained in the homestead.

What, then, is the status of the property described in these two items?

It is said in item 9, "I give and devise and bequeath to my wife, Jennie, all of the residue and remainder of my property of whatever kind, and wheresoever situated." This, followed by qualifying expressions as to such ownership as appears by the item already quoted.

What is the residue and remainder which is disposed of by item 9?

It is urged that it includes all the property which is not taken under either of the preceding items, and that, as the widow declined to take under the will, she takes nothing under item 7 or item 8, and therefore this residue and remainder includes the property mentioned in those two items. We think otherwise. It would seem clear that all which the testator intended to have included in this ninth item is that which had not, by previous items of the will, been cared for out of the estate for particular purposes, and from this it follows that as to the property named in items 7 and 8 the rights of the parties are just what they would have been if he had died intestate; and so the widow, as next of kin, and by inheritance, not by will, becomes the owner of the homestead and the household furniture.

If there were doubt as to this being the true construction, it would have to be resolved in favor of the widow, as heir, upon the doctrine that words of doubtful meaning in a will are to be construed most favorably to the heir. See *Davis* v. *Davis. Executor, etc., et al,* 62 O. S., 411.

From the syllabus:

"1. When a residuary clause in a will admits of a limited application as well as one of more general character it should be given that construction which will be most favorable to the heir-at-law.

"2. The rule which adopts a construction more favorable to the residuary legatee with respect to void or lapsed legacies than is applied with respect to void or lapsed devises, does not obtain in this state. The will should be construed, in either

case, so as to give effect to the intention of the testator as fairly ascertained from a consideration of all its provisions and his situation at the time of its execution."

By referring to the tenth item of the will, above quoted, it will be seen that upon the death of the widow the executor was to convert all the property into money and make distribution as provided in this item. The widow having rejected the provisions made for her in the will, thereby rejects the trust provided for in the ninth item of the will, but she does not thereby hasten the time when the conversion and distribution is to be made. This conversion, however, as has already been said, has been made by the sale of the real estate, upon the order of the probate court, and it is urged upon the part of the widow that such conversion having been made, she is entitled, taking under the law, to have the avails of the conversion of this real estate treated as personal property in the distribution to be made.

In support of this attention is called to the case of *Hutchings* v. *Davis, Executor,* 68 O. S., 160. In that case no provision whatever was made for the widow. In fact, the will was made before the marriage of the testator to the woman who became his widow at the time of his death. One of the provisions of that will reads:

"The Enterprise Mills, my interest in the business of Stoneman & Hutchins, with what real estate is not sold of any and all kinds, shall be disposed of, and business settled up, if possible, within two years of my death."

It was held that this constituted an equitable conversion of the real estate into personalty, taking effect from the death of the testator.

The fourth clause of the syllabus reads:

"The positive direction by a testator to sell all of his real estate and to blend the proceeds with his personal property in one fund for the distribution of his whole estate according to the scheme of the will, makes an absolute conversion for all purposes into personal property, which should be distributed as personal property, even if the special object intended by the testator should fail. And the effects of the conversion extend to,

and may be claimed, not only by those who claim under or through the will, but also by those who are not entitled under the will, but are entitled directly from or under the testator."

An examination of this case shows that the equitable conversion of the realty took place because the testator by his will directed it to be done by his executors and blended it with his personal estate for distribution.

In the present case the testator contemplated and directed the conversion of this property, this real estate, only upon the death of his wife.

Section 1162 of Pomeroy's Equity Jurisprudence reads:

"The instrument might in express terms contain an absolute direction to sell or to purchase at some specified future time, and if it created a trust to sell upon the happening of a specified event which might or might not happen, then the conversion would only take place when the event happened, exactly as though there had been an absolute direction to sell at that time."

Here, although there is no specified time at which the conversion was to take place, there is an event, to-wit, the death of the widow; certain it is true to take place at some time, but no conversion is to be made until the happening of that event.

If the intention of the testator had been carried out, by the acceptance on the part of the widow of the provisions made for her, she could never have had any part of the avails of the sale of the real estate. If the testator had died intestate, she would have had nothing in this real estate but dower. Her rejection of the provisions made for her in the will did not necessarily expedite the time when this conversion should have been made, and certainly it would have been wrong to those to whom distribution is to be made, after her death, to hold that because, as a matter of fact, the real estate has been sold under an order of the probate court, the distribution of the avails of such sale is expedited in such wise as to increase the amount for the widow and thereby decrease the amount for those to whom distribution is to be made, as provided in the will. We hold, therefore, that the widow is not entitled to distribution out of the avails of the sale

of this real estate. She is entitled, of course, to the avails of her dower interest in all of the real estate except the homestead. As to that, she is entitled to all of the avails of the sale, because the property was hers by inheritance.

The claim is made as against the widow, that because of her rejection of the provisions of the will she has lessened the amount which would ultimately come to the distribution and that she should not have a liberal construction of the will made in her favor. Holding as we do in the case, however, this could affect only the matter of her having the entire avails of the sale of the homestead, because we hold that she gets no distributive part of the avails of the sale of the other real estate. But it is not at all clear, that the distributees, upon final distribution will receive less than they would, if the widow had accepted the provisions of the will. Had she done so, she would have been entitled to the entire income of the property mentioned in item 9, and might have diminished the principal. Her age is said to be about 51 years. With her expectancy of life, it is probable that the portion of the estate which will be left in the hands of the trustees to be distributed at the time of her death will be as great as it would have been had she accepted the provisions of the will.

The only ground upon which the widow can claim distribution of the avails of the sale of the real estate is that there was an equitable conversion of the real estate, taking effect at the time of the death of the testator, because of the provisions in the will that there should be a conversion at the death of the widow, and this would result in saying that the widow is to have a distributive portion of a fund that was not to be in existence until after her death. This is manifestly untenable.

If all the parties who might be entitled to distribution under item 10 of the will, were now in being, it might well be said that the trust provided for in item 9 of the will would be a dry trust, and that there would, therefore, be no reason for continuing it. But the provisions made for distribution at the termination of this trust includes, "the children of my brother Franklin J."

All other distributees are mentioned by name, but the distribution is to be per capita, and since it is to include the children

of Franklin J., and it can not now be known whether children will hereafter be born to Franklin J., it can not be known to whom, when, and to how many distribution will have to be made when this trust ends, and so this trust must be continued. And for that purpose the probate court will doubtless, upon application, appoint a trustee; very likely the testator's executor may be appointed as such trustee, but since duties are required of the trustee in the matter of investing funds, and the like, which the executor as such can not do, it would be better, perhaps, that some other person than the executor be appointed trustee. It will be necessary however that a trustee be appointed.

The executor is directed, therefore, to pay to the defendant. Jennie McClentic, all the avails of the sale of the homestead, and her distributive portion, as provided by statute, out of the personal property, not including the avails of the sale of the real estate, and to pay to the proper trustee, when appointed, all the remainder of the property in his hands for distribution.

PURCHASE MONEY LOANED TO JOINT PURCHASER.

Circuit Court of Cuyahoga County.

CHARLES M. ALLEN v. EMMA H. ALSOP ET AL.

Decided, February, 1899.

Equitable Liens—Joint Purchaser Loaning Purchase Money to Co-Purchaser Has no Lien on that Share.

While it is true that the payment of an excess of purchase money in a joint purchase is sufficient to create an equity in the nature of a trust in favor of the paying purchaser against the other share, such is not the case where the purchaser does not pay the purchase money but loans it to the joint purchaser to be used by him in paying for his share.

T. W. Shreve, for plaintiff.

Tuttle & Fillius, contra.

LAUBIE, J. (sitting in place of Marvin, J.); CALDWELL, J., and HALE, J., concur.

This was a proceeding for the partition of premises consisting of a house and lot in Cleveland, between the representatives of two deceased owners, a brother and a sister, in each of whom, at their deaths, was the legal title to one-half, in fee. The property had been conveyed to the two some twenty-five years before upon a joint purchase, after an agreement therefor, and after making another brother, residing in Cleveland, an agent for the purpose, the funds to be furnished by the brother, one-half on his own account, the sister promising to repay her brother the other half during her life, so far as she might be able without inconvenience to herself, and that the balance should be paid from her estate at her death. The purchase was made to furnish joint homes for this sister and brother and another sister and the husband of the latter during their lives, if the latter sister should choose to occupy so long, but subject to termination of her rights by her abandonment. Soon after the conveyance and after a limited reimbursement of the brother, writings were executed in which the terms of the undertaking was in part recited and in part formally promised and in which the transaction of furnishing so much of the money as was left unpaid was mentioned as "loaned or advanced" to the sister to enable her to pay off her half of the purchase money. The brother had lived for many years in Pittsburgh where he carried on extensive business in which he was engaged until he died some two years before the sister. The sister continued to occupy the premises until her death but the other had abandoned it several years before.

The sum paid was $32,500. For this sum the brother bought in Pittsburgh, New York exchange payable to his own order and sent it to the brother in Cleveland, endorsed payable to his order, and with these funds the brother paid the purchase price including as part of it the removal of an incumbrance of more than $20,000.

At the time of the purchase the brother had in his hands $2,500 of his sister's funds which was applied as of that date on her share of the price and sometime afterwards she caused a further sum of $3,500 to be paid, making in all $6,000 reimbursed

by her. No other sum was ever paid on the sum advanced, but during her life the brother released all interest accrued or afterwards during her life to accrue.

The representatives of the sister brought the suit and made the devisees and executors of the brother defendants. It was agreed that the property could not be divided and must be sold. The executors of the brother claimed a lien on the sister's share of the proceeds for the unpaid portion of the price.

There is in this case but one point in issue between the parties, or at least, there is but one point which should determine the case against the executors of Hussey and that point is, whether or not the executors of Curtis G. Hussey have a lien in equity on the property in question. It is claimed that they have, by reason of the fact that Mr. Hussey and his sister Mrs. Terrill bought the property together, and that Mr. Hussey paid more than his proportion of the purchase money.

That is the question in dispute; whether he did pay more than his proportion, more than his half of the purchase money, or not.

In the elaborate brief filed by counsel for the executors, this is stated as being a principle of equity upon which the executors rely for the purpose of establishing this lien or trust:

"It has long been a recognized principle of equity in the English law that the payment of an excess of purchase money in a joint purchase is sufficient to create an equity in the nature of a trust in favor of the paying purchaser against the other share. It was long ago held sufficient to take away the right of survivorship in what would otherwise be a joint tenancy."

Such was held in *Lake* v. *Gibson*, 1 Equity Cases Abridged. 290, 291; 2 Ves., Senior, 256.

Among the earliest cases I have found directly on the point in this country, is that of *Warfield* v. *Banks*, 11 Gill & John. Rep., 98. The case was one of partition between parties claiming and considered as tenants in common. The second point of the syllabus in that case is as follows:

"When one of the several joint purchasers of land pays more than his due proportion of the purchase money and the land is

afterwards sold for the purpose of distribution, the party making the excessive payment is entitled to be paid and the net balance only is to be distributed among the joint purchasers."

There is no question whatever so far as the principle of equity is concerned, and no difference in regard thereto, between the English authorities and the American, that where the joint purchaser pays more than his share of the purchase money, and the title is taken in both or to all the joint purchasers, the title is held in trust for him who pays the most, to the extent of the excess which he has paid over and above his share of the purchase money.

Now, perhaps, the very statement that I have made is sufficient, but to make it more explicit, it is and has been always asserted that this payment must have been in the character of purchaser, that he, as purchaser, paid more of the purchase money than was requisite to entitle him to the share agreed upon by the contract made between them. In other words, it must have been his money, and that is the only question here.

I do not understand there is any dispute between counsel as to the law or principle of equity, which requires that it shall have been payment of or by one of the joint purchasers—payment by him—of his money. And the only point really in dispute is as to the facts in the case; whether the money in the instance given was the money of the decedent, Curtis G. Hussey, at the time of payment, or the money of his sister, Jane R. Pettit.

The purchase price money was $32,500, and each party was to pay one-half. Mrs. Pettit was not able to pay more than $6,000, and the $10,500 remaining to complete her share of the purchase money was furnished by the decedent, Mr. Hussey. It seems that he, having a relative in this city, forwarded the money in the shape of drafts to his relative. a brother, and in doing this, he made and caused to be sent a separate draft for the $10,500 which he was advancing of the purchase money as and for Mrs. Pettit's share; if he was advancing it in the character of purchaser or was paying it in the character of purchaser as part of the purchase money to the seller, then, undoubtedly, he was entitled to this lien

One thing to strike us at the very threshold of the case is, why he should make the distinction and send forward two drafts instead of one—why he should send forward in one draft especially the amount for which Mrs. Pettit was in default.

It is all explained—by the contract—if not presented by written contract, then subsequently by the parties. And I have that original contract before us. It recites the fact of this purchase, and then proceeds as follows:

"And whereas said Curtis G. Hussey and Jane R. Pettit were, according to an understanding between themselves, each to pay the sum of sixteen thousand two hundred and fifty dollars, making in the aggregate the said sum of thirty-two thousand and five hundred dollars, and each were and are entitled to a one-half undivided interest in the fee simple of. in and to said house and lot; and whereas said Jane R. Pettit was unable to pay more than six thousand dollars on account of her portion of the purchase money, without embarrassment to herself, therefore said Curtis G. Hussey, at the request of said Jane R. Pettit, loaned or advanced to said Jane R. Pettit the sum of ten thousand two hundred and fifty dollars to enable said Jane R. Pettit to pay off her share, the one-half of said purchase money of said house and lot."

Now, the language of the contract is in the past tense and it refers to the original contract and understanding between these parties in the purchase; what their agreement was when they made the verbal agreement which now has been reduced to writing, referring back to the time when they made the purchase, that instead of Mr. Hussey paying an excess of the purchase money to the seller over and above his own share, he was loaning and advancing money to Jane R. Pettit at her request to enable her to pay off her share of the purchase price. So that there can be no dispute but what it was a loan from Mr. Hussey to his sister, Mrs. Pettit, to the amount of ten thousand two hundred and fifty dollars, and that is the reason why he sent it to his brother, his agent here, who was attending to the matter.

This contract, which can not be disputed and which can not be misinterpreted and about which there can be no doubt, differed from the oral testimony where the memory of witnesses may be so mistaken as to pervert the facts. Here it is in writ-

ing, about which there can be no misinterpretation or doubt, and it was, that Mr. Hussey was loaning and advancing to Mrs. Pettit the money to enable her to pay for her share precisely as if she borrowed it from a perfect stranger to the transaction.

This is a complete statement of the whole case and ends it.

The authorities state explicitly that where money is loaned by one joint purchaser to another or to the other joint purchaser to enable him to pay his share of the purchase price, no trust arises. It is not a payment in excess on the share of the joint purchaser; it is merely a loan to the joint purchaser to enable him to pay off his share.

All the other papers in the case, and this contract itself, and subsequent parts of it, seem to recognize the fact that the parties themselves never contemplated that Mr. Hussey should have a lien upon the premises for this ten thousand two hundred and fifty dollars, but it expressly provides that Mrs. Pettit may pay the amount to him at such time and in such sums as she may be able to, and that, at her death, it shall be payable out of her estate; and two bonds were given; one corresponding with the date of this contract; the last bond that was given to take the place of the first, provides especially for the delay of payment until the death of Mrs. Pettit, when the amount is to be payable out of her estate; the first bond of October 1, 1870, refers to the contract itself and provides that the money shall be paid as specified in this contract.

The principle of equity to which I have referred has settled the case; there can be no lien because it was not Mr. Hussey's money that was paid, but it was Mrs. Pettit's, for which she was indebted to Mr. Hussey.

The decree in this case will be the same as entered in the court below.

LIABILITY FOR RENT WHERE PREMISES BECOME UNINHABITABLE THROUGH NATURAL DECAY.

Circuit Court of Cuyahoga County.

GEORGE V. MUTH v. FANNY WRUBEL.

Decided, April 1, 1899.

Landlord and Tenant—Tenant Liable for Rent When Premises Become Uninhabitable Through Gradual Decay—Trial—Charge to Jury.

1. Section 4113, Revised Statutes, is for the relief of ignorant and indifferent lessees who fail to protect themselves through a special provision in their lease, and does not relieve the lessee from liability for rent, where the premises become uninhabitable through gradual decay resulting from the ordinary action of natural or human agencies.
2. It is not error to charge the jury that defendant had repudiated his contract, where he had refused to perform his contract and claimed that through the operation of law the contract was no longer in effect.

Kerruish, Chapman & Kerruish, for plaintiff in error.
Burton & Drake, contra.

MARVIN, J.; CALDWELL, J., concurs; HALE, J., not sitting.

This is a proceeding in error seeking to reverse the judgment of the court below in an action wherein Fannie Wrubel brought suit against George V. Muth to recover for the breach of a contract which she says was originally entered into between herself and a man by the name of Acnovitch.

Fannie Wrubel was the owner of certain property on Lorain street in the city of Cleveland. She entered into a written contract of lease with Acnovitch, by which he was to have the property for the period of five years, beginning on the 1st of September, 1891. The lease had the ordinary clauses and terms and in addition it had a clause that all repairs upon the property should be made by the lessee. The rent was four hundred and eighty dollars per year, to be paid the first day of every month—forty dollars per month.

The lease was acknowledged by Fannie Wrubel before a proper officer. On the back of that lease Muth made this endorsement:

"I hereby guarantee the payment of the rent within stipulated, for the entire time of the lease and further guarantee the performance on the part of the lessee, his heirs and assigns, of all the conditions herein expressed.

"But it is expressly understood that if the said Abe Acnovitch fails or should violate the obligation of this lease or if the said lessee, Acnovitch, fails to sell other beer than the goods produced by Geo. V. Muth, as long as the same is marketable, then this lease shall be null and void and the said Geo. V. Muth shall have full control of the same, otherwise it shall be in full force."

This case was in this court once before and it was then said and agreed, and is now, that the words here used in this endorsement do not express what was intended by the parties. The evidence shows that Muth was operating a brewery; that the place leased was a place where brewers' goods were sold, and that what Muth meant to provide here was, that if Acnovitch failed to sell the goods manufactured by Muth the lease would be null and void, and Muth could become the lessee. So that this endorsement is to be treated as though it expressed an agreement that if Acnovitch forfeited his rights, then Muth became lessee; and when Acnovitch failed to sell goods manufactured by Muth and whenever he failed to perform the conditions on his part to be performed, he, as lessee, would lose his rights under the lease.

The petition sets forth that Acnovitch, having occupied the premises for a time, gave up the possession to Muth and Muth took possession and kept possession for a time, and then repudiated the contract. Then Wruble sought to recover damages by reason of such repudiation, and recovery was had in the action. The defense was that Muth was justified in refusing to go on under the lease, by reason of the fact that the premises were utterly unfit for occupancy or use; that at the time notice was served, to-wit, on the 29th day of October, 1892, this house was then in an utterly ruinous, dilapidated and uninhabitable condition; that it was entirely unfit for any person to live in; that the sides had bulged out; that it had sagged down in places

and was in a falling condition, and was not only unfit to live in, but it was dangerous for any person to remain in it; that a hole beneath it, which many years before was a cellar, had been filled with ashes; that there was no sewerage; that the house had sunk down upon one side; that the floors were rotten and utterly worthless, with great holes through them, and that the partition had fallen down inside, and that it was in a rotten and utterly worthless condition, and in such a condition that the only advisable thing to do with it was to tear it down or to set fire to it; that it was incapable of repairing.

He sets up further that he gave notice to Wruble that he abandoned the premises because of this condition of the property, and delivered up the possession and gave the key to her, and that she accepted the possession.

On the trial of the action it was sought on the part of the defendant to prove that these premises were uninhabitable and unfit for occupancy, not by reason of any destruction of the elements, by fire or hurricane or the like, but, as set out in the answer, that they became uninhabitable.

Relief is sought by reason of Section 4113 of the Revised Statutes, which reads:

"The lessee of any building which, without any fault or neglect on his part, is destroyed or so injured by the elements, or other cause, as to be unfit for occupancy, shall not be liable for the payment of rent to the lessor or owner thereof, after such destruction or injury, unless otherwise expressly provided by written agreement or covenant; and the lessee shall thereupon surrender possession of the premises so leased."

In the case of *Hilliard* v. *The New York & Cleveland Gas Coal Co.*, 41 O. S., 662, this statute was construed, and on page 669 the court uses this language:

"The evident design of the act was to relieve the ignorant and indifferent who might fail to protect themselves by special provision in their lease, against the evil and mischief of the common law, which held the tenant liable for rent although the demised premises were destroyed by fire, flood, tempest or otherwise, unless he was exempt from liability by some express covenant in his lease.

"The destruction or injury, within the purview of the statute, is not that gradual decay which results from the ordinary action of the elements nor injury resulting from the ordinary action of human agencies, which a lessee is supposed to have in view when he enters into his contract. The statute is designed rather to protect the lessee against an unexpected and unusual action of the elements or of human forces, causing a total destruction of the demised premises or an injury thereto only short of a total destruction, which the parties ignorantly or inadvertently failed to anticipate and provide against when the demise was made."

And the court then quotes from a decision in the state of New York under a similar statute, *Suydam* v. *Jackson*, 54 N. Y., 450.

The defendant below attempted to show, not that there had been a destruction by the elements, but that by reason of faulty construction and the ravages of time the building had become uninhabitable and unfit for occupancy. Clearly that was not, in the language of the Supreme Court, an "unexpected and unusual action of the elements or of human forces."

A large part of the objections to the admission of evidence on the part of the defendant below is disposed of by this construction of the statute. Quite a number of witnesses were offered on the part of the defendant below, to show how badly decayed this property was because of the ravages of time, and, perhaps, of mis-use by prior tenants.

This the court refused, and properly refused, unless we misconstrue the statute.

It was proposed to introduce in evidence a certain notice that was not properly identified. As we understand the statute that would not have availed him. Acnovitch occupied this property some time after the lease was made; he thereafter left the occupancy of it, and others went into the occupancy; rent money was paid to Mrs. Wrubel by Muth during the occupancy of other tenants, or part of the time; Muth says he got this money from other tenants and paid it over to her. Mrs. Wrubel testifies that she had a conversation with Muth after Acnovitch had left. This is what she says:

"I went to Mr. Muth and I told him Acnovitch sold out the place to Mr. Rock, and he said 'No, I am the lease-holder, and

contract to the time prior to and ending with the time she sold the property, and also reduced the amount by the difference she had been able to get out of the property after the discontinuance on the part of Mr. Muth to pay any rent.

We think the charge was clearly the law, and that the ruling on evidence was the proper ruling.

There was an agreement as to what should be paid. Unless the defendant was justified in giving up this property, then that agreed price between them was a matter to be taken into consideration in determining the damages. That, the court instructed the jury, should be done.

We think the judgment was right and there was no error in the proceedings.

SUITABILITY OF DRAW BRIDGE OVER NAVIGABLE STREAM.

Circuit Court of Ashtabula County.

STATE OF OHIO, EX REL RUSSELL C. HUMPHREY, v. THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY.

Decided, March 23, 1901.

Bridges—Waters—Hand Draw in Bridge Over Navigable Stream Not Reasonable—Jurisdiction—State Courts Have Jurisdiction Over Navigable Waters Entirely Within State—Suitability of Draw a Question for the Court.

1. A draw bridge which is operated by hand and which requires the efforts of thirty men to move it, resulting in long delays for vessels seeking to pass it, is not a compliance with a decree ordering the construction of a "suitable" draw bridge at that point.
2. Until the United States assumes jurisdiction over navigable waters wholly within a state, the state has jurisdiction over them and the state courts may make and enforce decrees regarding the use of them.
3. The fact that plans for a draw bridge were approved by the Secretary of War and by the state board of public works, does not prevent the court from requiring a different motive power from that supplied, where the plans submitted and approved did not disclose the motive power for moving the draw.
4. The suitability of a draw in a bridge over a navigable stream is for the court to determine.

Goulder & Holding and *Burton & Dake,* for plaintiff.
Brewer, Cook & McGowan and *Judge Green,* contra.

CALDWELL, J.; HALE, J., and MARVIN J., concur.

An action was brought in this court by the plaintiff against the defendant to require the defendant to remove a bridge that it had and was occupying over the navigable waters at Ashtabula Harbor.

In that case the question was tried as to whether the waters were navigable or not and to what extent. This court decreed in that case that the waters were navigable above the bridge and that the bridge interfered with the navigation of waters, and ordered the bridge to be removed and left it to the option of the railway company to either build its bridge above the navigable waters of the river or to build where the one then existing was, with a suitable draw in the bridge. That case was carried to the Supreme Court of this state by the defendant, in which court this court was affirmed, and the defendant then carried the case to the Supreme Court of the United States, where the courts of this state were affirmed.

The railroad company thereafter proceeded to build the bridge in question. The evidence shows that they found a bridge that had been constructed for other parties and for a different place, and bought that bridge; that the bridge was 360 feet long and, by putting the pier on one side of the channel, it left an arm to be operated over the channel of the river substantially 180 feet long. While it seems to us that that length of bridge was entirely unnecessary for this place and especially for the present uses, yet we are not called upon to condemn the same for that reason, nor could we do so, for the railroad company had a right to anticipate a growth of business and future conditions of the harbor.

This action is now brought by way of proceedings in contempt against the railroad company for having at Ashtabula Harbor a bridge with a draw that can not be operated by the means employed by the railroad, without much interference with vessels passing through the same, and much injury to those abutting upon the navigable waters of the stream above the bridge; and

it is sought in this proceeding to have the court take such measures as to carry out the purpose and intent of the decree that was entered in the former action, and compel the railroad company to comply with the intent and purpose of that decree.

Before the railroad company built the bridge in question, it submitted plans of the bridge to the Secretary of War, which plans he approved; and it submitted also to the board of public works of the state of Ohio the same plans, which plans were approved by that board. It is contended by the defendant that, having built according to the plans submitted to the Secretary of War and the board of public works of Ohio, that the jurisdiction of this court to take such proceeding as are asked for in this action, is entirely wanting. It is contended that the proceedings between the defendant and the board of public works was in form and was in fact a contract; that the board of public works representing the state of Ohio in matters of public improvements, it amounts to a contract between the state of Ohio and the defendant, which settles and determines the question now before the court, and, if it does not strictly comply with the decree made by this court, still it was a contract that the state had a right to make and if it did make it *this* court is without jurisdiction to proceed in the matter.

Various other questions are raised, which I will notice in their order.

In the first place, the defendant claims that it has furnished a proper and suitable draw.

This involves the question as to what is a proper and suitable draw. It may relate to the mechanical construction of the bridge itself; or that term may be used to include also the machinery and means of moving the bridge—of opening and closing the same. Certainly a bridge with the necessary structure, so far as the bridge, strictly speaking, is concerned, may have what may be called a *suitable draw* and yet be entirely useless as a *draw bridge* unless there is some means of opening and closing the same. A bridge of this size, 360 feet long, to be of any use at all, by way of keeping the channel over which it is built open for craft navigating the waters, must have some means of opening and closing the same.

The railroad company claims that it has furnished a bridge that, when swung, will clear the channel of the stream, and a bridge with a draw which can be operated by the application of ordinary motive power of hand or otherwise; and that they have furnished a draw which can be opened within a reasonable time; and that, having submitted these plans to the Secretary of War and to the board of public works of the state of Ohio, it has fully complied with the requirement of the decree and of the requirements of the United States Government and of the state government.

The evidence shows that one man was kept upon the bridge as a draw-tender and a draw-watchman; that when a boat whistled for the bridge, it became his duty to go to where the section-men were working in the yards of the company, which yards extended from the bridge, one mile away, and secure the section-men for the purpose of opening the bridge; if the men happened to be near at hand, the time was shorter than when they were far away; sometimes they might be near enough to be called by the person on the bridge without his going out after them; but this method of operating the bridge caused delay at all times very unusual and unreasonable. The evidence shows that sometimes the bridge was not opened at all and boats were unable to pass through, and sometimes boats, tired of waiting, or unwilling to wait the length of time necessary to get the bridge open, turned about and went away. The evidence shows that the present mode, adopted for the last five years, of moving a bridge of this size, is by steam-power or by electricity, and not by hand; and the evidence shows that it would require a sixteen-horse-power engine to handle the bridge in proper manner, and that that size engine would be light for the work. The evidence shows that it would require at least thirty men to do the work with rapidity and certainty.

The evidence conclusively shows that the railroad company has at no time since it built the bridge used upon it the requisite power nor the facility in way of number of men, or time of getting the men there, to make the bridge of any practical use to those desiring to use the river above the bridge.

The only excuse the railroad makes for not using steam-power, or some other artificial power, for opening and closing the bridge, or the requisite number of men for doing it rapidly and easily, and for not having the men present at the bridge ready to open it at any time, is that the bridge is so seldom called for by any boat, that it would be a needless expense upon the defendant and that the emergency of the case does not require it.

If the railroad company should continue to operate the bridge as it has been doing, undoubtedly the demand for the bridge to swing would never be increased, for the delay is such that it is of no practical use to those desiring to use the waters above the bridge.

There is no material differences between this argument and the one that might have been used in the former suit. In the former suit it might have been said that whenever the relator and others owning property above the bridge, establish a business that demands a swing-bridge, then they would put one in.

The bridge, as it has been operated, practically prohibits business being introduced above the bridge; and it seems to us unreasonable and of no weight whatever for the railroad to say that when the relator and others establish business on the waters above the bridge, that calls for service, then they will give them that service, but that, until they have thus established business, the present service is all that is necessary; whereas, it is clear that with the present service there never will or can be a business of any consequence established above the bridge and hence the relator and others could never make any use of their property for which it is best adapted.

But it is said that these plans, having been submitted to the Secretary of War and the board of public improvements and and being approved, this court has no jurisdiction to now consider the sufficiency and adaptability of this bridge. The evidence in the case shows, however, that the mode and manner of opening and closing the bridge was never exhibited to those authorities by any drawings or in any other manner. The kind of machinery used to operate the draw was not submitted to them, nor was there submitted to them the kind and amount of power to be used.

But it is said that the decree pointed out nothing except a *suitable bridge,* and the decree not having declared what that suitable bridge should be, and it being shown that the bridge itself is suitable, that this court has now no authority to enforce any part of its decree because the decree has been wholly complied with.

If this proposition is true, then the railroad company might have built the bridge as it now is, without any machinery to open and close it; and without power to be used for that purpose, and it might be said that the decree had been wholly complied with, and yet the bridge, so completed, would be substantially the same kind of a bridge that the court required to be removed.

It is evident that the decree, when it says "suitable," *means* a bridge complete in all its parts and one that has upon it the necessary equipment and machinery for opening and closing the same to traffic, as such bridges are usually opened and closed. If this decree, then, means what we think it does, then it is within the jurisdiction of this court, so far as the limits of the decree go, to not only enforce the building of the structure, but the equipping it for opening and closing within that reasonable time that is common in other bridges.

It is said that this is not the proper proceeding to take in this case. That if any of the parties living south of the bridge have been injured by the way in which the bridge has been operated, their action is for damages; that we are not called upon by such parties to act except as they may call upon us through the state by means of the proper officer of the state.

The state is interested. It is a matter pertaining to the interests of the state; it is a matter directly over which the state has control; and besides, if it had been simply the individual, Mr. Humphrey, who was making this application, if he could make it at all, there would be open to him *three* remedies; he could proceed by way of indictment, or he could proceed by way of having the nuisance abated, or he could proceed for damages.

It has been held in this state and other places that under the facts and circumstances existing in *this* case, a proceeding by way of damages is inadequate. 23 O. S., 523. And we may cite many cases from other states.

There is a case in 44 O. S. which bears directly upon the question of when a party has an adequate remedy by way of damages and when he has not, which, we think, is applicable to the case before us.

If we had any authority to enter a decree in this case in *the first place,* and it has been established by the highest court in the land that we had, then we certainly have the authority to enforce that decree and can do it in an action of this kind, if we can do it at all.

There is no proof in this case, nor does such proof exist, that the United States has ever assumed jurisdiction over these waters by way of any legislation whatever, and it is the law that until it does, the state has entire, or at least concurrent, jurisdiction over the waters and her courts may proceed to decree in regard to the same and to the rights of parties therein. There has been nothing done, either by the general government or the state government since our decree, that in any way removes our jurisdiction over this matter. No legislation has been pointed out to us; nor, as far as we know, is there any legislation that in any way takes away the jurisdiction of the state courts over these waters. The mere approval of the plans of the bridge by the Secretary of War and the state board of improvements would not serve that purpose, nor is it intended to serve any such purpose. It is provided that such plans may be submitted to the Secretary of War, because at any time the United States may, through Congress, undertake to legislate over these particular waters, and to save parties who make improvements needless expense, it is proper and right that improvements be submitted to the Secretary of War.

The contract between the state and defendant shows on the face of it that the state did not intend to relieve the defendant from any duty resting upon it under the decree of this court. In fact, it shows to the contrary. As that contract requires of the defendant everything that we have construed the decree to require of the defendant, and if that contract were to be enforced it would have to be done through the courts, and if the decree is to be enforced *that* must be done through the court; so certainly, the court has jurisdiction to determine *this* matter.

The defendant seems to have understood from the beginning that its method of operating the draw would be called in question; it seems to have had a suspicion that the public would not be satisfied with the way in which it was operating the draw; and such appears to be the fact from the testimony which it undertook to preserve.

That testimony was kept and presented to this court by employees of the railroad company, at the suggestion of the officers of the company. It is not in harmony with the testimony of disinterested parties who saw this bridge move at different times. The testimony in this case shows clearly, or at least the weight of it is, that the operations of this bridge were much more unsatisfactory and much more tedious than would appear from the testimony of the defendant on that subject.

The means and force heretofore used on this bridge for opening and closing it, have been unreasonable and not such as the law requires the company to maintain; and they have been so unreasonable that they have made the time of passing the bridge so uncertain that no boat, unless it was a boat owned by some one living above the bridge, would undertake to pass the same with any frequency at all, or to carry on any business or trade or traffic that would require it to pass through the bridge. It has been practical prohibition to all craft to undertake to pass through the bridge; and it is no answer for the company to say that it will give no *better* accommodations until a traffic has first been established that will warrant the necessary expenditure and outlay; nor will it do for the company to say that it is unreasonable to require it to maintain an engine and power day and night, or a large force of men on the bridge constantly, considering the amount of traffic that would pass through the bridge.

But, in saying this, the defendant judges the amount of traffic by what it has had; by what is an effectual prohibition to traffic to go above the bridge.

We believe that the railroad company might have built a bridge that would have been entirely sufficient for this place on which the draw might have been operated by hand-power by the use of two or three men, and the only reason why it may not

so operate a bridge is because it has seen fit to place there a bridge which requires a much greater force to handle; and as the railroad company has seen fit to use so large and extensive a bridge, it certainly can not complain if the courts require it to use a proper force and appliances for handling the same.

It is claimed that this court has no authority to establish any rules or regulations governing the operation or opening of the bridge in question.

The court has authority to carry out this decree, and to require the defendant to use such means as are necessary for that purpose.

Decisions are not wanting to show that it is for the courts to determine whether a draw is *suitable or not*. 2 Gray, 339; 4 Conn., 54.

The purpose of law-makers and of courts is to so regulate traffic upon the bridge and traffic upon the navigable waters, that they shall interfere with each other as little as possible. The state may determine in its legislative capacity, that one is of so much greater importance than the other, on account of the quantity and volume of business, that the lesser shall give way entirely to the greater; and the private individual who is damaged by such action on the part of the state, may have no cause of action for damages; but we apprehend that the courts have no authority to say that, because the traffic of defendant over its bridge is very large and that upon the water is small, therefore that upon the water should yield to that upon the bridge. This reasoning would lead to keeping the traffic upon the water at a minimum, and the traffic upon the bridge at a maximum, greatly to the injury of the public, and it has been the law, and is today, that no one has a right to obstruct or materially impede the use of navigable waters for the commerce for which they are adapted.

The court, therefore, is unable in this case, in following the law, to adopt the ideas of the defendant that it is under obligation to afford only such privileges and opportunities for passing through its bridge as the size of the commerce may demand.

The railroad company has, in a measure, tried to comply with the decree, and insists that it *has* complied with the same in

good faith so far as, in its opinion, it believed it was under obligations to comply.

The kind of service it has given to boats passing its bridge, it contends, is all that the *law* of the decree required of it, and that in every way it has acted in good faith.

The court is inclined to give the company credit for acting in good faith and not designedly refusing to carry out the decree of this court. Nevertheless, what it has done does not satisfy the law of the case nor the law intended to be imposed upon the defendant by the decree, and which we believe the decree does impose upon it.

Having, therefore, determined this much, it would, perhaps, be unjust at this time to proceed to punish the defendant for a failure to comply with the decree of the court, when the decree itself does not point out definitely what the defendant is to do by way of specifying wherein and to what extent it must afford lawful privileges to those navigating the waters under its bridge. The means to be adopted to comply with the law of the decree were left wholly to the company. If it adopted means that could not accomplish the end required of it, it would afford no excuse in law for not doing anything more, but it might be some excuse for its action so that it would be unjust, when it had done what it has in good faith—believing that it had fully complied—to punish it, as would be done in case of a refusal to comply at all.

Under such circumstances, in an action of this kind, it is within the authority of the court and, we believe, within the duty of the court, to point out to the defendant wherein it has not complied with the decree of the court, and give to it a further opportunity and require that by a time named it shall comply with the decree as understood by the court and, if not, then the excuse now offered can no longer be plead by the defendant.

We, therefore, say to the defendant, that it is its duty by the decree to furnish a draw-bridge for that place, such as is customary over navigable waters. That means that it shall have a suitable draw and machinery and power necessary for operating the same, as such bridges are usually operated, and, under the testimony in the case, that power should be such that this bridge can be opened within seven minutes from the time it gets the

signal from the boat. In fixing the time, we believe that we have given the railroad company a full length of time usual for bridges situated under like circumstances of this bridge.

We will not say that the power to be used shall be steam or electricity, although the evidence shows, without contradiction, that the power usual on bridges of this size, adopted within the last five years, is steam or electricity.

Under the circumstances, we believe that the railroad company should have the privilege of moving this bridge by hand-power providing sufficient men are used to have the bridge opened within seven minutes from the time the signal from the boat is given. This can not be done, according to the evidence, in the method which has been adopted by the railroad company.

The matter of sending for help at quite a distance from the bridge, and giving time for the help to get there, is not sufficient and does not comply with the law of the case.

Accepting the plea of the defendant that it has acted in good faith, believing that it was complying with the decree of the court, and having pointed out more definitely than the decree does, what is required of the defendant to fully comply with the decree, we give the defendant a further opportunity to comply with the terms of the decree as herein construed, and we will postpone this case until the 13th day of May, 1901, to give the defendant an opportunity to perform the duties imposed upon it by the decree as construed by the court, and, if it has not by that time so complied, we will further consider what is to be done in this case.

EMPLOYEE AT YEARLY SALARY NOT ENTITLED TO OVERTIME.

Circuit Court of Cuyahoga County.

THOMAS W. DAVIS v. R. S. HUBBARD, TREASURER OF CUYAHOGA COUNTY, ET AL.

Decided, March 17, 1899.

Master and Servant—No Extra Compensation Recoverable Where Employment is at Yearly Salary.

In the absence of any express provision in the contract of employment, an employee, who is employed in a certain capacity at a yearly salary, can not maintain an action to recover extra compensation for time spent in excess of eight hours per day.

CALDWELL, J.; HALE, J., and MARVIN J., concur.

Thomas W. Davis brought this action in the court below to recover for over-work under a contract.

An answer was filed denying any indebtedness, and a reply was filed to that.

When the case came before the court below, an objection was made to any testimony under the pleadings, based on the ground that there was no cause of action set out in the petition. The court sustained that demurrer to evidence, and a verdict was rendered by direction of the court for the defendant, Hubbard, and a judgment entered therein dismissing the petition. The action was first brought against R. S. Hubbard individually, and against R. S. Hubbard, treasurer of Cuyahoga county, and a demurrer was filed to that petition which was sustained, but no final judgment entered, and the plaintiff below, Davis, took leave to amend the petition and put it in the shape in which it was at the time the case was finally disposed of in the lower court.

The first part of the petition presents one question involved here, and the latter part another, and although they might be considered together, I will consider them separately.

This is plaintiff's amended petition:

"Now comes the plaintiff and by leave of court first obtained files this, his amended petition herein, and for his cause of action he says:

"The defendant, R. S. Hubbard, is the duly qualified and acting treasurer of the county of Cuyahoga in the state of Ohio, and on the first day of September, 1894, plaintiff entered into a contract with said defendant, by the terms of which contract the plaintiff promised and agreed to enter the employ of said defendant in the capacity of a deputy in the office of said county treasurer of said county and to perform the duties of said deputy, in consideration of which agreement said defendant, as treasurer of said county, promised and agreed to pay to plaintiff for said services as deputy at the rate of one thousand dollars per annum, payable semi-monthly; that said agreement was thereafter modified and made definite in this, to-wit: The said plaintiff and defendant agreed that eight hours per day should constitute a day's work of said plaintiff; that under said agreement as so modified and made certain, the plaintiff entered said employment as deputy county treasurer and continued in said occupation and employment up to and until the 31st day of January, 1896, on which day plaintiff was discharged from said employment by said defendant."

The petition sets out the amount of labor he (Davis) performed during the time he was acting in the capacity of deputy treasurer, to the amount sued for in this petition, at fifty cents an hour, as over-work, in excess of the eight hours per day. Now he says this was only done to make the agreement more specific, that eight hours should be a day's work; that that was the only object and purpose, and that for any work over-time he was to be paid extra.

If the original contract meant eight hours should be a day's work, then the additional contract made did not alter the original contract in that respect; eight hours still constituted the day's work. But if the contract meant as here set out—the substance of it, and that is all we have—if the contract read that he was to perform such ordinary labor or ordinary day's employment as the duties of the office called for and as was customary in the office, if the contract meant that, then the alteration, whatever the eight hours meant, was without any consideration whatever and would be of no binding force. It

would simply be agreeing, after a contract was made, to pay a party more than he was to receive by the contract, without any extra consideration, and it would have no binding effect upon the party so agreeing. So that the original contract not being in force as to its terms, we can only take the contract as being what contracts of this nature generally mean.

It would be a strange doctrine to most of the merchants of this city where they employ a man to work in a store on a salary of a thousand dollars a year, if that man was only to work eight hours a day and when he worked eight hours each day for a year, he had fully performed his contract, although it was the custom in that store to open very early in the morning and keep open until very late in the evening, or until nine or ten o'clock at night.

And so we might follow this in any department of the business of life where men are employed by the year. It would be introducing into that kind of contract an element that the public has not dreamed of. And to hold now under any law that exists in this state that eight hours a day applies to a contract of this character, would be going beyond anything that the law would warrant, and would simply be revolutionizing the understanding that is entered into by both employer and employee under contracts of this character, and that would not do. Instead of the courts becoming arbitrators of principles of law to make persons more safe and to secure men in their property and in their rights, it would be making the courts mere machines to overthrow all the safety in contracts that parties have.

Now, so far then as we have any knowledge concerning this contract of the hiring by the year at a thousand dollars, it means that he was to devote such time to the work of the office of the treasurer of the county as men generally do who work in that capacity in receiving taxes and working upon the books; and we all know that that varies; there are seasons when people are not paying taxes that a day's work may be short, and there are other seasons when the day's work is necessarily long; and I notice that for all extra hours charged here, he has charged for days longer than eight hours, and this being true, under any fair

construction of the contract as entered into, it clearly appears that the new contract was one without any consideration so far as the treasurer, Hubbard, is personally concerned; hence of no binding effect whatever.

This might be sufficient, but further on the plaintiff says, that said R. S. Hubbard, as county treasurer as aforesaid, did not, at the time said extra labor was performed, nor at any time within the period of said employment or theretofore, agree with the county commissioners of said county of Cuyahoga as to the compensation which this plaintiff was to receive for said extra labor, nor was said defendant authorized by said county commissioners of Cuyahoga county to employ this plaintiff at said extra labor at a stipulated sum per day in accordance with the statute in such case made and provided.

Wherefore, he concludes that the said R. S. Hubbard personally is liable for this extra labor. In other words, he says that there is a statute in this state and that under it Hubbard can employ help in the office of county treasurer only in accordance with that statute and, not having the authority required from the county commissioners to do what he undertook to do, he therefore could not bind the county and hence did bind himself personally.

I have examined this question because it is new, with some considerable care, and I find this to be the rule in regard to public officers, and it varies somewhat from that of an agent.

It is frequently said in works on agency, that if the agent does not bind his principal because he has gone beyond the authority given him, then he binds himself; and, with some exceptions, that is quite a general rule. Now that is not the rule in regard to public offices. A public officer may not bind himself and yet he may not bind the principal. The party may be without any remedy either as to the public officer or corporation—the municipal corporation if it be such—or the government, or whatever corporation of which he may be acting as a public officer. But I find this to be laid down as the rule governing public officers, that the party can recover from the officer only where he has acted without authority from his principal and has used

apt words to bind himself. Before he can be held liable, he must have acted entirely without authority to act, and he must then have used apt words to bind himself.

I have examined all the cases that were cited to show that Mr. Hubbard is liable under this petition, and I find, in every case cited, that they find that the officers acted clearly without any authority, and without any contract and they used apt words to bind themselves. *This* contract is entirely wanting in showing that Hubbard used any apt words to bind himself. No language is set forth, nothing definite is set forth to determine that matter at all—a mere conclusion and nothing else—and that is not set forth as a conclusion from the words used, but as a conclusion of law. So that, in this case it would be impossible to hold Mr. Hubbard until it is shown, first, that he acted without authority, and second, that he used apt words in the contract he made, to bind himself; and, even then, there are exceptions to that rule, and one is this: If the officer act under a public statute that limits his authority and shows just how far he may go, then the party who acts, who deals with him, deals with knowledge of his authority and he knows that he has no authority to make such contract, because what is known publicly is known by all men, and a public statute and any action that officers may take under it, that is, of a public nature, is known by everybody. And that being true and the contract having no apt words, even if he has exceeded the authority of the statute and acted contrary to it without authority to act under it, he still is not liable.

This is held in 18 Ind., 66; 4 Minn., 126; and in a number of other cases cited.

It is held that the party dealing with the officer in such case is presumed to know his authority: 16 Fed. Rep., 688; 42 Ind., 106; 12 Iowa, 142; 18 Md., 276; 52 Mo., 578; 7 Wallace, 606; and I have seen many other cases on this subject.

There are cases holding that where, as in this case, the party is bound to know the authority of the officer and deals with him about matters that concern the government, such dealings are against public policy; that it is against public policy to have an officer dealing with matters pertaining to government where

he has no authority to, and the party thus dealing with him can not justify his acts even on a personal basis and, in order to escape liability himself, it is not necessary, that he should create a liability against his principal, against the corporation. That is held in a number of cases: 22 Conn., 371; 29 Cal., —: 21 Wis., 199; 42 Ind., 106.

This being the law of the case as I find it laid down without exception, it appears conclusively, beyond all possibility to contradict it, that Hubbard in this case did not make himself liable on this contract, even though he made it, and even if it had a sufficient consideration to sustain it, which it did not have, as I have stated.

The judgment of the court below is affirmed.

DESCENT OF ANCESTRAL PROPERTY PASSING BY WILL TO THE RELICT OF A DECEASED HUSBAND.

Court of Appeals for Hamilton County.

ARIBERT GAZLAY ET AL. v. JOHN E. GOSLING ET AL.*

Decided, November 22, 1915.

Law of Descent—Deceased Husband Not the Ancestor of His Relict—Ancestral Property Devised by Husband to Wife Who Died Testate Thereby Stripped of Its Ancestral Quality—And Next of Kin of the Husband Can Not Maintain an Action to Contest the Will of the Wife.

1. Within the meaning of the statutes of descent, Sections 8573 to 8577, G. C., inclusive, a deceased husband can not be the ancestor of his relict.
2. Property which came to a deceased husband of a relict as ancestral property by discent, devise or deed of gift, and is devised by him to his widow, ceases to be ancestral property in her hands, and if she should die intestate such property would not pass under the provisions of Section 8573, G. C., to the blood of the original ancestor from whom the estate came.
3. When such relict of a deceased husband dies testate seized of property which was ancestral in her deceased husband, but came to her by devise from said husband, those who are of the blood of the husband and of the ancestor from whom the estate came and the next of kin of the deceased husband have no such interest in the property, as entitles them to maintain an action to contest her said will.

C. W. Baker, for plaintiffs in error.
Schorr & Wesselmann and *Clore, Dickerson & Clayton,* contra.

GORMAN, J.

Plaintiffs in error brought an action in the court below to contest the will of Susan Gazlay, deceased. Upon motion of the defendants the court ordered the plaintiffs to amend their peti-

* Motion for an order to direct the court of appeals to certify its record overruled by the Supreme Court January 25, 1916.

tion, which was accordingly done and an amendment to the amended petition was also filed.

In substance the plaintiffs claim in their amended petition and the amendment thereto that Susan Gazlay died testate on or about April 9, 1913, leaving a paper writing which purports to be her last will and testament, and which they aver is not her last will and testament. Plaintiffs further aver that they are brother and sister, and are heirs at law of Susan Gazlay, deceased, and that they are the only children of Carter Gazlay, deceased; that Carter Gazlay, their father, was the only surviving child and sole heir at law of Aribert Gazlay, deceased; that Aribert Gazlay, deceased, was a brother of James W. Gazlay, deceased, and that James W. Gazlay, deceased, was the father of Allen Gazlay, deceased, who was the husband of Susan Gazlay, deceased, testatrix herein; that James W. Gazlay left no children but Allen W. Gazlay, deceased, and said Allen W. Gazlay left no issue and had no other property except that which he inherited from his father, James W. Gazlay, deceased, except what he may have purchased; that said Susan Gazlay, deceased, obtained all the property and estate which she had in her lifetime and of which she died seized through her husband, Allen W. Gazlay, by inheritance, devise and gift, and in no other way, so that under the statutes of descent and distribution had said Susan Gazlay died intestate her said property would have reverted to the collateral blood kin of her husband, Allen W. Gazlay, and that plaintiffs are such collateral blood kin. Plaintiffs further aver that said James W. Gazlay had a brother, Theodore Gazlay, who died leaving children and their representatives who are parties to this cause, and that said James W. Gazlay had other brothers and sisters who are deceased, and whose representatives are made parties hereto. Plaintiffs pray that an issue be made up as provided by statute, and that said paper writing purporting to be the said last will and testament of Susan Gazlay be held not to be her last will and testament.

To this petition and to the amendment thereto a demurrer was filed by the defendants, which demurrer was sustained, and

the plaintiffs not desiring to plead further, the petition was dismissed at their cost. They prosecute error to that judgment.

From the averments of the amended petition it appears that the plaintiffs in error are the first cousins once removed of Allen W. Gazlay, deceased, being the children of his first cousin, Carter Gazlay. It further appears that the estate of Susan Gazlay came to her by devise from her husband, Allen W. Gazlay, and that the estate of Allen W. Gazlay which came to Susan Gazlay descended to Allen W. Gazlay from his father, James W. Gazlay, by devise, descent or deed of gift; that there are no children of Allen W. Gazlay, deceased, and no brothers or sisters.

The question presented by this demurrer is whether or not the plaintiffs in this case have an interest in the estate of Susan Gazlay, deceased, or, rather, would they have an interest in that estate if the paper writing purporting to be her last will and testament should be set aside and held for naught. Under the will of Susan Gazlay they are not legatees or devisees, nor are they heirs or next of kin of Susan Gazlay, so far as the averments of the petition disclose. Their only right, as they claim, to maintain this action is by virtue of the fact that they are of the blood of Allen W. Gazlay and James W. Gazlay, from whom the estate came. If they would have no interest in the estate of Susan Gazlay in case her will should be set aside, then they are not proper parties plaintiff; they would have no interest in this action and could not maintain the action, and the demurrer was properly sustained.

We are of the opinion that the court of common pleas did not err in sustaining the demurrer to the petition.

Plaintiffs claim under Section 8573, Subdivision 6 of the General Code, which is the section relating to the descent of ancestral property. Plaintiffs' counsel in his brief admits that there are no children or their legal representatives of Susan Gazlay; that there is no husband of Susan Gazlay, he having died before Susan Gazlay; that there are no brothers or sisters of Allen W. Gazlay; that there is no ancestor of Allen W. Gazlay to whom the estate may ascend. He admits that James W. Gazlay, the ancestor from whom the estate came, is

deceased, and that the only child of that ancestor is Allen W. Gazlay, who is deceased; that there is no relict of Allen W. Gazlay to take the estate, and none of the half-blood. But he claims that under Subdivision 6 plaintiffs are entitled to inherit this property as the next of kin of Allen W. Gazlay. That subdivision of the section reads as follows:

"If there are no such half-brothers and sisters of the intestate, or their legal representatives, the estate shall pass to the next of kin to the intestate of the blood of the ancestors from whom the estate came, or their legal representatives."

Now it will be noted that two conditions must exist to enable the plaintiffs to inherit this estate if Susan Gazlay had died intestate: They must be the next of kin of Susan Gazlay, and also of the blood of the ancestor from whom the estate came—that is, the blood of Allen W. Gazlay. According to the allegations of the petition they are of the blood of Allen W. Gazlay and of the blood of James W. Gazlay, his father, but they are not next of kin of Susan Gazlay, the intestate—assuming that she would be intestate if this will were set aside. Therefore it appears certain that they could not inherit this property, even if it were ancestral property.

Furthermore, we are of the opinion that this property which came to Susan Gazlay from her deceased husband ceased to be ancestral property when she acquired it, even if it were ancestral property in Allen W. Gazlay during his lifetime. We think it is clear that a husband can not be the ancestor of his wife, and we think this proposition has been decided in *Brower* v. *Hunt*, 18 O. S., 311. The proposition decided in that case was that the terms "ancestor" and "descent" as used in connection with the order of distribution prescribed in the first section of our statute of descents had reference to such estates only as descended to the intestate in right of blood, or which came to him by devise or deed of gift from one from whom he might have inherited the same in such right, and that where the estate came to the intestate otherwise, its descent to him is regulated by the second section of the act. The second section of that act is 8574, pre-

scribing the order of descent of non-ancestral property, or property which came by purchase.

Now let us assume that Allen W. Gazlay died intestate, possessed of this ancestral property. His wife could only take a life interest in this ancestral property under the provisions of 8573, and at her death her interest in the property would become extinguished. She could not inherit from her husband as ancestor within the meaning of Section 8573, because the only persons who can take under that section are those having the blood of the person from whom the estate comes, as was said in *Brower* v. *Hunt, supra*. So that in any aspect of the case it appears to us that whether this property was ancestral in the hands of Allen W. Gazlay during his lifetime, or was non-ancestral property, the plaintiffs in this case, upon the death of Susan Gazlay, if she had died intestate, would have no right, title or interest in the property; and inasmuch as those only who have an interest in the property, or who would have an interest in the property if the will were set aside can maintain an action, it is manifest that plaintiffs have no standing in court—are not the proper parties plaintiff—and the court of common pleas did not err in sustaining the demurrer to the petition.

Whether or not the court of common pleas was warranted in requiring the plaintiffs to make their petition definite and certain by setting out the sources of their title or interest in this property, need not now be considered. It is probable that the court might not have been warranted in granting this motion, but in view of the fact that the plaintiffs complied with the requirements of the court to set out fully the sources of the title which they claim, we can not see that any prejudice resulted to the plaintiffs in granting the motion.

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

JONES (E. H.), P. J., and JONES (Oliver B.), J., concur.

VALIDITY OF A VOLUNTARY ASSESSMENT AGAINST COMMON STOCKHOLDERS.

Court of Appeals for Knox County.

ED. DEVER v. THE REEVES ENGINEERING COMPANY.*

Decided, October 22, 1915.

Corporations—Dividends Remitted by Preferred Stockholders—On Condition that the Common Stockholders Stand an Assessment—Action Lies to Compel Payment of the Assessment.

An agreement entered into by all the stockholders of a corporation, whereby the holders of the preferred stock remitted all dividends accrued and unpaid and all dividends which should accrue up to a certain specified date, on condition that the holders of the common stock should stand an assessment of $40 per share, does not lack in mutuality nor is it void for want of consideration, and an action lies against a common stockholder who has failed to meet the assessment so levied.

L. C. Stillwell and *C. L. Bermont,* for plaintiff in error.
Henry C. Devin and *D. B. Grubb,* contra.

HOUCK, J.

This cause is here on error to the judgment of the common pleas court of this county. The action below is based on a written agreement entered into between the stockholders of the Reeves Engineering Company, whereby they agreed to pay certain amounts to the treasurer of said company, for the benefits to accrue to them and said company, the amount claimed to be due from the defendant below being $640. The petition averred that:

"Plaintiff is a corporation organized under the laws of the state of Ohio, with an authorized capital stock of 600 shares of common stock of the par value of $100 each, and 400 shares of

* Motion for an order to direct the court of appeals to certify its record overruled by the Supreme Court December 11, 1915.

preferred stock of the value of $100 each; that on or about the 15th day of December, 1910, and at the dates and times hereinafter mentioned, said plaintiff had issued and outstanding of its said capital stock 576 shares of the said common stock and 263 shares of said preferred stock; that on or about said date, in order to provide said corporation with additional money, the stockholders entered into a written agreement between themselves, and with said corporation, for the payment of a voluntary assessment upon the shares of common stock held by each stockholder, and the following is a copy of said agreement, to-wit:

" 'We, the undersigned, being all of the common and preferred stockholders of the Reeves Engineering Co. of Mt. Vernon, Ohio, in consideration of the mutual promises of each other, and of the benefits to accrue to each of us and the Reeves Engineering Co., do hereby agree as follows:

" 'We, the preferred stockholders, hereby agree to excuse and remit in full, receipting therefor, all dividends now accumulated or that shall accumulate prior to Jan. 1st, 1911.

" 'We, the common stockholders, hereby agree to pay to the treasurer of the Reeves Engineering Company $40 per share upon the number of shares set beside our respective names.

" 'Payments to be made as follows: 25% of said amount on or before Dec. 15, 1910; 25% on or before Jan. 15, 1911; 25% on or before Feb. 15, 1911, and the entire balance on or before March 15, 1911.'

"Plaintiff further says that said agreement was signed by the owner and holder of each and all of the issued and outstanding stock of said corporation; that at said time the said defendant, Ed. Dever, was the owner and holder of sixteen shares of the said issued common stock of said corporation, and that on or about said date said defendant, for the consideration therein set forth, did sign his name to said agreement, and did set beside his said name the number sixteen to indicate the number of shares of said stock so owned and held by him.

"Plaintiff further says that said agreement was accepted by the board of directors of said company, and the subscription thereunder called for; that said defendant was duly notified thereof, and requested to make payment to the treasurer of plaintiff of the several installments due thereunder, which said defendant refused and neglected to do, and has ever since refused and neglected to pay the said amount of $40 per share upon the number of shares set beside his name, or any part thereof.

"Plaintiff further says that it has duly performed all the obligations and conditions upon its part to be performed, and there is now due and owing to said plaintiff from said defendant, upon said defendant's agreement hereinabove set forth, the sum of $640, with interest at six per cent. per annum from the first day of August, 1911,"—and prays judgment, etc.

The defendant filed an answer denying all the material allegations of the petition, and specifically averring that notwithstanding he signed said paper writing that it was without consideration moving either to him or the said the Reeves Engineering Company, and that said company did not own the claim upon which suit is brought.

A reply in the nature of a general denial was filed to the answer; the cause was tried to a jury, and a verdict returned for the full amount, with interest, and judgment rendered upon the verdict. The judgment is sought to be reversed for the following reasons:

First. That the statutes of Ohio do not authorize a recovery upon such an agreement as the one upon which the suit at bar is based.

Second. That the plaintiff below did not own the claim upon which suit was brought.

Third. The contract of agreement is not founded upon a good, valid, or sufficient consideration, and is without any consideration to support it.

From an examination of the statutes of Ohio and the record in this case we are fully satisfied that the alleged errors Nos. 1 and 2 are not well taken, and should be overruled, and the same is hereby accordingly done.

The real question presented for the determination of the court appears to us to be: Is the paper writing sued upon a contract in substance and in fact, with a good and sufficient consideration to support it, or is there any consideration for it? If this is answered in the affirmative then the judgment should stand; but if in the negative it must fall. Can it be claimed with any degree of assurance, after an examination of the contract, that the plain language contained therein does not state a considera-

tion? It certainly does not fall for lack of mutuality, and as mutuality is essential to the validity of at least an executory contract, the law certainly presumes an intent to create mutual obligation, except in cases where the expressed agreement will not admit of that interpretation. From the nature of the agreement, what is the reciprocity between the parties? The plaintiff in error was the owner of sixteen shares of the common stock of the Reeves Engineering Company, and there were many others who owned stock, and also a number who owned preferred stock. The company needed more money to conduct its business, and the preferred stockholders said in the agreement: "We hereby agree to excuse and remit in full, receipting therefor, all dividends now accumulated or that shall accumulate prior to January 1st, 1911." The common stockholders said in the agreement: "We hereby agree to pay to the treasurer of the Reeves Engineering Company $40 per share upon the number of shares set beside our respective names." This was a promise for a promise; and when carried into effect, which was done by all of the stockholders except the plaintiff in error and two others, enhanced the value and increased the assets of the company, and thereby inured to the benefit of all the stockholders, including the plaintiff in error and the company, which was fully intended by the language of the agreement, namely:

"We, the undersigned, being all of the common and preferred stockholders of the Reeves Engineering Company of Mt. Vernon, Ohio, in consideration of the mutual promises of each other, and of the benefits to accrue to each of us and the Reeves Engineering Company, do * * *."

What were the benefits to be derived? The payment on the contract would and did increase the value and assets of the company. The co-stockholders with plaintiff in error contributed their part, as provided for and agreed to by them in said written agreement, which was all they had agreed to do or could do, and which thereby enhanced and enlarged the assets of the company, which inured to the benefit of the plaintiff in error as well as the company, and which was the ultimate object of the contract. From an examination of the language of the instru-

ment it is apparent that the parties thereto intended to make a contract—a binding obligation—and every line precludes the idea that it was not intended to be binding upon the parties thereto and of full force and effect in law.

We think the doctrine laid down in the case of *Sterling Wrench Company et al* v. *Amstutz*, 50 Ohio State, page 484, first paragraph of the syllabus, is applicable to this case:

"An agreement entered into by solvent shareholders of an embarrassed corporation that they will severally contribute and raise a fund to pay the corporate liabilities, creates a valid obligation; and if the share to be contributed by each is not expressly fixed by the terms of the agreement, each should contribute in the proportion that the number of shares of stock owned by him bears to the shares held by all the contributors."

The record discloses that all of the stockholders except the plaintiff in error and two or three others have paid the several amounts agreed by them to be paid under said contract, and that full performance by all of the contracting parties of their obligations under the contract have been met by them. In the face of this fact and the plain language of the contract, which to our mind is founded upon a good and valuable consideration, is it proper and right under the facts and the law that the plaintiff in error should not be compelled to comply with his agreement and the terms of the contract as entered into by him? We think not. A majority of the court is of the opinion that the judgment below is right and should be affirmed.

Judgment affirmed.

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

INDEMNITY TO BENEFICIARIES UNDER A POLICY OF INSURANCE PLEDGED FOR A LOAN.

Court of Appeals for Hamilton County.

HENRIETTA D. SCHUERMANN, EXECUTRIX OF THE ESTATE OF CHRISTIAN F. SCHUERMANN, DECEASED, v. HENRIETTA TWACHTMAN ET AL.

Decided, January 31, 1916.

Life Insurance—Policy Pledged by the Insured for a loan Which was Not Repaid—Beneficiaries Who Satisfied the Debt Entitled to Indemnity.

Beneficiaries under a policy of life insurance, who have been compelled to pay a loan which the insured by pledging the policy obtained for his own use and benefit, are entitled to judgment against the estate of the insured for the amount of the debt so satisfied.

L. D. Oliver, for plaintiff in error.
Long & Paxson, contra.

JONES (Oliver B.), J.

This cause was decided in the court below upon a general demurrer to the petition. Defendant there not desiring to further plead, on the overruling of this demurrer judgment was entered for plaintiffs.

The petition states that in each cause of action money was borrowed by defendant's intestate Christian F. Schuermann for his sole use and benefit, from the Mutual Life Insurance Company, under an agreement to repay same signed not only by himself but also by his children, W. H. Schuermann and Elizabeth Schuermann Twachtman, neither of whom received any part of said consideration and who were then the only beneficiaries of the insurance policy which was by the terms of said agreement then assigned to the company as collateral security for the payment of said loan; that Elizabeth Schuermann Twachtman died January 26, 1908, leaving surviving her the following named children: George Twatchman Henrietta

Twachtman, Elizabeth Twachtman and Willie Twachtman, and Christian F. Schuermann died November 15, 1913; that by reason of the failure of Christian F. Schuermann to repay said loan according to the terms of said agreement, plaintiffs Henrietta Twachtman, Elizabeth Twachtman and Willie Twachtman, George Twachtman and William H. Schuermann were compelled upon the death of Christian F. Schuermann to pay out of the proceeds of said policy of insurance in the first cause of action the sum of $1,658, and in the second cause of action the sum of $1,436, to the Mutual Life Insurance Company; that the said George Twachtman duly assigned his claim therein to the plaintiff; and that by reason of said facts plaintiffs have been damaged to the extent of $829 and $718 respectively—making together the sum of $1,547, for which judgment was prayed.

It was alleged in the petition that William H. Schuermann had an equal interest with plaintiffs, and had on request refused to join with them as plaintiffs and had therefore been made a defendant. Plaintiffs claim as representing the half interest of their mother, who with her brother became surety for the debt of their father, the insured, to have paid such debt and ask to be reimbursed for such payment out of the estate of the principal debtor.

It is well settled that where property is mortgaged or pledged by its owner, to secure the debt of another, such property occupies the position of a surety or guarantor, and if such property is taken to satisfy the debt the owner may recover indemnity from the principal debtor. *1 Brandt on Suretyship & Guaranty,* 3d Ed., Section 43.

The demurrer admitting that the debt to the insurance company was the debt of Christian F. Schuermann and that it was in part paid by plaintiffs, it follows that they were entitled to recover from his estate so much of the debt as they were compelled to pay, and the judgment was properly rendered for plaintiffs.

Plaintiff in error, however, contends that the proceeds of the insurance policy should have been paid entirely to William H. Schuermann and not one-half to him and one-half to the chil-

dren of Elizabeth Schuermann Twachtman. In other words, it is contended that the words of the policy under which the company upon the death of the insured agrees to pay the amount named therein to Henrietta Schuermann as the "assured for her sole use, if living, in conformity with the statute, and, if not living, to her children or their guardian, for their use," must be construed so as to confine such payment strictly to the "children" of said Henrietta, and can not be construed as including "grandchildren" to let in the children of her daughter Elizabeth Schuermann Twatchman.

The conclusion contended for would make William H. Schuermann the sole beneficiary of the policies, and thus a question might have been raised between him and plaintiffs below as to who was entitled to the proceeds of the policies. But it seems he has made no such claim, and it would hardly be in the power of plaintiff in error to assert such a claim for him. If she might have raised such a question in this case, it must have necessarily been done by answer, and in our view she has failed to do so by demurrer to the petition as filed herein.

The question as to whether the grandchildren would have been entitled to participate in the proceeds of the policies, if such right had been challenged by their uncle; is not entirely free from doubt. Each of these policies is an Ohio contract and would be governed by the laws of Ohio. *Plaut* v. *Insurance Co.*, 4 C.C.(N.S.), 94.

Counsel for plaintiff in error rely upon *Ryan* v. *Rothweiler*, 50 O. S., 595. We can not regard it as an authority for the reason that there the wife and only child, and the only child of that child, all died before the husband and father who was the insured, and the policy was held to enure to the benefit of the estate of the insured under the principle covered by Section 9399, General Code.

Reliance is also placed upon the two unreported cases of *Frank* v. *Bauman*, 54 O. S., 621, and *Dovel* v. *Dovel*, 69 O. S., 576. Each of these cases is stated in the report to have been decided on the authority of *Ryan* v. *Rothweiler*. Notes in regard to the first of these cases are found in 35 W. L. B., 59, and copies of

the printed record and briefs used in the Supreme Court in the Dovel case are submitted here. An inspection of these would indicate that the question whether a grandchild would be included under the word "children" as a beneficiary under such a policy in right of its deceased parent, was involved in each of these cases. But as the Supreme Court failed to report either of these two cases, we feel compelled to follow their repeated declarations as to unreported cases and refuse to consider them as authorities binding upon this court.

The authorities outside of Ohio are not in accord upon this question. A leading case in favor of admitting the child of a deceased child to an interest in the policy is found in *Continental Life Ins. Co.* v. *Palmer,* 42 Conn., 60. The same rule has been followed in *Ins. Co.* v. *Fish,* 59 N. H., 126; *Glenn* v. *Burns,* 100 Tenn., 295; *Ins. Co.* v. *Basler,* 140 Mich., 233; *Diehm* v. *Ins. Co.,* 129 Mo. App., 256.

A contrary rule has been announced in *Walsh* v. *Mutual Life Ins. Co.,* 133 N. Y., 408; *Martin* v. *Modern Woodmen,* 253 Ill., 400.

If it were necessary to construe the language of the policy, in the absence of reported decisions in Ohio we should be inclined to follow the rule laid down in the Connecticut case and the other cases first noted above, as carrying out the natural intention of the parties and being more in accord with the law of descent and distribution, the provisions for insurance being somewhat analogous to testamentary provisions. The condition of the record in this case, however, as we have above stated, does not require a decision upon this question, but does require an affirmance of the judgment.

Judgment affirmed.

JONES (E. H.), P. J., and GORMAN, J., concur.

INCOMPETENT TESTIMONY AS TO THE EFFECT OF INJURIES.

Court of Appeals for Hamilton County.

CITY OF CINCINNATI v. SUSIE C. OSBORNE.

Decided, March 8, 1915.

Evidence—Statements by One Who has been Injured as to Pain and Suffering Caused Thereby Incompetent, When.

Statements by one who has been injured, as to the effect of the injury and the suffering caused thereby, can not be repeated from the witness stand by a physician not in attendance on the case or by third persons, in an action in which damages are sought on account of the injury.

Walter M. Schoenle, City Solicitor, and *Constant Southworth,* Assistant Solicitor, for plaintiff in error.

F. E. Burnett and *Thomas L. Michie,* contra.

CHITTENDEN, J.

This action was brought in the common pleas court by Susie C. Osborne to recover damages from the city of Cincinnati for injuries alleged to have been sustained by a fall caused from an alleged defective sidewalk. The plaintiff recovered a verdict and judgment against the city for $4,000. A number of errors alleged to have occurred on the trial are urged as grounds for reversal.

Plaintiff called as a witness Dr. Theodore H. Wenning, who was qualified to testify as an expert. He had at no time treated the plaintiff for the injuries complained of. During the course of his examination he testified, among other things, as follows:

"From what she told me of her previous condition I should judge that this displacement was much more pronounced only after exercise."

Also:

"From what she said the displacement was very pronounced and occurred only after considerable exercise."

After further describing the condition of the plaintiff, he was asked:

"That being the case—is that from your own examination or what she told you? A. I am using both, my examination as a basis."

Objection was made by counsel for the city to the introduction of this evidence, which objection was overruled and exception lodged.

A daughter of the plaintiff was called as a witness. Among other things, she testified as follows:

"And she would always tell me just how it felt and would always tell me it hurt her very, very bad. Q. Did you hear her make any complaints of pain? A. Yes, sir. Q. How frequently? A. She complained of it all the time."

Counsel for the city moved to strike out all the evidence of the witness as to complaints, which motion was overruled and exceptions taken.

The evidence of Dr. Wenning and of the daughter as to the complaints made by the plaintiff is in direct conflict with the decision of the Supreme Court in *Pennsylvania Co.* v. *Files*, 65 O. S., 403, and *City of Cincinnati* v. *Olshewitz et al*, 89 O. S., 414. This same conclusion was also reached by the Court of Appeals of the Sixth District in Lucas County in the unreported case of *The Toledo Railways & Light Company* v. *Yahnke*.

We find no other error justifying a reversal of the judgment, but for the error in receiving the evidence of Dr. Wenning and the daughter of the plaintiff, as above set forth, over the objection and exception of the defendant, the judgment of the common pleas court will be reversed and the cause remanded for a new trial.

RICHARDS, J., and KINKADE, J., concur.

COMPLIANCE WITH THE CONDITIONS OF A WRITTEN CONTRACT PRECEDENT TO RECOVERY.

Court of Appeals for Lucas County.

THE NORTHERN ASSURANCE COMPANY v. FRANK F. KEHOE.

Decided, June 2, 1913.

Insurance—Denial by an Adjuster of Liability for Loss by Fire—Not a Waiver of the Requirement as to Proofs of Loss, etc., When—Evidence of a High Character Required to Brush Aside Conditions of a Contract.

In the absence of evidence that an insurance adjuster had authority from the company to deny liability on the policy in suit, the fact of such denial by an adjuster on the ground that the insured had himself caused the fire does not amount to a waiver of conditions of the policy and particularly of those relating to appraisement of loss and the making of proofs of loss.

J. W. Mooney and *Doyle & Lewis*, for plaintiff.
B. F. Ritchie and *J. H. Doyle*, contra.

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

The action below was based upon a policy of fire insurance. The plaintiff claimed a total loss of the property covered by the policy, stating the value of the property destroyed by fire at $2,718, and prayed a judgment for $2,000, the amount of the policy. To the petition as filed was attached a copy of the insurance policy, and the insured averred in the petition that he had performed all the terms and conditions of the policy to be by him kept and performed. The assurance company answered setting up numerous conditions of the policy and alleging the violation of each of the conditions set forth and denying all liability. In the reply the insured reaffirmed in general terms that he had complied with all the terms of the policy and then set forth in detail a specific compliance with the various conditions of the policy alleged by defendant to have been violated. Later an

amendment and supplement to the reply was filed in which the plaintiff averred that the assurance company subsequent to the fire denied all liability. Thereafter an amended petition was filed by the insured in which various conditions of the policy are set forth showing the grounds on which the policy might become void, and these portions of the amended petition are followed by the statement "for a more particular description of each and every item of the terms and conditions of said policy aforesaid, plaintiff hereby refers to said policy attached to the petition filed herein." Following the clause quoted, the amended petition states the averment that the insured had not violated any of the conditions set forth in the amended petition as being in the policy, and that none of the things as described in the amended petition existed at the time of the fire which would avoid the policy, and following this the amended petition contains the following statement:

"Immediately after said fire said plaintiff notified said defendant of said loss and thereupon said defendant denied any and all liability to said plaintiff for the loss by him incurred as aforesaid, and charged and alleged that said fire had been occasioned by his own act."

The assurance company filed an answer to the amended petition, setting forth various conditions and provisions of the policy of insurance and stating particularly with respect to each that there had been a violation thereof by the insured. The reply denied the allegations of the answer to the amended petition. At the close of the plaintiff's evidence the defendant moved the court for a directed verdict in its favor, which was overruled and exception noted and at the close of all the evidence, this motion was renewed by the defendant, again overruled and exception saved. The jury returned a verdict in favor of plaintiff for $1,293.80. The motion for new trial was made and overruled and judgment entered on the verdict.

It is not contended here that the plaintiff below complied with all the provisions and conditions of the insurance policy to be kept and performed by him, but the contention is that in so far as he did not comply with the provisions of the policy as he

stated in his amended petition, the terms and conditions of the policy were waived by the company by its denial of liability.

Stating the evidence as favorably as it can be stated for plaintiff below on the subject of the denial of liability by the company, it amounts to this and only this: that the adjuster who came to adjust the loss after the fire stated to the plaintiff that the company was not liable and would not pay and assigned as a reason for the non-liability that the plaintiff himself had caused the fire that destroyed the property. No claim is made by plaintiff that any one representing the company other than the adjuster made any statement in the nature of a denial of liability; and no claim is made that this denial of liability was in writing nor is it claimed that any waiver of any provision or condition of the company was ever endorsed upon the policy. The adjuster was called as a witness for the company and denied having made the statements attributed to him by the insured. The defendant contended below and contends here that even conceding that the statements were made by the adjuster at the time and in the form and under the circumstances stated and claimed by the insured, that still they did not amount to a denial of liability by the company for the reason that there was no evidence to show that the adjuster had any authority from the company to deny its liability on the policy, and no authority to waive any of the conditions of the policy, and that this being true, that which was stated by the adjuster could in no event be held as sufficient to waive the provisions of the policy, several of which the company claimed had been violated by the insured and particularly the provisions of the policy with respect to appraisement of the damage and proofs of loss. On the other hand the insured contends that under the clause quoted from the amended petition and the evidence produced in support of it, which was as I have stated, the company waived all provisions of the policy not performed by the insured and particularly that it waived the provisions of the policy with respect to appraisement and ascertainment of the loss and the making of proofs of loss within the time required by the policy.

To state that one who relies for a right of recovery upon a written contract must show that he has himself complied with

the conditions precedent to a recovery stated in the contract, or he must show that the performance of those conditions has been waived is but to state an elementary proposition of law familiar to all lawyers and the courts. It has been definitely and plainly laid down, not only by our own Supreme Court, but by the Supreme Court of the United States and most every inferior court so many times that it certainly ought to be understood, but for some unaccountable reason these principles appear to be regarded as not applicable to certain kinds of written contracts, particularly building contracts and contracts of insurance, and hence it is found necessary to keep re-stating what the law is in this respect or to at least cite cases where it may be found.

The policy of insurance in question contained the following provisions:

"This policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof which are hereby specially referred to, and made a part of this policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value; with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate.

and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy.

"In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

"If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all encumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify."

Our own Supreme Court in the case of *Ashley* v. *Henahan*, 56 O. S., 559, in speaking of an attempted waiver of the terms of a witten contract, used this language in the fifth paragraph of the syllabus:

"Such stipulation being for the benefit of the employer, proof of a waiver must either be in writing or by such clear and concise evidence as to leave no reasonable doubt about it."

And on page 573 of the opinion, the court used this language:

"We suppose the law to be that the contract must control unless its provisions have been clearly waived. Some of the authorities maintain that there must be an express waiver; and all agree, or should agree, that nothing short of evidence of the most satisfactory character should be permitted to brush aside a contract which the parties have deliberately made. They have determined that certain things shall be proved only by written evidence. To that extent that is the law of this case. It is the duty of the court to enforce that law unless it appears that the parties have abrogated it. Has it been thus abrogated? If the owner has intentionally relinquished a known right, the plaintiff should be able to show it either in express terms or by acts and conduct equivalent thereto. Equivocal conduct or conduct of doubtful import is not sufficient." (Cite authorities.)

The language of our Supreme Court in the case just cited is quite as applicable to an insurance policy as it is to a building contract. Almost every provision and condition in the standard form of fire insurance policies has been before our Supreme Court for consideration. We call attention to the following authorities, to-wit:

Union Central Life Insurance Co. v. *Hook,* 62 O. S., 256, paragraph one of the syllabus:

"1. 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."

Eureka Fire & Marine Insurance Co. et al v. *Baldwin,* 62 O. S., 368, paragraphs one and three of the syllabus:

"1. Where a party avers that he has performed all the conditions of a contract to be by him performed, his proofs upon the trial must show such performance in order to entitle him to a recovery. Under such an averment it is not competent to prove a waiver of such conditions. If the waiver of conditions is relied upon, such waiver must be averred in the pleadings.

"3. The power of an agent to waive conditions in a policy of fire insurance is not different from the same power in life insurance. As to such power, *Union Central Life Insurance Co.* v. *Hook*, 62 Ohio St., 256, is followed and approved.

Ohio Farmers' Insurance Company v. *Titus*, 82 O. S., 161, first paragraph of the syllabus:

"1. An insurance company can not be deemed to have waived a condition in a policy of fire insurance rendering it void. 'If the subject of insurance or any part thereof, or the real estate or any part thereof described in the application as that on which any building insured herein is situated now is, or shall hereafter be incumbered by mortgage or otherwise' unless by agreement endorsed hereon, or added hereto, simply because its agent had notice or knowledge of the existence of a mortgage incumbrance and received premiums, when an agreement as to such mortgage was not endorsed on the policy and where such policy also provided that 'No officer, agent or adjuster or other representative shall have power to waive or alter any of the provisions or conditions of this policy, except such as by the terms of this policy are made subject of an agreement endorsed hereon or added hereto and as to such provisions or conditions, such waiver or alteration, if any, shall only be valid when actually endorsed hereon or added hereto by such officer, agent or adjuster; nor shall any permission or privilege affecting this insurance exist or be claimed by the insured unless so written, endorsed or attached."

Scottish Union & Nat. Ins. Co. v. *Encampment Smelting Co.* 166 Federal, 231, paragraph one of the syllabus:

'1. *Insurance—Proof of Loss—Requirements of Policy—Waiver.*—Where a policy of fire insurance expressly provided that in case of loss a written and verified proof of loss should be made by the insured containing certain stated and detailed information, such proof of loss is an essential condition precedent to the company's liability unless waived; and where it further provided that no officer, agent, or other representative of the company should have power to waive any of its conditions except in writing indorsed thereon or attached thereto, the failure to make such proof of loss is not excused by a claimed waiver, not in writing, by an agent of the company not shown to have any

express authority to make it and whose action was not ratified by the company."

Northern Assurance Company v. *Grand View Building Association,* 183 United States Reports, 308, paragraph six of the syllabus:

"Contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and can not, by the courts at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts, and this principle is applicable to cases of insurance contracts."

The precise question presented here was passed upon by this court in the case of *Billings* v. *National Insurance Co.*, 17 Circuit Decisions, 27 C. C., page 582. This court there decided that statements made by an adjuster sent by the company to adjust the loss could not be held to operate as a waiver of any of the conditions of the policy, and cited numerous authorities in support of the position then taken. The question presented in that case had been fully argued in the court of common pleas, and the opinion of the trial judge (Judge Morris) with many authorities cited is found in Volume 14 Ohio Decisions N. P., page 387.

After a very full examination of all the authorities presented for our consideration, we see no reason to modify the position taken by this court in the case of *Billings* v. *National Insurance Company,* cited. We are clearly of the opinion that the evidence produced by plaintiff below in support of the claim of denial of liability by the company was insufficient to show any such denial by the company as would amount to a waiver of any of the conditions, and provisions of the policy, and this being true, it follows that the motion of the defendant below for a directed verdict in its favor should have been granted.

The judgment of the court of common pleas will be reversed and the judgment that should have been entered by that court will be entered here, dismissing the action at the costs of the defendant in error.

CONSTRUCTION OF AGREEMENT FOR PURCHASE OF OPTIONS.

Circuit Court of Hamilton County.

ROBERT KUHN v. WILLIAM WARNOCK AND CHARLES STRAHL.

Decided, February 2, 1905.

Contracts—Parties Employed to Secure Options on Coal Lands—Construction of Agreement as to Compensation and by Whom to be Paid—Weight of Evidence.

Where the significance and meaning of a conversation, embodied in the testimony submitted to the jury, depends upon the emphasis which was placed on certain words and particularly on the pronoun "I," a reviewing court will give it a construction consistent with the finding of the jury.

Max B. May, for plaintiff in error.
Shay & Cogan, contra.

PER CURIAM (Giffen, Swing and Jelke, JJ.).

The only error complained of in this case is that the verdict and judgment of the court below is against the weight of the evidence.

Counsel for plaintiff in error in his zeal has urged upon us not to apply, without great and careful consideration, the principle that a reviewing court will not disturb the judgment, on the ground that the verdict is against the weight of the evidence, unless it is manifestly so. After a careful reading of the record, we are of opinion that this is *par excellence* a case for the application of this rule.

It appears that the defendant, Robert Kuhn, was the president and acting as the representative of the Empire Coal Mining Company, in securing a large number of options embracing a wide tract of coal land. In his capacity as president, or such representative, he had given Warnock and Strahl general instructions as to the terms and methods on which they were to acquire these options.

It developed that there were three parcels of land in the middle of this tract which they had failed to secure, and that at a

meeting in the office of Theodore Neff, in Bellaire, said Warnock and Strahl reported their failure, and said they were unable to secure these parcels of land on the terms provided in their instructions. It seems, thereupon, Mr. Kuhn withdrew these gentlemen either to another room or to a different part of the same room, where the following conversation took place, as narrated in the testimony of Mr. Strahl:

"A. He said to me, 'What is the reason that you haven't these three farms optioned?' I told him that the farm—those three wouldn't take the price that we had been optioning the other farms for, and he says, 'What will they take?' I says, 'I don't know, but I believe they can be got for fifteen dollars an acre.' 'Well,' he says, 'go and take them.' My next question was, of course, 'What is in it for us, Mr. Kuhn, if we go and take these options?' And he says, 'I will tell you. If you go and take these options up and take them up in my name that I will pay you the half of the difference between the option price and fifteen dollars an acre.' And he went and—well, I believe Mr. Kuhn at that time give us his address—yes—where to send those options to, and said to send them to him; take them up in his name and send them to him at the McClure House in Wheeling."

It seems clear that the transaction in regard to these three parcels of land was to be under a different and separate arrangement from that under which the options had been procured on the other parcels in the tract.

The significance and meaning of the conversation would be directly opposite, dependent upon what emphasis was put upon the pronoun "I" in this conversation. As this appears in the cold typewritten record, we can not tell, excepting that we are bound to give it a construction consistent with the verdict and judgment below. If Mr. Kuhn said:

"*I* will tell you. If you go and take these options up and take them up in *my* name that *I* will pay you the half of the difference between the option price and fifteen dollars an acre,"

it would be very plain who was the principal and for whom Warnock and Strahl were acting in securing these options, and who should pay the commission.

We find nothing necessarily inconsistent in the letter of May 11th, 1901, with the view that Robert Kuhn was the principal in this transaction. It would seem, after a reading of the record, that with Robert Kuhn acting either for himself or for the Empire Coal Mining Company, it would not be expecting too much of him by way of business courtesy, to have looked after the interests of Warnock and Strahl, and at least to have called their attention to the closing up of matters, so that their rights could have been defined and their claim then asserted. It may very well have been that this indifference on the part of Mr. Kuhn prejudiced him in the eyes of the jury and led them to somewhat discount his testimony. If they did so, that was within their province. Not having any of these parties before us and so much in this record being susceptible of either one of two opposite constructions, we are compelled to apply the principles first above mentioned.

Judgment affirmed.

LESSOR MADE JOINT TORT FEASOR WITH LESSEE.

Court of Appeals for Hamilton County.

THE KROGER GROCERY & BAKING COMPANY v. BLANCHE GREENLAND.*

Decided, July 13, 1914.

Landlord and Tenant—Made Joint Tort Feasors—By Settlement with Landlord for Injury Received on the Premises.

Settlement with the lessor for injuries received on the premises makes the lessor a joint feasor with the lessee and bars an action against the lessee for damages on account of the same injury.

R. A. LeBlond, for plaintiff in error.

O. M. Dock, contra.

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*Affirmed without opinion, *Greenland* v. *Kroger Grocery & Baking Co.*, 92 Ohio State, —.

JONES (E. H.), J.

In the court below the defendant in error recovered a judgment of $1,000 against the plaintiff in error, as damages for injuries received by her through an alleged defect in the sidewalk at the base of steps leading into the store of the plaintiff in error company on Reading road in the city of Cincinnati.

Four grounds of reversal are set forth and argued in the brief for plaintiff in error, as follows:

1. That there was no liability on the part of the defendant below.

2. That the plaintiff was guilty of contributory negligence and could not recover.

3. That there was no evidence of the defendant having created or maintained the defect complained of.

4. That the plaintiff's release to Mrs. Thale, as set up in the second defense of the answer, was a complete defense both under the doctrine of estoppel and as a full settlement of the injury received.

As to the first three grounds, we find against the plaintiff in error.

The question presented by the fourth proposition is one not free from difficulty, and one to which we have given much time and thought. After examining the authorities cited in the excellent briefs of counsel on both sides we have reached the conclusion that the settlement with, and the release given, to Mrs. Thale, the lessor, to Mrs. Greenland, was a bar to any action against the Kroger Grocery & Baking Company. Said release reads as follows:

"CINCINNATI, OHIO, May 9, 1911.

"KNOW ALL MEN BY THESE PRESENTS:

"THAT WHEREAS, Blanche Greenland, is about to institute an action for damages resulting from an injury sustained on the 11th day of March, 1911, on the premises of Christina Thale, in the Court of Common Pleas of Hamilton County, Ohio, and whereas the said Blanche Greenland and the said Christina Thale, through their respective attorneys, have agreed to compromise and settle said claim and all liability in the premises against the said Christina Thale by the payment to the said

Blanche Greenland or her attorney, by the said Christina Thale, the sum of three hundred ($300) dollars.

"*Now, Therefore,* I, Blanche Greenland, in consideration of said sum of three hundred ($300) dollars, received to my full satisfaction of the said Christina Thale, do hereby release and forever discharge the said Christina Thale from all claims, demands, damages, actions and causes of actions whatsoever, including such as have arisen by reason of or in any manner grow out of said injury.

"IN WITNESS WHEREOF I have hereunto set my hand this 9th day of May, 1911.

"(Signed) BLANCHE GREENLAND.

"In presence of
"OLIVER M. DOCK."

The petition in this case shows that the injuries therein complained of are the same injuries for which Mrs. Thale settled with Mrs. Greenland, and in the threatened suit against Mrs. Thale, had the same been brought, the allegations of negligence would necessarily have been similar to those contained in the petition herein.

Cooley gives the test to be applied in determining whether two or more persons are joint tort feasors in the following language (*Cooley on Torts,* 3d Ed., 246):

"In respect to negligent injuries there is considerable difference of opinion as to what constitutes joint liability. The authorities are, perhaps, not agreed beyond this, that where two or more owe to another a common duty, and by a common neglect of that duty such other person is injured, then there is a joint tort with joint and several liability. The weight of authority will, we think, support the more general proposition that where the negligences of two or more persons concur in producing a single, indivisible injury, then such persons are jointly and severally liable, although there was no common duty, design or concert action."

It is well settled in Ohio, and conceded by counsel on both sides in this case, that but one satisfaction of a claim existing against tort feasors can be enforced. By her action in this case in making claim against Mrs. Thale, Mrs. Greenland has made Mrs. Thale a tort feasor, and the tort is joint as between Mrs. Thale and the Kroger Grocery & Baking Company. The motion

for judgment in favor of the defendant below should have been granted, and in refusing same the court erred.

Judgment reversed, and judgment will be entered here for plaintiff in error.

SWING, J., and JONES (Oliver B.), J., concur.

CONSTRUCTION OF A GUARANTY UPON WHICH CREDIT WAS BASED.

Court of Appeals for Hamilton County.

LOUIS H. LANDMAN v. GEORGE D. SAUERSTON ET AL.

Decided, March 29, 1915.

Guaranty—Of Payment for Goods if Credit is Given—Testimony as to Surrounding Circumstances May be Offered—But Must Not Modify the Written Contract—Duration of the Guaranty.

1. The situation of the parties and the object sought to be accomplished are competent evidence to aid a court in construing a guaranty, but it is not permissible by the aid of such evidence to modify or alter the written contract entered into between the parties.
2. A request to "extend credit to the extent of one hundred dollars to my nephew I. B., for which I will stand responsible," is not a continuing guaranty, but is limited to the first one hundred dollars' worth of goods purchased.

Error to the court of common pleas.

H. L. Bevis, for plaintiff in error.
C. S. Bell, contra.

RICHARDS, J.

The plaintiff in error, who was defendant in the court of common pleas, was sued on a written guaranty reading as follows:

"CINCINNATI, O., Sept. 22, 1909.

"MESSRS. SAUERSTON & BROWN:

"Please extend credit to the extent of one hundred dollars to my nephew, Isaac Breastin, for which I will stand responsible for, and obliged.

"LOUIS H. LANDMAN."

At the close of the evidence each side moved the court for a directed verdict and the court thereupon directed the jury to return a verdict in favor of the plaintiff for the amount of one hundred dollars.

It appears from the evidence disclosed in the bill of exceptions that Breastin was a nephew of Landman and desired to start in the candy business, and that Landman went to Sauerston & Brown, who were wholesale dealers in candy, and inquired as to the extent of credit it would be necessary for his nephew to have with them and whether they would extend credit, which they promised to do if Landman would guarantee the same. Thereupon he signed the guaranty as above quoted. Subsequent to the making of this guaranty, goods were furnished to Breastin to the amount of several hundred dollars, a large part of which was paid for, but at the time he ceased doing business there remained due Sauerston & Brown an amount in excess of one hundred dollars.

The only question in this case is as to whether the guaranty is a continuing one. The common pleas court held that it was a continuing guaranty and that the liability of Landman thereon was not limited to the first hundred dollars' worth of goods purchased. In so holding the trial court erred. By its terms the guaranty is limited in extent to the amount of one hundred dollars and would be exhausted when goods to that amount had been furnished and paid for. The situation of the parties and the object sought to be accomplished are competent evidence to aid the court in construing the guaranty, but it is not permissible by the aid of such evidence to modify or alter the written contract entered into between the parties; and it is a fundamental principle in this state that a contract of guaranty must be construed most favorably to the guarantor. It was said by our Supreme Court in *Birdsall* v. *Heacock,* 32 O. S., 177, 184, that such an instrument should be confined to the immediate transaction, unless the language of the promise is sufficiently broad to show that it was intended to render the guarantor liable for future credits. That such a guaranty should be held to be limited and not continuing, is held in the case above cited and also the following cases: *Morgan* v. *Boyer,* 39 O. S., 324;

The Merchants' National Bank v. *Cole*, 83 O. S., 50; *National Bank of Commerce* v. *Garn et al*, 3 C.C.(N.S.), 428.

In the case last cited the guaranty read as follows:

"TOLEDO, OHIO, June 10, 1895.

"KETCHAM NATIONAL BANK:

"We, the undersigned, hereby jointly and severally guarantee to you the payment of any and all sums of money that may be loaned by you to the Carothers Publishing Company, on request of F. W. Garn, treasurer, providing the amount of said loan shall not exceed in the aggregate, $3,000."

The circuit court, sitting in Lucas county, held that such a guaranty is not a continuing one but is restricted to the first three thousand dollars loaned.

Counsel for defendants in error relies very largely on the case of *Rochford et al* v. *Rothschild et al*, 16 C. C., 287, a decision also by the Circuit Court of Lucas County. In that case the guaranty under consideration was held to be a continuing guaranty, but the written instrument itself provided that it was to secure the sum guaranteed on open account, and the decision of the court is based upon that particular language. The decision is not, therefore, in conflict with the conclusion we reach in the case at bar.

Counsel for the defendants in error also relies on *Wolf* v. *John Shillito & Company*, 9 O. D. Repr., 273, a decision rendered by the old District Court of Hamilton County, but that case appears to have been controlled and the conclusion arrived at by a consideration of surrounding circumstances which are essentially dissimilar from those in the case at bar.

The general principles that control in determining whether a written guaranty is or is not continuing are clearly announced in *1 Brandt, Suretyship & Guaranty* (2d Ed.), Sections 156 to 165, inclusive.

It follows from what has been stated that the judgment must be reversed, and, proceeding to enter the judgment which should have been entered in the common pleas, a finding will be made for the defendant below and the petition dismissed.

CHITTENDEN, J., and KINKADE, J., concur.

GAME LAWS NOT APPLICABLE TO TAME SQUIRRELS.

Circuit Court of Cuyahoga County.

W. J. PHILLIPS v. STATE OF OHIO.

Decided, January 22, 1898.

Game Laws do Not Apply to Tamed Animals.

Section 6961, Revised Statutes, making it unlawful to have in one's possession certain animals, was intended to protect wild game animals, and does not apply to a case where the animals had been reclaimed and tamed and were in one's possession at the date the law was enacted.

HALE, J.; MARVIN, J., and CALDWELL, J., concur.

The case of W. J. Phillips against the State of Ohio comes here on error to the court of common pleas.

The plaintiff in error, Phillips, was charged by affidavit, before a justice of the peace of this county, with having in his possession two fox squirrels, contrary to the provisions of Section 6961 of the Revised Statutes of the state of Ohio.

This statute provides in general terms that it shall be unlawful for any person to have, between the first of September and the fifteenth of December, any squirrels in his possession.

The plaintiff in error was tried, convicted and sentenced to pay a fine of $25 and costs. That judgment was affirmed by the court of common pleas, and it is brought here for review, and we are asked to reverse both judgments.

The facts disclosed by the bill of exceptions are, that Phillips had had for some seven years prior to the passage of the present statute, these squirrels in his possession; that they had become tame and were by him kept in the ordinary way in which pet squirrels are kept.

Our Supreme Court have said in 39 O. S., 691, in the case of *Moore* v. *Gibben,* that it is the duty of courts in the interpretation of statutes, unless restrained by the letter of the statute, to adopt that view which will avoid an absurd consequence, injus-

tice, or great inconvenience, as none of these can be presumed to have been within the legislative intent.

Of course, this charge is, that the plaintiff in error violated the section of the game law of this state, and that Section 6961 provides that no person shall, on any place, catch, kill, or injure, or pursue with such intent, any squirrel or other animals named (I will leave out the balance of the statute), and in violation of this statute shall be subject to a ,fine of $25 and costs, except between the first day of September and the fifteenth day of December.

Section 6964 provides that whoever purchases, sells, exposes for sale or has in his possession any squirrel, etc., between the first day of September and the fifteenth day of December, inclusively, shall be fined as provided by another section.

It is very evident that this statute, Section 6961, was intended to protect these wild animals named, and to prevent their destruction, and, perhaps, extinction, and made it unlawful for any person to catch, kill or injure, or pursue with such intent, any such wild animals.

It is made unlawful to pursue, while at large, catch, kill or injure such animals.

It was not, in our judgment, the intention of the Legislature to apply the statute to such animals as had been captured and had become the property of the person who made that capture.

Section 6964, which I have read from, it is evident, was passed because it would be difficult and many times impossible to apprehend and punish the person who pursued and killed the game found in possession of another; and, hence, by this section, it is made unlawful for any person to have in his possession any of the animals protected by Section 6961.

But this section should be given by construction, in our judgment, the same limitation as that of Section 6964 and should not be held to apply to animals that had been reclaimed and were subject to lawful ownership.

This man had these squirrels in his possession at the time this section of the statute was passed as it now stands. He could not keep those squirrels in his possession if this statute was intended to apply to him—to a transaction of that kind. He could

not kill them; he could not slaughter them; the *only* thing for him to do would be to turn them loose after they had been tamed and cared for, for seven years. Now we do not think this statute should be given an interpretation to apply that way. We do not believe this statute was intended to make such a transaction unlawful.

We, therefore, reverse the judgment of the court of common pleas and of the justice of the peace, and discharge the defendant below.

LEGALITY OF A SEWER TAX LEVY.

Circuit Court of Cuyahoga County.

C. AUGUST KRAUSS v. THE CITY OF CLEVELAND AND JAMES P. MADIGAN, AUDITOR OF SAID CITY.

Decided, March 28, 1905.

Taxes—Sewer District Tax Legal.

Taxes may be levied at a uniform rate upon territory not constituting a political district or subdivision of a political district: hence taxes for sewer purposes levied uniformly upon a sewer district are lawful.

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

The plaintiff is a resident and tax-payer of sewer district No. 1 of the city of Cleveland. He requested the city solicitor to bring this suit and he declined to do so. Suit was brought on behalf of the plaintiff and other tax-payers to restrain the payment of money for the construction of a sewer in Case avenue. This sewer had been contracted for and is now in process of construction, the city having passed an ordinance for the construction of said sewer and provided that 66 per cent. of the cost thereof should be paid out of the sewer fund of sewer district No. 1, 33 per cent. out of the sewer fund of No. 2 and 1 per cent. out of the sewer fund of district No. 7.

It is claimed, first, that this sewer is not needed. This is a main sewer, and it is for the council to determine the necessity

for its construction. Unless the council abused its discretion in so determining its necessity, this court could not interfere. The evidence falls short of showing such abuse of discretion.

It is further urged that the council is without lawful authority to levy a tax upon such divisions of a city; that it may levy assessments according to benefits for public improvements, but that the manner of securing the money for this improvement is not such as comes within this authority, and that therefore it must be that it is to be read as a tax. We hold that this money is to be paid out of money arising from taxation, but that taxes may be levied at a uniform rate upon territory not constituting a political district or subdivision of a political district.

In 37 O. S., 35, the first clause of the syllabus is directly in point; also the language of the opinion found on pages 39 and 40 of the report, which we will not stop to read.

In *Root* v. *Board of Education*, 52 O. S., 589, the syllabus and from the opinion on pages 596 and 597, it appears that as to each of the sewer districts to be charged with any portion of the expense of this sewer, the rate of taxation is uniform upon all of the property real and personal within such district. It is not uniform in all districts, but in each particular district it is uniform as to that district. This tax is for a sewer fund and is authorized by law.

In paying for this sewer, the council followed the method pointed out in Section 2406-6, Revised Statutes, an act which had not been held to be unconstitutional at the time the council acted, October 28, 1901.

Without discussing further the questions, we think that those to which attention has been called determine the case, and the petition of the plaintiff is dismissed.

CONVERSION OF CHECKS USED IN PAYMENT OF INSURANCE PREMIUMS.

Circuit Court of Cuyahoga County.

THE PARK NATIONAL BANK OF CLEVELAND, OHIO, v. THE TRAVELERS INSURANCE COMPANY OF HARTFORD, CONNECTICUT.

Decided, January 22, 1905.

Agency—Banks and Banking—Bank Liable to Principal for Amount of Checks Drawn on Other Banks Cashed for Agent.

Authority of an insurance broker to collect premiums from policy holders, raises no presumption of authority on his part to endorse and collect checks, and a bank which cashes them upon the endorsement of the agent and then collects them from the banks upon which they were drawn is liable to the principal as for conversion of the checks.

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

This proceeding in error is brought to reverse a judgment for $2,409.67 recovered at the April term, 1905, of the Cuyahoga common pleas court by the Travelers Insurance Company against the Park National Bank. The action below was begun to recover from said bank the amounts of certain checks drawn on other banks in favor of said insurance company by holders of its policies in payment of premiums. The checks were given by the drawers about July 1, 1902, to one W. B. Uhl, an insurance broker, by whom the business was solicited, and the policies delivered. But although Uhl had authority thus to collect the premiums he, without authority, endorsed the checks in the insurance company's name by his own as agent, and deposited them to his own account in said bank, by which they were collected in the ordinary course from the banks on which they were drawn. Uhl's deposit was subsequently withdrawn and consumed by him, and he became a fugitive. The insurance company's attorneys learned of Uhl's misconduct October 29, 1902, having consumed the interval in the investigation and attempted settlement of the matter with Uhl's friends.

At the trial, and upon the court's ruling that the defendant had the burden, the bank put in its evidence first. After both parties had rested, each asked the court to direct a verdict in its favor. When the defendant's motion was disallowed, it made no request to go to the jury upon the facts, and the court was thus clothed with the functions of a jury, so that the verdict for the plaintiff, which the court thereupon directed, can not here be set aside unless clearly against the weight of evidence. *First National Bank* v. *Hayes & Sons,* 64 Ohio St., 100.

It is claimed, however, that the verdict thus directed is founded on insufficient evidence and on a petition which states no cause of action. The bank insists that the insurance company has its remedy against the policy holders, because, on this state of facts, the premiums which they owed have never been paid. payment of their check by the drawees upon forged endorsements being, in law, no payment at all. The fact that the policy holders may have recourse upon their own banks, and the latter, in turn, upon the defendant below, affords no warrant, it is urged, for the short cut sought to be taken here; for the intervening parties may well have defenses *inter se* that are not available in this action, and, in any event, there is no privity between the parties here.

We think, however, that the rule of *Shaffer* v. *McKee,* 19 Ohio *State,* 527, presents a complete answer to this contention. The syllabus is:

"A debtor of the plaintiff enclosed and mailed to her a draft on a bank in New York, payable to her order. The draft was stolen from the mail and the thief, having placed a forged endorsement of the plaintiff's name thereon, sold the same to the defendant, who drew from the bank the money and appropriated it to his own use. *Held:* On this state of facts the plaintiff was entitled to recover the amount of the draft from the defendant."

It is said, however, that the reasoning in that case proceeds upon a state of the law which does not now prevail, for there the plaintiff was permitted to recover against the defendant because she might have recovered against the drawee, the action being in the nature of trover and the damages being the amount

which could have been recovered from the bank. But we think the checks in this case, whose value the defendant below received, were clearly things of value, the property of the insurance company; that, misled by Uhl's forgery and false representation of agency, the bank converted this property; that on these facts it is liable to this action for damages, and that it is no answer to say that some one else may also have incurred a liability in the transaction. Nor do we know of any principle on which a person whose property has been thus converted owes a duty to the person converting it of notifying the latter when the conversion is discovered or of exercising any greater promptness or diligence in making demand than was employed in this case.

The defendant below, having interposed by general denial and other allegations, the defense that Uhl had authority from the plaintiff to endorse the checks in question, and that, even if he was without authority, he had actually paid the proceeds to plaintiff, was charged with the burden of making good those defenses, as the court below rightly ruled. Uhl's admitted authority to collect premiums from the policy holders and his right to commissions thereon, create no presumption of authority on his part to endorse and collect checks made payable to the order of his principal. We find no error in this record and the judgment below is affirmed.

CONSTRUCTION OF LEASE OF AN UNCOMPLETED BUILDING.

Circuit Court of Cuyahoga County.

THE BANKERS' FRATERNAL UNION v. THE WILLIAMSON COMPANY.

Decided, December 12, 1904.

Landlord and Tenant—Clause in Lease Regarding Delay in Giving Possession Construed.

When a clause in a lease provides that the lessor shall not be liable in damages for any failure on its part to complete the building leased in time for occupancy under the terms of the lease, but will endeavor to have it completed at that time and in case of failure so to do, the lessee shall be entitled to a proportionate rebate of rent, such clause postpones the date when the lease becomes effective, in case the building is not completed, and is not a mere limitation of damages on the part of lessor for non-delivery, and gives lessee no right to repudiate the contract of lease because the premises are not ready for occupancy.

Hogan & Parmely, for plaintiff in error.
Ford, Snyder & Henry, contra.

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

The Williamson Company brought its action in the common pleas court against the Bankers' Fraternal Union to recover for the rent of certain offices in the Williamson Building, Cleveland, Ohio, under the terms and covenants of a written lease entered into between the parties wherein the lessor demised certain premises for the term of three yars from the first day of April, 1900, and the lessee agreed to pay as rent for the demised premises for said term the sum of one thousand dollars per annum in monthly installments in advance.

The eighth clause of said lease contains the following provision:

"Lessor shall not be liable in damages for any failure on its part to complete the Williamson Building in time for occupancy under the terms thereof. Said lessor, however, agrees to use its best endeavors so as to complete said building, and in the

event of any failure so to do the lessee shall be entitled to a proportionate rebate of the rent for the premises hereby leased."

The defendant below tendered issue as to the authority of the person who signed the lease for it to bind the corporation and as a further defense alleged that said offices were not completed ready for occupancy April 1, 1900, and that the lessor failing to give it possession of the premises on said day the defendant on said day rescinded and canceled said lease, refused to be bound thereby and immediately so notified the lessor.

These issues being referred to a jury, there was a verdict for the plaintiff below and the judgment thereon we are now asked to review.

As to the authority of one Myler, who signed said lease, to bind the defendant below, the question was fairly submitted to the jury, and we are not disposed to disturb its findings with regard thereto.

The alleged rescission of the contract by the lessor's failure to give possession on April 1, 1900, is a legal proposition and is properly brought before this court for review by exceptions of defendant below to the court's charge as given and its refusal to charge as requested by said defendant.

There was evidence offered at the trial that the building was not completed on said day and that possession of said offices could not be taken on that day; there was no evidence that the lessor had not used its best endeavors so to complete the building.

We are thus called upon to construe that part of the eighth clause of said lease heretofore quoted.

Counsel for plaintiff in error has argued that the evidence in this case shows a breach on the part of the lessor of the covenant to give possession; that the time for the delivery of possession to the tenant is treated as of the essence of the lease and if the landlord refuses to deliver possession at the time specified, the tenant may abandon the lease, or he may affirm the lease and sue the lessor for damages for the breach of the covenant; that the law thus stated, giving the lessee an option as to his remedies, would be applicable to this case were it not for said eighth

clause of the lease; that the sole purpose and effect of said clause is to limit the lessor's remedy in damages without taking from it its option to rescind the lease.

The supposed attitude and intention of the Williamson Company at the time it prepared this lease is colloqually stated by lessee's counsel, as follows:

"I believe now that I will be able to deliver to you the possession of these rooms on April 1, 1900, consequently I will make your term begin on that date and have your rent payable from then. But, for fear that I may be unable to do so, I propose, as a matter of precaution, to limit my liability in damages to you. If I am unable to deliver possession to you on April 1, 1900, you may have all the remedies that the law gives you therefor, except that I am not to be liable to you in damages for such failure. I agree, however, to use my best endeavors to have the building completed and these rooms ready for occupancy at the commencement of your term. If I fail, however, and you prefer to hold me to the lease and accept possession of the rooms when I am able to deliver them to you, then you are only to be entitled to a rebate of the rent, provided for in the lease from the date of the commencement of the term to the time you receive possession of the rooms. If I fail to use my best endeavors to complete the building and have it ready for occupancy by April 1, 1900, then of course I will be responsible to you for such damages as the law gives you, in event that you elect to hold me to this lease; otherwise not, except as herein provided."

We are inclined to think that the parties were not contracting with regard to lessee's remedies in case of the lessor's breach of the covenants of the lease, but were contracting with regard to the term of the lease, when it was to begin, if the building was not completed on time, and that it would be more proper to put the lessor's attitude and intention as follows:

"If I am unable to deliver possession to you on April 1, 1900, it is hereby agreed that the term hereby granted shall not begin until the building is completed and I can give you possession, and you shall not be liable for rent until the building is so completed."

This is the construction given to the eighth clause of the lease by the trial judge, and we find no error in it.

Judgment affirmed.

DELAY IN MOVING FOR THE RETAXING OF COSTS.

Circuit Court of Cuyahoga County.

T. J. KERNS v. AUGUSTA F. LINDER ET AL.

Decided, March 28, 1905.

Costs—Right to Have Retaxed Lost by Laches.

A motion to have costs retaxed should be made within a reasonable time after the judgment awarding them, and one who has waited four years before making such a motion has been guilty of laches.

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

This is a motion to retax costs awarded by the judgment of this court on November 7, 1901. The docket shows that after judgment by this court the case went to the Supreme Court and was there dismissed.

While there is some merit in the contention that some part of the costs complained of were excessive and improperly charged against the defendant, Augusta F. Linder, we think this motion is altogether too late to be entertained by this court. Since said costs were taxed almost all the officials connected with the litigation, such as the clerk and sheriff, have gone out of office, and only one judge who sat in the case is now on the bench.

A motion to retax costs should be made within a reasonable time after the judgment awarding them, so that the court can call upon its officers to explain the items of the cost bill. The right to have costs retaxed may be lost by laches of the party against whom they are taxed. 11 Cyc., 165; 5 Enc. of Pl. & Pr., 248, and cases cited in notes.

This motion is made more than four years after the costs were taxed and entered on the dockets of the court, and we hold that defendant has waived his right to have the same retaxed and the motion is overruled.

TRUSTEE SHOULD REPRESENT INSANE DEFENDANT IN DIVORCE PROCEEDINGS.

Circuit Court of Cuyahoga County.

MARY KEERLICK v. THOMAS KEERLICK.

Decided, 1906.

Divorce—Trustee Should be Appointed for Insane Party.

Where an insane party is sued for divorce the court should appoint a trustee to defend the suit, as in other cases.

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

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 Insane, duly committed by the Probate Court of Cuyahoga County, and is hopelessly insane beyond hope of recovery. All of the grounds for 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, superintendent 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 beeen 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:

"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 the 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 appealable as to the property rights of the parties, and we do not 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 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 O. S., 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, Section 7) to appoint a trustee to prosecute or defend the suit for and on behalf of such insane party."

The statute referred to is now 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, Section 4), and then read:

"Whenever any suit in court now pending, or that 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 procedure (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 (66 O. S., 566, 572).

Section 604 of the code of 1853 (51 O. L., 161) provided:

"Until the Legislature 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 appears 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 in the case of 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 reason stated, overruled and the case is assigned for trial.

UNION OF LEGAL AND EQUITABLE CAUSES OF ACTION DOES NOT PREVENT SUBMISSION TO JURY.

Circuit Court of Cuyahoga County.

THE CURTISS-AMBLER REALTY COMPANY v. MARY TWEEDIE ET AL.

Decided, 1906.

Appeals—Action on Note and Mortgage, When Not Appealable.

1. When an action is brought to foreclose a mortgage and personal judgment is asked upon the mortgage note, the union of legal and equitable causes of action does not prevent the submission to a jury of the issues raised as to the note, and the case on the note is not appealable.
2. An answer setting up an equitable defense to an action on a note does not make the case appealable where the answer, if sustained, would not extinguish plaintiff's demand, but only result in allowing certain credits.

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

A motion is made in this case to dismiss the appeal on the ground that upon the issues joined in the common pleas court the parties were entitled to demand a jury.

The petition sets up a promissory note and a mortgage given to secure it; recites that certain of the mortgaged premises were released from the mortgage and other property deeded to certain persons to hold in trust as security for the payment of said note and in lieu of the premises released, and sets forth certain expenses incurred and taxes paid in and about the transfer of securities.

The prayer of the petition is for a money judgment and that the several securities be subjected to the payment thereof.

The amended answer of the makers of the note admits the execution of the note and mortgage, but alleges that by fraud and misrepresentation the note was obtained from them for a larger sum than was owing by them to plaintiff and that a farm was deeded to a trustee, as alleged in the petition, was not so deeded as security for the note, but as payment thereof, and that certain city property was deeded to a trustee for the interest of said defendants and not as security for said note.

There is no prayer that the original note and mortgage be set aside. On the contrary, the answer recognizes the note and its prayer is that credits be made upon the note as claimed by defendants and that the farm be decreed to belong to plaintiff and the said city property to said defendants. The credits claimed would not extinguish the note.

The case was tried in the common pleas court without the intervention of a jury; the issues were found in favor of plaintiff, and personal judgment rendered on the note and the securities ordered subjected to its payment.

It has been repeatedly held in this state that where an action is brought to foreclose a mortgage and personal judgment is asked upon the mortgage note, the union of legal and equitable causes of action does not prevent a submission to a jury of the issues raised as to the note, and the case is not appealable. *Ladd* v. *James,* 10 O. S., 437, and cases in *Laning's Notes.*

The fact that the answer sets up an equitable defense does not make this case appealable, because it goes only to the credits upon the note, and, if sustained, would not extinguish the plaintiff's demand. *Raymond* v. *Railway Co.,* 57 O. S., 271, 288.

Motion to dismiss appeal granted.

AS TO THE FIDUCIARY RELATIONSHIP BETWEEN AN ADMINISTRATOR AND THE WIDOW OF HIS INTESTATE.

Circuit Court of Cuyahoga County.

MARY LALLY v. MARY LALLY ET AL.

Decided, 1906.

Gifts—When Duty of Court to Scrutinize.

Although as to the title to real estate, no legal fiduciary relationship exists between the administrator of an estate and the widow of his intestate, a *de facto* relationship of that character may exist; and where the administrator is the brother of the intestate and accustomed to doing business and the widow is illiterate and not accustomed to doing business, a deed of gift from the latter to the former could only be made after full disclosure to the donor of her rights in the property, and where such conveyance is sought to be set aside it is the duty of the court to scrutinize jealously the conduct of the donee and the comprehension of the donor in respect to the entire transaction.

Herman Preusser, for plaintiff.
McCaslin & Cannon and *Jas. F. Walsh,* contra.

HENRY, J.; LAUBIE, J. (sitting in place of Marvin, J.), and WINCH, J., concur.

This is an appeal by plaintiff from the judgment of the court of common pleas in an action to set aside a conveyance which she alleges was fraudulently procured from her by her brother-in-law, Michael Lally, since deceased. The defendants are Michael Lally's devisees, etc.

John Lally died intestate November 20, 1903, without issue, leaving a house and lot on Phelps street, in Cleveland, which he had purchased, and personal property consisting chiefly of bank deposits. He and his brother Michael had been intimately associated as co-administrators of an estate, and John's widow, who is an illiterate woman about 65 years old, had confidence in Michael and consented to his appointment, December 2, 1903, as an administrator of her husband's estate. At the same time

she signed a deed to Michael of the Phelps street property, and he executed a life lease thereof to her. She also consented to a distribution of the bank deposits, but inasmuch as the personal property is the subject of a separate action still pending, we refrain from discussing this feature of the transaction. All this business was transacted at the office of James F. Walsh, Esq., of counsel in this cause. The evidence shows no actual fraud or misrepresentation in the premises, but on the contrary, an effort on the part of the widow to carry out what she believed to her late husband's wishes. He had been her second husband and she had had issue by her former marriage. It is said that the Phelps street property had been paid for by John, Michael and a sister, as a home for their mother in her lifetime, and title taken in John's name with a life lease to the mother; and that John's widow, knowing this, wanted a similar provision for herself, but so arranged that the property would belong to Michael on her death. The source of the original purchase money is not proved in this case, but we think it is proved that John's widow signed the deed which she now seeks to set aside, and that she knew or should have known what she was signing. She alleges that she first discovered the fact that she had made such a conveyance about one month thereafter, at Michael Lally's funeral, and the files here show that she brought this action within a fortnight afterwards.

The main question in this case is whether and under what circumstances one occupying such a relation to another, as that of Michael Lally to his brother's widow, can take a gift of land from that other. Here the fact of confidence reposed is abundantly established, in addition to such confidence, if any, as is legally implied from the kinship by affinity, the relationship between an intestate's widow and the administrator of the estate, and the inequality of footing as between a man accustomed to the transaction of business and an illiterate widow whose husband has been dead but twelve days.

It is pointed out to us, and we agree, that no official fiduciary relationship subsists between an administrator and the widow of his intestate, in respect to the title to the latter's real estate.

But we think a *de facto* relationshhip of that character may exist between parties so situated which will give rise to legal duties; and under the facts of this case we hold that the duty of making a full and complete disclosure to plaintiff of her rights as heir of her deceased husband rested upon Michael Lally before he could take a valid gift from her of the real estate which she had thus inherited. And it is the duty of a court of equity, where such a gift is sought to be set aside, to scrutinize jealously the conduct of the donee and the comprehension of the donor in respect to the entire transaction. The rule as to purchases applies with even more force to such gifts as this. *Walker* v. *Shepard,* 210 Ill., 100; *Pairo* v. *Vickery,* 37 Nev., 467; *Handlin* v. *Davis,* 4 Ky. Law Rep., 675.

No disclosure of her rights appears to have been made to John Lally's widow. Whether she supposed she was giving away her own property or merely effectuating her husband's intended disposition of his property, is at best uncertain. Under these circumstances the gift can not be upheld, but must be set aside and the deed of conveyance canceled. The plaintiff may take a decree in accordance with this opinion.

ALLEGED COLLUSION IN PLACING A CORPORATION IN THE HANDS OF A RECEIVER.

Circuit Court of Cuyahoga County.

DAVID B. CARPENTER v. ANDREW WILLIAMSON ET AL.

Decided, November 24, 1905.

Corporations—Stockholder Must Redress Wrongs Through the Corporation.

A stockholder in a corporation can not maintain an action to redress wrongs done the corporation, whereby he has suffered in his stockholding interest, unless he alleges an effort to secure redress through the corporation, its officers, assignee or receiver, and neglect or refusal on their part to act.

David B. Carpenter, for plaintiff in error.
E. Hitchens, contra.

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

The petition in this case attempts to set forth a cause of action growing out of the defendant's collusion and fraudulent management or mismanagement, of a corporation in which plaintiff was a stockholder, by reason whereof said corporation was placed in the hands of a receiver and its entire assets transferred to defendants under the guise of a new corporation which is also made defendant to the action.

The plaintiff says that the suit is one of general interest to all the other stockholders and creditors of said original company, who are very numerous, and that he brings the action not only for himself, but for all other stockholders and creditors thereof who may come in to prosecute it.

One of the defendants demurred to the petition in the common pleas court, the demurrer was sustained, judgment entered on the demurrer, and the matter brought here for review of said judgment.

The petition is very voluminous, but we have searched it in vain for any allegations that plaintiff ever attempted to secure redress for the wrongs of which he complains through the original corporation or its receiver, though it is manifest that he was wronged, if at all, because of his ownership of stock in a corporation whose rights were infringed.

Neither is said corporation or its receiver a party to the action.

We hold that a stockholder can not maintain an action to redress wrongs done the corporation, whereby he has suffered in his stock-holding interest, unless he allege an effort to secure redress through the corporation, its officers, assignee or receiver, and neglect or refusal on their part to act.

No authorities on this proposition need be cited. The whole of the eighty-ninth chapter in the fourth volume of *Thompson's Commentaries on the Law of Corporations* is on this subject, and this court has heretofore recognized the rule. *Larwill* v. *Burke*, 19 C. C., 449, 475.

The petition being deficient in the respect pointed out, it failed to state a cause of action, and the demurrer to it was properly sustained.

Judgment affirmed.

RIGHTS UNDER A BROKER'S UNEXECUTED CONTRACT TO SELL STOCK.

Circuit Court of Cuyahoga County.

NORTON T. HORR, AS ASSIGNEE OF R. H. YORK & COMPANY, v. R. M. BAKER.

Decided, November 24, 1905.

Stock Brokers—Tender Necessary Before Action for Breach of Contract of Sale.

Where a stock broker contracts with another broker to sell him certain stock at a certain price, delivery to be made at any time within ninety days, and then makes an assignment for the benefit of creditors without having any of the stock in question with which to make tender, in the absence of any rules of the stock exchange governing the transaction the assignee has no right as against the other broker for the difference between the contract price of the stock and the price at which he purchased it in the open market within the ninety days.

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

R. H. York & Company and E. M. Baker were both members of the Cleveland Stock Exchange, and on April 13, 1905, the former agreed to sell the latter two hundred shares of American Ship Building stock at fifty-five dollars per share, seller to have the privilege of delivering said stock at any time within ninety days thereafter, the buyer to pay for said stock upon delivery.

Two weeks later R. H. York & Co. failed and made a voluntary assignment for the benefit of creditors, to the plaintiff. The next day Baker purchased in the open market two hundred shares of said stock and paid thereafter at the rate of fifty-three dollars per share.

Thereupon, the assignee claiming from Baker the sum of four hundred dollars, being the difference at $2 per share on said two hundred shares of stock, and Baker denying the claim, they submitted their contention to the common pleas court as an agreed case in which the above facts were set forth and also the further statements that at the time of the transaction first mentioned the parties intended actual delivery of the stock should be made, but that at the time of the assignment R. H. York & Co. did not have on hand for delivery any of the stock referred to.

It was further agreed that the rights of the parties are covered by the rules of the Cleveland Stock Exchange, but that said rules do not expressly regulate the rights of the parties under said circumstances, although said rules provide that when a member of the exchange fails, all his transactions upon the exchange shall be at once "closed," and for all debts then existing to members of the exchange such members shall have a lien upon the membership seat of the failing member.

As there is no averment in the agreed statement that York & Co. tendered the stock to Baker, but, on the contrary, it appears therefrom that York & Co. were and are utterly unable to make such tender, under familiar rules of law, plaintiff can not recover, unless the rules of the stock exchange excuses tender under such circumstances as are presented here, and such rules are enforcible in the courts.

It is said that the word "closed," as found in said rules, implies a settlement upon differences. No definition of the word is given in the agreed statement and the court has no judicial knowledge of its meaning. Doubtless the statement of facts contained no definition of the meaning of the word "closed" as used upon the exchange and in its rules, because such definition would not be consistent with the allegation that the parties intended actual delivery of the stock. If, indeed, to close a transaction upon the exchange means to settle upon differences, then clearly we should have a gambling contract, and the court could not enforce it. Nor is plaintiff's position strengthened by the lien provided by the rules, which the exchange is in a position to en-

force, for if there is no debt, the security for it is unavailable. The common pleas court having also come to this conclusion, its judgment is affirmed.

MUNICIPALITY NOT LIABLE FOR NEGLIGENCE WITH RESPECT TO A WORKHOUSE PRISONER.

Circuit Court of Cuyahoga County.

DAVID H. WHITE v. THE CITY OF CLEVELAND.

Decided, May 31, 1901.

Municipal Corporations—No Liability for Injury to One at Work Under a Prison Sentence.

W. C. Rogers and *L. H. Ware,* for plaintiff in error.
Beacom, Babcock, Excell, Gage & Carey, contra.

HALE, J.; CALDWELL, J., and MARVIN, J., concur.

In this case we hold that a prisoner convicted of a violation of a city ordinance, and sentenced to the workhouse at hard labor, can not maintain an action against the city for negligence of its officers and employees in the execution of the sentence, either in negligently providing defective machinery upon which the prisoner is compelled to work, or negligently directing the manner in which the work is to be done.

This results in an affirmance of the judgment of the court of common pleas.

NO APPEAL FROM MOTION TO SET ASIDE FINAL ORDER.

Circuit Court of Cuyahoga County.

THE SOUTH CLEVELAND BANKING COMPANY v. H. L. NACHTRIEB ET AL.

Decided, March 27, 1905.

Appeals—No Appeal from Motion to Set Aside Final Order.

Appeals may only be taken from final orders or decrees, and a motion to set aside such an order or decree is not appealable.

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

This case is heard on a motion to dismiss the appeal which was taken by one Crowell, who was not a party to the proceeding but was interested in the result. Crowell was appointed by the common pleas court in this action as receiver of the property of H. N. Nachtrieb. When his report was filed as such, the court of common pleas found a certain amount of money to be in his hands as such receiver, and ordered that the entire amount be distributed to the creditors, and that the receiver should have no compensation for his services. This order was made on the 26th day of October, 1904.

On the 15th day of December, 1904, Crowell made a motion in the same court to have the order and judgment set aside. This motion was overruled, and it is from this order of the court overruling said motion that Crowell gave notice and bond, and filed transcript for appeal to this court. The motion now disposed of is made by the South Cleveland Banking Co., on the ground that the order is not appealable. The final order in the case was that of October 27, 1904, and without consideration of the question whether Crowell might or might not appeal the case, it is perfectly clear that what he seeks to appeal is not the final order of the court of common pleas.

The statutes provide within what time thereafter proceedings may be taken. Crowell allowed the case to rest from that day until the 15th day of December and then filed a motion to set

aside that final order of October. The court refused to set it aside. If an appeal can be taken from such an order, all one has to do who desires to appeal his case is to leave the final order, pay no attention to it until a convenient season, and then file a motion to have it set aside. There is nothing here for anybody to appeal from. The motion to dismiss the appeal is sustained.

AS TO THE ENGRAFTING OF A TRUST ON LANDS.

Circuit Court of Cuyahoga County.

S. T. LEBARON v. ARTHUR A. SKEELS ET AL.

Decided, December 24, 1904.

Trusts and Trustees—Evidence to Engraft Trust on a Deed Absolute Must be Clear and Convincing.

The evidence necessary to engraft a trust on lands conveyed by deed absolute must be clear and convincing and where the plaintiff has allowed eight years to elapse before seeking to establish the trust, the evidence of one prejudiced witness as to declarations of the original grantee, since deceased, will not be sufficient to meet that requirement.

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

This case was heard on appeal. The petition was originally filed in the common pleas court January 23, 1902, and in it the plaintiff asks the court to ingraft a trust upon a deed absolute on its face whereby on May 26, 1891, eleven years before, certain premises in Cuyahoga county were deeded to one Frank B. Skeels. The plaintiff says that he paid one-half of the purchase price for said premises and that at the time said deed was made it was the express understanding that said Skeels should take title in his own name in trust for himself and plaintiff, each to have a one-half interest in said premises.

The records with regard to said title, beginning with said deed to Skeels in 1891, show that on June 15, 1894, Skeels deeded said premises, by deed absolute on its face, to one C. A. Bejcek; January 22, 1895, by similar deed, the premises were conveyed

by Bejcek to Rose Skeels, wife of said Frank B. Skeels; she died November 8, 1897, and by her will this property was left to her husband; January 31, 1900, he deeded the premises, by quit-claim deed, to his brother Arthur, defendant in this action; the proof shows and it is admitted by Arthur, that this deed was in reality a mortgage to secure money due and thereafter to be advanced by Arthur to his brother; about six months later Frank became insane and died about a year later, June 27, 1901, after having been confined in a private hospital for the insane. The following September his administrator brought proceedings to sell this land as part of his decedent's estate, made Arthur party defendant to said suit and the latter set up the conveyance to him as a mortgage, claiming $700 due him thereunder. This was found to be the case, sale was ordered and made and Arthur became purchaser of the premises for $1,200, $700 of which was paid by crediting on the purchase price the debt due him from the estate, the balance, $500, remaining in his hands as guardian of Frank's two minor children, one of whom has since come of age and has been paid her share: the $250 due the other minor is still held by defendant, Arthur A. Skeels, as his guardian.

The only testimony upon which it is sought to ingraft a trust upon this property is that of C. A. Bejcek, who says that he formed a partnership with F. B. Skeels in 1891 and was then shown deeds in the safe which said Skeels remarked represented the title to property which he held in trust for himself and plaintiff; when the deed was made to him three years later witness testifies that said Skeels stated that he was financially involved and deeded the property to the witness to hold as in trust for himself and plaintiff, one-half for each, and that the next year he deeded said property to the wife at said Skeel's request and then told her that he deeded it to her in trust to hold for the equal benefit of her husband and plaintiff.

The lapse of time since these transactions, the witness' personal difficulties with defendant about other matters, the utter failure of proof that plaintiff made any effort to establish this secret trust from the time that the wife took title in 1895 until eight years later when he brought suit, meanwhile the wife dying

and the husband first becoming insane and a year later dying himself—all these circumstances tend to weaken the effect of said witness' statements, so that we are unable to say that uncorroborated as he is this witness brings the proof within the rule laid in the case of *Boughman* v. *Boughman*, 69 O. S., 273, which "requires that parol evidence to engraft an express trust in lands upon a deed absolute shall clearly and convincingly show that contemporaneously with the execution of the deed the terms of the trust were declared and beneficiaries designated."

Again it was sought to show that defendant had notice of plaintiff's claims, both before he took deed in 1900 and again before the land sale proceedings in the probate court in 1901, but, without stating the evidence on this subject, it is sufficient to say that it was not satisfactory.

Perhaps the principal reason we decide this case against the plaintiff is because his conduct was so absolutely indifferent as to his alleged interest in the property for about eleven years, during which time he allowed the person he claims was trustee for him to convey the property as his own and to become incapacitated and die without making any claim upon him or effort to establish his interest.

Secret trusts are not favored and we fear this secret has died with the trustee, if ever there was one. It would have been so simple for plaintiff to have taken from Frank B. Skeels a written statement of his alleged trusteeship that he must not now complain if the rules regarding parol proof are enforced against him.

The petition is dismissed.

SERVICE UPON A GARNISHEE

Circuit Court of Cuyahoga County.

ANNA CLARK MURPHY v. THE CLEVELAND & SANDUSKY BREWING CO. ET AL.*

Decided, December 24, 1904.

Service—When Non-Resident Defendant Not Subject to Personal Service.

A civil action against a garnishee under favor of Section 555, Revised Statutes, brought for the purpose of reaching credits in the hands of the garnishee, is not an action for the recovery of specific property which would authorize personal service upon a non-resident defendant under Sections 5049 and 5045, Revised Statutes.

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

In an action by plaintiff against one C. R. Barrett and others, the defendant brewing company was served with garnishee process and answered that it had no property in its possession or under its control belonging to said C. R. Barrett or others, defendants with him in said suit.

Thereupon plaintiff brought this action in the common pleas court against the brewing company, setting forth said attachment proceedings, stating that the brewing company's answer therein was not satisfactory and further alleging that when served in attachment on August 13, 1903, the brewing company had about $300 in its possession and under its control belonging to said debtors. The prayer of the petition was that the brewing company be ordered to disclose truly what if any property or credits of any kind it had in its possession or under its control belonging to said debtors or either of them at the date of the attachment and for judgment for the amount of property and credits of every kind of said debtors, or for what may appear to be owing by the brewing company to them and for such other relief as the court may deem proper.

*Affirmed without opinion, *Murphy* v. *Cleveland & Sandusky Brewing Co.*, 74 Ohio State, 506.

To this petition the brewing company answered, setting forth that on April 10, 1903, 189 shares of its capital stock stood upon its books in the name of C. R. Barrett; that on said day said Barrett was adjudicated a bankrupt by consideration of the United States District Court for the Northern District of Illinois; that by said court on May 14, 1903, the Equitable Trust Company of Chicago was duly appointed trustee of the estate of said C. R. Barrett and qualified as such; that upon the demand of said trustee said 189 shares of stock were transferred to it as trustee. That on August 1st, 1903, a dividend on said stock amounting to $283.50 was declared upon said stock, which amount is still in its possession and control, and that said trustee had demanded said dividend of it. The defendant further answered that at the time of the service upon it of said garnishee process it did not have, nor has it had at any time since, any property of any character in its custody or under its control belonging to any of said debtors.

Thereupon plaintiff filed an amended petition, making the Equitable Trust Company party defendant, setting forth the claim against Barrett and others, the attachment proceedings against the brewing company; its answer in said proceedings that it had no property belonging to the debtors; its answer in this case-stating its possession of $283.50, dividend as aforesaid, and the statement that the Equitable Trust Company had demanded said dividend.

The prayer of the amended petition is that said trust company be required to assert its rights to said dividend and to maintain or relinquish the same against the plaintiff or the defendant brewing company, or be barred upon all claims in respect thereto, and for such other relief as the court might deem proper.

Upon this amended petition personal service was made upon the Equitable Trust Company of Chicago, by delivering to its president there copies of the writ and amended petition.

Thereupon the trust company, appearing only for the purpose of the motion and denying expressly the jurisdiction of the court over its person, moved the court to quash the serv-

ice upon it. This motion was granted, plaintiff excepted and by petition in error brings before this court for review the ruling on said motion to quash, as the only matter for our consideration.

Plaintiff in error contends that the service complained of is authorized by Sections 5049 and 5045 of the statutes. Section 5049 authorizes personal service out of the state in cases where service by publication may be made. Section 5045 sets forth nine cases in which services may be had by publication, and counsel claims that this case comes under the fifth paragraph of said section, which reads as follows:

"In actions which relate to, or the subject of which is real or personal property in this state, when a defendant has or claims a lien thereon or an actual or contingent interest therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is a non-resident of the state, or a foreign corporation, or his place of residence can not be ascertained."

It will be noticed that such service may be had only "in all actions which relate to or the subject of which is real or personal property in this state." That means specific real or personal property. No specific real property being in issue, the question arises: does this action relate to, or is the subject of it specific personal property?

We think not. The action was brought under favor of Section 5551, Revised Statutes, which provides:

"Sec. 5551. If the garnishee fail to appear and answer, or if he appear and answer, and his disclosure be not satisfactory to the plaintiff * * * the plaintiff may proceed against him by civil action; and thereupon such proceedings may be had as in other actions, and judgment may be rendered in favor of the plaintiff for the amount of property and credits of every kind of the defendant in possession of the garnishee, and for what may appear to be owing by him to the defendant, and for the costs of the proceedings against the garnishee."

It thus appears that the action is one for damages in which judgment may be rendered against the defendant; it does not

involve the recovery of specific property, but a judgment for the amount of such property and costs. No specific property is mentioned, but a credit on the books of the brewing company is sought to be reached.

The service had in this case was therefore unauthorized, and the objection to it was properly raised by the motion to quash it. *Williams, Adms.*, v. *Walton's Adms.*, 28 O. S., 451-469; *Hinch* v. *d'Utassy*, 1 O. D., 372. Said motion was properly sustained and the judgment is affirmed.

AS TO LEGALITY OF NOTICE OF LOSS.

Circuit Court of Cuyahoga County.

ROYAL INSURANCE COMPANY v. M. SILBERMAN.

Decided, November 18, 1904.

Insurance—Soliciting Agent, Not Agent for all Purposes—Question of Performance of Conditions for Jury—Parol Evidence of Custom Not Admissible to Vary Written Contract.

1. Section 3644, Revised Statutes, making the agent who solicits insurance the agent of the company, does not make him the agent of the company for all purposes, but only those connected with the negotiation of the contract, and notice of loss given to such agent will not constitute notice to the company.
2. Where an insurance policy provides that immediate notice of loss shall be given the company, it is a question for the jury to determine, whether, under all the circumstances in the case, the insured has complied with that requirement in giving notice of a loss.
3. In determining whether or not the insured has complied with the condition of a policy that immediate notice of loss be given the company, evidence of a local custom by which notice of loss is given to the agent soliciting the insurance, is not admissible.

Carpenter, Young & Stocker, for plaintiff in error.
C. W. Stage and *W. G. Guenther*, contra.

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

This is a proceeding in error brought here to reverse a judgment of the court of common pleas of this county. Silberman was the owner of certain chattel property, baled rags, which were stored in a warehouse. Silberman obtained a policy of insurance upon these goods from the Royal Insurance Company. The insurance was brought about by one Max Levi obtaining for Silberman an application for this insurance. Levi represented no insurance company in which the risk would be taken; he applied to another insurance firm, Snider & Crittenden, and they again make the application, or called the attention of the agents, Tremaine, Draper & Company, of the Royal Insurance Company, and the policy was issued, put into the hands of Levi, and by him delivered to Silberman and the premium paid to Levi. The commissions were, undoubtedly, divided between the agents.

On the 19th day of August, 1901, a fire occurred which injured this property, and suit was brought to recover for this injury to the property by fire.

The insurance company set up as a defense that notice of the loss was not given to it as required by the terms of the policy.

The language of the policy in that regard to notice is: "If fire occur the insured shall give immediate notice of any loss thereby, in writing, to this company."

On the 20th day of August, 1901, the day following the fire. Silberman gave oral notice to Levi of the loss. Levi told him to make out a bill showing his loss, and this he did. Levi communicated to the firm of Snider & Crittenden the fact that the loss had occurred.

The testimony in regard to this notice to Levi was admitted by the court under objection of the defendant, and the court having allowed the testimony, charged the jury upon the effect of such evidence. Before giving the language of the court in its charge, attention should first be called to Section 3644 of the Revised Statutes of Ohio, which reads:

"Section 3644. (*When solicitor held to be agent of insurer.*) 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 renewal thereof, anything in the application or policy to the contrary notwithstanding."

The court charged the jury, in effect, that if they found that Levi solicited this insurance, the premium was paid to him, and he delivered the policy to the assured, then he was the agent of the company, upon whom it would be proper to serve notice of the loss under the policy, and that he would have authority to waive the conditions in the policy, which has already been read, that notice in writing must be given to the company in case of loss. There was no error in the admission of this testimony, if there was no error in the charge. It may be that the testimony might be admitted, though the charge was wrong.

Counsel representing the assured has furnished us a brief, and called attention to a considerable number of authorities in oral argument, all of which have been examined. An authority to which attention was not called is Section 419 of *Wood on Insurance,* which reads:

"Where an agent is entrusted with policies signed in blank, and is authorized to issue them upon the application of parties seeking insurance, he is thereby clothed with apparent authority to bind the party in reference to any condition of the contract, whether precedent or subsequent, and may waive notice or proofs of loss, and may bind the company by his admission in respect thereto."

A number of the states have statutes similar to our statute, Section 3644, passed for the purpose of protecting people who obtain insurance through agents from the defenses which were made in many cases that the agent had not authority from the company, and that, therefore, representations made by such agent were not binding upon the company.

In Iowa, the statutes provide, "That he who solicits the insurance shall be the soliciting agent of the company," and under that statute it is held that knowledge of such agent of conditions existing at the time of the issuance of the policy, though they may be such as are negatived by the application, and are such as under the terms of the policy would forfeit the insurance, constitutes knowledge of the company. To that effect is the case of *St. Paul Fire & Marine Insurance Company* v. *Schafer,* 76 Iowa, 82. In that case the policy was different from that which the insurance company intended and from that which any agent

of the company was authorized to issue. The fact was, however, that it was not the regular agent of the insurance company, but one who was only so by force of the statute, to whom the conditions were known. The company brought suit to reform the contract after the fire; the court held that the knowledge of that soliciting agent was the knowledge of the company, and they could not, therefore, maintain their suit to reform the contract.

Other cases in Iowa are to that effect and hold that whatever knowledge the soliciting agent had, that is, he who solicits the insurance, and who by virtue of the statutes is the soliciting agent, is the knowledge of the company.

In Wisconsin the statutes provide: "That he who solicits the insurance is the agent of the company to all intent and purpose," and it is held that such agent may, after the policy is issued, waive the provisions that there shall be no other insurance upon the property, without the consent, in writing, endorsed upon the policy of the company issuing the policy. It was so held in the case of *Schomer* v. *Hekla Fire Insurance Co.*, 50 Wis., 575.

Attention has also been called to the case of *Pollack* v. *German Fire Insurance Company of Pittsburg, Pa.*, 86 N. W., 1017. In this case, however, the direct question of whether the soliciting agent is the agent of the company, beyond being such agent for the purpose of the contract made between the insurance company and the assured by virtue of the policy is not raised. And the strongest authorities in that regard that we find are the authorities cited in *Wood on Insurance*, under Section 419, to which attention has been called.

Elliot on Insurance, Section 165, which was not cited to us in the argument, but which seems to us to be directly in point, reads as follows:

"Section 165. (*Notice of Loss to Local Agent.*) The local agent of a fire insurance company had actual authority to accept applications for insurance, fix the premium or rate of insurance, and fill up, countersign and issue policies thereon, which he received from the company, already signed by its president and secretary. This was the extent of the agent's actual authority, and there was no evidence tending to show that his apparent authority was other or greater than his actual authority. The

policy required written notice of loss to be given to the company. It was held that the agent had no authority to receive or waive notice of loss and, hence, notice to him was not notice to the company."

It will be noticed that the agent here spoken of was the local agent, but he had authority to accept applications for insurance, to fix the premium or rate of insurance, to fill up and countersign and issue policies therein which he received from the company already signed by the president and secretary.

In another section of *Elliot on Insurance* is a discussion of the construction of the statutes.

In Section 157 there is a discussion as to the agency of insurance brokers; and in other sections a discussion as to the difference between general and special agents. And, perhaps, one of the matters to be considered in this case is, as to what is meant by the word "agent" as used in our statutes.

Wood on Insurance adopts the idea that he is the agent of the company for all purposes. But is it necessary to hold that he is an agent for all purposes to accomplish the real purposes for which the statute was enacted? It seems hardly probable that the statute was passed for the purpose of making him an agent beyond the agency one would have who had the actual authority to accept applications, to fix the premiums, to fill up and countersign and issue the policy and receive the premium. One who has authority to do that would be clearly the agent of the company. But in the case referred to here, it was held that that kind of an agent had no authority to receive or waive notice of loss. The authority cited is 63 Minn., 305, and the syllabus reads practically the same as has already been read from Elliot; indeed, I think the language is the same.

Now, I know that it does not appear from the statutes that he who is there designated or declared to be the agent of the company shall be only the local agent; but what has already been said seems to us to show that he ought not to be held by reason of the statutes to be an agent with greater authority than the agent spoken of in this case; and though he is such agent, that his knowledge of conditions and facts at the time of the issuing

of the policy is to be held to be the knowledge of the company, and that he may waive the condition that there shall be no other insurance during the continuance of the policy.

In one of these cases to which attention has been called he may waive other conditions during the continuance of the policy while the policy is in force before the loss, yet to say that he is an agent who can do more than the local agent, seems to be carrying the statute further than most of the cases go.

In the case under consideration, I mean the case in 63 Minn., 305, the question seems to be well considered and is fully disposed of. I read from the opinion, beginning on page 309, but premise that by saying that Seeley & Company were the soliciting agents; they were the agents to whom the application was made, who delivered the policy, and who received the premium. The court says:

"If Seeley & Co. were the proper parties to whom to give this notice—in other words, if it was within the scope of their authority to receive notice of loss—we would not feel any doubt but that if, when they received verbal notice, they made no objection to its form, they would be deemed to have waived the omission to give it in writing. But it is self-evident that if they had no authority to receive such notice, then they could waive nothing in the matter. Upon this state of facts, it was not within the scope of the authority of Seeley & Co. to receive or waive notice of loss, and hence notice to them was not notice to the company. Even if there could be any doubt of the correctness of this proposition as a new question, it has been too long and too well settled in this state to be now considered open. *Bowlin* v. *Hekla F. Ins. Co.*, 36 Minn., 433; 31 N. W., 859; *Shapiro* v. *Western Home Ins. Co.*, 51 Minn., 239; 53 N. W., 463; *Shapiro* v. *St. Paul & M. Ins. Co.*, 61 Minn., 135; 63 N. W., 614. But we think the rule is correct upon both principle and authority. It is in accordance with the general principles of the law of agency. It is elementary that a principal is only liable for acts done by his agent within the scope of the authority, actual or apparent, with which the principal has clothed him; that it rests entirely with the principal to determine the extent of the authority which he will give to his agent; also, that every person dealing with an assumed agent is bound, at his peril, to ascertain the nature and extent of the agent's authority.

"In insurance cases courts frequently inaccurately classify agents as 'local' and 'general.' But the extent of the territory

which is to be the field of his agency is no test of the extent of an agent's authority within that field. His field of operations may include the whole United States, and yet his powers be special and limited. On the other hand, his field of operations may be confined to a single county or city, and yet his authority within that field be unlimited. In the present case there is no question of apparent as distinguished from actual, authority. The question is simply one of actual authority, expressed or implied. Authority to act in the matter of a loss under the policy, after it has occurred, is not expressly given. All the authority expressed relates to the making of the contract of insurance. It is a fundamental principle in the law of agency that a delegation of power, unless its extent be otherwise expressly limited, carries with it, as a necessary incident, the power to do all those things which are reasonably necessary to carry into effect the main power expressly conferred. But it is equally fundamental that the power implied shall not be greater than that fairly and legitimately warranted by the facts; in other words, an implied agency is not to be extended by construction beyond the obvious purpose for which the agency was created. We do not think that mere authority to make a contract of insurance carries with it implied authority to act in the matter of a loss under the policy after it has occurred. If the implied authority extends to accepting notice of the loss, it would logically follow that it also extends to proof of loss, and even to the adjustment of the loss—a length to which no court has ever gone. The rule which we have adopted is also in accordance with the general current of the authorities. *Lohnes* v. *Insurance Co.*, 121 Mass., 439; *Smith* v. *Niagara F. Ins. Co.*, 60 Vt., 682; 15 Atl., 353; *Bush* v. *Westchester F. Ins. Co.*, 63 N. Y., 531.

And then the court in this case goes on to say that if it is to be held that proofs of loss may be made to any agent, he may waive proofs of loss and, legally followed out, he might waive the requirements of notice; he may waive the proofs of loss, and he may waive every other matter and adjust for the company, because it can be said that he is the agent of the company; therefore, whatever he does binds the company; but this court say in the opinion no one has ever claimed it went so far as that. That is, that there must be some limit to his agency. We reach the conclusion that the statute does not make the soliciting agent, or the agent who solicits the application, the agent of the com-

pany, authorized to receive notice of loss. But in this connection evidence was permitted to go to the jury, also, as to a custom existing in this city at the time of the fire and at the time of the issuing of this policy, by which those sustaining loss, gave notice to the agent who delivered the policy; that that notice was sent on through whatever intermediate agents there were to the company. That was admitted under objection. We think it was error to admit it.

We have looked at the case in 111 Federal Reporter, 697, in which evidence as to a custom was held proper to be considered, but the custom there under consideration was a custom among insurance brokers by which, if application was made to an insurance broker or agent who could not issue a policy through the company represented by him, he arranged with the agent of some other company; and it was held that the insurance company was bound to know that custom. We think that is far removed from undertaking to show that a contract expressed in terms could by custom mean something different from what it provides.

The statute has said that an agent can do some things, which we have already stated, that will bind the company, though the acts of the agent are in violation of some of the terms expressed in the contract. Beyond that, we do not think the authorities go.

But, on the 17th day of September, 1901, written notice was given to this company of the loss, and the court submitted to the jury the question of whether that was a sufficient compliance with the requirement that in case of loss immediate notice shall be given to the company. It was twenty-nine days after the loss. It was charged by the plaintiff in error that the court should have said, as a matter of law, that that notice was not a sufficient compliance with the law. In the Minnesota case, from which extracts of the opinion have been read, it was held, as a matter of law, that notice after a period of about sixty days was, under the circumstances of that case, not a sufficient compliance with the requirement. Other cases have fixed certain periods. As a matter of law it has been held that the notice given at a certain time, after a certain number of days, was not a sufficient compliance.

We think here it was proper to leave to the jury whether what was done under all the facts and circumstances of the case, which were proper to be considered, was a sufficient compliance with the requirement to give immediate notice, and but for the fact that we find that the court gave to the jury certain things to take into consideration in determining that question, we should affirm its judgment. But the court in giving to the jury the rulings by which they were to determine whether the notice given on the 17th day of September was a sufficient compliance with the requirement that an immediate notice be given, said:

"And in determining whether or not the notice was given within reasonable time, you will consider all the circumstances in the case; consider the character of the plaintiff; the fact that he is a foreigner by birth; that his mother language is not English; that he neither reads English or writes it, nor speaks it very well; those are all circumstances affecting the obligation to be prompt. And you may also in that connection consider certain testimony which was introduced tending to show that it is the uniform custom in this city to give notice to the agent who has procured the risk; you may consider that as throwing light upon the propriety of his not giving any further notice for twenty-nine days."

We think the court called attention to some things which the jury ought not to have been permitted to consider, and especially this matter of "custom." We do not think that that bore at all upon the question of whether he should have given notice earlier, in writing. It is a matter of contract, not custom. He had contracted to give notice, immediate notice, which means, of course, within a reasonable time under the circumstances; but that time, we think, can not be varied by any custom which is shown here.

We have not been able to fully satisfy ourselves that the court should call attention to the fact that this man was not native born and did not understand our language. Some countenance is given to that in *Elliot on Insurance,* Section 188, in that the ignorance of the party assured is permitted to be considered; and we should not reverse the case on this branch of it, but for the court telling the jury to consider the custom. We think it legitimate for the jury to consider the question of effort made

by the assured to give the notice by notifying Levi, and we think the evidence on that subject was properly admitted. For that reason then we are not satisfied that it is erroneous. We are satisfied that the court's charge as to custom is erroneous.

Another defect set up is that the provision of the policy in lines 86-91, both inclusive, were not complied with. That reads:

"In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two chosen so shall first select a competent and disinterested umpire; the appraisers together shall estimate and appraise the loss then, stating separately sound value and damage, and failing to agree, shall submit their differences to the umpire, who shall make an award in writing. The parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire."

No appraisement was ever had. But we do not think that should defeat a recovery if the assured, under the circumstances of this case, on the 17th of September, did give notice of this loss. No attention was paid to that by the company, so far as appears, until the 26th day of October, when the company wrote him that the first they knew of his loss was when they received proofs of loss made on the 16th day of October. The company was mistaken; they knew on the 17th of September, but no attention was paid to it until the 26th of October, ten days after the proofs were made out. Then correspondence back and forth went on for a few days, before they wrote and answered on the 15th day of November, denying all liability. They did not suffer for want of appraisement. They paid no attention to the notice which the jury found sufficient, for there was a special finding by the jury that the notice was sufficient, and then they did not take the matter up as to whether the loss was great or little.

It is with regret that we reverse this judgment. The defect is a technical one, but it is one under the law the company may make, and for the error indicated, and for no other, the judgment is reversed and the cause remanded to the common pleas court.

DUAL AGENCY MUST BE SPECIALLY PLEADED.

Circuit Court of Cuyahoga County.

GODFREY FUGMAN AND ANNA L. F. FUGMAN v. A. TROSTLER AND O. C. RINGLE & CO.

Decided, November, 1903.

Pleading and Practice—Action Upon Express Contract and Upon Quantum Meruit Not Inconsistent—Burden of Proof—Dual Agency a Matter of Defense—Trial—When Charge to Jury Misleading.

1. An action upon an express contract for real estate commissions and a second cause of action set forth in the same petition, based upon the same transaction and in which recovery upon a *quantum meruit* is sought, are not inconsistent and the court may, in its discretion, overrule a motion to compel plaintiff to elect between them.
2. Dual agency as a defense can not be shown under a general denial, but must be specially pleaded, and when so pleaded the burden of proof is upon the defendant to establish it.
3. A charge to the jury which directs them to use their sense of fairness, fairplay and good conscience, and not be influenced by anything, but a desire to do what is right and fair between the parties, is misleading, when no reference is made to the law and facts in the case.

White, Johnson, McCaslin & Gannon, for plaintiffs in error.
E. H. Bushnell and *J. C. Hutchins*, contra.

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

Error to the court of common pleas.

A. Trostler was plaintiff below and brought his action against Godfrey Fugman, Anna L. F. Fugman and O. C. Ringle & Co. to recover commissions for the sale of real estate. The amended petition contains two causes of action. The first cause of action alleges that the Fugmans were the owners of certain real estate and O. C. Ringle & Co. their agents for its sale. That Trostler represented to them that he could procure a purchaser for them if they would pay him one per cent. commission on the sale, whereupon the following agreement was entered into between the parties:

"CLEVELAND, O., April 1st, 1901.

"It is hereby agreed by and between Godfrey Fugman, O. C. Ringle & Co. and A. Trostler, that in consideration of services rendered as agent in negotiating sale and transfer of the Fugman property at the corner of Wade Park and Dunham avenues to John Schaber, said A. Trostler shall receive as his share of the commission one (1%) of the selling price of said property.

"(Signed) O. C. RINGLE.

"GODFREY FUGMAN."

Plaintiff further alleges that said Godfrey Fugman was authorized to enter into said contract by his wife, Anna L. F. Fugman and signed the same in her behalf as well as his own, and that O. C. Ringle did the same in behalf of O. C. Ringle & Co.

Plaintiff then alleges that he procured said John Schaber to purchase said property for $54,000; that it was conveyed to Schaber for said price; that he had demanded his commission which had not been paid, although the defendants Fugman had paid to Ringle & Co. a portion of said commission due plaintiff under said contract, but not all.

The second cause of action recites substantially the same facts as are set out in the first cause of action, except that it makes no reference to the express contract dated April 1, 1901, and concludes with an averment that the fair and reasonable value of plaintiff's services is not less than $540.

The prayer of the amended petition is for judgment in the last named amount.

The answer of the Fugmans admits the making of the contract with Trostler, dated April 1, 1901, but states that at the time said contract was made they were asking $60,000 for their property; that Schaber refused to buy at that price and the written contract for commissions was thereupon rescinded by all the parties to it. That afterwards, Trostler, acting as agent for Schaber, and not otherwise, offered to buy said property for $54,000 and thus initiated new negotiations which were conducted on the part of Schaber by Trostler, acting as his agent, and a sale was finally made at that price. That the latter negotiations had no reference to the first negotiations in which Trostler was to induce a sale by the Fugmans at $60,000, the

later negotiation being carried on by Trostler as the agent of Schaber exclusively, to induce the Fugmans to sell for $54,000, without any promise, express or implied, from the Fugmans, to pay any commission whatever.

The answer of O. C. Ringle & Co. adopts the answer of the Fugmans and further states that they have received no part of the commission claimed to be due Trostler.

It will be noticed that the two causes of action set out in the amended petition refer to the same transaction, the first pleading an express contract and the second seeking to recover on a *quantum meruit*. At the trial defendants moved that plaintiff be compelled to elect upon which cause of action he would rely. This motion was overruled, and the overruling of said motion is assigned as one of the errors in the trial of the case.

The two causes of action were not inconsistent and it was within the discretion of the court whether the plaintiff should be compelled to elect between them. *Ware* v. *Reese,* 59 Ga., 588; *Warner* v. *Nagel,* 33 Minn., 348; *Manders* v. *Craft,* 3 Colo. App., 236; *Longprey* v. *Yates,* 31 Hun., 432; *Evans* v. *Habfleisch,* 36 N. Y. Supr. Ct., 450; *Packard* v. *Reynolds,* 100 Mass., 153; *Wilson* v. *Smith,* 61 Cal., 209; *Cowan* v. *Abbott,* 92 Cal., 100; *Globe Light & Heat Co.* v. *Doud,* 47 Mo. App., 439.

Again it is claimed that the court erred in ruling on evidence, but the record shows no prejudicial error of that nature.

Very serious criticisms are made by counsel for plaintiff in error of the charge of the court. Counsel for Ringle & Co. criticise the conversational style of the charge, and the recital of testimony by the court, objecting that the court made itself the purveyor of the testimony to the jury, and that the closing part of the charge, while a beautiful homily, is not good law. Admitting the merit of much that has been urged against the charge, we have examined it with reference to the facts proved in the case to see whether the defendants below were in any manner prejudiced by the charge of the court as given.

As to the recital of the evidence to the jury by the court:

We think the court fairly stated what the witnesses on both sides had testified and that in this respect the charge comes

within the rule laid down in the case of *Morgan* v. *State,* 48 O. S., 371, in which it was held that it was not improper for the trial judge to sum up the evidence, if it is fairly done.

Again, the court used the following language:

"He (the plaintiff) says: 'I ought to receive it; I sold this property. This contract says I was to have one per cent. commission upon the selling price of this property; I sold it, *there is no denial of that,* and I am entitled to my five hundred and forty dollars.'"

This, we are inclined to believe, was a colloquial way of referring to the allegations of the petition; if it referred to the evidence it may fairly be said that the record shows no denial that the plaintiff sold the property. The language used was unfortunate, but upon a careful examination of the whole case we do not think it was misleading.

It is urged that the court erred in charging the jury that the burden was upon the defendants to prove that the plaintiff was acting as agent for Schaber as well as for them. The dual agency was properly pleaded in the answers. It has been held that the double agency can not be shown under a general denial. *MacFee* v. *Horan,* 40 Minn., 30; *Reese* v. *Garth,* 36 Mo. App., 641; *Childs* v. *Ptomey,* 17 Mont., 502; *Durvee* v. *Lester,* 75 N. Y., 442.

Such being the law, it follows that the burden was upon the defendants to prove that plaintiff acted also as agent for the purchaser.

That part of the charge which has given us the most difficulty is the concluding words of the court, as follows:

"This is a matter now in which, as in all matters in court, you want to use your judgment, your sense of fairness, fair play and good conscience and not be influenced by anything but a desire to do what is fair between these people."

We had supposed that juries were to be influenced only by the facts as they may find them and the law as the court may give it to them, but counsel for defendant in error has reminded us that if a jury doesn't use its judgment, sense of fairness, fair

play and good conscience, and doesn't show a desire to do what is fair between the parties, its verdict is at once set aside by all courts.

The trouble with the language used in this case is that it is misleading; the whole case is left to the jury to decide between the parties without reference to the law or the facts. They *were mislead* in at least one important respect in this case, the verdict is too large.

While we are satisfied that the plaintiff proved a meritorious claim against the defendants, the verdict does not disclose whether the jury based its verdict upon the express contract of April 1, 1901, set up in plaintiff's first cause of action, or the implied agreement pleaded in his second cause of action. There is evidence therefore to sustain the verdict, but the recovery could not have been under the agreement of April 1, stipulating a straight one per cent. on the selling price.

We are satisfied that by mutual consent of all parties that agreement, when the selling price of the property was reduced, was modified to one-half of the usual broker's commissions, testified in the case to be two per cent. on the first $10,000 and one per cent. on the balance.

The verdict therefore should not have exceeded the sum of $320 with interest from June 7, 1901, amounting in all to $350.

If defendant in error, Trostler, will remit all of his judgment in excess of that amount, the judgment will be affirmed.

SPIRIT MEDIUMS AND FORTUNE TELLING.

Circuit Court of Cuyahoga County.

LENA WOLF v. STATE OF OHIO.

Decided, February 8, 1904.

Criminal Law—Pretending to be Spirit Medium Not a Violation of Law Against Fortune Telling.

A representation that the accused is a spirit medium, made to one person only, does not constitute a violation of Section 7017-4, Revised Statutes, making it a misdemeanor for one to represent himself to be an astrologer, a fortune teller, a clairvoyant or a palmister.

Hart, Canfield & Croke, for plaintiff in error.
City Solicitor, contra.

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

Error to the court of common pleas.

This is a proceeding in error to reverse the judgment of the court of common pleas and the police court of the city of Cleveland. The judgment in the police court was a judgment of conviction, and that was affirmed by the common pleas court.

The prosecution of Lena Wolf before the police court was undertaken under Section 7017-4, Revised Statutes, and that section, so far as applicable here, reads:

"Whoever shall represent himself to be an astrologer, a fortune teller, a clairvoyant or a palmister, shall be guilty of a misdemeanor," etc.

The case has some curious features about it. It involves, among other things, the question of what is meant by "represent" and what is meant by a "fortune-teller."

The information reads that—

"One Lena Wolf, late of said city of Cleveland, on the 3d day of December in the year aforesaid" (and there seems to be no aforesaid year mentioned), "in said city and county did unlawfully represent herself to be a fortune-teller to one James Dolan." It will be observed that, so far as this information charges, she made no representation to any one but to one per-

son, James Dolan, that she was a fortune-teller, and this is the way she made the representation: "By then and there pretending to have the power to reveal future events in the life of him, the said James Dolan, in the following manner, and in substance, to-wit: By then and there seating herself upon a chair opposite to a chair occupied by him, the said James Dolan, facing a small wooden table." (So far there is no representation that she is a fortune-teller; so far she could do all that without making any pretense of being a fortune-teller.) "She, the said Lena Wolf, then and there passing the palms of her hands over and across the top of said table, and then and there pretending to place herself in a tranced condition" (up to this point, so far as appears, she made no representation of being a fortune-teller); "and while pretending to be in said tranced condition to clasp the right hand of said James Dolan, and then and there saying to said Dolan, in substance, the following: 'You are going to change your business before the first of the year and next spring.' Now to that extent there seems to be a fore-telling of a future event; but if it required any kind of mystic help to say to one he is likely to change his business, it seems a little strange. Indeed I suppose it would not be regarded as fortune-telling for any one to say 'I do not think you will continue in the business in which you now are.' She then said, 'You must not be afraid to go into this, Big Chief. You will make lots of money.' There is the fore-telling of something. Suppose she had said, 'You will lose money.' I suppose most of us would be safe in telling our acquaintances: 'You are likely to lose money, or are making money,' without really being charged with representing ourselves to be fortune-tellers. 'You will have a partner; you are afraid of him, but he is all right. I see a gold field; lots of gold. You have an interest in this gold field.' So far there is no fore-telling of future events in this regard. 'You are going there but Big Squaw does not want you to. I am a little rosebud in the spirit land that is talking. You are the Big Chief.' Contrary to the form of the statute in such cases made and provided and against the peace and dignity of the state of Ohio."

Now, if there is any charge of crime in that information we are unable to see it. We think that a demurrer to that information, or a motion to quash should have been sustained. It is too ridiculous a thing to found a charge of crime upon. The statute itself is bad enough to make it an offense to represent one's self to be a fortune-teller, a palmister, a clairvoyant or an astrologer,

but clearly it was not the understanding of the makers of that statute that because a person says to another person "I can read your palm, or I am a spirit medium and have communication," to charge him with being a fortune-teller.

The statute provides that one may be licensed. It seems clear that the term "fortune-telling" does not include all sorts of claims to mysterious power from the fact that it is allowed by the words "clairvoyant," "palmister" and I think "astrologer" and this woman, the bill shows, had a card representing herself to be a spirit medium. It is easy to understand that good men and women should be glad to converse with those who have passed into the spirit land; but how any one would care to talk with an ignorant Indian girl because she is dead and can not use either English or any known Indian dialect, how it should deceive any one, is a very strange thing.

We think we should have to strain the statute very much to say the representing to a single person—not making a public representation, not holding out that she was in the habit of telling fortunes—that she could as a spirit medium read something of one's life, constituted a representation that one is a fortune-teller. A definition of fortune-telling includes making a practice of foretelling of pretending to foretell future events. But the said Dolan, who had time in the performance of his duties as a police officer to call on her, and all she told him, was that she saw gold fields, and she thought he would get richer, and that she was a little rosebud.

A demurrer to this information should have been sustained. But when the facts were heard the court should have found there was no such representation, no holding out to the public, nor any such claiming even to one person that she made a practice of fortune-telling. It certainly was not the intention of the Legislature to include every one who represented himself to be a spirit medium, else that would have been included in words. Spirit communications are held very sacred by some excellent people, but certainly not, I take it, the trash given out here about a rosebud, big chief and big squaw.

Judgment is reversed. The court of common pleas is reversed. and the police court as well. The proceedings will be dismissed.

EMPLOYERS NOT EXCULPATED FROM BLAME BY FURNISHING APPLIANCES IN ORDINARY USE.

Court of Appeals for Hamilton County.

DRESES MACHINE TOOL COMPANY v. JAMES G. HENDERSON, A MINOR, BY LORENZ LEMPER, HIS NEXT FRIEND.

Decided, March 8, 1915.

Negligence—Flying Splinter from Lathe Causes Operator to Loose an Eye—Guards Against Such an Injury Not in General Use, But Employer Held Liable.

The fact that machines of a certain type are used in the trade without guards for the protection of employees operating them, and that although guards are known to the trade their use is infrequent, does not render it improper to submit to the jury the question of whether in the case under consideration the defendant employer was guilty of negligence in not providing a guard; and where the jury has found that negligence existed, and has fixed reasonable damages which should be paid to the injured employee on account of such negligence, a reviewing court will not disturb the judgment based thereon.

Robertson & Buchwalter and *Theo. C. Jung,* for plaintiff in error.

Littleford, James, Ballard & Frost, contra.

GORMAN, J.

The action below was one to recover damages by the defendant in error, a minor by his next friend, for personal injuries claimed to have been received while working upon a turning lathe in the machine tool shop of the plaintiff in error. It was alleged in the petition, and the evidence tended to show, that the defendant in error James G. Henderson, while at work for the plaintiff in error on or about the 24th of November, 1912, in its machine tool shop on McMicken avenue in this city, engaged in operating a certain lathe to turn mitre gears from steel castings, was injured by a splinter or sliver from the steel casting thrown

from the lathe into his left eye, thereby causing the loss of sight in said eye.

It was claimed in the petition that the negligence of the defendant consisted in failing to place a guard over the tool which did the cutting of the steel casting which was being turned in the lathe to make the mitre gear. There was a great deal of testimony offered pro and con upon the practicability of the use of a guard.

The evidence of Henderson tended to show that guards were used at the LeBlond Machine Tool shop in the city of Cincinnati, where the same sort of lathes were in use as the one at which he was at work when injured. There was also other evidence tending to show that guards made of sheet iron or galvanized iron and cardboard were used in many shops in the city of Cincinnati, which guards were usually made by the employees operating the lathes. It was further shown in evidence that the superintendent of the Dreses Machine Tool Company knew of the practice of using guards, and that he had known them to be used when mitre gears were turned out of brass rather than steel. There was also evidence of others that they had used guards and known of them to be used. But the great weight of the evidence tended to show that guards were not used generally upon lathes of the kind involved in the case at bar.

There was a verdict in favor of plaintiff, Henderson, in the court below for $4,000, and a judgment entered upon that verdict. It is now claimed that there is error in the record of the case which calls for a reversal by this court.

Practically the only grounds upon which plaintiff in error claims a reversal in this court are, that upon the facts shown in the case there was no culpable negligence upon the part of the Dreses Machine Tool Company; that the use of a guard upon the machine in question was impracticable and not in general or customary use, and that it was contrary to the custom of the trade to use a guard. There was evidence tending to show that where these guards were used, made of sheet iron, galvanized iron or pasteboard, the dangers resulting from the flying of particles of steel were greatly minimized if not entirely re-

moved. There was also evidence tending to show that guards are manufactured and sold made of wire gauze close meshed, and glass, which when placed in position before the cutting tool deflect the particles of steel thrown off so they can not come in contact with the eyes of the operator.

The contention of the defendant is that the rule to be observed in a case of this kind is that the master is not bound to furnish the most approved appliances that may be had in his business; that he has performed his duty when he has furnished appliances of ordinary character and reasonable safety in general use; and that the evidence in this case tends to show that it was not customary to employ guards upon these lathes. The evidence is conflicting upon the practicability of the use of guards, and the great preponderance of the evidence tends to show that the guards were not in general use.

But we do not think that this is determinative of the question of negligence in this case. We do not think that the right of plaintiff to recover depends upon the fact that the guards were usually, generally or customarily used upon the kind of lathes at which he was put to work.

In 1911 the Legislature amended Section 1027, General Code, so as to read as follows:

"The owners and operators of shops and factories shall make suitable provisions to prevent injury to persons who use or come in contact with machinery therein or any part thereof as follows:

* * * * * * * * * * * * *

"7. They shall guard all saws, wood-cutting, wood-shaping and all other dangerous machinery."

Previous to the amendment of this section in 1911, this subdivision of the section required only the guarding of saws, wood-cutting and wood-shaping machinery, and by the addition of the words "all other dangerous machinery," the court is of the opinion that the Legislature intended to extend the provisions of guarding to all dangerous machinery.

Now we think the evidence in this case tends to show that this was a machine attended with more or less danger in its operation. It was of frequent occurrence for those who operated

machines of the character of the one involved in the case at bar to have splinters of steel or metal fly into their eyes, and to the extent that there was danger to the eyes of the operative we believe that the machine was dangerous and that by the terms of the statute it was incumbent upon the plaintiff in error, as it was upon every other owner of such shops, to guard the lathes so as to minimize the danger that would result to the operatives.

It is laid down in Section 916, Labatt's Master & Servant, Vol. 3, 2d Ed.:

"That the entire failure to furnish any instrumentalities or materials in a case where they are necessary for the servant's protection is not less a breach of the duty to furnish proper instrumentalities or materials than is the furnishing of instrumentalities or materials which fall below the legal standard of safety. A servant who bases his right of action on the total lack of requisite appliances must show that, under the circumstances, they were reasonably necessary for his protection from a danger which the master knew or ought to have known to be incident to the work, and that they were either not obtainable at all or were not readily accessible."

Now the plaintiff's right to recover in this case is based upon the absence of a guard, and that it was reasonably necessary to have such a guard in order to protect him. There is a conflict of authority as to whether or not the master has performed his duty when he has furnished a machine such as is ordinarily or customarily in use, or whether or not he must go further and furnish appliances and machinery which are readily obtainable and known to science or the trade which will tend to protect the operator and employees.

Section 940 of Labatt's Master & Servant, Vol. 3, states the rule as follows:

"Where the only inference that can be reasonably drawn from the evidence is that the master conformed to the general usage of the average member of his trade or profession with respect to the adoption or retention of the instrumentality in question, he may be declared as a matter of law to have been in the exercise of due care. The language in which this doctrine is formulated

or referred to would, if taken literally, often convey the idea that the generality of the usage and the similarity of the business or establishment of which the usage is adduced as a standard of comparison are the only points to be considered, and that the manner in which that business or establishment is conducted, and the character of the persons engaged in it are not material factors in the question to be determined."

But, he says:

"It is clear that under the general principles of the law of negligence, these latter elements must be material, and that the test really propounded is not usage of any employers, however imprudent and unskilful, or of any concerns, however ill regulated, but the usage prevailing among prudent and skilful employers and in well regulated concerns. That this is the actual position taken is shown by the following extract from the opinion in a leading decision by a court which has been one of the most uncompromising exponents of the doctrine now under discussion."

The author then quotes the language of the court in the section above cited. The author does not agree with those courts which hold that the master has performed his duty when he furnishes machinery and appliances such as are in ordinary and general use. In Section 947 of Volume 3, he says:

"*The doctrine that conformity to common usage is not conclusive in the master's favor.* The principle upon which a large number of decisions is based, some of which emanate from the courts whose rulings are reviewed in the preceding sections, is that embodied in the remark of Wiles, J., with reference to the plea put forward by the defendant in a well-known case, that, 'no usage could establish that what is in fact is unnecessarily dangerous was in law reasonably safe as against persons towards whom there was a duty to be reasonably careful. That is to say,' the position is taken that custom furnishes no excuse, if the custom itself is negligence. In this point of view the master's conformity to general usage is regarded merely as evidence tending more or less strongly to exculpate him from the charge of negligence. After it has been shown that the defendant had complied with the usage of other employers in the same line of business the question whether the particular instrumentality or

method was reasonably safe still remains open, and unless it is decided in the master's favor, he must indemnify the servant."

The author states that it is proper for the master, in an action by the servant to recover damages, to introduce evidence tending to show that he conformed to the general custom and that he furnished an ordinarily safe machine or appliance, but nevertheless it is still a question to go to the jury whether or not the master has performed his full duty even when he furnishes machinery and appliances in general and ordinary use in the business. He cites a great number of authorities in various states to show that the latter view is very strongly maintained in many jurisdictions. On page 2550 of the 3d volume, under Section 947, he says:

"In spite of the imposing array of authorities which have adopted the doctrine explained in paragraph 940 *et seq.*, the present writer has no hesitation in saying that in his opinion the cases just cited embody the correct principle. The essential meaning of the theory that the case ceases to be one for the jury when conformity to common usage is once established, is that employers ought to receive the benefit of a presumption which may be thus expressed: The persons who pursue a particular line of business at any given time are reasonably prudent, and the majority of a reasonably prudent body of persons will not use unsuitable instrumentalities or methods when suitable ones are available. As a basis for the doctrine founded upon it, however, this presumption seems to be extremely unsatisfactory."

He then proceeds to show at length that this presumption does violence to reasonable logic and experience, and concludes the section (947) with these words:

"Under such circumstances, it is submitted, there is no sufficient basis upon which to found an inference of law that an employer fulfills his duty when he adopts instrumentalities and methods which are in common use."

In *Bailey on Personal Injuries, Master & Servant*, Vol. 1, pages 381, 382, 383, it is stated that while it is proper for a master to be permitted to introduce evidence to show that he conformed to

the general and ordinary custom in the furnishing of machinery and appliances, nevertheless it is still a question for the jury to determine whether or not he was negligent notwithstanding such appliances. On page 382, he cites this case:

"An employer, however, was held guilty of negligence in not furnishing a guard to prevent small pieces of boards and knots from being thrown back. The machine was of standard type and as sent into the market such machines were not furnished with a guard, yet upon the evidence of a former employee that he caused a board to be bolted to the frame work of the machine to act as a guard, which remained for about two seasons and a half, when it was shattered by recoiling pieces of timber and was not replaced, it was held that the employer was liable in not providing some other device. It was said that an employer could not be excused for operating a machine, although of standard type, when a reasonable amount of experience and observation has developed the fact that it is inherently dangerous and could be made reasonably safe by attaching safeguard appliances. See *Johnson* v. *Atwood Lumber Co.*, 101 Minn., 325; 112 N. W., 262.

In the case of *Roy Lumber Co.* v. *Donnelly*, 31 Ky. L. Rep., 601, the court of appeals on page 603 employs this language: —"The third contention of the appellant is error in the instructions."—

"The court in effect instructed the jury that they should not find for appellee, if the saw was guarded and protected with safe appliances, as was customary and usually employed with such saws to make them safe and prevent them from swinging out into the room.

"This is not the true test, and was prejudicial to appellee. It was proper for appellant to introduce testimony showing that this saw was placed, guarded and protected as such saws used for a like purpose are usually and customarily guarded and protected. If the saw in question was so guarded and protected, it created a strong but not conclusive presumption that it was reasonably safe. If the custom and manner of hanging and guarding these saws is dangerous, it should not prevail, if they could be swung and protected in a reasonably safe way."

The court is of the opinion that, aside from the question of whether or not this case is covered by the statute, Section 1027,

General Code, it was proper to submit to the jury the question of whether or not the master, plaintiff in error, was relieved from liability by furnishing a lathe without a guard and that that was the custom and general method of furnishing lathes to employees.

We think the great weight of authority supports the rule laid down in the case of *Mather* v. *Rillston*, 156 U. S., 391. The opinion was announced by Justice Field, in which he says:

"All occupations producing articles or works of necessity, utility or convenience may undoubtedly be carried on, and competent persons familiar with the business and having sufficient skill therein may properly be employed upon them, but in such cases where the occupation is attended with danger to life, body or limb it is incumbent on the promoters thereof and the employers of others thereon to take all reasonable and needed precautions to secure safety to the persons engaged in their prosecution, and for any negligence in this respect, from which injury follows to the persons engaged, the promoters or the employers may be held responsible and mulcted to the extent of the injury inflicted. * * * Occupations, however important, which can not be conducted without necessary danger to life, body or limb should not be prosecuted at all without all reasonable precautions against such dangers afforded by science. The necessary danger attending them should operate as a prohibition to their pursuit without such safeguards. Indeed, we think it may be laid down as a legal principle that in all occupations which are attended with great and unusual danger there must be used all appliances readily attainable known to science for the prevention of accidents, and that the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence."

In the case at bar we think the evidence shows that there was known to science and to those employers using lathes, such as the one in question, guards which would prevent or minimize the danger attending the flying of steel splinters from the metal which would have a tendency to injure the eyes of the operator. We think the evidence in this case fully discloses that if a guard such as the operators had used themselves, of sheet iron or pasteboard had been used, the probabilities are that the plaintiff below would not have suffered injury to his eyes. It is further shown that other kinds of guards were known to science

and attainable, and it was proper to submit the question to the jury whether or not the master had done his full duty when he furnished a machine without a guard, even though that was the usual and customary method of furnishing machines. It was in the last analysis for the jury to say whether or not a reasonably prudent employer, in view of the experience which he had, or should have had, would not have taken further precautions to protect his employees.

This being practically the only question involved in this case, except the question of the excessive amount of the verdict—which we do not believe was excessive—we are of the opinion that the judgment of the court below was in accordance with substantial justice, and that the judgment should be affirmed.

JONES (E. H.), P. J., and JONES (Oliver B.), J., concur.

ENFORCEMENT OF CONTRACT BETWEEN MUNICIPALITY AND GAS COMPANY.

Court of Appeals for Perry County.

VILLAGE OF NEW LEXINGTON v. THE OHIO FUEL SUPPLY CO.

Decided, July 31, 1913.

Minimum Charge per Month for Gas—Where Consumption Falls Below a Fixed Amount—Can Not be Demanded by the Company When Provision Therefore is Not Found in its Contract with the Municipality—Jurisdiction to Enforce Such a Contract.

1. An ordinance fixing the rates which may be charged consumers for gas when accepted by the company constitutes a binding contract which may be enforced by the municipality.
2. While a controversy between a municipality and a gas company as to rate to be paid by consumers for gas would fall within the jurisdiction of the Public Service Commission, the courts have jurisdiction to settle differences of that character whenever a contract has been entered into and so long as the contract exists.

3. When a petition filed by a municipality alleges the making of such a contract, its breach and a continuance of the breach, with a prayer for injunction and general relief, it states a cause of action.

T. B. Williams and *John Ferguson*, for plaintiff.
L. B. Denning, contra.

POWELL, J.

The petition in this case was filed by the village of New Lexington, against the Ohio Fuel Supply Company, alleging for its cause of action that on the 27th day of January, 1897, an ordinance was passed by its council granting to the New Lexington Natural Gas Company, its successors and assigns, the right to lay and maintain in the streets and alleys of said village, mains and pipe fixtures for conveying natural gas, and supplying the same to the said village and its inhabitants for use as fuel and for lighting purposes; that pursuant to such grant said company laid its mains and pipes in said village, and exercised the rights and privileges granted by said ordinance; that thereafter and prior to September 8, 1903, said right or franchise was assigned to the defendant who has been, and is now exercising all the rights and privileges contained in said ordinance or granted thereby; that on said 8th day of September, 1903, plaintiff by its council passed another ordinance fixing the price at which natural gas could be sold therein at twenty-five cents per 1,000 cubic feet of gas, meter measurement, and provided that the company so selling the same should make a reduction of 20 per cent. discount from said rate to any one paying for the same on or before the 10th day of the succeeding month, and provided that no greater rate should be charged therefor during a term of ten years, together with other terms and conditions, fixing the rights of the company in the use of its franchise, and in supplying gas to the citizens of said village; that the defendant in writing accepted the said ordinance and all its terms and provisions, and agreed to be governed thereby in its charges for gas furnished to said village and its inhabitants, and

was governed thereby until November, 1910; that ever since November, 1910, it has violated said ordinance and its said agreement to be bound thereby by imposing on all the citizens of said village not consuming fifty cents worth of gas per month a minimum charge of fifty cents for each and every month whether the meter shows that amount of gas consumed during such month or not, and which charge is alleged to be illegal and in violation of said ordinance; that defendant threatens to turn off its gas to such of the citizens of said village as refuse to pay said minimum charge unless their meter shows that amount of gas consumed, and have turned off the gas from such of its consumers as have not paid such charge. Injunction is prayed for.

To this petition a demurrer is filed alleging three grounds of demurrer—

1. Want of legal capacity to sue.
2. Want of jurisdiction of the subject-matter.
3. The petition does not state facts sufficient to constitute a cause of action.

This demurrer should be overruled, because—

1. The ordinance of September 8, 1903, and its acceptance by the defendant constitute a contract, and it is such a contract as the village is specially authorized to make for the benefit of its inhabitants. Section 3982, General Code.

If a municipality is authorized to make a contract, it has authority to enforce it, by implication, if not by express provisions.

2. It is contended that questions, such as are presented by this petition, are questions that ought to be settled by the public service commission, and not by the courts, but this court takes the view that this is a proceeding to enforce a contract already entered into, plain and unambiguous in its terms, and that the controversy is properly cognizable by the courts, and not by the public service commission. It invokes judicial authority, and properly belongs to the courts. When the contract terminates or the time comes when there is no contract existing between the parties, then it could properly be submitted to the commission, but so long as a contract exists, its enforcement is for the courts.

3. The petition alleges a contract, a breach of it, and a threatened continuation of such breach, with a prayer for injunction and general relief.

We think it states a cause of action.

These questions are not made in a recent case, decided by our Supreme Court, involving the same question as is sought to be determined in this action, viz: the right of a public service corporation to make a minimum or "readiness-to-serve" charge when operating under an ordinance or contract, that makes no provisions for such charge. That action was commenced,

1. By the city of Springfield, Ohio.
2. Against the Springfield Light, Heat & Power Co.
3. To enjoin the imposition of a minimum or "readiness-to-serve" charge in violation of an ordinance of said city, under which it operated and for general relief.

The judgment of the court of common pleas in favor of the city was sustained by the Supreme Court without report. The case is numbered 13153 on the docket of that court.

The same questions were made by an amended answer in that case as are made in the amended answer in this case, the first defense consisting of certain admissions of fact, and a general denial of everything not admitted or controverted, and being in legal effect a denial of the legal conclusions arising from the averments of the petition. For its second defense defendant alleges that there is an initial cost of fifty cents per month for each consumer; consisting of taxes, interest on money invested, cost of ington, entirely aside from the cost of gas used by such consumer consisting of taxes, interest on money invested, cost of operation and inspection, and other items of expense, so that a customer who uses less than fifty cents a month worth of gas is unprofitable and must be carried at a loss. In addition to such initial and overhead expenses, the defendant company has a rule that each customer must agree to take a minimum of fifty cents worth of gas per month, or pay that sum when the meter shows less than that amount of gas consumed. It alleges that such rule is reasonable and just, and such charge is not fixed or prohibited by statute or ordinance.

To this defense a demurrer is filed, and it is to the same defense, that the Court of Appeals of Clark County sustained a demurrer in the Springfield case cited above, excepting only that the subject-matter of that action was the furnishing of electricity to the city and its inhabitants, while this relates to the furnishing of natural gas. Said judgment sustaining said demurrer was affirmed by the Supreme Court.

The matters alleged in the said second defense are not defensive against a contract entered into of which they are not a part, and furnish no reason why the contract should not be carried out as made. There is nothing alleged that was not already in existence, when the contract was entered into, and it is presumed they were all taken into account at that time.

The demurrer to said second defense will be sustained, and a decree may be entered in favor of the plaintiff, making the injunction heretofore allowed, perpetual, and exceptions may be noted.

VOORHEES, J., and SHIELDS, J., concur.

TENANT INJURED BY FALLING INTO CELLAR.

Court of Appeals for Hamilton County.

LOUISE STINSON v. FERD METZGER.

Decided, March 29, 1915.

Landlord and Tenant—Damages for Personal Injuries Suffered by a Tenant by Reason of a Defect in a Common Passageway—Not Recoverable from the Landlord, When Tenant Knew of the Condition.

A tenant will not be permitted to recover from her landlord for personal injuries caused by a fall through an open cellar door in a common passageway, where no claim is made that the landlord or his servants were in any way responsible for the door being left open and there had been no change in the passageway or the cellar door during the tenancy.

Robert S. Alcorn and *Thorndyke & Capelle*, for plaintiff in error.

Gideon C. Wilson, contra.

RICHARDS, J.

Error to the superior court.

The action was commenced in the Superior Court of Cincinnati by Louise Stinson to recover damages for personal injuries suffered by her in falling into a cellar, the cellar door having been left open. She was a tenant of the defendant, occupying the lower apartment in a three-story flat, certain other tenants using the second and third stories. Each of the tenants used the cellar or basement and obtained access to the same by a cellar way located in the rear of the flat. The premises had a common passageway leading from the street to the rear of the flat and thence turning at right angles around the building. The passageway at the rear where the cellar was located was unlighted and had remained in that condition ever since the plaint-

iff had occupied the premises. The cellar door when closed was even with the surface of the concrete passageway and the tenants frequently walked over the cellar door in order to get to the side of the door which enabled them to lift the door and enter the cellar way. On returning to her apartment after dark on the evening of the injury, the plaintiff walked along this unlighted passageway and the cellar door having been left open by some person, other than the defendant or his agents or servants, she walked into the same and was severely injured. The trial judge directed a verdict for the defendant and to this action error is prosecuted.

It appears from the bill of exceptions that no defect existed in the construction of the cellar door, and that it remained in the same condition all the time that the plaintiff occupied the premises as a tenant. She at one time complained to the landlord that no railing was placed around the entrance to the cellar, but it does not appear that he promised to erect any railing or barrier, and the conditions continued the same. Certainly it can not be said that a cellar door in a passageway is in and of itself an inherent defect. It is common knowledge that with the increased congestion incident to city life, such method of construction is very frequently resorted to. The landlord did not reside on the premises and no claim is made that either he or his servants were responsible for the door being left open on the occasion of the injury to plaintiff.

The principle applicable is stated in *Stackhouse* v. *Close et al*, 83 O. S., 339, in substance, that a lessor, out of possession and control, would not be liable to a tenant for personal injuries in the absence of deceit or of any agreement or liability created by statute. The circumstances disclosed in the record do not show any ground of liability against the landlord. The plaintiff knew when she rented the premises the exact condition of the passageway and the cellar door. There was no concealed defect and no misrepresentation. She got exactly what she bargained for when she rented the premises. It can not be successfully maintained that the condition tended to show the existence of a nuisance.

Counsel for plaintiff cite and rely on the case of *Hohly et al* v. *Sheely*, 21 C. C., 484, a decision of the circuit court in Lucas county; but an examination of that case discloses that evidence was submitted to the jury tending to show the active negligence of the owner of the premises and her agents, in the opening and shutting of the door and in the management of the same. The case, therefore, is not in point on the question now under consideration.

We think the rule of law applicable to the case at bar is well stated in *Quinn* v. *Perham*, 151 Mass., 162, where it is held that a tenant will not be permitted to recover against the landlord for personal injuries caused by a defect in a common passageway, if the tenant knew of the passageway when the tenancy began and if no substantial change had occurred during the continuance of the tenancy. This case is cited and explained in *Andrews* v. *Williamson*, 193 Mass., 82, 94.

The plaintiff's own testimony tends to show negligence on her part in walking along the passageway in the dark without ascertaining whether the cellar door was closed, and this conduct brings the case within the holding of the circuit court in *Dawson* v. *Seiberling*, 18 C.C.(N.S.), 267, for such evidence indicates that her own negligence was largely responsible for the unfortunate injury with which she met.

Finding no error, the judgment of the superior court will be affirmed.

CHITTENDEN, J., and KINKADE, J., concur.

PROSECUTION FOR LOANING MONEY ON CHATTELS WITHOUT A LICENSE.

Court of Appeals for Montgomery County.

CHARLES HOUSER v. STATE OF OHIO.

Decided, January, 1916.

Criminal Law—Loaning Money on Chattels—Means Loaning on the Faith or Pledge of Chattels—Money Broker's License Law—Can Not be Given Greater Deterrent Effect by Broadening its Construction.

A conviction can not be had as for the violation of a statute which prohibits the business of "making loans upon chattels or personal property of any kind" without first obtaining a license as provided in the act, where the evidence of the loan consists only of a note of hand, unaccompanied by any enforceable security "upon chattels or personal property;" a paper writing, signed by the borrower, but not sworn to nor recorded nor filed for record, the only material parts of which are certain recitations to the effect that the signer is the owner of certain undescribed chattels and that these are unencumbered, the writing being delivered to the lender, is not the security contemplated by the act.

GRANT, J.

Error to the court of common pleas.

Charles Houser, plaintiff here, was tried in the municipal court of the city of Dayton, as for a violation of certain provisions of Section 6346 of the General Code of Ohio.

The affidavit upon which his trial was there had, and which was the first step towards jurisdiction taken by the trial court, was in the following words and figures, as to its material and charging parts:

"Did unlawfully then and there carry on the business of making loans upon personal property, by then and there loaning the sum of twenty and no/100 ($20.00) dollars to one Mary Brown upon certain personal property, without first having then and there obtained a license so to do from the secretary of the state of Ohio, the said Charles Houser, not then and there being engaged in business as a bank or building and loan asso-

ciation, contrary to the statute in such cases made and provided, and against the peace and dignity of the state of Ohio."

The trial resulted in the conviction of the accused and he was sentenced to pay a fine of $—— and the costs. A new trial having been denied and an exception saved, error proceedings to reverse this judgment of conviction were prosecuted in the court of common pleas, where the judgment was, upon consideration, affirmed. We are now asked to reverse both of these judgments.

Various formal assignments of error are made, but the one relied on as basic in the case is that the conviction had in the court of first instance can not be supported by the evidence and so is contrary to law.

The two sub-sections of the statute upon which the accused was prosecuted and convicted, and which alone are material here, read, respectively, as follows:

Section 6346-1. "No person, firm or corporation except banks and building and loan associations shall engage or continue in the business of making loans upon chattels or personal property of any kind whatsoever, or of purchasing or making loans upon salaries or wage earnings, without first having obtained a license so to do from the secretary of state."

Section 6346-6. "Any person, firm or corporation, or any agent, officer, or employee thereof, violating any provision of this act, or that carries on the business of making loans upon chattels or personal property of any kind whatsoever, or of purchasing or making loans upon salaries or wage earnings without first obtaining a license as provided in this act shall, for the first offense, be fined not less than fifty dollars ($50.) nor more than two hundred dollars ($200), and for a second offense not less than two hundred dollars ($200) nor more than five hundred ($500) dollars, and it shall thereupon become the duty of the secretary of state upon such second conviction to revoke any license heretofore issued to such person, firm or corporation."

The inhibition of these provisions, so far as it touches the accused in this case, is against loaning money "upon chattels or personal property," without first having obtained a license to do so from the secretary of state.

We assume as fully proved that the accused had no such license.

For the rest, the single kernel of grain in the case, when sifted clear of a good deal of chaff—all the papers before us being considered—is to be found in the following and only material facts: A woman applied to the accused, or the concern for which he must be deemed responsible, for a loan of money. Finally, and after some circumlocution, she got it. It was evidenced by one, or perhaps two, promissory notes, in the ordinary cognovit form, and in no other way.

These notes were not secured in any way beyond the signature of the maker. At the time, the woman was asked to sign and did sign a paper, which was represented to her by the lender as being a mortgage upon her furniture. It was not a chattel mortgage, nor anything resembling a mortgage. It consisted of several statements or recitations, the most material of which were of the tenor and effect that certain undescribed property belonged to the applicant for the loan and was in no way incumbered. The paper was not sworn to, nor was it ever filed or recorded in any public office, so far as appears.

The ulterior purpose of the accused and his coadjutors in the enterprise, probably was to get the woman to believe she was giving a mortgage on her furniture, in the expectation that she would be sufficiently frightened by that thought not to part with her belongings till the debt was paid, so that the lender would in effect have all the security that a mortgage would give him, without any of the disadvantages of taking a mortgage, including the taking out of a license under the statute. Still, it was not a mortgage, nor anything like a mortgage.

These being the facts alone essential, in our estimation, to a determination of the question before us, we are now to inquire what that question is.

To our apprehension and in this case, it is whether the loan made by the accused, under the circumstances mentioned, was a loan "*upon* chattels or personal property of any kind," as those words are used in the statute under consideration. For loans thus made are the loans denounced by the statute when

made by an unlicensed person, and for making which punishment was visited upon the accused by the judgment complained of here.

"Loaning *upon* chattels," we take it, means loaning on the faith of chattels, on the security of chattels, on the pledge of chattels—the faith, the security, the pledge, in any case being made good and effectual by some legally recognized and binding form of sanction. Such we apprehend is the usual, the ordinary and plain significance of the words used by the lawmakers in framing the enactment. In the absence of any reason apparent for imputing to them a technical or other different meaning, no reason is perceived for a departure from this customary use of them now. To force another meaning into them would, in our judgment, amount to an assault on the English language, or would at least be taking improper liberties with it, if not doing outright violence to it.

Indeed, we do not know that another meaning is seriously contended for here. The contention, rather, seems to be, if it is understood, that what is called a liberal construction of a penal statute shall be allowed in order that some general or wholesale mischief to the community at large shall be—not exactly punished in the person of the particular offender, but to secure immunity against future like offenses—such seems to be the argument, in effect, although of course the example of punishment in the case in hand must be visited on the accused at the bar, who, lest others may offend, is to feel on his own back the legal rod in pickle provided by the statute in question.

Shifting momentarily from legal to medical nomenclature, the claim appears to be that this penal law is to be used as a prophylactic, or, in common parlance, as a deterrent, against future misdeeds of other evil-minded persons, the prisoner to suffer vicariously in that respect as well as properly for his own misdoings. Certainly, if his own crime is made out beyond a reasonable doubt, then he should suffer for that single reason, and it would not be difficult to separate his proper and real offending from that which is sought to be reached by way of example to others.

But that does not appear to be the drift of the argument made to us, if we rightly catch it. We are asked to affirm a conviction arising not so much from a plain infraction of the known letter of a penal statute, as from what the "Immortal J. N." used to call "the attitude of the situation." That is, a necessity springs from the notorious bad conduct of so-called "loan sharks" and their oppression of the needy, which can be met only by the condign punishment of some one, in order that the practices may be guarded against and stopped. And of course the "horrible example" must be at hand as equally necessary, in order that this remedy may be advanced. It looks like a variety of that "military necessity" under which Dayton, Ohio, groaned a half century and more ago, and of which its people hoped themselves well rid, and all the country said Amen. Even Mr. Lincoln was ashamed of it. A citizen, by a process unknown to the law's letter, to sustain which, as here, "the spirit of the law" was invoked, was seized and sent into the military lines of an armed enemy. General Burnside, in his return to the writ of habeas corpus, said: "An emergency is upon us which requires the operations of some power that moves more quickly than the civil." And the federal judge who denied the writ, in his opinion, said:

"The occasion which calls for the exercise of this power exists only from the necessity of the case; and where the necessity exists, there is a clear justification of the act. * * * In the judgment of the commanding general the emergency required it; and whether he acted wisely or discreetly, is not properly a subject for judicial review."

This is not far different in tone from the appeal put up before us to look with leniency on a conviction which may be upheld if the "spirit of the law" can only be brought to bear. The doctrine appears to us somewhat vagrant, not to say lawless. We should as soon look to see the court of Star Chamber and its practices resurrected and transplanted to Dayton, as to think the Burnside theory of what law is has been revived and brought back among you.

"In Adam's fall we sin-ned all," said the old catechism. It was all right to punish Adam, but the rest of the line has not gained a foothold in enlightened jurisprudence. We see nothing in the reason of the thing why Charles Houser should not be condemned if he has broken the commandment of the statute. We see no reason why he should be condemned if he has not broken the law, even though an example may be needed to keep others from breaking it. The probably mythical English judge who is said to have said in sentencing a culprit—"We hang you, not for stealing horses, but that horses may not be stolen," has not been thought to have spoken in the voice of a just or humane jurisprudence.

Of course the proposition is not put up to us in this precise form. We are not in so many words asked to wrest a statute from its import of language, not on the side of leniency, but of severity, to the end that an ultimate general public good may result. But the appeal to interpret the statute not so much according to its letter as in its "spirit" of tutelage over the common welfare, to the disadvantage of a prisoner—in substance and effect to resolve the doubt, if there is one, not in his favor, but against him—the purport, we say, of the exhortation can hardly be mistaken. We can not allow the force of it to coerce a judgment on our own part, which would be at variance with that commended by the facts of this case and the law applied to them, stripped of the ulterior consequences which may be supposed to flow from our action here upon the community, *aliunde*.

Having regard to this consideration and following the example of the prudent mariner who has been swept from his course by a gale of wind, we may with propriety, we think, take our bearings according to the chart of the statute, the breach of which is by the judgment complained of imputed to the accused. We have already adverted to what it prohibits, and have shown, as we suppose, that what the accused did violated none of the things forbidden by it. In other words, it is too plain for dispute, as appears by the evidence, that he did not loan Mrs. Brown money upon the faith, or pledge or security of chattels, although he made her think that he was doing so. He is not

charged with obtaining money under false pretenses. What he really is charged with is not having a license. Collecting license fees is not the end or purpose of the statute; that is but the taxing incident of the law, designed to raise the revenue necessary to its administration.

Failure to obtain a license is not the mischief aimed at and to be repressed by the statute. Before going far afield for vagrant authorities to justify stretching the letter of a law that it may be executed in what is vaguely called its "spirit," we may observe one canon of construction by going to the title of the act to find out what its framers were striking at when they put it in words. That title is this: "An act to regulate and license the loaning of money upon chattels or personal property of any kind and of purchasing or making loans upon salaries or wage earnings." It appears to us too clear for controversy that the mere failure to obtain a license, of itself and without more, without the further fact of loaning money on chattel security, is not enough to call down on the head of one who fails to have a license the penal consequences of a broken law. That professional lenders are bad men—some or all of them—is quite beside the question, as we must think. The defendant below was not prosecuted for being an all-around bad citizen, nor can he be punished for that, however culpable in that respect he may be. Bad citizenship is not a crime in this commonwealth. If it were, the formula of the crier would indeed be appropriate: "God save the state of Ohio, and —!"

Upon full consideration in the case lately reviewed by us in the Eighth District—*State of Ohio* v. *French et al,* construing this same statute—we held, affirming the common pleas, that the words of the title declaring the mischief to be remedied by the act and defining its repressive purpose, are to be distributed over all of its subsequent provisions. The supposed offense prosecuted in that case consisted in not giving the borrower a card, as required by sub-section 3 of the act. The difference between the two cases in point of law, is, we think, *nil.*

We adhere to that holding, finding nothing in the considerations brought forward here to shake our confidence in its cor-

rectness. To do otherwise—finding the facts where we do find them—would place us under the reproach of allowing a man to be punished because he did not pay for a license to do a thing he did not do. This would be a legal solecism and a contradiction and confusion of moral terms.

In reaching this conclusion—somewhat laboriously, it is true—we have paid but scant attention to the elaborate discussion of the supposed law of the case, on either side, backed as this is by numerous citations put before us with characteristic industry and zeal. But attention has been paid to them, and, in the view we have taken of the case, a particular discussion of them would not be useful or informing. They are largely addressed to the appeal—already met and disposed of—to construe the controlling statute as a drag-net, where a particular man is asked to be punished under it, or in the words of the contention to apply its spirit if its letter shall not be enough. We have said all that we care to say on this point. To work a conviction the statute must point its finger to this individual accused with that degree of inerrancy which the criminal law requires at the hands of the state, and be able then to say: "Thou art the man!" That requirement has not been met; that burden has not been borne, but the reverse, as the evidence without contradiction shows.

We have the utmost respect for the authorities brought forward in the briefs. In our opinion they are beside the question. We feel that we must keep within the known land-marks of the law, and not stray into the fields of speculation as to what might be if it were interpreted in what is called its "spirit" and intention, instead of declaring it as it says and in our estimation plainly is. That this offender, and likely other evil-minded persons, may go unwhipped of justice because we administer a statute according as we find it to be, and not according to what it might be or should be, is true. But really we must not concern ourselves with that or permit that consideration to control us in any way. We are not the Legislature. Our guide is *"Est ita lex."*

We deem ourselves guilty of no impropriety in closing our opinion in speaking of a statement to be found in one of the briefs. It is this:

"The common pleas court, after having heard the arguments of counsel and considering briefs, handed down a very able opinion sustaining the conviction of the municipal court, and now the plaintiff in error seeks to have this opinion set aside."

If our function in this case is to set aside opinions, then we have labored under a singular delusion as to what the one duty of any court is—namely, to declare the law. We disclaim the right or the wish to do more.

What the consequences flowing from that declaration may be, is matter of indifference. We might as well concern ourselves with our shadows on the wall.

Fortunately there is a court for the correction of our errors, and we have no ambition but to be right, even at the expense of being set right by the power whose duty it is to do that. The law is the ruler of us all, and it behooves us all to walk with John Milton, "as ever in his great Taskmaster's eye."

There is no evidence in this record to support either of the judgments complained of.

For that reason both are reversed and final judgment for the plaintiff in error, to recover his costs, expended, is rendered.

MEALS, J., and CARPENTER, J., concur.

EXECUTION STAYED PENDING DETERMINATION OF RIGHT TO SET-OFF.

Court of Appeals for Hamilton County.

CHARLES L. EVANS v. LOU BEDDINGER AND ELMER STEVIE.

Decided, March 8, 1915.

Replevin—Rights of Surety on Bond in an Action in Replevin—Where His Principal Has an Action for Damages Pending Against the Plaintiff—Set-off.

The surety on a replevin bond against whom judgment has been entered is entitled to the benefit of any valid judgment obtained by his principal against the defendant in an action by such principal to recover damages for breach of a contract with reference to the same property involved in the replevin suit, where both his princi-

pal and such defendant are insolvent; and the action to recover for the breach of contract being a pending action, execution against the surety should be stayed until the amount of the set-off, if any, is therein determined.

Cobb, Howard & Bailey and *Henry L. Rockel,* for plaintiff in error.

Dolle, Taylor & O'Donnell, for Lou Beddinger.

CHITTENDEN, J.

Error to the court of common pleas.

The facts, so far as they need be stated in this opinion, are as follows: On or about February 17, 1911, Elmer Stevie and Lou Beddinger entered into an agreement whereby Stevie was to exchange his automobile with Beddinger for a motor launch and was to pay Beddinger $150 in cash. The automobile was delivered to Beddinger and Stevie paid him $139.20. After more than a year had elapsed and Beddinger had failed to deliver the motor boat to Stevie, Stevie brought an action in replevin to recover possession of the automobile. The plaintiff in error, Charles L. Evans, became surety on the replevin bond given in that action. On trial in the common pleas court a verdict was rendered in favor of Beddinger, and the jury having assessed the value of the automobile at $150, Beddinger elected to take the amount of the judgment in lieu of the automobile, and thereupon judgment was entered in favor of Beddinger against Stevie for $150. Execution was issued upon this judgment and returned unsatisfied. Evans was then cited to show cause why the judgment rendered against his principal should not be enforced against him. He appeared in response to such citation and filed his answer in which answer he set out in substance the facts concerning the trade between Stevie and Beddinger, and that his principal, Stevie, had begun an action in the Common Pleas Court of Hamilton County against Beddinger to recover damages in the sum of $450, alleged to have been suffered by him by reason of a breach of the contract of trade above referred to. He further alleged the insolvency of the defendant Beddinger, and asked that no further proceedings be taken against him during the pendency of the action by Stevie against

Beddinger until after judgment should have been entered therein in favor of Stevie, and that then such judgment should be set-off against the judgment of Beddinger, and that after such set-off he be discharged from further liability on the bond. To this answer a demurrer was filed which was sustained by the court, and no further pleading being filed by Evans judgment was entered against him in the sum of $150. Error is prosecuted in this court by Evans. He insists that the common pleas court erred in sustaining the demurrer and entering judgment against him.

We have considered the oral arguments of counsel and have examined the briefs, and upon consideration of the question involved, we conclude that Evans is entitled to the benefit of having set-off against the judgment entered against him and his principal, Stevie, any valid judgment obtained by Stevie against Beddinger. At the time the matter was presented to the trial court on the demurrer, no judgment had been rendered. The allegations were simply that the action was pending, and we think that the trial court was justified in declining to stay the entering of judgment until after the case brought by Stevie against Beddinger had been determined. No existing defense was shown by Evans that would necessarily preclude the entering of judgment against him upon the summary proceedings that were instituted to accomplish that purpose; but it is clear that, in view of the allegations of the insolvency of Beddinger, and the fact that Beddinger had been unable to satisfy his judgment upon execution against Stevie, Evans was entitled to be protected against the collection of the judgment from him until such time as it should be determined that no valid set-off could be obtained in the form of a judgment in favor of Stevie in the pending suit. Therefore, we think, that while the trial court did not err in sustaining the demurrer, it should have stayed the issuing of execution upon such judgment until the right of set-off could be determined in the then pending case of Stevie v. Beddinger. It was stated by counsel in oral argument in this court, and not disputed, that a verdict by direction of the court was recently rendered in favor of Stevie for $150 in that case.

Under the statutory power conferred upon this court to modify judgments, we will so modify the judgment of the common pleas court as to stay the issuing of execution upon the judgment until after the final determination of the action set out in the answer of Evans. The judgment as so modified will be affirmed.

RICHARDS, J., and KINKADE, J., concur.

SOLICITATION OF OLD CUSTOMERS BY A VENDOR OF GOOD-WILL.

Court of Appeals for Hamilton County.

THE LEVY OVERALL MANUFACTURING COMPANY, SAMUEL LEVY, WILLIAM LEVY, DAVID LEVY AND HARRY HOEMELLE v. THE CROWN OVERALL MANUFACTURING COMPANY AND MARGARET WALKER.*

Decided, January 24, 1916.

Good Will—Restrictions on a Vendor Who has Organized a Competing Business—Must Not Mislead Customers of the Old Business into the Belief that he Has Succeeded Thereto—Old Rule Still in Force in Ohio Against Appropriation of Good-Will Which Has Been Sold.

The vendor of the good-will of a business may be enjoined from soliciting the trade of known customers of the old firm, or from improperly using his knowledge of the old business for the purpose of attracting customers to his new business, notwithstanding he retained the right to engage in such new business.

Lawrence Maxwell, Cohen, Mack & Hurtig and *Joseph S. Graydon,* for plaintiffs in error.

Harmon, Colston, Goldsmith & Hoadly and *Oscar Berman,* for defendants in error.

Cohen, Mack & Hurtig, for Margaret Walker.

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*Affirming *Crown Overall Mfg. Co.* v. *Levy Overall Mfg. Co.*, 16 N.P. (N.S.), 561.

JONES (Oliver B.), J.

Plaintiffs in error seek to reverse the judgment of the Superior Court of Cincinnati granting a permanent injunction against them and awarding $15,000 damages to defendant in error the Crown Overall Manufacturing Company.

The parties agree that an extensive business in the manufacture and sale of overalls had been carried on by Oscar Berman and Samuel Levy as partners under the name of Berman and Levy and the Crown Overall Manufacturing Company. That the partnership was dissolved by consent, Berman buying the entire interest of Levy including specifically the good will of said partnership, the value paid for Levy's one-half interest in this good-will being $15,000. The good will thus sold and conveyed was the good will of the business with all that imports, not merely the right to use the partnership name, occupy the old quarters or advertise as its business successor.

The facts of the case are well and fully stated in the opinion of the court below, which is reported in 16 N.P.(N.S.), 561.

Counsel for plaintiffs in error strenuously insist that the ruling of the court below in regard to soliciting the patronage of old customers is in direct conflict with the decision of the Supreme Court in *Brass & Iron Works Co.* v. *Payne,* 50 O. S., 115. They rely particularly upon the following language found in the opinion of Judge Spear, at page 118:

"He may carry on a like business in the immediate vicinity, and may solicit the patronage of old customers, both by advertisement and private solicitation, so long as he does not mislead customers into the belief that he is carrying on business as the successor of the old firm, but this does not involve an appropriation of anything which he once possessed, but has, for a valuable consideration sold."

This language was held by the trial judge to be *obiter dicta* and not binding as an authority in this case. To throw all the light possible, therefore, upon that case counsel for plaintiff in error have secured from the Supreme Court files and furnished to this court a printed copy of the record and of the brief in behalf of plaintiff. A careful examination of these show that the object of that suit was to enjoin the use of the old firm name,

by the retiring partner, and to enjoin him from representing himself in his new business as the successor of the old firm. As stated by Judge Spear in 50 O. S., at page 117:

"The single question of law presented by the record is whether or not, where a partnership is dissolved, one partner transferring to the other all his interest in the firm business and assets, with the understanding that the others are to succeed to the business of the old firm, and carry it on at the old stand, but not to use the old firm name beyond a specified time, the retiring member can lawfully use that name in a similar business thereafter carried on by him in the vicinity."

The result of the decision in that case was (p. 119):

"A perpetual injunction, restraining the defendant from using, in his business at Fostoria, the name of Walter S. Payne & Co., and from holding himself out as the successor of said firm of Walter S. Payne & Co."

The law of the case on this point is embodied in the second clause of the syllabus:

"Of this good will is the firm name; and where the contract of sale reserves to the retiring partner no rights with respect to the firm name, he can not lawfully use it in a busines of a like kind, carried on by him in the vicinity subsequent to such dissolution."

The rules of the Supreme Court provide that the points decided shall appear in the syllabus. Rule VI of these rules has remained the same from 5 O. S. through 82 O. S. Statements made by a judge in his opinion by way of argument or illustration, not called for by the issues of the case to be decided, do not become authoritative. 11 Cyc., 755; *Cohen* v. *Virginia,* 6 Wheat. (U. S.), 264, 399; *Carroll* v. *Carroll,* 16 How. (U. S.), 275, 287; *Pollock* v. *Farmer's L. & T. Co.* 157 U. S., 429, 574; *Love* v. *Miller,* 53 Ind., 294, 299.

In *Pioneer Trust Co.* v. *Stich,* 71 O. S., 459, 466, Judge Spear himself in giving the opinion of the court said:

"The syllabus controls, even though the expression of the judge should be thought to indicate a state of mind favorable to the contention of counsel upon a question not before the court."

The language used by Judge Spear in 50 O. S., at 118, quoted and relied on by counsel for plaintiffs in error here, is no doubt based upon an interesting note written by the editor, found appended to the case of *Berganini* v. *Bastian,* 48 American Report, 216. This case was cited and relied upon in the brief of plaintiff in error there. This note commences at page 223 and discusses the leading English cases on the subject of good will, beginning with *Labouchere* v. *Dawson,* L. R. 13 Eq., 332 (1872), and ending with *Pearson* v. *Pearson,* L. R. 27 Ch. Div., 145 (1884), and summing up with three general rules found on page 232, which appear to be drawn from the last named case. The case of *Pearson* v. *Pearson,* which discredited *Labouchere* v. *Dawson,* has since been overruled by the House of Lords in the case of *Trego* v. *Hunt,* L. R. Appeal Cases (1896), page 7.

While we agree with counsel for plaintiffs in error that if the rule of law in this state had been established by our Supreme Court based upon that found in *Pearson* v. *Pearson* there would be no justification in any inferior court to disregard that rule because *Pearson* v. *Pearson* has been in turn overruled by *Trego* v. *Hunt,* yet we can not concede that the case of *Brass & Iron Works Co.* v. *Payne,* 50 O. S., 115, established the rule of *Pearson* v. *Pearson* in Ohio. It certainly was not intended by it to overrule or weaken the authority of *Burckhardt* v. *Burckhardt,* 36 O. S., 261; 42 O. S., 474 (2 W. L. B., 22; 8 W. L. B., 253 and 14 W. L. B., 108). This case recognizes the rule of *Labouchere* v. *Dawson,* which was approved by *Trego* v. *Hunt,* in which the rule is thus stated:

"Where the good will of a business is sold (without further provision), the vendor may set up a rival business, but he is not entitled to canvass the customers of the old firm, and may be restrained by injunction from soliciting any person who was a customer of the old firm prior to the sale to continue to deal with the vendor, or not to deal with the purchaser."

And we must still regard *Burckhardt* v. *Burckhardt* as authority.

Counsel for plaintiffs in error discuss in detail the reasoning of the trial judge in his opinion as to the amount of damages.

It would appear that some of the detailed items as there discussed may be too large, but taking the total as finally fixed, considering all of the evidence and especially the conduct of defendants below, under the rules laid down by *Burckhardt* v. *Burckhardt*, 42 O. S., 474, the amount of the judgment can not be deemed excessive or as being manifestly against the weight of the evidence. The opinion of the trial judge is not to be treated as a finding of fact. *Transportation Co.* v. *Blanchard*, 31 O. S., 650.

The order of injunction as framed is in all its essentials correct; in one particular, however, we deem it as, inadvertently no doubt, going beyond what was intended or what should have been ordered; that is, wherein the individual defendants Samuel Levy, David Levy and Harry Hoemellee

"are restrained and enjoined from using or disclosing any knowledge, information or trade secrets of said firm of Berman and Levy acquired by them while in its employ."

"Knowledge" and "information" once acquired can not be taken away, and it is beyond the power of a court to prevent one from "using" either. Defendants, however, can be enjoined from "disclosing" such knowledge to others, and from *improperly* using it in their own business to secure the business of customers of the old firm that rightfully belongs to the plaintiff below. To such an extent the injunction may be modified.

A careful examination of the extended record in the case at bar, and full consideration of the able and elaborate arguments and briefs of counsel, bring this court to the conclusion that the case was rightfully decided in the court below, and the ground having been fully covered by the learned opinion of the trial court, further discussion becomes unnecessary here. With the modification of the injunction as suggested, the judgment will be affirmed.

JONES (E. H.), P. J., and GORMAN, J., concur.

ANNEXATION OF PART OF VILLAGE TO ADJACENT CITY.

Circuit Court of Cuyahoga County.

HENRY BACH v. F. H. GOFF.

Decided, February 8, 1904.

Municipal Corporations—When Annexation of Adjacent Territory Complete.

1. A proceeding to contest an election, under Sections 572-573, Revised Statutes, being a special proceeding before a special tribunal, the finding of that tribunal is final and not reviewable on error.
2. The annexation by county commissioners of part of a village to an adjacent city, upon application of the city council and the written request of two-thirds of the voters of the territory to be annexed, is not completed until the city council has, by ordinance or resolution, accepted the annexation as provided in Section 1591, Revised Statutes.

Pinney & Warner, for plaintiff in error.

F. H. Goff, contra.

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

Error to the court of common pleas.

Proceedings were begun in 1902 before the county commissioners of Cuyahoga county for the annexation of the second ward of the village of Glenville to the city of Cleveland. At the spring election in Glenville in 1903 the voters in said second ward voted for mayor of the village of Glenville.

If said voters of the second ward were entitled to vote in the village of Glenville, defendant in error was duly elected mayor of said village. If they were not entitled to vote in said village, C. C. Shellentrager was elected mayor.

To contest the election of Goff, plaintiff in error instituted proceedings provided by Section 572, Revised Statutes of Ohio, and three respectable freeholders were appointed according to law, heard the evidence produced before them and decided in favor of the contestee, Goff. To reverse this decision, petition in error was filed in the common pleas court accompanied by a transcript

of the proceedings in the probate court and what purports to be a bill of exceptions allowed by the probate "court" and signed by the probate judge as the "trial judge." The common pleas court struck this bill of exceptions from the files, heard the case on the pleadings and the transcript and dismissed the petition in error.

Thereupon petition in error was filed in this court in which it is alleged that the common pleas court erred:

1st. In striking the bill of exceptions from the files.

2d. In dismissing the petition.

3d. Other errors appearing of record.

To sustain the judgment of the common pleas court counsel for defendant in error has argued three propositions:

1. The proceedings to contest the election was a special proceeding before a special tribunal composed of the three freeholders and the bill of exceptions should have been allowed, if at all, and signed by said freeholders.

2. The proceedings before the tribunal were political rather than judicial, and its findings are final and not reviewable on error.

3. The decision of the tribunal was in accordance with the law and the facts.

An examination of the first and second propositions has left the court in doubt.

A majority of the court is of the opinion that by the wording of the statutes the three freeholders and the probate judge constitute a special tribunal for the trial of such contested election cases, and that the decision of said tribunal is final and not reviewable on error, but as such conclusion has been reached with much hesitancy, and is not unanimously concurred in, it would be profitless to discuss the matter at length, in view of the further fact that the court has examined the bill of exceptions and considered the merits of the finding by the freeholders.

It appears that May 21, 1902, the city of Cleveland filed with the county commissioners an application for the annexation to it of the second ward of Glenville. These proceedings were under Section 1615, Revised Statutes, and the statutes made part

thereof by reference. The first part of said section reads as follows:

"Section 1615. When a city and village adjoin each other, and the inhabitants of any portion of the territory constituting a part of said village desire to be detached therefrom and annexed to such city, the commissioners of the proper county, on the application of the council of the city, and on the written request of two-thirds of the legal voters inhabiting the territory proposed to be so annexed, may cause such alterations to be made, and the boundaries of such city, and said village, respectively, to be established in accordance with such application and request, and such territory shall thereafter constitute a part of such city, *provided,* that in all their proceedings in the premises, the county commissioners shall, as far as applicable, be governed by the provisions of this division, prescribing the manner of proceeding on applications for the annexation of adjacent unincorporated territory to villages and cities; and provided further, that the commissioners shall ascertain and apportion the amount of the existing indebtedness of the village, which shall be assumed and paid by the city on the annexation of the territory aforesaid."

Sections 1589 to 1598 inclusive are the provisions of "this division, prescribing the manner of proceeding on application for the annexation of adjacent unincorporated territory to villages and cities," referred to above, and they provide that a final transcript of the proceedings of the commissioners being filed with the clerk of the city to which annexation is proposed (1590) at the next regular session of the council of such city after the expiration of sixty days from such filing, the clerk shall lay the transcript and accompanying map and petition before the council, and thereupon the council shall by resolution or ordinance, accept or reject the application for annexation (1591), and when the resolution or ordinance accepting such annexation has been adopted, the territory shall be deemed a part of the city or village (1597).

It appears that the final order of the county commissioners apportioning the indebtedness of the city and village was made February 21, 1903, and filed with the city clerk February 23, 1903.

Sixty days thereafter, the earliest time within which said transcript could be presented to the city council by the clerk (1591) would be April 24, 1903. The election contested was held April 6, 1903, and before said annexation could be accepted and the territory deemed a part of the city of Cleveland and no longer a part of the village (now city) of Glenville, in accordance with Section 1597, Revised Statutes, if said section applies to this case.

It is contended by plaintiff in error that this section does not apply because it comes in as a part of Section 1515, only under the language "provided, that in all their *proceedings* in the premises, the county commissioners shall be governed," etc.—that the action of the city council is no part of the *proceedings* of the commissioners, that the proviso affects the procedure of the commissioners alone and that if their procedure was regular, as it is admitted to be, then, under Section 1615, the commissioners having finished all they had to do in the premises by February 21, 1903, such territory thereafter constituted a part of the city of Cleveland.

We consider this contention one of those technical objections about which Judge Spear speaks in the annexation case of *Shugars* v. *Williams,* 50 O. S., 297, when he says:

"In the practical administration of justice mere technical objections have to give way to substance."

We quote further from Judge Spear as to his views of the annexation statutes:

"It is manifest that one of the purposes of this legislation is to provide for the addition of territory by the joint action of the village council and the county commissioners, and it would seem that, giving effect to all these sections, a scheme has been mapped out which, though not altogether coherent in its parts, will nevertheless practically reach the end intended."

This language is applicable to the case at bar. In adjusting the indebtedness of the city and village, the county commissioners ordered the city to pay the village the sum of $19,543.22 and to assume a large floating indebtedness of the village. On account of this large charge the city council might have deemed the an-

nexation inadvisable and for that reason, or for some other reason, have rejected the application for annexation. (Section 1591.)

Section 1592 provides that "If the resolution or ordinance is to reject such application, no further proceedings shall be had; but such rejection shall not be a bar to any application thereafter to the county commissioners on the same subject." The further proceedings referred to are the filing by the city clerk of two certificates of the annexation proceedings, one with the county recorder and the other with the secretary of state. We think that Section 1592 means that no further proceedings shall be had by the city council, the county commissioners or any one claiming under or by virtue of the action of either, so that citizens of the territory to be annexed, claiming that action of the county commissioners in favor of the annexation constituted such territory thereafter a part of the city, must of necessity abandon such claims upon the rejection of the ordinance of acceptance by the city council. So the plaintiff in this action, claiming to be an elector of Glenville, by Section 1591, upon rejection of the ordinance by the city council, would be barred from all further rights or privileges based upon the action of the county commissioners. Construing together all the statutes applicable to the annexation proceedings here in question we are of the opinion that the general scheme intends that the annexation by the county commissioners of part of a village to an adjacent city upon application of the city council and written request of two-thirds of the voters of the territory to be annexed, shall not be completed until the city council has, by ordinance or resolution, accepted the annexation as provided in Section 1591, Revised Statutes. It not appearing in this case that such ordinance or resolution was passed by the council of the city of Cleveland before the spring election for mayor of Glenville in 1903, on said election day the second ward of Glenville was still a part of Glenville and the voters of said second ward were entitled to vote for mayor of Glenville, and the contestee, F. H. Goff, defendant in error in this case, was duly elected mayor thereof as found by the freeholders.

The petition in error is therefore dismissed.

ALLOWANCE OF ALIMONY FOR SAME AGGRESSIONS FOR WHICH DIVORCE WAS DENIED.

Circuit Court of Cuyahoga County.

JAMES CULLEN v. NELLIE CULLEN.

Decided, January 18, 1904.

Alimony—Res Adjudicata—When Decree on Application for Divorce and Alimony is Not a Bar to Subsequent Action for Alimony.

The dismissal of a petition for divorce and alimony based upon charges of extreme cruelty and gross neglect of duty is not a bar to an action for alimony and support of a child, even though based upon the same acts of cruelty and neglect set forth in the first petition, where there is a further allegation that those acts have resulted in a separation and that the plaintiff and the child are destitute and not in good health.

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

Error to the court of common pleas.

The only error complained of in this case is the granting of a motion made by defendant in error, who was plaintiff below, for an allowance to her of temporary alimony for her sustenance and the support of her minor child and for fees for her attorneys.

The bill of exceptions shows that the only evidence presented at the hearing of the motion was the petition in the case which was sworn to as an affidavit, the answer, which was likewise verified, the petition in a former action for a divorce between the parties and the decree rendered in the former action. From this evidence it appears that on March 31, 1902, Nellie Cullen filed her petition against James Cullen praying for a divorce and alimony and alleging as her grounds therefor gross neglect of duty and extreme cruelty. October 12th, 1902, the case was heard and the court found that plaintiff was not entitled to the divorce and alimony prayed for, and dismissed her petition. Four days later she filed another petition praying for alimony alone, setting up the facts which may be said to amount to gross

neglect of duty, extreme cruelty and that there was a separation in consequence of ill-treatment on the part of her husband. The answer, in addition to denying the allegations of the petition, pleads the former adjudication as a bar to the last suit.

Counsel for plaintiff in error, in support of the plea of former adjudication, cite the case of *Petersine* v. *Thomas,* 28 O. S., 596, an alimony case wherein it was held:

"When a matter is finally determined in an action between the same parties, by a competent tribunal, it is to be considered at an end, not only as to what was determined, but also as to every other question which the parties might have litigated in the case."

Counsel for defendant in error urges that the case at bar does not come within the doctrine of *Petersine* v. *Thomas*; that the first action brought by Nellie Cullen was for divorce and alimony, alleging two of the grounds therefor mentioned in Section 5689, Revised Statutes, and the second action is for alimony only, under Section 5702, Revised Statutes, setting up a separation in consequence of ill-treatment on the part of the husband, which is not a ground for divorce and could not have been pleaded or proved under the first petition. On this point we do not agree with counsel for defendant in error. In the case of *Graves* v. *Graves*, 50 O. S., 196, the plaintiff asked for divorce and alimony, alleging extreme cruelty as her grounds for divorce. The common pleas court found that she had not sustained the allegations of her petition, denied her divorce, but finding that she had sufficient cause to leave her husband, and was still living separate and apart, awarded her alimony. The Supreme Court held that this proceeding and judgment was fully authorized by the statutes of Ohio. So it appears that in Nellie Cullen's first action for divorce and alimony she might have been awarded alimony because of the separation caused by ill-treatment of her husband, if the court had found her entitled to it.

It remains therefore to compare the two petitions to see if there are any allegations in the last of matters arising since the filing of the first petition, for if any new causes of action have

arisen since the filing of the first petition, they would not be barred by the former judgment.

Such comparison shows clearly that all acts of the husband which might constitute gross neglect of duty, extreme cruelty or ill-treatment causing separation, occurred before the filing of the first petition, for in the second petition it is alleged that the separation occurred on March 27, 1902, four days before the first petition was filed.

But, we find the following allegations in the last petition that are not in the first:

"Plaintiff has no money or property whatever and is depending on the charity of her relatives for her support. Her health is not good and she is unable to earn support for her child and herself. The said boy, Edwin, has also poor health and frequently needs the service of a physician which plaintiff is unable to furnish."

Non constat, but that all these conditions arose after termination of the former action. The verbs are in the present tense. If the wife's ill-health and inability to support herself and child and the child's health and need of special care developed after the first hearing they could not have been presented at the former trial. Such being the case, she should now have opportunity to present these facts, as they bear upon the question as to whether she is entitled to alimony, and would at least entitle her to a hearing under Section 5703, Revised Statutes, which says:

"The court *shall*, upon satisfactory proof of any or all of the charges in the petition make such order for the maintenance of the children of such marriage, if there are any, as is just and reasonable."

It does not appear that any order with respect to the child was asked for, granted or refused under the first petition.

Again, the merits of the case were not before the trial judge on this application for alimony *pendente lite* and the order complained of includes an allowance for the support of the child. Section 5701, Revised Statutes, provides that the court may grant an allowance for the support of minor children depend-

ent upon either party for support and not provided for by such party during the pendency of the action.

There was proof on the hearing of this motion that the boy, Edwin, is not being supported by his father, whose duty it is to support him. The order was that the defendant pay to plaintiff's attorney $25 as attorney fee and to plaintiff $5 per week for support of herself and child. The attorney fee has been paid. There was no such error in the exercise of the discretion of the court in the weekly allowance to require this court to reverse said order.

Judgment affirmed.

LOSS OF STOCK THROUGH DEFALCATION OF TRANSFER AGENT.

Circuit Court of Cuyahoga County.

SARAH C. K. ROBISON v. THE CLEVELAND CITY RAILWAY COMPANY; MARIA A. ROBISON v. THE CLEVELAND CITY RAILWAY COMPANY; AND MARTIN S. ROBISON v. THE CLEVELAND CITY RAILWAY COMPANY.

Decided, February 8, 1904.

Corporations—Liability of Company for Defalcation of its Transfer Agent.

Where a corporation has made it possible for its transfer agent to mix and confuse stock which he held as trustee for various parties with treasury stock of the company, and a large part of the stock entrusted to the transfer agent is lost through his defalcation, the company is liable to those for whom the transfer agent acted as trustee for such of the stock entrusted to the transfer agent as was returned to the treasury of the company.

A. W. Lamson, Kline, Carr, Tolles & Goff and *L. A. Russell,* for plaintiffs.

Squire, Sanders & Dempsey, contra.

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

These three cases were heard on appeal from the common pleas court and involve the rights of the plaintiffs, as stockholders in the Cleveland Cable Railway Company, to stock in the Cleveland City Railway Company, which they claim is due them by reason of the consolidation of the former company with the Woodland Avenue and West Side Street Railway Company, the consolidated company being known as the Cleveland City Railway Company.

It is admitted that the plaintiffs in the three cases were stockholders in the cable company and have not received stock in the consolidated company in exchange therefor. While the claims in the three cases vary as to the number of shares alleged to be due to each plaintiff, the three cases were heard together and are to be decided upon the same principles.

Litigation growing out of the consolidation of said street railway companies has been before the Supreme Court and it is proper in stating these cases to quote largely from the case of *Railway Co.* v. *Bank,* 68 O. S., 582.

May 10, 1893, stockholders of the constituent companies, owning more than two-thirds of the stock of each, and including plaintiffs in these cases, entered into a preliminary agreement for consolidation, providing, among other things, that both companies should pay their own floating indebtedness, the stockholders of the cable company appointing Frank DeH. Robison and John J. Shipherd their agents and proxies to carry out the agreement and perfect said consolidation, agreeing to deliver to said two persons or their chairman, all their stock to be exchanged for stock of the consolidated company, and the stockholders of the Woodland Avenue Company in like manner appointing M. A. Hanna, Dan P. Eells and C. F. Emery, their agents and proxies with like power.

May 11, 1893, the directors of the two companies entered into an agreement of consolidation in accordance with the stockholders' agreement, fixing the capital stock of the new company at 80,000 shares and providing that said stock should be distributed as follows: 51,750 shares to the Woodland Avenue Company to be distributed by it to its stockholders; 18,250 shares to the cable

company, to be disposed of by it, so far as necessary, to liquidate its floating indebtedness, and the remainder to be distributed among the holders of the common and preferred stock of said company, in proportion to the then relative value of said stocks; 10,000 shares to remain in the treasury of the company, to be issued by the board of directors according to law.

The cable company determined that one share of its preferred stock should be equal to five shares of its common stock; and on this basis, exchanging one share of preferred stock in the cable company for one share in the consolidated company, of the 18,250 shares distributed to the cable company, there would be 16,000 shares to be distributed to its stockholders, leaving 2,250 shares, of the par value of $225,000, to be sold to liquidate its floating debt. It later appeared, however, that said floating debt amounted to upwards of $400,000.

June 16, 1893, the consolidated company issued stock certificate No. 1 for 51,750 shares to M. A. Hanna, Dan P. Eells and C. F. Emery, trustees, and certificate No. 2 for 18,250 shares to Frank DeH. Robison and John J. Shipherd, trustees.

The Supreme Court in the case already referred to, had held that it was lawful for the directors of the constituent companies to agree, as they did, that the constituent companies should come into the consolidated companies free from debt; that of the stock apportioned to the cable company enough should be sold to pay its floating debt, the remainder to be distributed to its preferred and common stockholders in proportion to the relative values of said stocks; that the stockholders' agreement must be read into and made a part of the agreement of consolidation by the directors; and that the agreement that 18,250 shares of the capital stock of the consolidated company should be distributed to the cable company to be disposed of by that company so far as necessary to liquidate its floating indebtedness, the remainder to be distributed to its stockholders, was fully performed by the consolidated company by the issue of certificate No. 2 for 18,250 shares of stock to Robison and Shipherd, trustees, as "agents and proxies" for the cable company and its stockholders.

In the disposition of the cases before us we shall carefully follow all these holdings of the Supreme Court, although it has been

urgently contended by counsel for plaintiff that the last proposition, *i. e.*, that the delivery of certificate No. 2 to Robison and Shipherd, trustees, was a complete performance of the consolidated company's obligations to the stockholders of the cable company, was not necessarily involved in the decision of the bank case.

This contention is founded upon the statement of Judge Davis, who decided the bank case, that only one of the assignments of error would be noticed in the case because, on the conceded facts, the Supreme Court was of the opinion that the court of common pleas should have directed a verdict and rendered a judgment in favor of the defendant. Then, determining the rights of a person who holds shares of stock in pledge, assigned in blank, but not registered in the name of the pledgee, and holding that such pledgee is not entitled to participate in, or be notified of, the consolidation proceedings, as set forth in the third paragraph of the syllabus, it is stated, on page 599 of the opinion:

"The jury specially found in this case that on June 29, 1893, after the consolidation, Taintor & Holt (the pledgors), were still the owners of the stock and that on that date they received from the plaintiff in error all of the stock which they were entitled to receive by reason of their ownership of the cable company stock. It appears, therefore, the plaintiff in error having performed its agreement as to the registered and actual owners of the stock, that it is now sought to compel it to perform again, or account for the value of the stock, to a pledgee who has not shown that it was entitled to more than a mere lien upon the stock at the time of the consolidation."

It is urged that these are the conceded facts, in view of the law enunciated regarding the rights of an unregistered pledgee of stock, which should have required the common pleas judge to direct a verdict for defendant.

But having reached this conclusion Judge Davis goes forward with a consideration of the effect of the delivery of certificate No. 2 and enunciates the proposition hereinbefore stated and that proposition is embodied in the fourth paragraph of the syllabus and is therefore part of the law of the case, and hence to be followed by this court.

If the cases at bar are to be distinguished from the bank case it must be because of facts occurring and rights arising in favor of plaintiffs after the delivery of certificate No. 2.

In one salient feature these cases, of course, differ from the bank case: in that case the registered owners of cable company stock received all of the stock in the consolidated company which they were entitled to receive.

In these cases such registered owners have not received the stock in the consolidated company which it is conceded they were entitled to receive. It is said that plaintiffs have not received their stock because John J. Shipherd, one of their own trustees, appropriated it and converted it to his own use.

What are the facts as tending to sustain such statement?

The officers of the defendant company were M. A. Hanna, president; J. B. Hanna, secretary; F. DeH. Robison, vice-president; J. J. Shipherd, transfer agent, and the Savings & Trust Company, Registrar.

M. A. Hanna was one of the trustees for the Woodland Avenue Company and its stockholders; he was "trustee for construction account" for the defendant company and as such held certain shares of its stock; he, with Charles A. Otis and J. H. Wade, held stock for the defendant company, issued to them by it to indemnify them for money borrowed by them for use of the defendant company.

M. A. Hanna, as president, signed most of the stock certificates for the defendant; F. DeH. Robison, as vice-president, signed some.

The secretary, J. B. Hanna, signed all stock certificates; by direction of the board, the stock books were not kept by him, but by the transfer agent and registrar.

J. J. Shipherd was transfer agent of the defendant company and as such had entire charge of the issue and transfer of its stock, his direction alone being the authority upon which the registrar registered stock and kept track of the transfers. Shipherd was also one of the trustees for the cable road and its stockholders; he was chairman of said trustees; he was also "trustee for construction account" for the defendant company and as

such had stock issued to him in the name of "J. J. Shipherd, Trustee."

Certificates numbers one and two were issued to the trustees named in each, endorsed by them in blank, left with the transfer agent and by him lodged with the registrar.

Notices were sent to the stockholders of the Woodland Avenue Company and to the cable company to bring in their old stock to the transfer agent and get from him the new stock they were entitled to. If the defendant did not send the notices, it at least knew that they were sent. It thus appears that the transfer agent, whether as such, or as trustee for the cable company under written appointment, or as trustee for the trustees of the Woodland Avenue Company, by virtue of the delivery to him of certificate No. 1, endorsed in blank by said trustees, had entire control of the distribution of the entire 70,000 shares of stock going to both of the constituent companies, and in addition to this John J. Shipherd, trustee, held 5,000 shares of the treasury stock of the company duly issued and signed by the president of the company. These 7,500 shares of stock Mr. Shipherd, either as trustee for somebody, or as transfer agent, proceeded to mix up, and at least a majority of this court inclines to the opinion that the defendant company made it possible for Mr. Shipherd to produce the results he did and that it is responsible for such results.

However, such responsibility, under the pleadings in this case, does not determine the liability of the defendant company to these plaintiffs, unless it appears that when the stock books were finally straightened out there still remained in possession of the defendant company stock belonging to these plaintiffs and that when these suits were brought defendant had possession, or should have had possession of said stock.

Counsel for defendant, in argument, stated that "there was a mixing of this stock by Mr. Shipherd that is most difficult to unravel, and which would involve one in hopeless confusion who attempts its solution. Mr. Shipherd mixed the stock held by Robison and himself with the treasury stock of the company."

The matter is difficult and confusing, but the stock issued and transferred are all of record and have been patiently and tedi-

ously traced out by experts; so that we are satisfied from the evidence that Shipherd, out of certificate No. 2, which belonged to the cable company, distributed 3,100 shares to the Woodland Avenue stockholders, and to M. A. Hanna, Charles A. Otis and J. H. Wade, officers and trustees of the defendant company, he distributed 3,674 shares.

The 3,100 shares distributed by Shipherd to Woodland Avenue stockholders made good to them what he had appropriated and they were entitled to receive out of certificate No. 1, and relieved the defendant from that responsibility to them, under proper pleadings, which has been intimated above, arose out of its negligence in permitting Shipherd to confuse the stock.

The 3,674 shares out of certificate No. 2 which went to Hanna, Otis and Wade, they held as security for money borrowed by them for the company, and when the loan was paid, turned the stock back into the possession of the company; at least 2,000 shares, certificates Nos. 522 and 600, were assigned to the defendant company in proper form on the back of the certificate, and returned to the treasury of the company.

It hence appears from the evidence that after the delivery of certificate No. 2 to the trustees for plaintiffs and other stockholders of the cable company, part of the stock represented by that certificate came back into the possession of the defendant, and at least 2,000 shares of it was converted back into treasury stock. It also appears that at the beginning of these suits there were 4,000 shares of unissued stock in the treasury of the defendant company, all of which have been sold since by it.

It would seem that plaintiff's claims, which aggregate 513 shares, have been established and that they are severally entitled to recover the value of the stock claimed by them together with all dividends thereon, from which should be deducted, however, plaintiffs' *pro rata* share of the floating debt of the cable company.

Should it appear that there are other cable company stockholders not represented in these suits, who have not yet received stock they are entitled to, an accounting might be necessary, but no such facts have been presented to the court.

Decrees may be entered for plaintiffs in the three cases, the amount of recovery in each case to be computed as in the court below.

STEPS TAKEN BY COUNSEL AMOUNTING TO LESS THAN AN ENTRY OF APPEARANCE.

Circuit Court of Cuyahoga County.

HENRY H. FLANDERMEYER v. HUGO FISHEL ET AL.

Decided, February 9, 1904.

Practice—Jurisdiction—What Acts Will Not Amount to Entry of Appearance.

1. Complaint of defendants attorney made informally, that the amount of an appeal bond was insufficient to protect his client's interest, does not constitute an entry of appearance, where the record does not disclose that any motion or application to increase the bond was ever filed.
2. Where, in a motion to strike a petition from the files, it is expressly provided that the defendant enters his appearance for the sole purpose of making that motion and for no other purpose, this proviso inheres in an application to amend the motion, filed at a later date, and such application to amend the motion does not amount to an entry of appearance generally.

Alex. H. Martin and W. C. Ong, for plaintiff in error.
Hart & Canfield, contra.

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

Error to the court of common pleas.

Plaintiff filed a petition in error in the common pleas court to reverse the judgment of a justice of the peace in a forcible detainer action, but neglected to serve defendants with process on said petition in error. The common pleas court, because of the lack of service of summons on the petition in error, dismissed it. Thereupon plaintiff filed petition in error in this court to reverse the judgment of the common pleas court, and the sole question here is whether or not an entry of appearance was in fact made by defendants in the court below.

There is some little discrepancy between the transcript from the common pleas court and the bill of exceptions from that court, but we have considered all the facts shown by both.

1. It is claimed by plaintiff that defendants' attorney appeared in the court below, objected to the size of the bond given by plaintiff, and because of the appearance and objection, the court increased the bond from $200 to $2,000.

The bill of exceptions, as to this matter, shows that a petition in error being filed in the common pleas court without its consent or notice to defendants, defendants' attorney saw the judge presiding in Room 1 of said court and asked him if he thought it was right and legal to allow the petition to be filed without notice. The attorney says that he was a little mad and the judge said if he did not like what had been done he could file a motion to strike the petition from the files. The attorney says he made no application to have the bond increased but did complain about the insufficiency of the bond. The judge corroborates this statement and says that he did increase the bond from $200 to $2,000; explaining this action, he says:

"Either Mr. Hart or Mr. Canfield (plaintiff's attorneys) came to me and objected rather vigorously to the action taken, and among other things, complained about the size of the bond.

"Q. What did he say? A. Well, he complained about its insufficiency, said it was not large enough to protect his clients, and I thereupon increased the bond."

The increase was made by adding a cipher to the original entry of $200 on the docket. There was no new entry made. We do not consider this action of the attorney in talking to the judge in the general manner indicated, constituted an appearance for the defendants in the action. The record fails to show any application by said attorney for an increased bond. It fails to show any action by the court on any such application. What was done by the judge in increasing the bond was done upon his own motion.

2. It appears that defendant filed a motion to strike the petition in error from the files for the reason that said petition was not filed in said court within the time authorized by the statutes.

The motion reads that the defendants "enter their appearance for the sole purpose of making this motion and for no other purpose." It was the proper manner in which to make the point without making a general appearance.

No authorities need be cited on this point.

This motion was overruled. Thereafter the entry overruling said motion was vacated and set aside and the transcript shows the following:

"November 16, 1903. To court. The defendants in error have leave on their own application to amend their motion to strike the petition in error from the files, by interlining the words 'and action commenced within four months from time the judgment was rendered.'"

The interlineation was made and the motion as amended was granted.

It is claimed that the application to amend the motion constituted a general appearance in the case. We think not.

The application was solely regarding the motion and made under it. It affected no other proceeding in the case. The proviso in the motion inheres in the application to amend it and preserves to defendants all such exemptions as they were entitled under the original motion.

We find no error in the judgment of the common pleas court and it is affirmed.

WITHDRAWAL OF INCOMPETENT EVIDENCE.

Circuit Court of Cuyahoga County.

TONY CHICKO v. STATE OF OHIO.

Decided, March 7, 1904.

Criminal Law—Trials—Error in Admission of Evidence Cured by Withdrawal of Evidence at Any Time.

Where, in the trial of a criminal case, incompetent evidence offered by the state has been admitted over the objections of the defendant and exceptions noted, but such evidence is subsequently withdrawn and the jury clearly told to disregard it, the judgment should not be reversed for the admission of such evidence, unless it is manifest from the whole record that the jury disregarded the instructions of the court; and it is not important at what time the evidence is withdrawn from the consideration of the jury so long as it is clearly withdrawn before the case is finally submitted to them.

Vessey, Davis & Manak, for plaintiff in error.
Harvey R. Keeler, contra.

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

Error to the court of common pleas.

The plaintiff in error was indicted, tried and convicted of murder in the second degree. He was charged in the indictment with killing Andrew Crouch, a street car conductor. On the trial evidence was given by the state tending to show the transaction which occurred between the deceased, Crouch, and the plaintiff in error at the time Crouch was killed. Thereupon the state, to further maintain the issues on its part, called as a witness Otto C. Hansel, who testified as to the difficulty between the deceased and plaintiff in error and the pursuit of the plaintiff in error by various persons immediately following the transaction upon the car and his arrest at a point a half a mile from the scene of the shooting. Thereupon the prosecuting attorney put to the witness this question: "What was said at the time he was arrested by any person present?" to which question the

defendant's counsel objected, but the court overruled the objection and the witness answered "Some one said 'lynch him and kill him.'" Counsel for plaintiff in error then said, "We ask that the jury be instructed to disregard the answer," which request on the part of the counsel was overruled, and an exception noted.

The state also called one David Bertram as a witness, and after showing that he was one of the persons who pursued the plaintiff in error after the shooting and was present at his arrest, the prosecuting attorney put to him the following question, "Do you recall anything that was said by any one to any one at that time?" to which counsel for plaintiff in error objected, the objection was overruled and an exception noted. The witness answered, "Some one said 'Lynch him.'" A request was made by counsel for plaintiff in error that this answer be withdrawn from the jury, which was overruled and exception noted.

The court in its charge to the jury, referring to this testimony, said:

"Another thing I want to say by way of caution. I want you jurymen to pay particular attention to it; that is, there was some testimony here admitted as to some things that were said by the crowd when they were in pursuit of the defendant. Somebody testified that somebody cried 'Lynch him.' I do not think that is competent testimony. Pay no attention to what was said by any witness on that subject; disregard it utterly; drive it out of your minds, because that testimony would not be competent and this man should not be prejudiced by it if it should in any way affect your minds. Everything of that sort should be entirely eliminated from your consideration."

It is quite clear that the court was correct in holding that this testimony was clearly incompetent and prejudicial. The court erred in its admission, and unless that error is cured by the withdrawal of the testimony from the consideration of the jury, in the part of the charge above quoted, the case should be reversed. But we hold that, where in the trial of a criminal case incompetent evidence offered by the state has been admitted over the objection of the defendant and exception noted, but subsequently withdrawn and the jury clearly told to disregard it, the

judgment should not be reversed for the admission of such testimony, unless it is manifest from the whole record that the jury disregarded the instructions of the court. This, we think, is in accordance with the rule which prevails in this state.

In *Mimms* v. *State of Ohio,* 16 O. S., 222, it was held:

"Where the court improperly overruled the objection of the defendant to testimony offered on the trial by the state, the judgment against him will not be reversed for such erroneous ruling when the court on motion of the defendant excluded all the testimony so given from the consideration of the jury and instructed them that it must be wholly disregarded."

It appears in this case that the testimony of which complaint is made was withdrawn from the consideration of the jury on motion of the defendant and that therefore he could not further complain of its introduction. This would seem to be a sufficient answer to the ruling made, but in this case, at the time the answer was given, counsel for the plaintiff in error asked in each instance that the answer given by the witness should be withdrawn from the jury. It is true that his request was overruled at the time, but subsequently, in the charge, in as emphatic and distinct an utterance as could be, the request was granted and the testimony withdrawn from the consideration of the jury. Many other cases might be cited giving some support to the holding we here make. I refer only to one other case, 17 Cir. Ct., 404.

It is said, however, that this withdrawal of the incompetent evidence came too late; that if the error in its admission could be cured at all by its withdrawal, that withdrawal must be made before the close of the evidence, or at least before the argument of counsel to the jury; that its withdrawal in the charge of the court to the jury comes too late, and this is the holding of the Supreme Court of Pennsylvania in the case of *Erie & W. V. R. Co.* v. *Amelia E. Smith,* 125 Pa. St., 259, in which it is said:

"Where evidence has been improperly received which tends to prejudice the minds of the jury, and motions made to strike it out at or before the close of the testimony are refused, a direction to the jury in the general charge to disregard the evidence and withdraw it from their consideration comes too late and does not cure the error of admitting it."

We are not inclined to follow that holding. We think the tendency of the reported decisions in our own state is not in accord with it. In the case of *Mimms* v. *State,* above referred to, it does not appear whether the testimony was withdrawn from the consideration of the jury before the charge or in the charge. It would seem not to be of the utmost importance when the testimony was taken from the jury, whether before the charge or in the charge to the jury. If the testimony was clearly and distinctly taken from the consideration of the jury at any time before the submission of the issues to them, it would seem to be sufficient. It can not be doubted that if the jury followed the plain and distinct instructions of the court in this case and wholly disregarded this testimony, that its introduction was without any prejudice to the plaintiff in error. There is nothing in the record of the case that gives any support to a claim that the instructions of the court were not followed by the jury. We are, therefore, of the opinion that there was no error upon the record of which the plaintiff in error can justly complain.

The judgment of the court of common pleas is affirmed.

PROCEEDINGS TO COMPEL ATTORNEY TO TURN OVER PAPERS.

Circuit Court of Cuyahoga County.

JOHN MULHOLLAND v. GEORGE A. GROOT.

Decided, March 7, 1904.

Attorneys May be Proceeded Against Summarily for Refusing to Turn Over Papers of Client.

An attorney may be proceeded against in a summary way, by motion, for refusing or neglecting to turn over papers and documents belonging to his client.

W. C. Ong, for plaintiff in error.

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

Error to the court of common pleas.

This action is in this court to review the ruling of the common pleas court in dismissing proceedings begun therein to require the defendant in error, who was defendant below, to turn over to plaintiff certain papers, notes, bonds and securities held by the defendant as an attorney at law and coming into his hands as attorney for plaintiff.

The proceedings were instituted in the court below by the filing of an application entitled by plaintiff a motion, in which it is alleged that John Mulholland, one of the plaintiffs, is a resident of Ohio, and the other plaintiff, Maud B. Darrow, is trustee for John Mulholland and a resident of Cleveland.

This motion is signed: "John Mulholland and Maud B. Darrow, trustee, by Walter C. Ong, their attorney," and is verified as follows:

"STATE OF OHIO, CUYAHOGA COUNTY, SC.

"M. R. Hodgman, being first duly sworn, says that he is the duly authorized agent and manager for John Mulholland, the complainant in the foregoing motion, and as such manager he is familiar with all the facts pertaining to the foregoing application, and that all the facts, allegations and exhibits of said motion as herein set forth are, as he believes, true.

"M. R. HODGMAN.

"Sworn to before me and subscribed in my presence by the said M. R. Hodgman this the 29th day of January, A. D. 1904.

"D. M. BADER, *Notary Public.* (Seal)"

With the application was also filed an affidavit as to the truth of the matters set forth in the application.

It appears that upon the filing of this application the defendant appeared, waived citation and asked leave to answer and file a counter-affidavit. Thereafter he filed a motion to dismiss the proceedings for the reason that the motion was unsupported by any evidence and the court granted said motion, without receiving proof from plaintiff as to the truth of the matters complained of in the motion. In support of this ruling of the trial judge it is urged that the motion or application was not signed by either of the plaintiffs personally, was not sworn to by either of them, and the verification that does appear is only upon information and belief.

Section 564, Revised Statutes, provides that every attorney receiving money for his client and refusing or neglecting to pay the same when demanded, shall be proceeded against in a summary way, on motion.

It was held by the circuit court of the seventh circuit, in the case of *Cotton, Ex.*, v. *Ashley*, 11 C. C., 47, that under the common law an attorney might be proceeded against in the same manner for refusing or neglecting to turn over papers and documents to his client, and we follow that ruling in this case.

It appears that the proceedings were properly brought by filing a motion.

A motion is not strictly a pleading, not being enumerated as such under Section 5055, Revised Statutes.

Section 5102, Revised Statutes, provides that every *pleading and motion* must be subscribed by the party or his attorney, and *every pleading* must be verified by the affidavit of the party, his agent or attorney.

Section 5105 provides that the affidavit shall be sufficient if it is stated therein that the affiant believes the facts stated in the pleadings to be true.

Section 5109 says that the verification may be made by the agent of a party when the facts are within the agent's personal knowledge.

From these statutes it appears that the application, whether considered as a motion or as a petition, was properly signed and verified. It was subscribed by the attorney of the plaintiffs and was verified by the agent of one of them who says that he is familiar with the facts he swears to. As one of several parties may verify a pleading (5104, R. S. O.), so the affidavit of the agent of one of them is sufficient.

We find no statute requiring that such proceedings as were instituted in this case must be begun by a motion or pleading sworn to absolutely, but hold that the general statute (Section 5105) authorizing a verification upon belief, applies.

It follows that the preceedings were regularly instituted and that the trial judge erred in granting the motion to dismiss them.

Judgment reversed.

WOMAN PASSENGER INJURED BY AN EXPLOSION DURING A STRIKE.

Circuit Court of Cuyahoga County.

ELLE SCHROEDER, BY HER GUARDIAN, CARL F. SCHROEDER, v. THE CLEVELAND ELECTRIC RAILWAY COMPANY.

Decided, March 15, 1904.

Carrier of Passengers—Degree of Care Required to Protect Passengers Against Danger During a Strike.

1. A carrier of passengers is not liable for the act of an intervening independent agency. But where there is a known impending danger from a source for which the carrier is not responsible, then the law imposes upon the carrier a degree of care in respect to such impending danger; but the degree of care in such case depends upon the conditions and circumstances of the particular instance, varying with those conditions, and is not that absolute degree of care which a carrier owes to its passengers under ordinary conditions.
2. The law requires of a carrier of passengers operating its cars while a strike is in progress and while known dangers exist, the highest degree of care practicable for the safety of its passengers in view of the existing and known conditions, consistent with the practical operation of and management of its cars.
3. Where passengers upon a street car are injured by the explosion of an explosive placed on the tracks by some miscreant, at a time when a strike of the employees of the street-railway company is in progress and after numerous other similar explosions had occurred, the company is not liable unless the conditions existing at the time were of such a nature that it had reason to expect damage to its cars and injury to its passengers from explosives, and therefore should have adopted extraordinary precautions to avoid such damages and injuries and failed so to do.

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

Error to the court of common pleas.

The defendant is a corporation owning and operating a street railroad in the city of Cleveland.

On the 30th of August, 1899, the plaintiff, while a passenger upon the defendant's road, was most seriously injured by an ex-

plosion of some kind, which nearly demolished the car on which she was riding. The exact nature of the explosion the plaintiff alleges she is unable to state, but does allege that her injuries were caused by the negligence of the company and without any fault upon her part. She alleges that the company was negligent in not providing for a proper inspection of the cars, machinery, dynamos and apparatus in use by it; that the company was also negligent in not providing a proper inspection of the tracks upon which the cars were run; that the servants and employees of the company were negligent in not keeping a proper lookout for obstructions upon the track; further, that the company was negligent in not notifying the plaintiff of the dangers incident upon the riding upon the car at the time, also negligent in the appointment of incompetent servants, particularly the motorman in charge of the car upon which the plaintiff was riding; that the motorman was negligent in the management of its car; that he neglected to apply the brake at the proper time, of all of which the plaintiff had no knowledge. These allegations of negligence, considered independent of the peculiar conditions existing at the time, as further alleged in the petition, were in no sense sustained by the evidence.

Following these allegations, it is alleged that in the month of July, 1899, difference arose between the company and its employees, resulting in a strike by the employees, causing troubles and dangers incident to the same.

It is further averred in the petition that several other explosions had occurred in other parts of the city upon the defendant's track prior to the one which caused the injuries to the plaintiff, and that by reason of said explosions prior to the date of the plaintiff's injuries the defendant was aware and well knew that attempts were being made to place explosives of some kind or description, unknown to this plaintiff, upon the tracks of the defendant; that, notwithstanding this knowledge which the defendant had, it still continued to run and operate its cars and thereby invited the public to ride on said cars; that it took no measures or precautions to prevent such explosions or concussions; that it failed to patrol its track on which it ran its cars, either by persons on horseback or by men on bicycles or other-

wise, which it might easily have done; that it negligently failed to equip its cars in front of the forward wheels with brushes or other appliances which might have been placed thereon; that it failed utterly to take any precautions to discover whether explosives were placed upon its tracks or not; that it adopted no means to protect its track and protect the public who were traveling in its cars by direct and implied invitation; that the headlights upon its cars were placed upon the top of the car, and that the headlight upon the car in which the plaintiff was riding at the time she was injured was upon the top of the car; that said headlight was insufficiently furnished with an illuminant or light that would enable the motorman, who had charge of the car upon which this plaintiff was riding, to see ahead far enough safely to stop the car in case he saw anything upon the track, and that the defendant was guilty of negligence and careless in failing to supply or equip its said car with a proper headlight; and such a headlight as would enable the motorman operating the car to see whether any obstruction had been placed upon the track or not, the company well knowing, as this plaintiff alleges it did, that obstructions were being placed upon its tracks at that time.

"The plaintiff further says that the defendant employed no person on horses or on wheels, or on foot, to patrol said tracks and see that the same were free from obstructions, that is, the tracks on Wilson avenue; that it was guilty of recklessness, carelessness and negligence in not so doing, well knowing that obstructions and explosives were being placed on its tracks at that time, especially on said Wilson avenue; that instead of protecting its tracks or taking any measures to prevent explosion under its cars on said Wilson avenue, it published cards and interviews in the newspapers inviting the public to ride upon its cars and did say to the public that it was safe for the public so to do; that before the grievances hereinbefore set forth were committed, the president of the said defendant corporation, speaking for the defendant company, told the state board of arbitration, which had met in the city of Cleveland for the purpose of adjusting the difference between the defendant and its former employees, that 'The company fully appreciating the sincerity of your desire to bring about a readjustment with former employees, begs to say that the men who went out on Monday last, July 18, 1899, are not in the company's employ, and there is nothing to negotiate

about or arbitrate.' That it thereby carelessly and negligently assumed that the persons it had then in its employ were fully competent to operate, manage and run cars, and by said assumption publicly made, informed the public that the men who had been hired to take the place of its former employees were competent to care for, manage and run its cars, although the defendant knew, or ought to have known the facts to be otherwise.

"Plaintiff further says that the agents and servants of the defendant on said occasion were guilty of carelessness and negligence in this, that just prior to the happening of said accident said car was being negligently and carelessly run and operated at a high and dangerous rate of speed, and at such a rate of speed as rendered a proper and careful lookout by the motorman in charge of said car difficult; that is, at such a rate of speed as partially prevented a careful and proper lookout upon the tracks in front of said car; and that said agents and servants of the defendant in the management, conduct and control of said car and in the operation of the same, were guilty of carelessness and negligence upon said occasion and just prior thereto."

These allegations of negligence last quoted are connected with the allegations of the dangerous condition existing at the time, and the alleged acts of commission and omission on the part of the company are negligent acts, if at all, because of the alleged condition then existing in the city.

Issue was taken upon these allegations of the petition by answer.

Much evidence was produced upon the trial tending to sustain the claim of the respective parties. The trial consumed four weeks of time. There was no direct evidence of the size, nature or character of the explosives; much time was consumed in the examination of witnesses called as experts to establish such fact.

Numerous errors of the trial court are insisted upon as a ground for the reversal of this judgment. It will be noted that the explosive which caused these injuries was unlawfully placed upon the track by some miscreant for whose act the company was not responsible. The company, however, was charged with the duty of protecting its passengers from the dangers resulting from such act. It was not responsible for placing the explosive upon the track. Respecting this part of the case, the trial court said to the jury:

"As I have said, there had been a strike; the employees of the company had gone off; others had taken their places. There had been some explosions of some kind of explosive on the tracks of this company; they had been numerous; I think thirty or forty, the evidence tends to show; a few of them had been dangerous, but had evidently been intended simply to frighten people and prevent them from traveling on the road. It is claimed that the company had knowledge of this condition of things. They were operating their road impliedly inviting the public to travel on it; that persons were traveling upon it; they were operating their road carrying passengers, and that the company did not take proper measures to protect its passengers from this impending danger for which they were not, in the first instance, responsible. Now, that is the nature of this plaintiff's claims; that is the nature of this case.

Again, in the charge, he says:

"Did the company have reason on the 30th of August, 1899, to expect danger to its passengers on Wilson avenue, from explosives on its tracks? If it did not have reason to expect such danger at such time, there can be no recovery in this case. The burden is upon the plaintiff to prove by a preponderance of the evidence, that the company did then have reason to expect such danger, and if, upon consideration of all the evidence bearing upon this question, you do not find that it has been proved that the company had reason, at that time, to expect such danger, that will end your consideration of the case, and you should return a verdict for the defendant."

Again, it is stated:

"There is evidence tending to show that at this time about the full number of cars were being operated, and the public confidence had been restored to such degree that travel had increased to such extent as the evidence shows it had increased.

"Now, in view of these considerations; in the light of whatever else the evidence shows, bearing upon this question in view of whatever might, in the nature of the situation, reasonably be expected or not expected; what should this company have expected as to a recurrence of the dangerous explosions?

"If, upon full consideration of this question, you do not find it proved that the company had reason, at that time, to expect danger to its passengers from explosives placed on its tracks, you should return a verdict for the defendant, without further consideration.

"If, on the contrary, you find it proved that the company had reason at that time to expect such danger to its passengers, then you will inquire further, and determine whether it has been proved that the company was negligent in any of the respects charged in the petition."

The jury were thus instructed that the alleged negligent acts were not such unless the conditions existing at the time were of such a nature that the company had reason to expect damage to its cars and injury to its passengers from explosives, and therefore should have adopted extraordinary precautions to avoid such damages and injuries. The omission to employ by the company the agencies which it is alleged they omitted to employ became negligence only because of the fact of the dangers incident to the strike which the company was bound to guard against. If it be true that the conditions growing out of the strike were such that the company had reason to anticipate danger from explosives, then such omission may have been negligence on its part, but if the omission to employ such agencies can be characterized as negligence only when it is found that the conditions were such that the company had reason to anticipate danger from explosives, or by the exercise of due care should be charged with knowledge of such danger, then the court correctly charged the jury. We are of the opinion that a proper construction of the pleadings and proper application of the evidence to the issues fully justifies such charge and that there was no error in it.

Again, it is insisted that the jury were mislead by the charge of the court upon the subject of the degree of care which the defendant was bound to exercise toward its passengers, and attention is called to some expressions in the charge giving some support to this claim. The court said, among other things, upon this subject:

"The law imposes upon the carrier of passengers a high degree of care for their safety, the highest practicable degree of care—I am now speaking of passengers ordinarily—not in this particular instance—as to acts or omission of things under its control. A common carrier of passengers is required, by the law, to exercise the utmost care and diligence for their safety, and is responsible for injury resulting from the slightest neglect of such care. There is more or less danger from any means

of rapid transit, however careful the carrier may be, and whatever risk there is, when the carrier has been as careful as he ought to be, the passenger assumes."

It is insisted by counsel for the plaintiff that here the jury were given to understand that the rule laid down applicable to the duties of common carriers did not apply to the case then on trial; but when the court charged the jury upon the responsibility of the defendant in this particular case, the true rule, we think, was stated. The court said:

"A carrier or passenger is not liable for the act of an intervening independent agency. But where there is a known impending danger from a source for which the carrier is not responsible, then the law imposes upon the carrier a degree of care in respect to such impending danger; but the degree of care in such case depends upon the condition and circumstances of the particular instance, varying with those conditions, and is not that absolute degree of care which I have stated the carrier owes to its passengers under ordinary conditions."

Again the court say:

"On the 30th of August, 1899, this defendant had the right, and it owed the duty to the public to operate its several lines of street railway, and to carry such persons as chose to ride in its cars. It was not obliged, and it is not claimed here that it was obliged to cease to operate its road. This being so, you can plainly see that the degree of care which it could be required to exercise for the safety of its passengers must be consistent with the reasonable operation of its road; and this is the requirement of the law. Under the circumstances of this case, the law required of this defendant company the exercise of the highest degree of care practicable for the safety of its passengers, in view of the existing and known conditions, consistent with the practical operation and management of its street railway system. Failure to do this would be negligence on its part."

More is said upon this subject in other parts of the charge and in comments upon the requests made, but we think the above fairly states the law applicable to this case.

Again, complaint is made that the trial court took from the consideration of the jury the alleged negligence of the motorman

in failing to keep a proper lookout. We have carefully read the record, and fail to find any evidence whatever tending to support said allegation. The same may be said of the failure of the motorman to stop the care by proper application of the brakes. The brakes were disabled by the effect of the concussion or explosion, and all was done that could be done after the explosion took place. And, generally, it may be said of the allegations of negligence, relied upon, that unless the company had reason to apprehend danger from explosions, no duty was imposed upon it to adopt extraordinary measures to guard against the danger from such explosions. In such case, a failure to patrol its tracks, or to equip its cars in front of the forward wheels with brushes to remove the explosives from the track, or to provide more efficient headlights than were in ordinary use, or to employ extraordinary vigilance to discover such explosives upon the track—its failure to do so in any of these respects would not be negligence on the part of the company unless it was found that it had reason to apprehend such dangers.

Again, it is said the plaintiff was not awarded a fair trial by reason of certain rulings of the court in the admission and exclusion of evidence, and comments made in the presence of the jury during the trial. The most serious objection made under this complaint is of the rulings and comment of the court as appears on page 385, and following of the record. The plaintiff sought to show by a witness the speed at which the car was going at the time of the accident. An objection was interposed by the defendant to the testimony offered. Under a recent holding of the circuit court sitting in Licking county, approved by the Supreme Court, this testimony was competent. The trial court commented very freely upon this decision and, among other things, said:

"I know the holding of the Circuit Court of Licking County is not the law, if I know anything about such things, and yet here is the affirmance of that judgment by the Supreme Court. If you want to take the chance, this witness may answer the question."

Plaintiff's counsel then said: "We take the chances." The law upon this particular subject had been settled by the decision

of the highest court of the state and, therefore, was the law of the forum in which this case was tried; and the evidence should either have been excluded, or permitted to go to the jury without the condemnation of the trial court.

Again, it is said the charge of the court to the jury was misleading and, therefore, erroneous. A considerable portion of the charge, it is true, deals with general propositions of law applicable to this class of cases, and it is possible that the jury would have been better aided in their consideration of the evidence of the case by a shorter and less learned charge. The case was a peculiar one and so out of the ordinary as to present many difficulties and to require careful discrimination of the trial court. We believe that the true theory of the case and the ground of responsibility of the defendant company to the plaintiff was adopted by the trial court and that that theory was so enforced upon the jury by the trial court that they could not have misunderstood the charge. We conclude that the correct result was reached; that the judgment is the only one that was authorized by the evidence and the law applicable to the facts, and that there is no error apparent upon this record for which the judgment should be reversed.

The decision is by a majority of the court only, Judge Marvin dissenting.

The judgment of the court of common pleas is affirmed.

VALIDITY OF ORDER BY A DE FACTO OFFICER TO RAZE A BUILDING.

Circuit Court of Cuyahoga County.

JOHN G. BRUGGEMAN v. CITY OF CLEVELAND.

Decided, May 16, 1904.

Municipal Corporations—Officers—Municipalities May Raze Dangerous Buildings—Acts of De Facto Officers Valid.

1. The acts of a *de facto officer* acting under a law, which at the time had not been declared unconstitutional, are valid.
2. The state in the exercise of its police power may delegate to municipalities the right to raze buildings which become dangerous to life or property.

George A. Groot, for plaintiff in error.
N. D. Baker and *C. J. Estep,* contra.

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

Error to the court of common pleas.

The petition in this case alleges that Mr. Bruggeman was the owner of a certain parcel of land improved with a frame building; that on the 14th day of August, 1900, the city of Cleveland, though its agents, officers and servants, without any right whatever, entered upon said premises and tore down and destroyed said building, and he prays judgment for one thousand dollars.

The answer admits the plaintiff's ownership and says that R. J. Harks was, for more than a year preceding the 14th day of August, 1900, duly appointed, authorized and acting inspector of buildings in the city of Cleveland; that it was part of the duty of Harks to inspect the construction of new buildings, and to require old structures within the city to be maintained in safe and proper condition or torn down. It alleges that on the 14th day of August, the timbers of the building upon plaintiff's premises were rotten; that said building was liable to collapse at any time, and was so unsafe as to endanger life; that prior to that date, on the 17th day of March, 1900, and at other times, the said Harks, as building inspector, served upon the plaintiff

written notice requiring him to tear down said building, for the reason that it was dangerous and unsafe; that the plaintiff failed and refused to comply with said notice; that the public safety required immediate action, and that, therefore, on the 14th day of August, 1900, said Harks caused said unsafe and dangerous structure to be torn down.

The reply filed by the plaintiff admits that Harks was occupying a position called "Inspector of Buildings" in the city of Cleveland, but denies that he had any power or authority to tear down buildings, and asserts that whatever he did in that behalf was done in violation of the rights of the plaintiff, and without authority of law. The reply further asserts that the defendant, the city of Cleveland, had no right to destroy the plaintiff's building, whatever its condition was, for the reason that the law and ordinance under which the plaintiff destroyed said property, and which purported to confer authority upon the defendant to destroy and tear down property in said city, are unconstitutional and void.

The reply also contains the following:

"He denies all and singular the statements set forth in the defendant's answer inconsistent with the statements set forth in plaintiff's petition."

At the trial of the case an objection was made to the introduction of any testimony under the pleadings. This objection was sustained and a verdict for defendant directed. Such action of the trial court amounted to granting judgment on the pleadings, and a review of this case requires only an examination of the pleadings.

The petition, we think, states a cause of action.

Were there no reply to the answer, the question whether it sets forth a good defense would be one of law, to be determined by the court; but material allegations of fact in the answer are controverted by the reply, unless the judgment of the city as to the advisability of tearing down the building is not reviewable.

It is claimed by counsel for defendant in error that this reply contains only conclusions of law; that it is argumentative and does not squarely deny the allegations of the answer that the

timbers of plaintiff's building were rotten, that the building was unsafe and liable to collapse, that plaintiff was notified to take the building down, failed to comply and that the public safety required immediate action.

There is much merit in this criticism of the reply, but applying the rule that pleadings are to be liberally construed in favor of the pleader—stretching that rule, perhaps, to its utmost—we are disposed to say that the allegations of the petition that the city destroyed the building "without any right whatever," taken in connection with the denial in the reply of "all and singular the statements set forth in the defendant's answer inconsistent with the statements set forth in the plaintiff's petition," together were intended as a denial of the facts pleaded in the answer to which attention has been drawn.

So holding, it remains to determine whether the city acted under authority of law and whether the judgment of the city as to the facts and its discretion in the matter are reviewable.

The action complained of occurred on the 14th day of August, 1900, prior to the adjudication of the infirmity in the so-called "federal plan law" of the city of Cleveland. At that time Section 1545, sub-divisions 49 to 53, were in full force and effect. By Section 1545-53 it is provided that the director of fire service shall appoint an inspector of buildings who shall be an architect or builder, and who shall have all the power, perform all the duties and receive the same salary prescribed for the inspector of buildings by an act passed April 15, 1888, as amended April 11, 1890, entitled "An act to regulate the construction of buildings within any city of the first class and second grade," etc. Section 1545-49 gave to the fire department of the city of Cleveland the control and management of the inspection of buildings. At that time there likewise existed upon the statute books the so-called building code for the city of Cleveland, Section 2575, 1 to 52, being the same law as is referred to in Section 1545-53, where the powers of the building inspector are set forth. Among the powers and duties prescribed by this building code, in Section 2575-48, is the following:

"The owner or other party having an interest in any building, staging or other structure or any thing attached to or con-

nected with a building or other structure which shall be unsafe, so as to endanger life, shall immediately, upon notice received from the inspector, cause the same to be made safe and secure, or taken down, and where the public safety requires immediate action, the inspector may enter upon the premises with such assistants as may be necessary, and cause the said structure to be secured or taken down without delay, and the passers-by to be protected at the expense of such owner or party interested."

Among the general powers of municipalities at this time were those conferred by Section 1692 of the Revised Statutes, Subsection 1 of which provides that municipalities shall have power, and council may provide by ordinance for the exercise and enforcement thereof "to preserve peace and good order, and protect the property of the municipal corporation and its inhabitants." Sub-section 17 includes, among the enumerated powers, the power to guard against injuries by fire; Sub-section 27, the power to regulate the erection of buildings, fences and other structures within the corporate limits; Sub-section 30, to organize and maintain a fire department, erect necessary buildings therefor, etc.

It is admitted by the pleadings that H. J. Harks was inspector of buildings in the city of Cleveland, and in destroying plaintiff's building, acted in behalf of defendant.

All the statutes above referred to have since August 14, 1900, been repealed, and in their stead the Ohio Municipal Code has been enacted.

Plaintiff claims that the statutes above referred to are unconstitutional, being special legislation. Such is the case, but we hold that the acts of Harks in the premises were the acts of a *de facto officer*, acting under a law which had not at the time been declared unconstitutional, and that his official acts while so acting are valid. *State, ex rel,* v. *Bingham,* 11 C. C., 245; *Hick* v. *the Findlay Window Glass Co.,* 16 C. C., 111; *State* v. *Gardner,* 54 O. S., 24.

It is further claimed by plaintiff that the law is in contravention of the constitutional provision that private property

shall ever be held inviolate, and shall not be taken for public use without compensation therefor being first made in money.

We think not; the statute is in exercise of the police power of the state. Upon this subject see *Dillon on Municipal Corporations,* Sections 141, 379, 955; *Evansville* v. *Miller,* 38 L. R. A., 161, and extended note.

The above authorities dispose of the contention by plaintiff that the city had no authority to tear down his building no matter what its condition, but they all recognize the rule that if the public good did not require the act to be done—if the act was not apparently and reasonably necessary, the actors can not justify, and would be responsible.

We think the plaintiff attempted to raise the latter issue, *i. e.*, that the public good did not require the tearing down of his building; that such tearing down was not apparently and reasonably necessary; and on this issue he should have been permitted to go to the jury.

For this reason it was error for the trial judge to sustain the defendant's objection to the introduction of any evidence by the plaintiff and to direct a verdict for the defendant, and for said error the judgment is reversed.

DESIGNATION OF BENEFICIARY BY WILL.

Circuit Court of Cuyahoga County.

F. DHONAU, JR., v. SUSAN CLARE STRIEBINGER AND MARIE VAN CAMP.

Decided, June 6, 1904.

Mutual Benefit Societies—Step-Children May be Beneficiaries as "Members of Family"—Beneficiary May be Designated by Will.

1. Where step-children, taken into the home at a tender age are reared as children of the step-father and after marriage one of them remains in the home of the step-father, they can be designated as beneficiaries of a member in a mutual benefit association, whose

constitution requires that beneficiaries shall be members of the family or someone related to the member by blood.

2. The designation of the beneficiaries of a member of a mutual benefit association may be made by will so long as those designated belong to the class from which they are to be selected.

Albert Mendelson and *McKeney & Belville,* for plaintiff in error.

E. K. Wilcox and *F. C. Friend,* contra.

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

Error to the court of common pleas.

The issues tried and determined in the trial court relate to the disposition of the benefits of a deceased member of a benefit association.

In 1881, Robert Jaite became a member of the Ancient Order of United Workmen and continued a member of that order until his death, which occurred on the 2d day of January, 1900. He fulfilled all his obligations to the order while thus a member. In the certificate issued to him, his wife Elizabeth was named as the beneficiary. She died on the 2d day of December, 1899, just one month prior to the death of her husband. After the death of his wife, no other beneficiary was designated, unless such designation was made by him in his will, which was executed on the 2d day of December, 1899, just a few days before his death. The clause of the will which, it is claimed, made such designation reads as follows:

"Fifth. I give, devise and bequeath to Susan Clara Striebinger and Marie Van Camp my life insurance of $2,000 made payable to my wife, now deceased, each $1,000 and further, to Marie Van Camp my fire insurance business, and my household furniture shall be divided between said Susan Clara Striebinger and Marie Van Camp. My horse, buggy and tools I give to George Van Camp."

The provision regarding the designation of the beneficiary in this order is contained in Section 46 of the constitution, and reads:

"BENEFICIARIES.—Each member shall designate the person or persons to whom the Beneficiary Fund due at his death shall be

paid, who shall, in every instance, be one or more members of his family, or some one related to him by blood, or his affianced wife, who shall be dependent upon him."

The object of the order, as expressed in its by-laws and constitution, is:

"To pledge the members to the payment of a stipulated sum to such beneficiaries as a deceased member may have designated, while living, under such restrictions and upon such conditions as the laws of the order may prescribe."

There are several errors alleged for which it is claimed the judgment should be reversed, but chiefly three are relied on:

1st. That the defendants in error, Mrs. Striebinger and Mrs. Van Camp, are not of the class which the member was authorized to designate as a beneficiary, and therefore their designation is entirely nugatory.

2d. That the designation of a beneficiary could not be made by will, and is therefore inoperative.

3d. That the will does not sufficiently designate in terms the defendants in error as the beneficiaries, and, further, that it does not so definitely designate the benefits under the term "insurance" that it should be operative.

Now, as to the first point, whether these parties belong to that class that might be designated: Mr. Jaite shortly before becoming a member of this order, was married to his wife, Elizabeth, designated in the certificate. The wife at that time had two daughters, one three years of age and the other six, now Mrs. Striebinger and Mrs. Van Camp. They were taken into the family of Jaite and educated, clothed, fed and treated entirely and absolutely as his own children, he calling them his children and they calling him father. In 1893, perhaps, one of the daughters was married, Mrs. Striebinger; later Mrs. Van Camp was married. Both of these stepdaughters have looked to their father's home as their home, as children look to the old home after they have left. Later Mrs. Van Camp's husband met with reverses and misfortune came upon that family. She and her husband were taken into the family of Mr. Jaite, provided for and looked after until his death. Some three years prior to

his death they became absolutely members of his family and dependent upon him. Mrs. Striebinger, as I have said, has gone back and forth to the old homestead. Now under the circumstances of this particular case, we hold that these parties *did* come within the class that might have been designated by Mr. Jaite as the beneficiaries under the will.

It is said that this designation could not be made by will. Let it be borne in mind that this is a case in which the beneficiary has died and no other beneficiary named in her place. The rules of the order, Section 47, provide:

"If one or more of the beneficiaries shall die during the lifetime of the member, the surviving beneficiary or beneficiaries shall be entitled to the share of such decedent, equally, unless otherwise provided in the beneficiary certificate; and if all the beneficiaries shall die during the lifetime of the member, and he shall have made no other direction in his beneficiary certificate, the benefit shall be paid to his widow; if he leave no widow, then said benefit shall be paid, share and share alike, to his children; his grandchildren, living at the time of his death, to take the share to which their deceased parent would be entitled if living; if there be no children nor grandchildren of the deceased member living at the time of his death, then said benefit shall be paid to his mother if living, and if she be dead at the time of his death, then to his father if living, and should there be no one living at the death of the member entitled to said benefit under the provisions of Section 46, then the same shall revert to the beneficiary fund of the grand lodge."

It will be borne in mind that this is a controversy between the beneficiaries named and the grand lodge. No other beneficiary is disputing the claim; the benefits go to the grand lodge only, if there be no one under Section 46 entitled to its benefits. Now, this section that I have read named certain parties—the widow, children, grandchildren, the mother, the father—but there are others named in Section 46 who are entitled to these benefits before it goes to the grand lodge. How shall they be designated? It does not name them. The language of the section reads:

"Each member shall designate the person or persons to whom the beneficiary fund due at his death shall be paid, who shall, in every instance, be one or more members of his family, or some one related to him by blood."

It may be his father, his mother, brother or sister are entitled to the benefits. It may be some of those specifically enumerated or otherwise. No designation is made in Section 47 as to the dependent party taking. We find there was neither widow, children, grandchildren, father or mother. The order says it may go to "one or more members of his family," a dependent, and if there is any one under Section 46 who can take, then the grand lodge does not take it. Clearly in this case there was not the slightest excuse for this order refusing the payment to Mrs. Van Camp. She was a member of Mr. Jaite's family; she was dependent upon him. Neither the constitution and by-laws of the order nor the statutes designate any way in which the members shall designate the beneficiary as a member of his family, or as a dependent, and we are of opinion that it may be done by will.

The statute itself contemplates that it may not be done in the lifetime of the member. How shall it be done? Manifestly, only in the way it was done here. At all events, we hold that it was a sufficient designation.

Again, it is said that the language of the will is not a sufficient designation. Certainly it is clearly a designation of the parties. They are named by name, and they are the daughters of his wife, and there can be no doubt that he intended this benefit under the term "insurance." He refers to the fact that his wife was named as beneficiary, hence we hold that the designation by will could be made, and that designation is sufficient.

We reach the same conclusion that was reached by the trial court. We think this judgment was not only right but rests upon a good, solid, legal foundation. The judgment of the court of common pleas is affirmed.

DEFENSES UNDER A POLICY OF CASUALTY INSURANCE.

Circuit Court of Cuyahoga County.

THE OHIO MOULDING MANUFACTURING COMPANY v. THE STANDARD LIFE AND ACCIDENT INSURANCE COMPANY.

Decided, December, 1903.

Estoppel—Casualty Insurance—Defending Action Brought Against Insured, Not a Waiver of Conditions in Policy.

In an action against a casualty insurance company to recover the amount of a judgment for personal injuries secured against the holder of a policy by one of his employees, the fact that the insurance company defended the action in which the judgment was secured against the assured, does not amount to an estoppel, nor is it a waiver of conditions in the policy that it shall not cover loss from liability for any injuries caused by failure of the assured to comply with the requirements of any law respecting the safety of persons, nor to injuries resulting through the employment of a child.

Smith & Taft, for plaintiff in error.
Hoyt, Dustin & Kelley, contra.

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

Error to the court of common pleas.

On the 12th day of May, 1897, the defendant made and issued to the plaintiff, who was then engaged in the manufacture of mouldings, doors, sash and blinds, in the city of Cleveland, its policy of insurance by the terms of which it insured the plaintiff against damages on account of any injuries to its employees caused by accident for twelve months from said date. A copy of the policy is attached to the petition and made a part thereof. The action was prosecuted by the plaintiff against the defendant in the court of common pleas to enforce the provisions of this policy.

The following facts appear from the record:

On the 13th day of October, 1897, during the life of the policy, Martin Uhas, an employee of the plaintiff, was injured while en-

gaged in said employment. His injuries were caused by accident within the terms of the policy. Immediate notice was given to the insurance company by the plaintiff of such injuries. Uhas claims that his injuries were caused by the negligence of the plaintiff, and brought an action against it to recover compensation for such injuries.

The defense in this action was conducted by the insurance company, as, by the terms of its policy, it was bound to do.

The action resulted in a judgment in favor of Uhas against the plaintiff, which, after a review and affirmance in the circuit court, the plaintiff paid. The total amount of the judgment and costs paid by plaintiff to Uhas was $756.56.

The plaintiff sought in this action to recover of the insurance company the amount of the judgment and costs so paid to Uhas, and all allegations are made in the petition necessary to entitle the plaintiff to a judgment for such sum.

The defendant denied any liability under this policy, and alleged that the policy contained these two clauses:

"1. This policy does not cover loss from liability for any injuries caused by the failure of the assured to comply with the requirements of any law or ordinance respecting the safety of persons.

"2. This policy does not cover loss from liability for injuries to any child employed contrary to law, nor to any child under fourteen years of age, nor does this policy cover any injury due wholly or in part to the employment of any such child."

It is then alleged that Uhas was employed by the plaintiff contrary to law, and reference is made to the act of April 8, 1890, wherein it is provided that no child under the age of sixteen years shall be employed by any person, firm or corporation in this state at employment where its life or limb is in danger, or its morals may be depraved by such employment.

It alleged further that Martin Uhas, at the time of his employment and of his injuries, was a child under sixteen years of age, and that the employment was of a dangerous character whereby his life and limbs were in danger, specifying that the employment was about a rapidly-moving circular rip saw.

The reply took issue with this defense, and alleged that the defendant waived all rights it had to such defense and is estopped from asserting the same by the facts specifically set forth by said reply, the chief of which is that the defendant, with such knowledge as it had of the facts of the case, by taking the burden of the defense of the original action, is estopped.

1. It is claimed that the court erred in the exclusion of evidence offered by the plaintiff in support of the claim made by it that the defendant had waived all rights to insist upon this defense. This evidence consisted mainly of conversations had between the attorney of the insurance company and Philip Decumbe, the general manager of the plaintiff company, and were to the effect that Mr. Wilcox, as attorney for the insurance company, had objected to the plaintiff making any settlement with Mr. Uhas. The policy provides that the assured "Shall not settle any claim except at his own costs, nor incur any expense, nor interfere with any negotiations for settlement in any legal proceeding without the consent of the company given in writing, but he may provide at the time of the accident such immediate surgical relief as is imperative." In view of this provision of the policy the plaintiff's testimony was wholly immaterial. If the insurance company did, by an authorized agent, object to any settlement made by the moulding company, it only did what it had a right to do under the terms of the policy, and such evidence would have no tendency in support of a waiver of the condition of the policy relied on by the insurance company. We think there was no error in any of the rulnigs upon the exclusion or admission of testimony.

2. It is claimed that the trial court erred in holding as a matter of law that under the evidence submitted on the trial of the case the insurance company had not waived its right to insist upon the defense made in its answer. We think the court correctly ruled upon this proposition. There was no evidence offered either by plaintiff or defendant upon which a finding of the jury in favor of such waiver could be sustained, unless the mere fact that the insurance company took charge of the defense in the original action against the plaintiff by Uhas was in law such waiver; but we hold that the mere fact that that defense was

conducted by the insurance company as by the terms of the policy it was bound to do, was not and could not operate as a waiver of its rights under the policy. It would hardly be claimed, if the insurance company, without any knowledge whatever that the boy Uhas was under sixteen years of age at the time of his employment and injuries, conducted said defense and subsequently learned the facts as to the age of the boy, that it would be estopped from enforcing the provisions of this policy, or had in any way waived such provisions. The most that can be said of the evidence in this case on behalf of the plaintiff is that Uhas, from the inception of his case against the plaintiff, was claiming his age to be under sixteen years, but that the plaintiff was at all times insisting that he was more than sixteen years at the time of his employment and of his injuries. Statements to that effect were made to the attorney for the insurance company, and it can not rightfully be claimed that because the insurance company, under the assurance by the plaintiff that the boy was more than sixteen years of age at the time of his employment, entered upon and conducted said defense, it waived its right to insist upon the terms of the policy. It was the duty of the insurance company to conduct said defense. It had so contracted in the policy, and it could not be justified in disregarding its contract because Uhas or his guardian claimed him to be less than sixteen years of age, while the assured was insisting that he was of greater age.

The issue was fairly made by the pleadings, whether the employment of Uhas was in violation of the statute above quoted, and therefore any accident to him not within the terms of the policy. The court refused to submit this issue to the jury, but said to the jury that the employment of the boy, if under sixteen years of age, to work in the place he was injured was unlawful. In so charging the jury it is claimed that the court erred. It is true that a question of fact was raised by this issue, and it probably would have been better to have submitted that issue to the jury for determination, but, after a careful consideration of all the testimony bearing upon that issue it is made certain that the jury must have found the employment to have been unlawful. Any other conclusion than that reached by

the jury would not have been permitted to stand. We are, therefore, of opinon that this judgment should not be reversed for this alleged error.

There was some conflict in the evidence offered upon the trial as to the age of the boy at the time of his employment and injuries. That issue was properly submitted to the jury and there was a finding by the jury that the boy was under the age of sixteen years at the time of the injuries.

If we are right in our determination of these several propositions, there is no error for which this judgment should be reversed.

The judgment of the court of common pleas is, therefore, affirmed.

COMPENSATION TO AN ADMINISTRATOR OF AN ADMINISTRATOR.

Circuit Court of Cuyahoga County.

EDWARD MADDEN, ADMINISTRATOR, v. EDWARD M. MCGILLIN, ADMINISTRATOR.

Decided, February 29, 1904.

Under circumstances warranting it, the probate court has authority to allow special compensation and attorney fees to the administrator of the estate of an administrator of another estate, for extra services performed by the last administrator and his attorneys in and about the filing of the final account of the deceased administrator of the first estate.

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

Error to the court of common pleas.

It appears that Sarah McGuire died in this county, leaving an estate of which Mary McGillin was appointed administratrix, and when Mary McGillin died, Edward M. McGillin was appointed her administrator, and filed a final account that should have been filed by Mary McGillin as administratrix on the estate of Sarah McGuire, claiming special compensation and attor-

ney fees for extra services rendered in and for the filing of that final account, which were allowed by the probate court in the sum of one hundred dollars for extra compensation to the administrator, and seventy-five dollars attorney fees.

The matter went to the common pleas court and the common pleas court allowed the attorney fees, but reversed the probate court on the allowance to the administrator for extra compensation.

We hold, that under circumstances warranting it, the probate court has authority to allow special compensation and attorney fees to the administrator of the estate of an administrator of another estate, for extra services performed by the last administrator and his attorneys in and about the filing of the final account of the deceased administrator of the first estate.

And so, upon the review of this case, we find that attorney fees were properly allowed, and owing to the fact that the account itself is not before us or attached to the record or bill of exceptions, we are unable to determine whether the extra compensation should have been allowed the administrator, or not, and therefore affirm the common pleas court in the reversal of the probate court.

The judgment of the court of common pleas is affirmed in that regard.

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A notary's commitment of a witness for refusal to be sworn is not to be attacked on the ground that his deposition had already been taken when the prior deposition showed refusals to answer the required questions. And if an order of court is necessary to a second deposition, it is substantially given by the court having stopped the trial for that purpose. 10.

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An agreement by all stockholders whereby preferred stockholders remit all dividends overdue and accruing to a future date on condition that the common stockholders pay an assessment of $40 per share, lacks neither mutuality or consideration and is enforcible against a common stockholder who has failed to pay the assessment. 454.

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A city can not grant to a railway the right to cross a street with five tracks running from a main line into its adjoining railway yard and thus in reality becoming part of the yard, for the right to do so could not be appropriated. 305.

Mandatory injunction lies to restore the street where it has been torn up by the railroad. 305.

G. C., 3678, authorizing a city to appropriate property outside its limits, is not to be restricted to property wholly outside of any other municipality, and a city may enlarge its park area by appropriating contiguous land although in another city. 317.

The county treasurer, being a mere ministerial officer, is not a necessary party in order to deduct taxes from the compensation awarded. 374.

As in an appropriation by a city title does not pass until compensation has been paid or secured, the taxes which are a lien at that date must be deducted and paid. Nor is the rule applicable to judicial sales to be applied. 374.

ERROR—

Leave to file a petition in error by the common pleas court to review a police court conviction is not necessary. 264.

A charge to the jury to use their sense of fair play, etc., without reference to law and the facts, is misleading. 521.

Admission of incompetent evidence in a criminal case over objection is cured where the court, as clearly and emphatically as could be, orders the jury to disregard it, although it was not so withdrawn until after the case had been argued. 579.

ESTOPPEL—

Refusal to grant a divorce and alimony does not bar an action for alimony and support of child, when. 566.

EVIDENCE—

To charge that between witnesses of equal credibility the affirmative testimony of those who heard a gong outweighs the negative testimony of those who did not hear it, is error without the qualification of equal opportunity to hear. 1.

A witness' statement in a collision case that plaintiff "could not see the street car" may be striken out where the jury by having the positions of the car, the plaintiff's buggy and an obstructing wagon could have found out. 63.

On trial for obtaining money by false pretenses, evidence of similar pretenses to others is not admissible, as it does not tend to prove scienter. 404.

Declarations of the plaintiff in a personal injury case as to her suffering made to a physician who did not attend the case or to a daughter are not admissible. 463.

As dual agency must be specially pleaded in defense and not by general denial, the burden of proof is on defendant. 521.

How the admission of incompetent evidence over objection in a criminal case is cured by order of the court to the jury. 579.

Rough treatment of the father by a son may be shown against him in a contest of the mother's will. 409.

Declarations of the testatrix as to why she kept a revolver in her bed; tendency to show fear of the son to whom she left all her property, are admissible to show mental state. 409.

Declarations of the testator before or after making the will if near such time, are admissible to prove state of mind but not to prove undue influence. If the declarations tend to prove both they must be admitted with an instruction to the jury to confine their effect to showing state of mind. 409.

EXECUTION—

When a surety on replevin bond may have execution of judgment stayed. 553.

EXECUTOR—

The probate court has no power to order that part of a distributive share shall be reserved and deposited in the judge's name to await an attempt to collect a claim from the distributee. 125.

Special compensation and attorney's fees may be allowed in a proper case to the administrator of an administrator for settling the accounts of the latter. 607.

EXEMPTION—

Defendant's marriage the day after levy does not entitle her to claim the property as exempt. 247.

FALSE PRETENSES—

Similar pretenses to others not sufficient to sustain charge of false pretenses. 404.

It is no defense that the victim was engaged in an unlawful business and that the money was paid to one pretending to be an officer in order to obtain immunity. 404.

That the money was obtained for a thing to be done in the future, as where the false pretense is pretending to be an officer, coupled with a promise of protection in an illegal business, will not relieve from prosecution. 404.

G. C., 13145, making it penal for one to represent himself as a fortune teller unless licensed, is not violated by representing to a single person only that she is a spirit medium and a rose bud. 526.

GAME—

G. C., 1417, making it unlawful to have in possession certain animals between dates, must, in order to avoid absurd consequences, be held not to apply to animals reclaimed and tamed as pets. 481.

GIFTS—

Donations of money to a religious society, for which it gives an annuity bond reciting that the gifts are executed and that it will pay the donor an annuity for life, which it does, are executed gifts. 95.

Testamentary capacity not sufficient to sustain. 103.

GOOD-WILL—

A retiring partner who sells the good-will may be enjoined from soliciting old customers or using his knowledge of the business to attract them. 556.

GUARANTY—

From what date interest may be charged. 339.

A written request to "extend credit to the extent of $100 to my nephew" is not continuing, but is limited to the first $100 worth of goods purchased; for such instrument must be limited to the first transaction unless its language is broad enough to cover future credits and can not be modified by parol evidence. 478.

HOMICIDE—

A charge that threats by deceased are not sufficient provocation to reduce second degree to manslaughter is error where there were no threats shown. 145.

HUSBAND AND WIFE—

Bequest of life insurance. 30.

A deceased husband is not the ancestor of his relict. Ancestral property of deceased husband devised to his wife ceases to be ancestral. 449.

INJUNCTION—

Doubtful whether insignificant violations of a building restriction by plaintiff and others estops injunction proceedings. 282.

The city solicitor has ample power under G. C., 4311, without authority of council and regardless of its wishes to enjoin a railway from occupying a street, under a city ordinance, with tracks. 305.

When injunction will lie against a gas company which endeavors to enforce a minimum charge. 537.

A retiring partner who sells the good-will may be enjoined from soliciting old customers, etc. 556.

INSANE—

An insane degenerate with paranoidal delusions in the form of egomania and megalomania may pursue his business with such self-restraint that his associates will not suspect his condition, but their testimony must yield to that of alienists who find him to be undoubtedly insane, and his change of beneficiary of his life insurance will be set aside. 49.

INSURANCE (Life)—

Where the owner of a life policy, with the consent of the beneficiaries, has borrowed money on the policy for his own use, which loan is deducted by the company on paying the policy, the beneficiaries are entitled to recover the amount from his estate. 459.

INSURANCE (Fire)—

An adjuster's denial of liability on the ground that the insured caused the fire does not amount to a waiver of conditions (*e. g.*, proofs of loss, appraisement, etc.) in the absence of proof of authority by the company. 465.

Proof of waiver of the conditions of a policy, like those of any other written contract, must be clear. 470.

Whether a requirement of immediate notice of loss (which means in a reasonable time) has been complied with is a question for the jury under the circumstances of the case. 511.

G. C., 9586, making the soliciting agent the agent of the company, makes him such only for purposes of making the contract and not for receiving notice of loss. 511.

In determining whether an immediate notice of loss was given (*i. e.*, in a reasonable time), evidence of a local custom to give notice to the soliciting agent is not admissible. 511.

INSURANCE (Surety)—

In an employer's action on an indemnity policy for the amount of a judgment recovered against him by an employee, the fact that the company defended that action is not an estoppel or a waiver of its condition that no injury is covered in case the employee is

under the age of legal employment. 603.

A clause that the policy shall not be in force until the premium is paid and that only certain chief officers can extend the time, is waived by an agent's delivery of the policy in which receipt of premium is acknowledged, where a custom of such agent to deliver policies before payment is known to the manager. 113.

A life insurance policy on a husband's life payable to his wife and "her executors, administrators or assigns" may be bequeathed by her to her husband. G. C., 9398 and 9399, do not apply. 30.

A life policy payable to children probably inures to grandchildren if one child his died. But if the surviving children are not objecting his executor can not raise the question. 461.

INTOXICATING LIQUORS—

One who keeps large quantities of liquor in a rented room 6 by 8 feet without windows or bed can not escape conviction on the ground that G. C., 6102, permits keeping liquor in dry territory in a *bona fide* private residence. 254.

JUDGMENT—

As an entry *nunc pro tunc* can be made only on clear and convincing evidence, a reviewing court can not reverse a refusal to allow it where there is no bill of exceptions showing the evidence. 110.

On distribution under a judicial sale transcripts of justice's judgments must be paid in the order of their filing if at the same term, and not pro rata, under G. C., 11661, and not under G. C., 11665, which relates to liens by levy of execution. 110.

A judgment against one or more of several defendants under G. C., 11584, leaving the action to proceed against others, is only when the plaintiff might have demanded a several judgment had he sued the defendants separately; hence where he could not have sued separately the vacation by the court of a joint judgment as to one debtor vacates it as to all. 156.

To cancel a justice's judgment on the ground that summons, returned served at residence, was never served, the proof of non-service must be conclusive. 220.

Even if putting an assignment of a judgment on the docket is constructive notice, yet if not put on until the judgment, plaintiff is in process of collecting the judgment by setting it off in another county; and without notice to the debtor the principle applies of where one of two innocent parties must suffer loss, etc. 280.

Although in a former action the answer was a general denial without claim for affirmative relief but evidence was offered (it seems to be on a counter-claim), this makes the claim *res judicata* in a later action by the former defendant against the former plaintiff. 357.

JURY—

Submitting to a trial by the court without asking for a jury or objecting until afterwards, waives a jury trial. 97.

Where a gift of corporate stock is attacked for senility of the donor, but has been sold by the donee, the action for its value is one for money only. 103.

JUSTICE OF THE PEACE—

The re-enactment of G. C., 13423, which had given justices criminal jurisdiction over the county, adding two additional classes of cases, did not repeal by implication Section 43 of the Cincinnati municipal court act depriving justices of all criminal jurisdiction in Cincinnati township, passed eleven days earlier, for they are not irreconcilable. 249.

LANDLORD AND TENANT—

A lessee under an invalid lease surrendering possession but leaving a sub-tenant in part, must pay rent while the sub-tenant is in. 177.

A lessor's covenant to make needed repairs on property leased as an entirety does not make him liable to a lessee or sub-lessee for injuries, for he is not in control. 233.

A tenant having acquiesced in a forfeiture of his lease for three months, during which time parts of the premises have been leased to others and by them sub-leased, will not be relieved in equity. 343.

Where the premises become uninhabitable by gradual decay from ordinary causes, as by faulty construction, the ravages of time and missuse by prior tenants, G. C., 8521, will not apply to entitle the tenant to surrender. 426.

Where a cellar door in a dark common passage in a flat building is well known to a tenant and is left open by others than the landlord and his servants and the tenant falls down it, the landlord is not liable. 542.

A clause in a lease to begin on a certain date, that if the lessor is unable to complete the building by that time the rent shall be proportionately rebated, does not relate to the remedy but merely postpones the time the lease takes effect; hence the lessee has no right to rescind for a delay. 488.

LIBEL AND SLANDER—

Publication by one who has bought out another's stock and business, stating that fact and also that the latter had "suddenly decided to retire from the business," neither reflects on his character or conduct in business and hence is not libellous *per se*. 314.

LICENSE—

Section 6346-4. The language of a penal statute can not be stretched to cover its spirit in order to deter others by punishing defendant for not getting a license to do what he did not do. 545.

LIEN (Mechanic's)—

No error in taking steps to perfect the lien will defeat it unless prejudicial to the owner. 352.

Mis-statement of the ownership of the property in a mechanic's lien (naming a dead woman as owner when her heir had inherited) does not invalidate the lien. 348.

LIMITATION—

Where plaintiff voluntarily dismisses his action, though without prejudice, to avoid being forced into trial when unprepared, such dismissal is not a failure otherwise than upon the merits and does not prolong the time. 180.

Title by adverse possession of a street rests rather on estoppel than limitation and obtains only as to land covered by valuable improvements. And although vehicles can not be used on a street strip until graded, excluding the public from it for some fifty years, by fencing the whole, gives no title. 20.

A bank's claim against a promoter for a fraudulent issue of stock to himself and fraudulent taking of a credit is not saved from limitation by non-discovery of the fraud, for the bank is bound to know and is estopped to plead ignorance of the stock and credit. 161.

A bank's claim against a promoter of the corporation for secret profits in the purchase and sale of furniture to it is not based on fraud but on the duty owed, and accrues on the consummation of the sale, and is barred in four years (G. C., 11224), though the wrong was not discovered within that period. 161.

MALICIOUS PROSECUTION—

The element of malice must be proven as a fact and does not nec-

essarily follow from want of probable cause, and a charge that the jury may assume malice in such case is error. 266.

MASTER AND SERVANT—

Although the use of a guard at a machine which throws splinters which are apt to strike the eye are not usual or customary in the trade, this is not the test of due care, and if a guard can be used and in some factories are used it is for the jury to say whether due care has been exercised. 529.

MAXIM—

"Clean hands"— see CORPORATIONS.

MONOPOLY—

No defense to debt. 27.

It is not ground to enjoin defendant from drilling for oil on certain leased premises or for quieting title against defendant that defendant is a member of an unlawful conspiracy to create a monopoly and that the lease was entered into in furtherance thereof. 27.

MOTOR VEHICLES—

Error in charging that an unlawful speed (automobile case) is negligence *per se* is not ground for reversal where this is alleged in the petition as a substantive ground of relief. 225.

MUNICIPAL CORPORATIONS—

A convict in a city workhouse can not sue the city for injury by the negligence of workhouse officials. 503.

Where a village and a gas company have made a rate contract, the gas company has no right to enforce a minimum charge, and injunction lies. 537.

An ordinance fixing gas rates, when accepted by the company, constitutes a contract (G. C., 3982), and a municipality authorized to make a contract has legal capacity to enforce it. 537.

Where a rate contract in unambiguous terms is made between a municipality and a gas company, its enforcement is within the jurisdiction of the courts and is not for the public service commission. 537.

Proceedings before county commissioners to annex part of a village to a city (G. C., 3575) are not complete until the city council has accepted the annexation (G. C., 3559); hence up to that time the inhabitants of such part of the village can vote for village officers. 561.

One elected to an office, created under an unconstitutional act is, before it is declared void, a *de facto* officer and his acts are valid. 594.

MUTUAL BENEFIT SOCIETIES—

In a fraternal order where a member may change his beneficiary, the beneficiary has no vested interest. 129.

Although the constitution of a fraternal order provides that its endowment fund is for the benefit of its widows and orphans but the state laws allow it to include the mother of a member, if it allows a member to change his beneficiary from his wife to his mother it will be deemed to have exercised the power granted by the state and to have waived the constitutional provisions. 129.

The fact that a man changed his beneficiary from his wife to his mother when fatally ill with tuberculosis after leaving his wife and refusing to support her and showing some ill-will towards her, does not prove unsoundness of mind or undue influence. 169.

Where a former beneficiary paid some of the assessments out of her own money, the court will on distribution restore them. 169.

Designation of beneficiaries may be made by will. 598.

Step-children who made their home with their step-father and remained with him even after

marriage may be made beneficiaries in a society (A. O. U. W.) which requires beneficiaries to be members of the family or related by blood. 598.

NAME—

Where a chattel mortgagor is known by more than one name. 286.

NEGLIGENCE—

Positive and negative testimony of; relative value of such testimony. 1.

The motorman of a street car must exercise greater care at intersections than between streets, but drivers of other vehicles must exercise greater care in crossing tracks between streets than at intersections. 1.

Whether a chauffeur exercised ordinary care in driving from private grounds upon a track in face of an approaching car which struck his machine is for the jury. 1.

A witness whose observation and experience makes his judgment reliable may give his opinion of the speed of a street car, although he is in the car, the same as if he was not on board. 60.

Violation of a speed ordinance is not *per se* negligence, but only an element to be considered. 60.

Where one about to drive across a street car track would have discovered an approaching car by using his senses with ordinary care, he is guilty of contributory negligence if run down. 60.

On the issue whether the speed of a street car exceeded the ordinance rate of twelve miles per hour a witness answers that it was moving "very fast" or "at an awful rate" may be stricken out as too uncertain. 60.

The question of the liability of the owner of an office building on account of an elevator accident is not affected by the fact that the elevator was being operated by an infant. 135.

It is for the jury to decide whether due care has been exercised in the use of a machine guard which is not in general use. 529.

NEW TRIAL—

The time for filing the motion dates from the verdict and not from the overruling of a motion for judgment on a special verdict. 274.

Where the significance of a conversation depends on the emphasis placed on certain words (as where by emphasizing the pronoun "I" would show that defendant was binding himself personally and not as president of a company), a reviewing court will construe them to sustain the verdict. 473.

OFFICE AND OFFICER—

Members of county boards of education are not county officers. 81.

A power to remove or suspend an officer or employee includes a power to reduce to a lower rank. 321.

A statute passed by a two-thirds vote (Constitution, Art. II, Section 29) requiring a county to pay additional compensation for past services is not a law of a general nature nor retroactive. 400.

A deputy employed at a yearly salary can not recover extra pay for time in excess of eight hours per day. A modification of the original employment that a day's work should be eight hours is without consideration. 443.

A public officer, unlike an agent who goes beyond his authority, does not bind himself personally, unless he has acted entirely without authority and also has used apt words to bind himself. 443.

One elected to an office, created under an unconstitutional act, is, before it is declared void, a *de*

facto officer and his acts are valid. 594.

PARENT AND CHILD—

One who is shown to be the parent of a child born in or out of wedlock and able to support it may be convicted under G. C., 13008, for failure to provide without notice or demand, for the parent is bound to know. 296.

PARTIES—

The county treasurer being a ministerial officer is not a necessary party to an appropriation proceeding in order to enable him to deduct taxes from the compensation awarded in appropriation. 374.

PARTITION—

The rule that an excess payment over his share by one joint purchaser gives him an equitable lien for the excess on distribution does not apply where the other purchaser loans the money to his co-purchaser to pay for the latter's share. 420.

Where the partnership name is fanciful, not disclosing the partners, the general notice of dissolution which may be necessary for non-dealers who knew of the partnership, is not necessary as to a non-dealer who did not know that the retired partner had been a member of the firm. 55.

PLEADING—

Refusal to compel defendant to make its answer definite by specifying in what particular plaintiff was negligent is not prejudicial if no evidence thereof was offered which plaintiff could not have anticipated. 60.

An exhibit is not part of a petition and can not be examined on demurrer to determine whether there is a defect of parties defendant. 222.

A cause of action for real estate commissions on an express contract and one on *quantum meruit* on the same transaction are not inconsistent and the court has discretion to overrule a motion to elect. 521.

As dual agency must be specially pleaded in defense and not by general denial, the burden of proof is on defendant. 521.

A motion to strike petition from the files; when not filed in time. 576.

POLICE POWER—

The state may delegate to a city the right to raze buildings which have become dangerous. 594.

POOLING—

Where stockholders have made a pooling agreement but have never done anything to put it into effect and have for years ignored its existence, one of them who has purchased stock in violation thereof can not insist on the others carrying it out while refusing to surrender to the pool the stock purchased by himself. He does not come into equity with clean hands. 74.

RAILROADS—

A carrier must use such care for the safety of passengers in a strike or other impending danger as the circumstances demand. 585.

REAL ESTATE COMMISSION—

A cause of action for, on an express contract and one on *quantum meruit* on same transaction are not inconsistent, and a court has discretion to overrule motion to elect. 521.

RELEASE—

A finding that a release, reciting $350 as consideration, of all causes of action, including a balance of a $400 alimony decree, is based on sufficient consideration, can not be reversed if the bill of exceptions does not contain all the evidence; for it must be assumed that prior payments left a less balance of alimony, so that there was a mar-

gin to support release of other claims. 230.

If one of the parties to an agreement to settle a case repudiates an integral part of it and the other party tenders back what was paid and elects to disavow the whole, the rescission is an accomplished fact and requires no judicial determination of the result. 12.

To sustain a gift by a living person without immediate prospect of death requires contractual capacity; mere testamentary capacity is not sufficient. 103.

RESCISSION—

Where a mother, aged and in a mental decline, conveys her property to her son without other consideration than his promise to support her, which is no consideration, as he does not work, there is a presumption of undue influence of which burden is on him to remove; failing to do which the deed is set aside. 328.

Although there is no official fiduciary relationship between the administrator and widow of an intestate as to real estate, yet it may exist *de facto;* and where she is old and illiterate and he is her brother-in-law and her husband recently died, the inequality of the parties requires the court to scrutinize a deed by her to him and to set it aside if her rights were not disclosed to her. 497.

SALES—

A seller billing goods shipped at a price in excess of the contract and refusing to correct the invoice thereby repudiates the contract, and, if the buyer refuses to accept the goods, can not recover even the agreed price. 385.

Retaining and using goods after inspection or reasonable opportunity to inspect waives any defect therein when there is no express warranty. 479.

Where a broker having agreed to sell stock to another broker deliverable within ninety days assigns for benefit of creditors without having any of the stock on hand, whereupon the buyer supplies himself from the market at a lower price, the assignee has no claim for the difference in price. Nor can a rule of the stock exchange that transactions shall be "closed" on insolvency apply. 501.

Where a purchaser to whom goods are sent is to select those he desires and return the others "on demand" and buyer elects not to keep any of them, he may after reasonable time (one week) ship them back without waiting further for a demand and is not liable for loss of the goods in transit. 411.

SCHOOLS—

The power of the county board (G. C., 4736, 104 O. L., 136) to arrange schools and change districts so as to be most easily accessible to pupils will not be interfered with by the court in the absence of clear proof of gross abuse of discretion. 81.

Under Section 3, Article VI, of the Constitution as amended in 1912, the Legislature has full power to provide for the public school system, and G. C., 4728, *et seq.* (104 O. L., 136), is within the limits of that power. 81.

G. C., 4736 (104 O. L., 136) that the county board of education may change districts and transfer territory from one rural or village district to another, does not limit it to adding territory from one rural district to another, but it may attach territory of a rural district to a village district. 81.

G. C., 4728 (104 O. L., 136), providing that members of a county board of education shall be elected by the presidents of village and rural boards, is not contrary to Section 2, Article X of the Constitution, requiring county officers to be elected; for they are not county officers, which means those whose jurisdiction is co-extensive with the county, since city districts are exempted by G. C., 4684. 81.

SELF-DEFENSE—

As a plea of self-defense admits and justifies the killing, if the accused stands on his plea of not guilty and does not admit the killing a charge as to self-defense is prejudicial, since it assumes a killing and shifts the burden to prove justification. 145.

SEWER—

A tax for a trunk sewer levied in different proportions on different sewer districts but being uniform as to all the property within each district is legal. The uniformity required by the Constitution is not confined to political subdivisions. 483.

SPECIFIC PERFORMANCE—

Where in a child's action against a parent on an alleged promise to convey to him real estate in consideration of his living on and improving the same and the evidence of the promise is conflicting, the probabilities, including the parent's apparent scheme of parcelling his real estate among his children, will be considered. 268.

STOCKS AND STOCKHOLDERS—

A corporation having made possible for its transfer agent to confuse stock held by him, as trustee for parties, with treasury stock, whereby part is lost by his defalcation, is liable to such parties for such of the entrusted stock as was returned to the treasury. 569.

STREET RAILWAY—

A clause in the fifty-year franchise granted to the street railway company that if the Liberty street viaduct should be made safe for heavy traffic or electric cars the company would contribute $7,000 towards the expense, was a condition of the grant and not dependent on a continued use of the viaduct for a street railway and the company must pay although the route was by consent taken off the viaduct. And such consent makes it unnecessary to prove that the viaduct would be safe for electric cars. 241.

SUMMONS—

Service of summons on an Ohio corporation can not be made by serving the secretary in a county other than that of the home office. He is not "other chief officer." 27[illegible]

SURETY—

A surety on a replevin bond against whom judgment is rendered is entitled to have execution stayed until a pending action by his principal against the creditor with reference to the same property is concluded, so that he may set the same off, the creditor being insolvent. 553.

TITLE—

A claim to be innocent buyer at a public sale can not be founded on the indefinite description in the opponent's deeds, where the records, plats and indexes would carry notice. 168.

As in an appropriation by a city title does not pass until compensation has been paid or secured, the taxes which are a lien at that date must de deducted or paid. 374.

TRIAL—

Where the killing was either by the accused or another, a statement by the prosecuting attorney that the other is clear of this trouble, thus creating the impression that the latter was acquitted and free to testify truthfully and hence that the accused must be the guilty one, is prejudicial misconduct. 145.

Error in charging the jury that what they saw on view is evidence (as to whether a street was closely built up to determine speed limit) is not prejudicial if the legitimate evidence is sufficient to sustain the verdict. 225.

TRUST—

Liability of promoter for secret profits. 161.

Where the attorney of a corporation buys land, taking the title in his own name, and the corporation goes into possession and issues to the attorney stock of the face value of the cost of the land and holds undisputed possession for over ten years without the attorney claiming any rent, these facts show that the purchase was for the corporation, and its title will be established against a grantee of the attorney with full notice of the facts. 380.

TRUST—

To engraft a trust on a deed absolute requires convincing evidence and will be refused after eight years delay on the evidence of a prejudiced witness. 505.

VENDOR AND PURCHASER—

Where a company gives a usurious bond and mortgage on premises and then sells and conveys the premises by deed in which the grantee assumes the mortgage to a definite amount which is less than the usurious amount, the grantee may on foreclosure of such mortgage have an order in the same suit requiring the vendor to pay the excess of such mortgage above the agreed price. 120.

Where a real estate company gives a buyer of a lot two contracts, one signed by a trustee who holds the title, agreeing to convey on receipt of the final payment, and the other signed by the company, agreeing to convey to the buyer's beneficiary if the buyer dies before full payment, both contracts are to be construed as one and the company by accepting past due payments waives any forfeiture in the trustee's contract. 139.

After a vendor has rescinded a contract voidable under the statute of frauds, the vendee can recover payments without averring that he is ready and willing to perform. 347.

VENUE—

On the transfer of a case (for alimony) from the court of one county to that of another county, the latter acquires exclusive jurisdiction to enforce all orders already made the same as if made by itself, such as by contempt for non-payment not ante-dating the transfer. 133.

VERDICT—

Where after a verdict on replevin the jury were discharged but inquired of the court as to the effect of the verdict and learning that it was in favor of defendant protested that that was not their intention, the court may re-assemble them and re-submit the case after further explanations. 53.

WAIVER—

Proof of waiver of the conditions of a policy must be clear. 465.

In an employer's action on an indemnity policy for amount of judgment recovered by an employee against him, the fact that he defended is not waiver of terms of policy. 603.

WATER AND WATER-COURSES

Until the United States assumes jurisdiction over navigable waters within the state, the state courts may make and enforce decrees concerning their use. 432.

WIDOW—

Refusal of, to take under will. 413.

WILLS—

Ancestral property of a deceased husband, devised to his wife who leaves a will, not being ancestral, the next of kin of the husband and those of his blood or his ancestor have no such interest as entitles them to contest her will. 449.

Designation of beneficiaries may be made by will; step-children; mutual benefit society. 598.

On the issue of undue influence the relations of the family to each other may be shown. Hence rough treatment of the father by a son may be shown against him in a contest of the mother's will. 409.