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IN

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THE AMERICAN LAW RECORD.

DE FACTO CORPORATIONS.

[Superior Court of Cincinnati, General Term, January, 1878.]

Tilden, Yaple and Force, JJ.

†MEADER FURNITURE CO. v. ROWLAND, ET ALS.

Where an association of persons for business attempted to form a corporation, complying with all the forms of the statute requisite to create a corporation, and such persons are by judgment of the supreme court in proceedings in *quo warranto*, ousted from the franchise of being a corporation because no law authorized the formation of a corporation for the objects stated in their certificate, a creditor, becoming such before the proceeding in *quo warranto* was begun, and who dealt with such association, supposing it to be a corporation, may hold individually liable the subscribers for stock who were such when the contract sued on was made.

FORCE, J.

This case comes up by reservation on the pleadings and a certified statement of facts. The defendants constituted an association under the name of the Southwestern Transportation and Wharf boat Company, which had gone through all thes forms required by law for the formation and organization of corporations, and was supposed by the members and others to be a corporation. The company gave it, promisory note, 12th of March, 1873, to John McCune, treasurer of the company in payment of an installment of his salary, and he, for value, indorsed it before maturity to the plaintiff. Plaintiff brought suit in the common pleas on the note against the company as a *corporation and recovered judgment. The state, on the

†The judgment in this case was reversed by the supreme court in Rowland *v.* Meader, 38 O. S., 269.

relation of the attorney general, filed information in *quo warranto* in the supreme court against the company as a corporation, and judgment was rendered ousting it of the franchise of doing the business which it was carrying on. (23 O. P.). A suit was brought in this court in which the company and its creditors were made parties; the property was sold and proceeds distributed, and the company transacted no further business. The state, on the relation of the attorney general, then filed information in *quo warranto* in the supreme court against the members of the company charging them with usurping the franchise of being a corporation without any grant or authority, and the supreme court found they did so usurp, and ousted them of the franchise of being a corporation. This case was never reported, but a transcript of the record is in evidence. Plaintiff now brings suit against the members of the company to hold them personally liable for the balance due.

The first question is this: Were the defendants ever incorporated? In the second proceedings in *quo warranto*, the information was filed against the defendants as individuals, charging them with usurping the franchise of being a corporation without grant or authority. It was a proceeding under the third subdivision of the first section of the act concerning *quo warranto* against an association of persons acting as a corporation without being legally incorporated. The judgment of the court found the fact to be that they were not incorporated. There was no defect alleged or claimed in the regularity of the proceedings by which they had obtained and recorded their certificate of incorporation. The defect was that no law authorized the formation of a corporation for the purposes named in their certificate. The law provides for "the building and repairing of steamboats and other watercrafts." The certificate of this company was for "the building, repairing and maintaining of wharf boats." The supreme court held that the "maintaining of wharf boats" from "building and repairing steamboats and other watercrafts." Hence it determined that although there was no informality in the proceedings by which the defendants attempted to become incorporated, the attempt failed because there was no law authorizing the existence of a corporation for such a purpose.

3 *The next question is this: Although it is true, and is a fact ascertained by the judgment of the supreme court, that the defendants were never incorporated, can the plaintiff now assert that fact or is he estopped? The earliest case in which this precise question was presented is Fay v. Noble, 7 Cush., 188. The company attempted to organize as a corporation, but by reason of some irregularity, the proceeding did not comply with the law. The defect was cured and the company became a legal corporation. Fay lent money to the company before the defect was cured; and, not being paid, sued the stockholders as partners. The court said it was a novel claim and not sound. The parties having contracted on both sides for a corporate liability, could not hold the promissor to a partnership libility.

The court of appeals of New York, in a later case, Fuller v. Rowe, 57 N. York., 23, declared the contrary to be undisputed law. All the cases out of Massachussetts differ from the decision in 7th Cushing. They state the principle to be, that where an association of persons engaged as an association in business, make contracts, the members are personally liable unless they have taken the steps pointed out by law to exempt themselves from liability. If they undertake for this purpose to become incorporated, and fail, either because they omit some material step required by law, or because the law does not authorize a corporation for the proposed purpose, they fail to relieve themselves from their personal liability, and remain individually liable. It was so expressly held in Field & Co. v. Cooks, et al., 16 La. An., 153 and Bigelow v. Gregory, 83 Ill., 197, where material steps were omitted, and *In re* Mendenhall, 9 Nat. R. R., 497, by the U. S. district court for Minnesota, where the law did not authorize incorporation for the purpose proposed. Where the supposed corporation is formed, as its certificate shows, for a purpose not warranted by law, no estoppel can arise, because every one is bound to know the law. And although in the case of this transportation company, this court, and the common pleas and the supreme court, treated it as a corporation till the supreme court, in the second *quo warranto*, determined it never was a corporation, and, under the law could not be one, the fact appears since that last decision that everybody was always bound to know it was not a corporation

4 *The fact that both parties to the contract supposed the transportation company to be a corporation and made the contract with that view, therefore, does not estop the plaintiff from holding the defendants personally liable. The next question is, is the plaintiff estopped by the fact of having recovered judgment against the company as a corporation and received a dividend from the proceeds of its property? In Louisiana it has been expressly decided that there is an estoppel in such case. If, indeed, the company is sued by its associated name, but it is not stated to be a

corporation, the plaintiff is not estopped from bringing suit on the same obligation against the members personally. Field v. Cooks, et al., 16 La. An., 153. But if he sues the company by its associated name, stating it to be a corporation, he is estopped. Pochelu v. Kemper, 14 La. An., 308.

But in Ohio, estoppel mainly rests upon the ground of misleading a party, inducing him to some action. In a recent case, where defendants were sued personally as bankers, under an associated name, and it was averred by way of defense that the association was a corporation and had been declared a bankrupt, and the plaintiff had presented in the proceedings in bankruptcy the claim now sued on as a personal claim, and had received a dividend thereon, the supreme court held the receiving such dividend was no estoppel; diminishing the claim by receiving corporate assests was no injury to the defendants if they were in fact personably liable. Ridmour v. Mayo, 29 O. S, 138. And we are directly advised that obtaining a judgment against a company in its corporate name does not estop the plaintiff from subsequently obtaining a judgment against the members. For in the first proceeding in *quo warranto* against the transportation company, the supreme court rendered a judgment against it as a corporation; and in the second, upon relation of same plaintiff, the supreme court rendered judgment against the members on the ground that they never were incorporated.

When the members are sued personally, it must be shown that they were members at the time the contract was made. The supreme court, in Collier v Medill, 16 O. S., 599, determine what evidence is sufficient. The same evidence is given in the present action to charge the defendants.

*After considering the case with some care, the majority of the court find themselves confronted at every step by precedents which they do not feel at 5
liberty to disregard; and feel bound to give judgment for the plaintiff, believing a different judgment could be given only by a court whose province is to make precedents.

Harmon, J., concurred; Yaple, J., dissented.

Challen, counsel for plaintiff.

Hoadley, Johnson & Colston; Harrison; Lincoln, Smith & Stevens, counsel for plaintiff.

*YAPLE, J. 497

†Dissenting opinion.

This association was not illegal or unlawful, on the contrary, the testimony conclusively shows that its objects were not only entirely lawful, but highly commendable and useful. It was merely authorized by law as a corporation. The corporation statutes being simply too narrow to permit such business to be prosecuted by a corporation.

Upon the whole, therefore, it appears that there is no case deciding that a joint-stock company with transferable shares, not incoryorated by character or act of parliament, is illegal at common law. 1. Lindley on Part, page 196, 16 O. S., 1613. The defendants in this case, in good faith, believed that the Southwestern Transportation and Wharf Boat Company was a corporation under the laws of this state; they, in good faith, subscribed for their respective shares of stock in it, as shares of stock in such corporation subjecting them only to the possible individual liability attaching by law the stockholders in this class of corporations. They never agreed to share or supposed they were to share losses of the business to any greater extent than corporate individual liability of stockholders in such corporations, and an agreement to share losses is of the very essence of a partnership. They never held themselves out to this plaintiff, or to any one else as partners, nor among themselves did they consider *themselves partners. They, it is true, must be 498
held to know the law of the state, and so must the plaintiff be held to have known it. They did not induce the plaintiff to purchase the note in question, and did not know, until afterwards, that he had bought it of the payee. And the plaintiff, when it bought the note from the payee, did not think it was taking the note of a partnership, the note did not purport to be a partnership note. The plaintiff sought to and thought it was taking the note of a corporation.

What then was the plaintiff's contract? If limited as it intended to, and did, as far as it could, intend and assent to and make it, why should it now be given, by law, a different and much more broad and comprehensive contract than it ever wished to make?

†This opinion was brought forward from 7 Rec. page 497.

Notwithstanding, however, the general rule by which each partner is liable for all the debts and engagements of the firm, it is competent for anyone dealing with the firm to contract not to hold the partners liable to an unlimited extent.

Again, if a person chooses to deal with a partnership or company upon the terms that its funds, and they only, shall be available to make good his demands. He cannot afterwards depart from those terms and hold the members individually iable as if no such restriction had been agreed to.

Lind, Part, p. 379. Now, was not such limited liability, with individual liability as corporators added, the extent to which the plaintiff intended, and in fact and effect did contract when buying this note? Why should it be given more than it intended to, and *in fact* obtained by the purchase of the note? It was willing to part, and, in fact, did part with the value it gave for the note for another, a less and a different liability than that it now seeks to enforce. Clearly, it could estop all parties from denying that the maker of the note was a corporation. It sued it as such upon the note and obtained a judgment against it as such, and took its distributive share of its assets as corporate assets. It is true, it claims that it was led by the fraud of the defendants to believe and deal with the payee of the note on the supposition that the maker was a corporation. But this fraud, so called, was merely an honest ignorance of the law; for all the defendants supposed, in good faith, that the Wharf Boat Company was a corporation. And the plaintiff, who is an Ohio corporation, was bound to know the law as well as the defendants, and hence, to know that it was not taking the note of a corporation. Yet it choose to by the note upon the assumption that the maker was a corporation. That is the length, breadth, heighth and depth, the whole of its contract. It should be held to such contract, and be held entitled to enforce it only as it made it.

I think the case of Fay v. Noble, 7 Cush., 188, which sustains the foregoing
499 *views, lays down the true rule. It is, I think, in manifest accord with reason and the principles of justice; enforce a contract as the parties intended to to make it, when the intention is plain, as it is in this case, and according to the terms they themselves have settled, I think the cases which hold the reverse of the case in 7 Cush., fail to consider sufficiently the nature and obligations of contracts; but assume that a merely *unauthorized* corporation is an *illegal* one, and that all engaged in conducting it should be peculiarly punished by persons who have contracted with and intended to deal with it as a corporation, and who can estop it and its shareholders from denying its corporate existence. While the state might properly inflict penalties in such cases, I see no good reason for permitting individuals to do so when thereby they are to obtain what they, at the making of their contracts, never intended to secure or thought they were securing.

It will not do to assume that, in every case persons associate themselves with such companies as this Southwestern Transportation and Wharf Boat Company for the sole purpose of conducting business for gain. It is first as reasonable to suppose that to aid a business lawful and highly useful to general commerce and trade, business men are willing to contribute to their means, and to invest a certain amount without reference to ever being profitted a single cent. They may be said to give rather than to invest.

I am fully aware that a majority of the court have and abundance, yes, the larger number of reported cases to sustain their decision; but I think the time has come when the question here involved should be argued afresh and decided upon principle and reason. In ancient times and among primitive people, as in India to-day, obligations created, imposed and enforced by public authority are alone respected. The consensual contract between man and man, the fruit of the growth of the Roman Civil Law is not respected and scarcely recognized.

If these defendants are to be held personally liable in this transaction it will not be because the plaintiff, when it acquired the note and parted with the consideration therefor, intended that they should be personally liable to it, as it intended to deal as a corporation only; but because public authority creates in its favor an obligation other than that which it, in fact, desired and obtained. Had it taken the note generally and not as the note of a corporation, the case might be different, but it did not.

It seems to me, then, that the decisions recognizing and enforcing personal liability in cases like this at bar smack too strongly of the flavor of rights created by supreme public authority, different and opposed to those fixed between the parties by their consensual contract.

I, therefore, dissent, hoping that it may lead to a full consideration of the subject by the supreme court.

*LEGACY. 5

[Superior Court of Cincinnati, General Term, June, 1878.]

Tilden, Yaple and Force, JJ.

SWING AND MELLEN, EX'RS, V. GATCH.

When a testatrix, being indebted to her physician in the sum of $2,500 on running account for professional services, leaves him a legacy in the following words: "I give and bequeath to my good, kind and attentive physician, Dr. Gatch, the sum of $5,000," and after giving numerous legacies and making no mention of debts, gives whatever remains, being about $200,000, to residuary legatees, the physician is not required to elect between taking the legacy or his claim for services, nor is the legacy presumed to be in satisfaction of his claim, but he is entitled to both.

FORCE, J.

This is a petition in error to reverse a judument rendered at special term after hearing by the court; jury being waived. The action was brought by Dr. Gatch against the executors of the will of Mrs. Townsend, to recover a claim said to be due him as physician for attendance on the deceased. There is no question made that the services were not rendered or that the charge, $2,500, was not a fair charge.

The defense is this, that Mrs. Townsend, in her will, gave him a legacy of $5,000; that he accepted that legacy, and that the legacy, either on the ground of election or on the ground of satisfaction, cuts him off from his claim for the debt due him.

The will reads: "I will and bequeath to my good, kind and attentive physician, Dr. Gatch, the sum of $5,000." No mention *of debts 6
is made in the will, and what is left after legacies, is given to certain residuary legatees. At the time the will was made this residuum was estimated at about $200,000.

The rule as to election is, as stated in Hewson v. Cone, 24 O. S., 26, that a party is not put to an election unless the will clearly shows on its face that the testator intends the legatee shall have only one of two things, and shall not have both. The rule is reversed as to dower, in Ohio, by statute. Now the entire property of the deceased, real and personal, constitutes under our law a fund for the payment of his debts. The entire estate is first subject to the payment of debts; only after they are paid can legacies be paid. There is no necessity for making in the will a provision for the payment of debts. The gift of a legacy under our law necessarily means a gift after what is left after payment of debts. Hence when a legacy is given to a creditor, he is not put to an election whether he will take the legacy or keep his claims, unless there is in the will something equivalent to an express statement that he must surrender his claim against the estate. And the appointment of a residuary legatee is not equivalent to such an express statement; for the residuary legatee is necessarily understood to get only what is left after payment of debts and legacies, though there is no express provision made for the payment of debts.

Under the ordinary rules of election Gatch is therefore not put to an election to determine whether he will take the legacy or his claim.

But it is urged that the legacy must be held to be, though not payment, yet satisfaction (which is payment in equity) of his claim.

This rule as to satisfaction in equity is undoubtedly an old and well-established rule of the English chancery courts; but it is equally true that it survives only in a very dilapidated condition in this country. The whole doctrine of satisfaction is an arbitrary creation of the chancellors. Under the guise of interpreting a will and giving effect to the testator's intention, it in fact makes a new will, and substitutes the chancellor's notions of justice in place of the testator's ideas of bounty. The rule, so far as it applies to the redemption of legacies, does not exist with us. We have no redemption of legacies except by some
7 *subsequent disposition by the testator of a specific article bequeathed. The rule of satisfaction as applied to double portions does not exist with us. The rule in its third form, where it applies to the satisfaction of a debt by means of a legacy of equal or greater amount, is, indeed, recognized in this country.

Although this rule of satisfaction of a debt by giving a legacy is long established, yet even in the English courts it is seldom referred to without recalcitration and criticism, and is subject to many limitations. One limitation was established by Lord Cowper, who said in Rawlins v. Powel, 1 P. Williams, 298, that where the debt is an open book account, it may very well be objected that the testator did not know the amount; nor the character of the indebtedness, or possibly even the fact of the indebtedness, and hence where the debt is an open book account, the court will not hold that the legacy was intended to be in satisfactiont and in such case the legatee shall have the legacy and also collect the debt.

It is also well settled that where the testator in his will assigns a particular reason for giving the legacy, there it shall be held that the legacy was given for this reason and not for the satisfaction of a debt, and the legatee shall have his legacy and also collect his debt.

In the present case, the claim of Dr. Gatch is an open, running book account, and also the will specifies a particular reason for the giving of the legacy. Hence, the rule as administered in England gives the plaintiff both his legacy and his claim. In the United States, it has been frequently stated to be an old rule too deeply seated to be overthrown, that when a legacy is given equal to or greater than a debt due from the testator to the legatee, the legacy is presumed to be in satisfaction of the debt. But in almost every case where the question has come before an American court, the court has said that while the rule is established and can not be overthrown, yet under the facts of that particular case the rule will not be enforced. If it were necessary, I should not hesitate to say that under our law for the distribution of es ates, making the entire property of the deceased, real and personal, liable for the payment of all debts, simple contract as well as specialty, no such presumption exists.
8 But it is enough to say that under the facts *of this case, the presumption would be overcome even under the English precedents.

Exception was taken also to some of the testimony. The clergyman who drew the will testified to remarks made by the testatrix at the time she directed this particular provision to be inserted in the will. These remarks were that Dr. Gatch had been so very kind and attentive and serviceable to her, that the fees which he would charge would be no equivalent, and she was precise in prescribing the words in which the legacy was expressed, and she desired especially to remember him in her will. It is claimed that this is not competent evidence. Not only the

text-books, but the cases, are express that where there is question as to the intention to the testator in a particular provision, testimony may be given to cotemporaneous oral statements for the purpose of establishing the intention. In the present case, however, the testimony is immaterial, because it was given to prove an intention which appeared sufficiently upon the face of the will itself. The judgment is affirmed.

Yaple J. and Harmond J. concurred.

Disney, and *Strickland & Foster*, for plaintiff in error.

Paxton & Warrington, for defendant in error.

ACCORD AND SATISFACTION—SHERIFF.

[Hamilton District Court, 1878.]

ISAAC RUNYAN v. D. W. VANDYKE ET AL.

A sheriff has no authority to accept part in full satisfaction of an execution though the judgment may be void for want of service; but if the creditor ratifies the act, and the lapse of seven years tends to show that he did, further execution will be enjoined.

LONGWORTH, J.

Runyan subscribed one hundred dollars toward establishing an omnibus line between Lebanon and Cincinnati, and was subsequently sued by Vandyke, the manager of the line, for money advanced by him for horses, and to pay indebtedness of the line, Runyan and others being sued as partners in this liability. The common pleas rendered a judgment *in solido* *against all for $3,000 in 1870. The petition alleges the first notice 9
the plaintiff received of the proceeding was by the sheriff threatening to levy on his farm and stock for payment of the demand; that he persuaded the sheriff to wait for a day, and then obtained a friend, Mr. Jarvis Spencer, to call on that officer to see what could be done. This party paid to the sheriff $154, which he alleges was in full satisfaction of the judgment against Runyan. He avers that Vandyke has taken out an execution against him for the balance of the judgment and levied on his farm. He claims the judgment has been fully satisfied, and asks that the defendant may be enjoined from further proceeding. Whether the plaintiff did receive a receipt in full, whether he believed he was discharged, and that the sheriff told him so, would make no difference, unless the owner of the judgment had authorized such compromise, or had subsequently ratified it. Vandyke testified he never intended to release and never did, in fact, release Runyan. The preponderance of the evidence would go to show that he did ratify the act of the sheriff, and the fact that he allowed seven years to pass without proceeding to collect the alleged indebtedness, should be regarded as an item of evidence to show that the subsequent execution was an aftherthought. The plaintiff showed by a preponderance of testimony that, whether the sheriff had authority to settle or not, Vandyke ratified the act, and stated that the payment was in full discharge of the liability of Runyan. A perpetual injunction would be allowed, restraining Vandyke from proceeding against the plaintiff.

S. F. Hunt, for plaintiff.

Archer & McNeil, contra.

PARTIES.

[Hamilton District Court, 1878.]

JACOB L. WAYNE, TRUSTEE v. JOHN D. MINOR ET AL.

One to whom the legal title in a note and mortgage has been transferred, for the purpose of collecting them in his own name may sue on them in his own name, as the trustee of an express trust.

The cause comes into this court upon appeal. The plaintiff sets forth in his petition that on July 1, 1876, the defendants, Minor and wife, made to the Cincinnati Savings Society their three promissory notes secured by a mortgage upon a tract of land in the northeaster quarter of fractional section 8, town 2, fractional range 2, in this county.

The petition further sets forth that the said notes and mortgage
10 *have been assigned to him, the plaintiff, as trustee, for the purpose of bringing this action, and that as such trustee, he brings the action on behalf of the savings society and for its benefit.

The defendants, by their answer, admit all the allegations of this petition except the averment that the plaintiff is trustee for the savings society, which they deny.

The proof offered at the trial shows that the savings society transferred the notes and the mortgage to the plaintiff so as to enable him to bring suit upon them in his own name, fearing that it might possibly injure the credit of the society to have it known that it was engaged in too many collection suits.

It is contended in argument on behalf of defendants that the plaintiff, not being the real party in interest, has no right to maintain this action, but that the same should have been brought by the savings society, in its own name, and that on this account there can be no recovery.

The code of civil procedure (sec. 25) provides that every action should be brought in the name of the real party in interest, except as provided in section 27.

Section 27 makes an exception to the general rule by providing that the trustee of an express trust may maintain an action in his own name without joining with him the person for whose benefit it is prosecuted.

A trust has been defined to be "an obligation upon a person arising out of a confidence reposed in him to apply property faithfully and according to such confidence." But the best definition is that given by Mr. Erskine in his institutes of the laws of Scotland (bk. 3, p. 454), where he says: "A trust is in the nature of the deposition by which a proprietor transfers to another the property of the subject intrusted; not that it should remain with him, but that it should be applied to certain uses for the behoof of another."

This obligation to apply the property of another, if it is created by agreement, constitutes in the hands of the holder of the title an express trust. If obligation arises not by virtue of any agreement, but by operation of law, then the trust is not express but implied. In either case to constitute any person a trustee in the sense of section 27 of the code above referred to, the title must be in him.

*In the case at bar the legal title to the notes and mortgage have been transferred to the plaintiff for the purpose of enabling him to collect them for the benefit of another. He is, therefore, with respect to this property, the trustee of an express trust. 11

We are cited to the case of White, Bonner & Wright v. Stanley (29 O. S., 423), to support the throng that one to whom the legal title has been transferred for the mere purpose of collection is not, within the sense of the code, the trustee of an epress trust. This doctrine is not to be found laid down in that case, and, as Judge McIlvain remarks in rendering the decision, is a very different case from the one before this court. It seems to us that the reasoning of the supreme court, if it bears in any way upon this question, is to the effect that where the legal title has passed completely out of the beneficial owner into another for certain uses, that this gives the latter the right to maintain an action in his own name, thus resting the question of his right to sue not upon the object of or reasons for such transfer, but upon the question as to whether such a transfer of title has in fact been made.

We are further referred to the cases of Kilmore v. Culver (24 Barb., 656), Eaton, Administratrix v. Alger (57 Barb., 170).

In the latter of these cases no title had passed, and the plaintiff claimed to hold the note simply an agent for the real party in interest. It was very properly held under section 111 of the code of New York, from which section 27 of our code was copied, such plaintiff could not be considered a trustee of an express trust, there was no title in him.

The case of Kilmore v. Culver, however, does seem to go to the extent claimed for it in argument, and fully maintains the proposition of defendant's counsel. This decision would be entitled to great weight as an authority were it not for the fact that the court of appeals thirteen years after its rendition effectually exploded the doctrine holding that the holder of the complete legal title *was* in such case the real party in interest under section 111—Allen v. Brown (44 N. Y., 228).

In the last case cited to us, Rawlings v. Fuller (31 Ind., 225), we can not, after a careful examination, find anything which touches the question before us. That case maintains the doctrine *that an agent, as such, cannot maintain an action in his own name, with which doctrine we are inclined most heartily to agree. 12

A decree will be entered for plaintiff.

ASSIGNMENT OF A LEASE.

[Hamilton District Court, 1878.]

†GREAT WESTERN DESPATCH CO. v. HARMONY LODGE.

Where a lease contains a covenant that the lessee shall not assign without the written consent of the lessor, and the lessee, desiring to dispose of the lease, applies to the lessor if he will accept a designated person as assignee, and the lessor agrees to accept him and indorses, "we assent to the transfer," *held*, that the original lessee remains liable for the rent.

LONGWORTH, J.

There were two suits between these parties, which were tried together in the common pleas. In 1872, the lodge leased room No. 30, in the Masonic Temple, in

†Petition in error in this case was refused by the supreme court, without report. 3 B., 488.

this city, for five years, to the Great Western Despatch company, the rent payable in monthly installments, and the lodge claimed that certain installments of rent remained unpaid, and brought suit to recover the rent. The Great Western Despatch company answered, alleging that the lease contained a covenant that it should not be assigned without the written consent of the lessor, and that the defendant, being desirous of disposing of the lease, applied to the agent of the lodge to know if it would accept of D. T. Woodrow, as assignee under the lease; that the agent on behalf of the lodge agreed to accept Mr. Woodrow, and the consent to the assignment was indorsed on the lease on the 14th of January, 1875, and on the same day the lease was assigned to Woodrow. The reply denied that the lodge ever, in any manner, released the Despatch company from the payment of rent under that lease. In the common pleas the lodge recovered a judgment, which it was sought to set aside, on the ground that it was contrary to the facts and the law.

There was no evidence in the bill of exceptions tending to make out any transfer of the lease and discharge of the lessee other than the facts pleaded in the answer, and the only question was whether these facts in law made out the defense. A mere acceptance of a proposition by a lessor to an assignment of a term of years does not operate to release the original lessee, who remain liable.
13 It is true, the parties may agree to transfer *of the lease and a substitution of one lessee for another, in which case the prior lessee would be absolved from future liability, and it makes little difference what the form of the transfer may be, provided the intention to substitute appears. There may be a question whether the statute of frauds requires a release to be in writing. The English statute of frauds contains the word "release;" the statute of frauds in this state omits the word. In this case the indorsement on the lease is in writing and a sufficient compliance with the statute of frauds, and the question simply is: Does it operate as a transfer, or assignment? The lease contained a covenant that it should not be assigned without a written consent, and the writing on the lease is that "we assent to the transfer." The word transfer is used, but it is nothing but a consent that the lease should be assigned, and in the assignment the word used is "assignment," instead of "transfer." There is no testimony in the bill of exceptions further than this to show anything more than an assignment. There is some testimony that the agent consented to the substitution, but no testimony to show that he had any authority. The finding below was in accordance with the evidence, and the judgment should be affirmed. In the second case, a suit between the same parties, the judgment was also affirmed.

Durbin Ward and H. L. Pummel, for plaintiff.

Sage & Hinkle, contra.

ADMINISTRATION OF ESTATES.

[Hamilton District Court, 1878.]

†JAMES HECK EXECUTOR v. MARY HECK.

The appraiser of an estate notwithstanding an ante-nuptial agreement or will, must set off a year's allowance to the widow of deceased.

This case is a proceeding to reverse a judgment of the common pleas affirming an order of the probate court. Joseph Heck died in April, 1877, leaving a will. James Heck, the executor named in the will, took out letters as such, and three appraisers were appointed to appraise the estate of the testator. The executor returned
14 an inventory to the court made by the appraisers, *which showed the property of the testator to consist of $1,000, in the hand of a third party. Following that was the statement that the widow, if entitled to anything, was entitled to it on the ground of an ante-nuptial agreement before marriage, and they omitted, therefore, to make any allowance to her for her year's support. The widow appeared in court and asked the appointment of three appraisers to set off to her the year's allowance. This the probate court did, an order being made appointing three persons, and directing them to set off enough of personal property for the year's allow-

†The judgment in this case was affirmed by the supreme court. See opinion 34 O. S., 369.

ance. These appraisers set off to the widow $6000. The executor objected on the ground that the order was made without his knowledge or consent, and, secondly, claiming that the widow was not entitled to such allowance in her husband's estate, because of the ante-nuptial agreement. A citation was issued for her to show cause why the order should not be set aside, whereupon the probate court overruled the motion, and to reverse that order the case was taken to the common pleas, where the action of the probate court was affirmed. The executor now files a petition in error to this court.

JOHNSTON, J.

It was claimed that the appointment of the second set of appraisers was without authority, and that the court erred in instructing them to set off a year's allowance to the widow. A bill of exceptions was taken, but not completed, lacking the prerequisite of the signature of the judge; but inasmuch as the testator died over a year ago, and as the widow desired that this allowance should be made to maintain her during the first year of her widowhood, the court had concluded to pass upon the question and examine the record.

The duty of the appraisers is to appraise the inventory presented to them by the administrator or executor, and they are required to set off to the widow and children, if any there be, sufficient for one year's support next after the decease of the testator, which allowance shall not be included in any inventory, but set out in a seperate schedule, and upon such appraisement and allowance being made, the executor makes his return to the probate court.

It is apparent that the first set of appraisers did not discharge the duty devolving on them by law, the statute being imperative *that they must make allowance for the benefit of the widow and children. For ought that the record 15
shows there may have been children, and they, as well as the widow, are interested. This duty of the appraisers was irrespective of any rights of the widow, under the ante-nuptial agreement. No matter even if the will should have stated the devises were to be in lieu of the year's allowance, yet it does not excuse the appraisers from going forward and setting off a sufficient allowance, for the year's allowance to the widow. The widow may not take under the will; she has one year within which to elect, and having elected, she may renounce or have that election set aside, and take under the law. To hold otherwise would be to allow the probate court or the appraisers to pass on the effect of an ante-nuptial agreement or the provisions of the will. As the probate court has original jurisdiction in the settlement of estates, it has a right to direct and control the action of executors and administrators, and that court performed its duty when it directed the appraisers to set off the allowance. The order did not provide that the executors should pay over the allowance, but that the appraisers should state the amount, and it would be time enough, if the probate court had undertaken to exercise chancery powers and ordered the money to be paid over, to take exception. That court did not err in appointing the appraisers to set off the year's allowance, and in the order simply emphasized the duty devolving on the appraisers.

Judgment of the common pleas affirmed.

F. X. Dengler, for plaintiff in error.

H. P. Gobbel, Contra.

IMPROVEMENTS—LATERAL SUPPORT—DAMAGES.

[Hamilton District Court, 1878.]

†CITY OF CINCINNATI v. EDWARD KEATING.

1. Damages to improvements on a lot of ground, near to, but not abutting upon an avenue, or street, the construction of which causes such lot with the improvements to slide into an excavation made to reach the original grade of such avenue or street, neither negligence nor malice being proven, cannot be recovered against the corporation.

IN ERROR TO THE COMMON PLEAS.

†The judgment in this case was reversed by the supreme court. In Keating v. Cincinnati. See opinion 38 O. S., 141. Keating v. Cincinnati is cited 43 O. S., 190, 193.

2. The corporation is not bound to furnish lateral support to abutting, or adjacent
16 lots or lands, where the owners, in the improvement of the *same, have made additional lateral support in the land within the streets necessary.

3. An abutting or adjacent lot owner, who overloads his lot, or imposes additional burdens thereon, and so near the adjoining streets or lots, as that in improving the latter in a lawful manner, the improvements of the former are injured, can not recover.

Keating alleged that he was the owner of a lot fronting on East Sixth street, and running back for depth some ninety feet to an alley; that having improved his property some twenty years before with reference to the then regularly established grade thereof, the city in the year 1873, in grading Gilbert avenue which passed near the rear of his lot, caused the surface of his lot to slip and slide, thereby cracking the walls of his dwelling and other houses thereon, also destroying his cistern and hydrant and privy, in all to his damage, $10,000. He alleged that he had no reason to believe that any street or avenue ever would be located where Gilbert avenue now is, and that in cutting, to reach the grade of said avenue, the same was done unlawfully, carelessly and negligently by the agents of said city. The city denied all these allegations. A verdict was rendered against the city for the sum of $450, and a motion for a new trial having been filed by the city on the ground that the verdict was contrary to the law and the evidence, the same was overruled and judgment entered. To reverse that judgment this petition is prosecuted.

JOHNSTON, J.

No exceptions having been taken to any of the testimony, nor to the charge of the court, the only question to be considered is: Did the court err in overruling the motion for a new trial.

If the verdict was contrary either to the law or the evidence, it was error to overrule the motion.

From the bill of exceptions it seems clearly to have been proven that this lot of Keating's did not abut upon Gilbert avenue, but was separated therefrom by an alley and a small triangular strip or gore, of private property; that his access was on Sixth street, to which his improvements were made to conform; that a frame dwelling was moved on the rear of his lot while the grading of the avenue was in progress and was
17 *being constructed to the original grade, the avenue never before having been graded. It further appears to have been established by the fair weight of the testimony that the cut nearest the property of Keating was about the depth of ten feet; that the work of construction was done according to the resolutions and ordinances of the city council and without negligence or malice. There was evidence showing that if the city had constructed, as the work progressed, a retaining wall against the cut, the slide would not have occurred. The damages proven were to the buildings, cistern and hydrant only.

This case involves the question whether a municipal corporation is liable to a lot owner whose lot does not abut upon a street, but the construction of which causes land in the vicinity to slip, entailing loss and damage upon the owner in the undermining and settling of his buildings, and this involves the question of lateral support, a question which, as between the lot owner and the corporation, our supreme court have never been called upon directly to pass.

Keating's lot not abutting, his right of recovery is certainly not more favorable than would be that of the owner who does abut. The rights of abutting owners have been quite definitely settled by our supreme court, settled, it is true, by a line of decisions, concurred in by a few only of the American and by none of the English courts, but upon a basis eminently equitable and just to the lot owner and to the corporation.

In this state when a lot owner improves to the grade of a street and the grade is thereafter changed without his consent and he sustains a substantial injury, he is entitled to compensation thereof. So if the grade of the street be not established and he so improves his property as to meet a reasonable and proper grade, thereafter to be established, he will be entitled to compensation, if he sustain damage by the grade when established, even though it be a reasonable grade. While thus apparently favoring the lot owner our courts have not, however, gone farther than to compensate him for the loss or damage sustained in the means of access to his property that has been improved. This right of access is as much property as the lot itself and can not be impaired by the corporate authorities without compensa-

tion. But this right extends only to the owner, * whose property abuts upon the street and whose access is dependent thereon and where the improvements conformed thereto. 18

Now, Keating's lot, not only did not abut on this avenue, but his access was through Sixth street. If indeed the rear of his lot had extended to this avenue, the evidence wouldnot have brought him within the decisions, for the cutting down of Gilbert avenue did not impair his means of access to his improvements.

There remains the other question whether, to prevent the sliding of the hillside above the avenue, whereby Keating was damaged, the city should have built a retaining wall, and, not having done so, should make good to Keating his damages. This might be dismissed with the single statement, that his property did not abut upon the avenue. Treating the case, however, as though it did abut, what are his rights under the law, and the facts in this case? Excepting as between adjoining lot owners in municipal corporations the principal of the common law govern. This is so as between the lot owners and the corporation in which is vested the title of the adjacent street. The limitation placed by our statute upon adjoining lot owners has no application to the municipality in excavating for its streets. Now, at common law, as long as the surface of the lots of adjoining proprietors remains in its natural condition, each is entitled to the lateral support afforded by their lots respectively. If one digs so near the line as to slip the natural surface of the other, he may recover for the loss or injury to the soil. If, however, the natural surface is broken and the lateral pressure is increased on account of buildings erected thereon, the lot of the adjoining owner can not be made to bear this additional burden. Hence, if erected so near the line as that when the adjoining proprietor in the lawful and proper use of his property, excavates the earth on his lot, and, for want of lateral support, the building falls or is injured, he cannot recover for that injury, Thurston v. Hancock, 12th Mass. 226. In choosing to load his land with a heavy structure, and in placing it so near the line as to impose a portion of the burden of support on the adjoining proprietor, he thereby contributes to his own injury, and this same principal of law we consider applicable as between an adjacent lot owner and the corporation.

*The lot owner ought not to be permitted to gain an easement or right to lateral support for his buildings in the property of the public. It has never yet been decided by our courts that this right to lateral support, as against the corporation, is of such a character as the right of access, a right defined by our supreme court to be as much property as the lot itself. 19

Keating not only had two dwellings on this lot of ground, but that one nearest the cut had been placed there after the grade had been established for the avenue and the work of excavating was going on hard by. In this he certainly acted with notice, and he took the risk of injury to this dwelling at least. In the opinion of the court the city was not called upon to build a retaining wall to protect his property, and the city having, through its officers, acted with ordinary care, and having a lawful right to construct the avenue, was not liable to make good to the plaintiff the damages sustained by him, and the motion for a new trial below should have been granted. The judgment is, therefore, reversed and the cause remanded for a new trial.

Bates, Perkins & Goetz, for city.

Mallon & Coffee, for Keating,

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*LIFE INSURANCE. 52

[Superior Court of Cincinnati, General Term, January, 1878.]

Tilden, Yaple and Force, JJ.

†BUSSING'S EXRS. v. LIFE INSURANCE CO.

1. Where a life insurance company agreed that after two or more annual premiums should be fully paid by the insured, the latter might demand a paid-up policy for as many tenths of the amount of the insurance as there has been annual

†The judgment in this case was affirmed by the supreme court. See opinion, 34 O. S., 222

premiums paid in full; and where, for five years, such insurance company took, as such annual premiums, from the insured, sixty per cent. in cash, and forty per cent. in promissory notes of the insured, drawing six per cent. interest, *Held:* that five annual premiums were fully paid by the insured, so as to entitle him to a paid up policy for half of the amount for which he was originally insured; he, on electing to take such paid-up policy being required to provide for the payment of the outstanding notes by him given.

2. Where such policy provided that the failure to pay any annual premium in full should work a forfeiture of the policy, and of all right of the assured to demand anything under and by virtue of it; and where the insured and his assignee neglected and failed to pay any annual premium, either in cash or by note, after the first five premiums, and no demand for a paid-up policy was made for several years after payment of the fifth premium, nor until after the death of the insured, when such assignee made a demand upon the insurer for a paid-up policy. *Held:* that the policy had become forfeited and void before such demand; that the demand could only be legally made during the life of the policy, and before any annual premium had become due, and was left unpaid; that
53 *the payment annually of the cash, and the giving of the note for the credit part of the premium, where *a condition precedent*, the non-performance of which by the insured, or the assignee, worked a forfeiture of the policy; and that, thereafter, no paid-up policy could be required from the insurance company.

YAPLE, J.

On October 16, 1865, William P. Van Deursen insured his life in the sum of $5,000 in the defendant company, at an annual premium to be paid, for ten years, of $251.26, when he would have a paid up policy for $5,000, payable at his death without any further payments by him. The premiums were paid annually sixty per cent. in cash, and the other part by premium note drawing six per cent. interest. Those premium notes were subject to reduction to the extent of such dividends as from time to time might be declared in favor of the policy.

In 1866 Nan Deursen assigned with the assent of the company, the policy to the plaintiff, Bussing. Premiums were paid as follows:

First year, 1865, cash $150.75, note $100.51; second year, 1866, cash $151.26, note $100; third year, 1867, cash $151.26, note $100; fourth year 1868, cash $151.26, note $100; fifth year, 1869, cash $151.26, note $100. The notes drew interest at the rate of six per cent. per annum, and the interest was, first year, $6.03; second, $12.03; third, $18.03; fourth, $24.03. The company at the end of the fifth year took a note in lieu of the foregoing $500.51, crediting the insured with $114.51 dividends, leaving a balance of $368, which was to draw interest from date, and was made payable twelve months after date. No other cash or note premiums were ever paid by the insured or plaintiff, his assignee, but the matter rested there without anything further being done by anybody, until after the death of the insured, which occurred on October 9, 1876. Then the plaintiff demanded $2,500, less the outstanding premium note as upon a paid up policy; and the defendant denied any liability in the premises.

The policy among other things stipulated: "That payments of premiums were to cease after ten years, and it is hereby understood and agreed, that after two or more said annual premiums have been fully paid, this policy may be exchanged for
54 a paid-up non-forfeiture policy, for an amount equal to the sum * of one-tenth of that hereby insured for each and every premium which shall have been so paid; requiring no further payments of premiums, subject to no assessments, but entitled to apportionment of the profits of the company," etc.

"Provided especially, and this policy is made, and it is accepted by the assured upon the express condition, that if the amount of any annual premium herein provided for is not fully paid, with the interest due thereon, on the day and in the manner so provided for, then this policy shall be null and void and wholly forfeited."

Also: "Special agreement. It is expressly understood and agreed, and this policy is accepted by the assured upon this *condition*—that if, at any time, any note, check, or draft (other than the usual premium note for one-half of the annual premium) shall be given in payment of any premium then due, or to become due, for or on account of this policy, and such note, check or draft shall not be paid according to the provisions thereof, then this policy shall become immediately void, and the company be thereby released from all obligations under it."

All the notes for the non-cash parts of the premiums contained this stipulation.

"And it is an express *condition* of the acceptance if this note by the said company *in part payment* of the annual premium, w ich condition is fully agreed to by the promisor herein, that such acceptance shall in nowise affect the condition in said policy respecting the forfeiture thereof, in case of the non-payment of *any other portion of said annual premium.*"

Now, it may be conceded, and we hold, that, up to October 16, 1870, the premiums upon this policy were fully paid according to the terms of the contract, and that the assured, or his assignee, up to that date, had a right to demand a paid up policy for $2,500; yet a majority of the vote hold that, as a condition precedent, in order to keep the policy from forfeiting, and thus to preserve the right to demand a paid-up policy, if no demand therefore had been previously made, the cash and note parts of the annual premium should have been paid or tendered on that day, otherwise, by its express terms, the policy became null and void; and no paid up policy can be required after forfeiture. Such demand must be made while the original policy is alive, in force and unforfeited.

*A company organized as this one is should have its regular cash and note premiums from all its policy-holders in order to preserve its solvency and existence; and this policy makes the annual payment of the cash part and the giving of the note for the credit part of every annual premium a condition precedent to the continuance of the risk. If the insured fail to perform such condition precedent, he forfeits his policy and all his right under it. 55

The application of this principle to the facts of this case, in the opinion of the majority of the court, is fatal to the plaintiff's right of recovery; for he should have demanded a paid-up policy during the life of the original policy. After he suffered that to forfeit by non-payment of the annual preminm when and as it became due and payable, he lost his right to demand anything from the insurance company.

A judgment will be rendered for the defendant.

Force, J., concurred.

Tilden, J., dissenting, said, that he wanted to be on the record as dissenting most distinctly from the reasoning and conclusion, announced by the majority of the court, and had prepared a dissenting opinion as follows:

DISSENTING OPINION.

TILDEN, J.

I can not concur in the conclusion just announced. It is conceded, and we all agree, that, up to October 16, 1870, the premiums were fully paid, and that the assured, or his assignee, up to that date had the right to demand a paid-up policy for $2,500, and yet the decision is placed upon the distinct ground that the payment of the "cash and note parts of the annual premium," or the tender of them, on that day, was a condition precedent to the right of exchange for a paid-up policy, or, upon the death of the assured, to recover the assurance money. But as to the cash part of the premium it is clearly manifest that the proposition includes an element which is not at all in the case, because the cash part of the premium was fully paid up to October 16, 1870, having been so paid on the 16th of the previous October, for the ensuing year. The real question, then, is such as involves only the consequences of the non-payment of the note ($386) on the 16th of October, 1870

*My brethren are of opinion that a company, organized as this one is, should have its regular cash and note premiums from all its policy holders in order to preserve its solvency and its existence. I am unable to feel the force of this reasoning, or even to understand its application to the case before us. It is the known, and a very general usage of these companies, in the investment of their surplus earnings, to prefer the holders of their policies, as borrowers, for a limited part of the annual premiums, and this expedient, while offering to the public a separate inducement for insurance, is offered upon terms as well adapted to the preservation of their solvency and existence, and with less expense and hazard than any other mode of investment can be. The note part of the premium is, generally, upon short time. In this case the note was payable in a year, and was negotiable, and might have been negotiated or enforced by action after its maturity, and its ultimate payment was abundantly secured. It was secured, in the first place, by the right of the company on the 16th of October, 1870, to require its payment, and to refuse to renew the policy for the sixth year, or to issue a paid-up policy including that year. And next, it was secured by the right of the company, on the event of the death of the assured, to set off the amount of the note and interest against the amount then payable under the policy. That event, according to the course of na- 56

ture, was sure to come, and the obligation to pay, if it existed at all, was absolute as the event was certain, and until the event occurred, the note was a security, incapable of impairment, at home in the hands of the company, and by the accession of interest, becoming constantly more valuable as long as the event was delayed. If, then, it be material to the consideration of the case to maintain in the company its means of solvency and self-preservation, these are, in my judgment, amply supplied in the manner here explained. But the question which we have to decide is not that of the motives which the company had for entering into the contract, or afterwards for insisting upon its terms. What we have to consider is: what were the terms of the contract? And this question like every other question of interpretation, must depend upon the proper application of legal principles.

Passing, then, to the consideration of this question, I have, in the first place, to observe that I am unable to reconcile the admission, *namely, that up to Oc- 57
tober 16, 1870, the premiums were fully paid according to the terms of the contract, and that, up to that date, the assured, or his assignee, had the right to demand a paid up policy, with the proposition, on which the decision is rested, namely, that the non-payment of the note was a breach of the condition authorizing the forfeiture of the policy. For if the note was a payment so as to confer a right to demand a paid up policy, it appears to me not to be competent to say that the note was not paid for the purpose of working a forfeiture of the policy. I am as little able also to reconcile the theory upon which the decision proceeds with the clause in the policy which confers the right to demand a paid up policy, and by which it is provided, in express words, that after the payment of two or more annual premiums, the asssured "shall be entitled to a paid up policy, requiring no further payments of premiums and no assessments." Under this clause it was the payment of the premium for the five years, which expired on the 16th of October, 1870, which entitled the assured to demand a paid up policy. After that he was not, for that purpose, required to pay further premiums. Such further payments were required only for the purpose of keeping the policy alive for the ensuing year. As to the previous years, during which the premiums had been paid, the right to a paid up policy was absolute. As to these, the condition was fully performed, and it appears to me that it must necessarily follow that in order to prevent a recovery in the case, it must be shown either that the non-payment of the premium for the sixth year was a breach of the condition, operating retrospectively so as to take away the right which became vested at the end of the first five years, or that an actual exchange of policies in the lifetime of the assured, or notice of his election to require such exchange and of his intention to discontinue the insurance for the subsequent years, were themselves conditions precedent to the right which I have supposed to have become vested.

The first hypothesis, however, is directly in the teeth of the policy, one clause of which secures the right without any condition, after two years, to a paid up policy, and another of which, being the one already referred to, exempts the assured, after the right of a paid up policy has accrued, from all obligations to *pay 58
further premiums. The non-performance of an act which no duty requires to be performed cannot be a breach of a condition, and there could have been no forfeiture because there was no right of forfeiture.

As to the other hypothesis: it being admitted that the right to demand a paid-up policy was perfect on the 16th of October, 1870, and there being nothing in the policy, and nothing in the nature of the case, as I understand it, to limit its duration, it seems to me that it would have been enforceable at any moment during the lifetime of the assured, and it may be admitted that for the purpose of so enforcing it, by an action at common law, a previous demand would have been necessary. But the death of the assured was an event which rendered the performance of the condition impossible, and, as I think, unnecessary. It is perfectly clear that the assignee of the original policy could not have compelled an exchange, because the substituted policy could not have operated to insure the life of a dead person.

It appears to me also that the reasoning of the court confounds two things which are essentially different, and then, as to one assumes, as a fact, a proposition previously admitted in the opinion, and, as to the other, adopts an analogy where none whatever exists. The two things which appear to me to have been confounded are the provision for the payment of premiums and that for an exchange of policies. In relation to the former, I can well understand the language by which it is called a condition precedent, and the legal consequence of the non-performance of it. That provision was one intended for the benefit of the company, and its strict observance, in all cases, was essential to the preservation of its solvency and its existence, and, what is of still more importance as an argument, it was one upon which,

as it was made an express provision of the policy, the company had a right to insist. But I think it is illogical to conclude that, because this provision was a condition precedent, therefore, that the provision for an exchange of policies was also one, and I think it was not one in any sense which authorizes a judicial sentence of forfeiture of the insurance. This provision was one intended exclusively for the benefit of the insured, and was not included in the clause of forfeiture. It was one in which the company had no interest, and which *could admit of no possible use except the single one, which has been so effec- 59
tivein the present case, of enabling it to evade an obligation, which upon every other ground, ought I think, in justice and equity, to be performed. This is manifest from the circumstance that for a period for which the assured was entitled to claim an exchange of policies, all his obligations had been fulfilled; and as to the period subsequently to ensue he was under no obligation whatever, a further renewal, which would require further payments, having been wholly optional with him. The right of his assignee, on the event of his death, to be paid the sum insured under the policy, having become absolute, and nothing remaining to be done which the policy required him to do, or which the company had any real or legal interest in having done, a mere formal exchange of policies, which would have effected nothing more than the substitution of one means of proof for another, both supporting substantially the same right, can properly be regarded only as an act which the assured had a right to require to be done, but not in justice and reason one which he was under any obligation to do, or one, which after his death, it was any longer possible for his assignee to do. The provision for an exchange of policies, then, was not as to the right to be insured, and as to the consequences of such right, a condition precedent It would have been so far such, in an action in the life time of the assured, to compel a specific exchange, as to require notice of the election to make it. But not only is this action not such, it is not one even to enforce rights expressed in the precise terms which would have been those of a substituted policy had one been obtained in the lifetime of the assured. The object of the action is to enforce a contract of insurance in contradistinction to a policy of insurance. An action founded on a policy has been rendered impossible by the death of the assured; but it does not follow that the loss of the remedy by an action founded upon a policy, which is but one species of evidence of the terms of the contract, involves the repeal of the contract itself. If the contract survived the death of the assured, as it did, unless an exchange of policies was a condition precedent, and one against which equity would not relieve, it may be still enforced if its terms can be established by competent evidence, as they can be in the present case.

*On that subject I have to say that the contract of the 16th of October, 1869, 60
by which the policy was renewed for a year, simply supplemented the contract expressed in the original policy, and, so far as the former modified the terms of the latter, displaced them. In ascertaining them, the nature of the contract, as so modified, the terms of the original and those of the supplemented contract are to be taken together, and according to these, in my opinion, the contract now sought to be enforced was a contract by which the life of the assured was so insured absolutely, and in the sum of $2,500 The right of the assured, and which was a right merely coupled with no obligation, the period for the exercise of which depended wholly on the option of the assured and continued unimpaired down to the day of his death, and never could have ceased to exist, and was subject to no modification of form, but by the actual exchange of policies had passed to and become vested in the assignee. This view is, in my judgment, fully sustained by the settled principles of interpretation and abundantly fortified by the analogies of all the reported cases. It is especially enforced by the rule that a contract shall, if possible, be so construed as to uphold it and not avoid it, and so as to carry into effect the real and substantial intention of the parties. It shall be construed *ut res magis valeat quam pereat*, and not so as to go only skin deep with its meaning and purpose. See Glahoem v. Hays, 2 Scotts, U. R.; Rfs. 482; Olive v Brooks, 17 Law J. Exch. R. 21; Furzee v Sharswood, 2 Q. B. 415 (E. C. L. 42); 17 Ohio Rep. 454: 3 Ohio State 415; 13 Id. 474; Ritchie v. Atkinson, 10 East. 306.

If, however, it were possible to entertain any doubt on the question as one of interpretation merely, it appears to me that none whatever can arise when considered on the principles which prevail in a court of equity and especially the principle upon which the substance of contracts as indicated by the conduct of the parties is habitually enforced, notwithstanding unimportant and non-essential deviations in the modes of performance. This is the principle which supports the doctrine in equity that a bond or covenant which is in its terms joint will be construed as being joint and several, and the doctrine that a provision having the form of a condition

will be made to operate as an independent covenant. It is upon the same general princi-
61 *ple that equity relieves against for feitures and penalties, andthat which forms the sole foundation of the broad doctrine of specific performance. But the principle is not confined to these cases. If there is competent proof of the real intention of the parties, if they have themselves furnished sufficient evidence of their meaning, it is not material by what expression they convey their intention, and that intention will prevail against the ordinary and obvious meaning of the words.

Lloyd v. Lloyd, 2 My. & Co., 202, 3 Ves., 692, and numerous other cases which might be cited.

Hitherto, this opinion has assumed what all of us agree in holding that the premium was fully paid down to the 16th of October, 1870, inclusive, and I have not, therefore, thought it necessary to discuss that question; the correctness of that proposition could be easily maintained upon satisfactory grounds, and I have only in conclusion to refer to a case which, in my judgment, is substantially a direct authority in support of the conclusions I have reached. It is the recent case in the supreme court of the United States of the Brooklyn Life Insurance Company v. Dutcher, published in vol. VII (No. I) of the Insurance Law Journal, page 18. Considering the very high authority of the rulings of that distinguished tribunal, especially upon questions such as the case presents, nothing need be said to justify its application.

And see also the case of Symonds v. North Westean Mutual Life Insurance Co., vol. VI, No. 8, of Insurance Law Journal, page 605, where a case very similar to the one at bar was decided by the supreme court of Minnesota, and where it is held that whenever "language purports to create a condition of forfeiture, it is to be construed most strongly against the company for whose benefit such condition of forfeiture is attempted to be created," and that the giving and receiving "of the note for the cash part of the premiums for the fifth and sixth years had the same effect, so far as payment of premiums was concerned, as payment of cash."

C. D. Robertson, attorney for the executors of George H. Bussing.

Sayler & Sayler, attorneys for the Union Mutual Life Insurance Company.

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76 ## *MORTGAGE—EQUITY—LIENS.

[Holmes Common Pleas Court, April Term, 1878.]

†F. & G. ADAMS v. CHRISTIAN STUTZMAN, ET AL.

Where a mortgage of real estate has been duly executed, a mistake in the attempted description of the mortgaged premises will be corrected in equity, and in its reformed state will attach as a lien from the date of its execution, and not from date of its reformation, and judgment liens attaching upon the premises between the dates of execution and reformation of the mortgage will be postponed to the former lien.— [Ed. Am. Law Record.]

VOORHES, J.

The plaintiffs file their petition, averring that they are a firm doing busines in the state of Ohio, and stating as a cause of action that Christian Stutzman, on the 7th day of March, 1876, executed and delivered his promissory note to R. V. Pinkerton, for the sum of $2,075, payable on the 15th day of January, 1878, with interest at 8 per cent.

The plaintiffs allege that said Christian Stutzman executed and delivered to said Pinkerton a mortgage to secure the payment of said note upon premises in the petition described, which was duly recorded. That Pinkerton duly indorsed the note and mortgage to the plaintiffs, and the same being past due, they ask a decree to sell the premises to pay the same.

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†This case was affirmed by the District Court. See note at end of case.

The plaintiffs allege that Magdalena Stutzman, Daniel Bates, David Stutzman, David Helmuth, Menilus Rudy and Henry Kallenbach all claim to have and to hold some interest by way of liens upon said premises subsequent to the lien of the plaintiffs, asking that they be made parties and be compelled to make manifest the interest which they claim in the premises.

To the petition, Daniel Bates, R. V. Pinkerton, Joseph Helmuth, A. S. Baird, Henry Kallenbach, Citizens' National Bank of New Philadelphia, Christian Stutzman and Menilus Rudy have severally filed their answers and cross-petitions.

Daniel Bates in his answer and cross-petition sets up that on the 14th day of November, 1876, Christian Stutzman made and delivered to him this promissory note of that date for $9,444.67, *payable in four years after the date thereof, with interest at 8 per cent. per annum, payable annually. 77

He avers that in order to secure the payment of said note the said Christian Stutzman and Magdalena, his wife, agreed to execute and deliver to said Daniel Bates a mortgage upon the following real estate, lying and being in Holmes county, Ohio: Being part of the east half of section 23, Tp. 9, range 5; beginning at the northeast corner of said half section, then south three-fourths of a deg.' west' 67 perches, then south 89 deg., east 76 perches and 18 links, then south 3 deg., west 25 perches, then north 88 1-2 deg east 15 perches, then south 22 deg., east 104 perches, then south 1 deg., west 82 perches, then south 89 1-4 deg., east 32 perches, then north 1 deg., east 270 perches, then north 89 deg., west 164 perches to the place of beginning containing 130 acres, of which premises the said Stutzman then was the owner, and of which he was notoriously possessed, and had been so possessed, for more than twenty-one years theretofore.

That in pursuance to his said agreement said Stutzman and his wife did, on the 14th day of November, 1876, before a notary public, execute, acknowledge and deliver to said Daniel Bates their mortgage deed, thereby conveying to said Bates and his heirs and assigns the premises set out and described in his said cross-petiton. He avers that the notary who wrote said mortgage by a mistake did not describe the lands intended to be described therein, nor did it convey to said Bates the lands intended to be a conveyance as security for the payment of said note, that the lands intended and supposed by both parties to be described in the mortgage and conveyed were the lands composing the east half of section 23, as he has first in his petition described. But by reason of the error and mistake aforesaid, the description was of the lands described secondly in his said cross-petition. He avers that he did not for a long time afterward discover said error, not was said error known to or discovered by said Stutzman, nor did either of them know of said mistake and error until the filing of the petition by the plaintiffs. He avers that said mortgage was executed and accepted, and afterward, on the 16th day of November, 1876, duly filed for record and recorded under a mutual mistake of all the parties, that it was not upon the lands intended to be conveyed and incumbered thereby.

*He avers that the accrued interest is unpaid, and that he has a right to have said mortgage so reformed and corrected that it will cover and convey the premises intended, and that he have an order and decree for its sale to satisfy said amount now due and unpaid. 78

The Citizens' Bank of New Philadelphia answer, setting up that at the January term, 1877, of the court of common pleas of Jefferson county, Ohio, it received a judgment against Christian Stutzman and Daniel Miller, for $3,785.45 debt and costs, $3.30; that on the 12th day of February, 1877, an execution was duly issued on said judgment to the sheriff of Holmes county, which was received by him on the 19th day of February, 1877, and levied upon the land and tenements in the answer of Bates, and in the petition of the plaintiffs describe, claiming a lien from the date of the levy.

Henry Kallenbach files his answer and cross-petition, after general denials to the facts alleged in the petition, and in the cross-petition of Daniel Bates, and avers that at the January term, 1877, of the court of common pleas of Holmes county, Ohio, he recovered a judgment for $3,153.14, and though he does not aver that his judgment was taken against Christian Stutzman, yet he does aver that it became a lien upon said premises on the 24th day of January, 1877.

Joseph Helmuth files his answer and cross-petition, in which he, for want of knowledge, denies the allegations of the petition of the plaintiffs and the cross-petitions of Bates, and avers that at the October term, 1877, of the court of common pleas of Holmes county, he recovered a judgment against Christian Stutzman for the sum of $726.40, which is unpaid and in full force, and claiming it to be a third lien on the premises in Bates' answer described.

Menilus Rudy answers that at the April term, 1877, of the court of common pleas of Holmes county, he recovered judgment against Christian Stutzman for $491.72 and costs $4.50.

Abraham S. Baird files an answer and cross-petition in which he makes a general denial to the allegations in the answer of Bates, and avers that on the 11th day of February, 1878, Stutzman executed to him a mortgage on the premises in Bates' answer described as the one upon which it was intended that his mortgage should have been to
79 secure the payment to Baird of $1,000 *in thirty days after date, he avers that his mortgage was recorded February 12, 1878, and prays for a declaration of the liens upon the property.

R. V. Pinkerton also files answer, presenting no issue material to be noticed here by the court.

We have now noticed all the questions to be effected by the decree to be rendered in this case as raised at least in the pleadings.

We have already decided that in the execution of the Bates' mortgage there was a mutual mistake of the parties, and that as against Stutzman, he has a right to have it so reformed and corrected as to make it become a mortgage and a lien upon the premises as originally intended by the parties.

The important question now is, after the mortgage is so corrected and reformed, does the correction carry with it the lien, and will it, in its reformed state, stand as a lien upon the premises as of the original date? or shall the lien attach at the date of the decree for its reformation? If the former, then it becomes the first lien upon these premises, after the lien of the plaintiffs. If the latter, then it is postponed until the liens of the defendants respectively in the following order are satisfied.

First, The Citizens' Bank of New Philadelphia; 2d, Henry Kallenbach; 3d, Joseph Helmuth; 4th, Menilus Rudy, and 5th, Abraham S.

Baird. This now reduces the question for decision to a simple one. Can this mortgage be corrected and reformed, and still hold a lien as against these, after acquired liens, or must it, with its reformation be postponed to all liens acquired prior to its reformation.

A mortgage is sometimes called a lien for the debt, but it is something more. It is a transfer of the land itself. The mortgagee is purchaser. Bank of Muskingum v. Carpenter, 7 O. R., 70.

An important question is, to determine the true status and relation of a mortgagor and mortgagee to the property after the giving of a mortgage? Is the mortgagee a purchaser? or is he merely a lien-holder, out of which to obtain satisfaction of his debt?

Various definitions have been given by different judges and elementary writers, some of which, atlhough correct in main, *fall far 80
short of giving an accurate status of this character of contract.

Hilliard in his work on mortgages, after giving many of the definitions from various judges and elementary writers, says, a more correct definition of a mortgage, therefore, would seem to be the conveyance of an estate by way of pledge for the security of debts, to become void on payment of it; or a conditional conveyance of land designed as security for the payment of money, to be void upon payment; an absolute pledge to become an absolute interest if not redeemed at a certain time; an estate upon condition defeasible by the performance of the condition according to its legal effect. The name mortgage originally signified that the estate became dead or extinct to the mortgagor unless the condition was performed at the time appointed. Our supreme court has declared that it is more than a lien for the payment of the debt; that the mortgagee is a purchaser, and that the mortgage is a transfer of the land.

When a debtor before judgment makes a *bona fide* sale of lands and executes a defective conveyance, the equity of the purchaser is superior to that of a judgment creditor; and a court of chancery will compel the judgment creditor, if he obtain the legal title under his judgment, to convey to the purchaser. Barr v. Hatch and others, 3. O. R. 527

In the case of White & Denman, et al., in the 1st O. S. R. 110, question, when relief was asked upon a defectively executed mortgage, it having but one attesting witness, the court to some extent review the case of Bank of Muskingum v. Carpenter, et al., Lake v. David, McGee v. Beaty, Stonsell v. Roberts, as well as the case in the 14 and 16 Ohio Reports, and say that those cases were based upon the interpretation given to the statute which provides that mortgages shall take effect and have precedence from the time of their delivery for record. They announce and declare as the true construction of the law, that a mortgage shall have no effect either in law or in equity before due execution and delivery for record. They declare mortgages to be mere securities. They repel the old doctrine that a mortgagee is to be treated as a purchaser. But the court in this case say as a conclusion that the relief asked for is upon the ground of mistake in the execution of the instrument. They however refuse to overrule the decisions referred to, declaring that a party *asking relief on the ground of mistake must 81
make in his pleading the necessary allegations to bring his case within the rule of equity for such relief, and it is said by the court in this decision that they do not go into the question whether or not relief could be granted on the ground of mistake, without coming in conflict

with the decisions before made by the court. The question not having been settled in the 1st Ohio State Reports, whether or not the relief here asked by Bates, can be afforded without conflict with former rulings of the court, induces me to farther look to the decisions and see if this question has since been settled by the court.

The authorities are very clear, and if the question here was one of a defective execution, we would need nothing more than to read the decisions that its reformation would make it a mortgage only from the date of its correction. This result is a just legal deduction from the statute enacted to regulate the mode of executing and recording mortgages.

The act of the legislature provides that all mortgages executed agreeably to the provisions of the act, should be recorded, and by the act and its amendement it should become a lien from the time of its delivery to the recorder for record.

As to the execution of a mortgage, the statute requires that it be signed, sealed, witnessed and acknowledged in accordance with the provisions of the statute. When so executed it is properly entitled to be recorded. An omission of either of the statutory requirements leaves the paper still not a mortgage and the recording of it would be no notice whatever, nor give it any validity as a mortgage.

The cases to which we have referred, and upon which the supreme court has so distinctly and elaborately announced the law, are all cases arising upon mortgages defectively executed or omitted to be recorded before the originating of subsequent liens upon the property. But the question for decision here arises between Bates who holds a mortgage admitted to be duly and properly executed and recorded—but by mistake describes other lands than those intended to be mortgaged—and the several judgment creditors of Stutzman, who have obtained their judgments during the time that this mortgage existed in its defective form for want of a correct description of the land. If this defect can be corrected and the mortgage reformed upon the same *terms that a de- 82
fectively executed mortgage can be, then as a lien it must be postponed to the liens of the judgments. We think the case of Peter O. Strang v. Obigah I. Beech, et al., 11 O. S. R., 283, is decisive upon this question. It is here declared that "Where a mortgage of real estate has been duly executed and recorded, a mistake in the attempted description of the mortgaged premises will be corrected in equity not only as against the mortgagor, but also as against attaching creditors of the mortgagor, and purchasers under them with notice of the mistake."

The premises described in the mortgage of Nickels to Beach was so defective that it failed to identify any land whatever. He prayed for its reformation and that it might be held by a title unaffected by the attachment of Strang. The parties claimed that the defective description might be cured by construction of the language used therein, but the court coming to the question treat it as so defective and so uncertain as to wholly fail in identifying the land attempted to be conveyed. Beech claimed that the court ought to give effect to the clearly ascertained intentions of the parties by reforming the mortgage or by dealing with the case as if the mortgage was reformed. The court say "If this was a case between the parties to the mortgage alone, it is settled by a uniform current of decisions in Ohio that this mortgage would on the admitted mistake as between them be reformed, see 6 O. S. R., 459, and cases therein cited. And aside from our own peculiar statutory provis

ions in respect to mortgages and the holding of our courts under them it seems to be equally well settled by decisions of high authority in neigboring states that on general principles of jurisprudence courts by equity will interfere to correct mistakes not only between the original parties, but also those claiming under them in privity as heirs, legatees, devisees, assignees, voluntary grantees, judgment creditors or purchasers from them with notice, and for this they cite Adams Eq., 406 1; Story Eq. Sec. 165; Simmons v. North, 3 Sm. and Mor. R., 67; Wall v. Arlington, 13; Georgia R., 88; White v. Wilson, 6; Blackford 448; Gouverneur v. Titus 6; Paige ch. R.; Whitehead v. Brown, 18, Alabama R., 682.

The reasoning of these cases very clearly establishes the principle of equity in favor of a vendor or mortgagee as the case may be against his mortgagor or vendor by which a court of equity will interfere to correct a mistake.

*One more question then remains, and that is whether the facts alleged in the cross-petition of Bates and admitted by the replies and 83
the agreed statement of the facts in the case, this court as a court of equity will be precluded by any legislation from granting to Bates the relief prayed for.

The first section of the act of February 22, 1831, which provides for the proof, acknowledgement and recording of deeds and other instruments of writings provide that when any competent person shall execute within this state any deed, mortgage or other instrument of writing incumbering any land, tenement or hereditament the same shall be signed, sealed and acknowledged by the grantor or maker in the presence of two attesting witnesses, who shall attest the same by signing their names thereto, which must all be done before certain officers in the act provided.

The seventh section of the same act provides that all mortgages which shall be executed agreeably to the provisions of said act shall be recorded in the office of the county recorder of the county in which the premises are situated, and by the subsequent act of March 16, 1838, declaratory of the laws upon the subject of mortgages the mortgage shall take effect and have preference from the time the same is delivered to the recorder of the proper county, to be by him entered of record. Under these statutes a series of authoritative decisions have been made in this estate declaring that such mortgages only as were signed, sealed, witnessed and acknowledged, as is required by the first section of the act of February 22, 1831, were entitled to be recorded, or could be of any avail by being delivered for record, and until properly executed it can have no effect in law or in equity as to third parties whether they had notice or not of the defectively executed mortgage. White v. Denman, 16 O. R. 59; Bloom v. Noggle, 4 O. S. R., 45; Erwin v. Shney, 8 O. S. R., 509; White v. Denman, 1 O. S. R., 110; in the last case the court say the correctness of these decisions has been much questioned. That they are at variance with the former analogies of the law, and but for the adjudicated cases, which had for years been adhered to, the court would feel impelled to take a different view of it. That only in view of the fact that such decisions have become a rule of property in setting priorities among creditors,* the court, on the maxim of *stare* 84
decisis, would not disturb it.

But the court further say the question before them was not whether they would disturb the rule so established but whether or not they would

enlarge the rule and extend its operation to a case not within the letter of the statutes, and clearly distinguishable from any decision which had heretofore been made upon these statutes. The court declare the rule to be statutory, and that the cases referred to proceed in obedience to what were deemed the unbending and imperious requirements of a legislative enactment. That these statutes related solely to the mode of execution and recording of the mortgage in these respects by a settled rule of the law could be corrected. But as to all other mistakes and defects of the instrument in other respects, the statutes are entirely silent, and upon them the decisions which have been made upon questions arising under the statute have no bearing.

In that case, as well as the case before us, there is no question as to the formal execution and recording of the mortgage, but in these respects both are admitted to be perfect. The court in that case felt that they were not at liberty to go beyond the statute and the decisions under it. They felt constrained to stop when the statute stopped, and as to mistakes in an attempted description of mortgaged premises, it being a matter not covered by the statute to again resort to the general doctrines of equity jurisprudence. It is claimed that the judgment creditors here had no notice of this mortgage lien, or rather that they had no notice of the defective description of the premises in the morgage. If the question of their knowledge was material, we do not see how they could successfully claim a want of notice. The mortgage set out that the mortgagor was conveying to the mortgagee one hundred and thirty acres of land in the east half of section twenty-three, and for its description to commence at the northeast corner of the section; thence to run south (this would be to run along the east line of said Section twenty-three, and to inclose lands in the east half of the section, after reaching the first point for a stop). The line should have run west, but instead of this the call is to run east, going away from instead of into
85 the land called for in the general description and into *lands which would, by the record, appear not to belong to the mortgagor. This would certainly be notice to the judgment creditors, that the mortgagee had an equity in one hundred and thirty acres of the east half of section twenty-three, and that there must be a mistake in the description of the premises in his mortgage. Here is both notice of an equitable mortgage and of the mistake. And in equity we think it is not an open question that a mistake may be corrected not only as against the mortgagor, but as against all claiming under him in privity as a judgment creditor, etc. In first and sixth pages Chancery R. and sixth Blackford, 448, and the other authorities referred to in 11th O. S. R., 287, we think this position is well sustained. It is ordered by the court that the mortgage be reformed, and that it stand as a lien from its original date.

D. D. Voorhes, Attorney for Plaintiff.

Hon. Wm. Reed and Maxwell & Sharp, for Bates.

Stilwell & Hoagland, for the other Defendants.

The case having been appealed to the district court was at its last term sustained, and same decree rendered as that of common pleas.—[ED. AM. LAW RECORD.

*WITNESSES. 115

[Superior Court of Cincinnati, General Term, June, 1878.]

MICHAEL ROWLAND, ADMR., v. RICHARD GRIFFITHS, ADMR.

In a suit between administrators, the heirs, grantees or devisees of the deceased person, who were simply interested in the event of the suit, and had no power to control it at all, are not disqualified from testifying under the provisions of section 313 of the code.

YAPLE, J.:

The action below, which was replevin, resulted in a verdict for the defendant. The plaintiffs then filed a petition in error in this court to reverse the judgment based upon that verdict at special term. The controversy was as follows: Edward W. Evans died and had in his safe at the time of death $7,000, in 5--20 bonds, in an envelope. Eleanor Evans, whose administrator the plaintiff is, was the mother of Edward W. Evans, and had not taken dower in the estate that was left, but received money from time to time from her children. On the death of Edward W., Eleanor Evans went with Sarah Jane Evans to the safe, they needing, as they said, money for funeral and other expenses. Sarah Jane unlocked the safe and took out and gave her mother two $1,000 bonds, and replaced in the safe the remaining $5,000. The appraisers appraised the $5,000, and it was stated to them that there were no other bonds in the safe. Subsequently Mrs. Evans claimed to own the bonds, that they were her property, in view of the fact that she had given the children the use of the property and charged nothing for her dower.

*By the will of Edward W. Evans, Sarah Jane Evans was his legatee, and would be entitled to the benefits of the estate; and 116
Gwynne Rowland, the wife of Michael, who brings this suit, was the heir of Eleanor Evans; she being a child of the whole blood. If the bonds belonged to Eleanor Evans, Gwynne Rowland, the wife of the plaintiff, would be entitled to them. If they were Edward W's property, Sarah Jane Evans, after the debts were paid, would be entitled to them.

The trial proceeded, and there were two errors relied on. Gwynne Rowland testified without objection to the transaction, and Sarah Jane Evans was put upon the stand as a witness, and was about to testify in answer to a question as to how her mother, Eleanor, obtained the bonds giving the circumstances of going to the safe and unlocking it and taking the bonds out, when it was objected that she was not competent to testify to that, because she was the adverse party, and would get the benefit of a recovery by the defendant, and that the plaintiff, Rowland, was the administrator of Eleanor Evans, deceased. The court overruled the objection, and the plaintiff excepted, and that is alleged as ground of error.

We may say that there was no error in admitting her to testify as a witness to these transactions between herself and Eleanor, as to how Eleanor became possessed of the bonds. Section 310 of the code says no "*person*" shall be disqualified as a witness in any civil action or proceeding by reason of his interest in the event of the same, as a party or otherwise, and the exception in section 313 is that no "*party to a civil*

action" shall be allowed to testify by virtue of section 310, in any action where the adverse party is a party claiming as heir, grantee or devisee of a deceased person. The distinction between a "party to a civil action" in this section 313, is much more narrow than the word "*person*" spoken of in section 310. Now, neither Sarah Jane Evans nor Gwynne Rowland was a party to this civil action. It was between the two administrators of the two estates claiming property in these bonds, and Sarah Jane Evans and Gwynne Rowland where both simply persons interested in the event of that action, and had no power to control it at all, and the court was right, therefore, in overruling the objection.

117 *Then another question is raised that the evidence given by Sarah Jane Evans in regard to conversations between herself and Eleanor as to those bonds was incompetent, because Gwynne Rowland, who became the heir of Eleanor at her death, was not present at those conversations, and the court overruled that objection. We think the court's ruling was proper, because at that time Gwynne Rowland had no interest whatever in the bonds, any possible interest vested in her mother, who claimed to own the property and had possession of it. It was between her and another person. Therefore that evidence was not incompetent, it going in its substance to the gist of the action. These are the two points, and the only two that have been made and relied on in the argument at bar, and considering the exceptions invalid, it but remains for this court to affirm the judgment.

Cole & *Cox*, for Plaintiff.

J. W. Trimble, for Defendant.

REFERENCE.

[Superior Court of Cincinnati, General Term, June, 1878.]

MANNING & LONGLEY v. A. LUDINGTON, ET AL.

The reference of a case to a master is not a matter of right. It is a matter of discretion, and if a party wishes a case referred to a master or wishes property to be taken possession of by a receiver, he must first make out a good case for the existence of such discretionary power.

FORCE, J.

This case was reserved upon an agreed statement of the testimony.

The plaintiffs recovered a judgment against Amos Ludington. Amos Ludington was a member of a firm. Execution was levied upon a chattel property of that firm, and thereupon this suit was brought, setting out these facts, and stating that this firm was also somewhat in debt, and asking for the appointment of a master to ascertain the amount of the indebtedness, for a receiver to take immediate possession of the property, and then for a sale and distribution of the proceeds.

Upon that issue testimony was heard, and by that testimony it appears that the firm is insolvent, that the assets are not sufficient to pay the firm debts. So that, upon testimony, it appears that there is no interest in Amos Ludington subject to sale on execution, or which would pass by execution.

*It is claimed that, notwithstanding that showing of the testimony upon the hearing, the parties are still entitled to have a receiver appointed and the cause referred to a master, and a sale made in order to determine more definitely after sale what interest, if any, Ludington has. 118

Now, a party undoubtedly has, as a matter of right, the right to proceed in a sale under the execution, and if there should be a purchaser, that purchaser could ascertain what interest he had acquired by his purchase. But the reference of a case to a master is not a matter of right. It is a matter of discretion. The appointment of a receiver is not a matter of right. It is a matter of discretion, and if a party wishes a case referred to a master, or wishes property to be taken possession of by a receiver, it is for him to make out a good case for the exercise of such discretionary power, as in this case, the plaintiffs have shown that the firm is insolvent, and so far as the testimony goes, that there is nothing in which Ludington has any interest, we do not think that it is a case for the exercise of such discretion. It would be winding up the firm and subjecting the firm and its creditors to expense on behalf of persons who do not show that they have any interest in the property held of the firm.

Hence, we find upon the testimony in the case that the plaintiffs are not entitled to the relief asked for in this action, and the action is dismissed, remitting them to their sale on execution.

ACCOUNTS—EVIDENCE.

[Superior Court of Cincinnati, General Term, June, 1878.]

JAMES W. UTTER ET AL. v. WM. HUDNELL ET AL.

1. Whatever the form of the security given to secure a future running account, parol evidence is admissible to show that it was intended to secure further indebtedness, for equity looks at things as they are, not as they seem to be.
2. Where a running account is kept between parties upon which payments are made, which the parties failed to apply to any particular items, the law applies them to the earlier items, each one of which is considered separate and distinct, and will be barred from its date.

HARMON, J:

Defendant, Hudnell, desiring to open an account with plaintiffs, and they being unwilling to give him credit without security, he executed to them a note for $600, dated December 14, 1875, due in one year, bearing eight per cent. interest, and secured the same by a mortgage upon real estate. The mortgage was duly recorded the next day. The note and mortgage were in ordinary form, as if to secure an existing indebtedness. He had already, upon promise of this security, received goods to the amount of about $200, and was to receive others as he should require them. Such payments as he should make *were to be entered to his credit upon his account, and the mortgage held intact to secure any balance which should at any time remain unpaid. Accordingly, he received goods and made payments from time to time, the same being regularly entered in his account upon the books of 119

plaintiffs, and statements rendered him showing the balance. Before February 22, 1875, he had received goods to the amount of $600, and made payments to the amount of $300. He so continued until July 9, 1875, when he had received goods amounting to $1,302.44, and made payments amounting to $771.65, leaving a balance due of $530.79. On that day a mortgage which Hudnell had made to defendant, Paull, November, 28, 1874, to secure a loan of $400, was recorded. Plaintiffs continued their account with Hudnell until December, 1875, when he had received goods amounting to $2,294.23, and made payments amounting to $1,434.56, leaving a balance due of $859.67. At that time their dealings ceased, and they agered to close the account by plaintiffs giving Hudnell credit for the amount of the note with accrued interest, he giving a new note with other security for the balance still remaining. This was done, and plaintiffs having neglected, until after such settlement, to allow interest on payments as well as charge it on sales, such interest was credited on the mortgage note. Plaintiffs now sue to foreclose their mortgage, and Paull, by cross-petition, sets up his mortgage. The question is one of priority, the property being insufficient to pay both, and the case is reserved for decision.

It is clear from the direct evidence, as well as the acts of the parties, that plaintiff's mortgage was given for the purpose we have stated, i. e., to cover the varying balance of the account. It might be called a "blanket mortgage," to cover future balances up to $600. It was not given for $600 worth of goods received, for then the note would have been entered as a credit when the goods delivered amounted to that sum. Hudnell, too, would have paid over twice the amount upon the note before it was due, and the payments added to the notes would have made him a creditor instead of a debtor a great part of the time. The payments were credited to his account, not in the note. The amount for which the note was held at any given time could be found only by balancing the account. Had the account been *closed July 9th, when
120 Paull's mortgage took effect, it would have been valid, as against Paull, to the amount of $500.79. As to any subsequent indebtedness it would, while valid between the parties, have been postponed to Paull's mortgage. Spader v. Lawler, 17 O., 371.

But the account was not closed. It was continued right on, and payments thereafter made and credited amounting to nearly $700. If those payments are to be credited tc the earlier items of the account, then the entire indebtedness, due when Paull's mortgage took effect, has been paid, and that mortgage is the first lien. If the payments are to be applied to the purchases subsequently made, then plaintiff's mortgage is prior to Paull's to the extent of the balance due July 9th. There was no application of such payments when made by either of the parties to any particular items. They were sometimes made at the same dates as the purchases, sometimes not, but the payment and purchases, when of the same date, were not of the same amounts. The parties, therefore, having failed to apply the payments to particular items, the law applies them to the earlier items, each one of which is considered separate and distinct, and will be barred from its date. Gaston v. Borney, 11 O. S., 506; Courson v. Courson, 19 O. S. 454; Turcross v. King, 2 Selden. Moreover, it may be said that the parties seem afterward to have so applied them, for when plaintiffs finally took the note absolutely upon settlement, having before held it as a security only, they

applied it to the *balance* then due, which *balance* covered only items accruing after Paull's mortgage took effect. That the mortgage and note were considered as only collateral up to that time, is evident from the fact that the interest which had accrued thereon at the time of the settlement was credited to Paull. If the note was an absolute indebtedness before, then the interest belonged to plaintiffs, not to Paull.

Turcross v. King, supra, was a case almost identical with this. It settles, too, the principle that, whatever the form of the security, parol evidence is admissible to show that it was intended to secure further indebtedness, for equity looks at things as they are, not as they seem to be. In that case a judgment had been confessed and so made a lien upon real estate. It was shown to have been done to secure future advances. A regular *account of advances and payments was kept. 121
and, although both at the time the subsequent lien took effect, and at the time the account was afterward closed, the balance due was equal to the amount of the judgment, yet the intervening payments being sufficient to pay the former balance, and the parties having applied them only generally, the court applied them to the earlier items.

The fact that in this case an absolute note was given for a specific sum, unlike Spader v. Lawler, where there was merely a general clause in the mortgage to secure future indebtedness, can make no difference in principle. The only effect is to limit the amount of the advances. The note was of no effect until the advances were made, and could only take effect at that time.

The authorities relied upon by plaintiff's counsel are in states where mortgages to secure future indebtedness take effect from the time they are recorded.

We find, therefore, that Paull's mortgage is prior to that of the plaintiffs.

Decree accordingly.

Yaple and Force, J., concurred.

John Johnston, for Plaintiff.

Thos. McDougall, for Paull.

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*CONTINGENT ESTATES—DEEDS. 144

[Superior Court of Cincinnati, General Term, January, 1878.]

GEORGE W. DYE ET AL. v. CATHERINE G. GIOU.

Where, by will, a person is given the fee simple, in remainder, in lands, upon the happening of certain specified contingencies, deaths of named living persons, such devisee may release such contingent fee to the holder of a life estate in possession of the land before the happening of any of the contingencies necessary to vest such fee in the person so releasing and if, after such conveyance, and before such contingencies occur, such devisee die, his heirs are not necessary parties in an action to foreclose a mortgage given by the testator prior to such will brought against the devisee's grantee, who, by such will, was given a life estate in such lands.

YAPLE, J:

This is a proceeding in error by which it is sought to reverse the judgment of this court rendered in special term. The plaintiffs in error

were plaintiffs below. The action for the recovery of the possession of certain described real estate situated in the city of Cincinnati. The defendant purchased the property at a master commissioner's sale, on
145 April 24, 1869, which *was made in an action to foreclose a mortgage brought by the Pickaway county bank against J. D. Anderson and others in this court. The defendant holds the master's deed for the property made in pursuance of the order of the court in that case. Elizabeth D. Anderson, the mother of J. D. Anderson, from whom she originally purchased the property, left a will, which was duly probated on April 15, 1850.

By the will she devised as follows:

First. I give and devise all my lands and tenements which I have now, or may have at the time of my death, to my son, Jefferson DeWitt Anderson, for his natural life, and I hereby direct and order that he shall pay all taxes and assessments on the said property, and also pay the interest of any money that may be secured by mortgage on the same.

Second. If my said son shall survive his present wife, Louiza D. Anderson, in that case, I give and devise the said lands and tenements to my said son, Jefferson DeWitt Anderson, his heirs and assigns forever, whether he shall have any issue or not.

Third. If my said son should die before his said wife and should have lawful issue of his body, or the descendants of such issue, in that case, I give and devise the said lands and tenements to such issue of my said son and their descendants, in fee simple, to be equally divided among those in the same degree, and the descendants of a deceased child to take the deceased parent's share.

Fourth. If my said son should die before my own death, leaving lawful issue of his body or their descendants of such issue, in that case, I give and devise the lands and tenements aforesaid to such issue of my said son, and their descendants, in fee simple, to be divided among them according to the rule of distribution aforesaid, thirdly above stated.

Fifth. If said land and tenements should not go to the said Jefferson DeWitt Anderson or his issue, or descendants, and continue in him or them according to the above provisions in that case, I give and devise the said lands and tenements to my nephew, Luke Dye, of Sardis, Mason county, Kentucky, his heirs and assigns forever, and at the death of said Luke Dye, or before, if he wishes, I give and devise said lands and
146 tenements *to William, George and Thomas Dye, sons of said Luke Dye, and Margaret Dye, daughter of said Luke Dye, to hold as tenants in common. It is my will that said Luke Dye shall take an estate in fee simple, if he takes any estate.

Jefferson D. Anderson survived his mother, the testator, but he has died, leaving his wife, Louiza D. Anderson, surviving. He died without issue or descendants of issue. Elizabeth D. Anderson executed the mortgage at the sale, foreclosing which the defendant purchased the property in dispute. The foreclosure suit was brought in 1858, and the master's deed was made to the defendant in May, 1869, shortly after the sale and its confirmation. The action was brought against J. D. Anderson and all the Dyes named in the will, and the husband of Margaret Dye was not made a party. They all resided in Mason county, Kentucky, and service was made upon them in no other way than by publication. J. D. Anderson resided in Cincinnati, and was personally served, and it being supposed that the decree of foreclosure had become

dormant, it was revived as a dormant judgment, the Dyes being served by publication. Luke Dye died in the spring of 1869, J. D. Anderson died in the spring of 1872. The defendant offered in evidence a certified copy of the record of the foreclosure suit, the master's deed, and a deed of Luke Dye to J. D. Anderson, executed in the fall of 1861. To each part and all this evidence, the plaintiff objected, but the court overruled the objection, admitted the evidence, and found for the defendant. This evidence and finding by the court form the grounds upon which the petition in error is based.

The question we shall consider is, whether the deed of Luke Dye to J. D. Anderson executed in 1861 was properly admitted in evidence.

The will, we hold, gave Luke Dye a contingent fee simple in remainder in the land. The present plaintiffs can only take by inheritance from him as his heirs at law. If he could convey such contingent estate to Anderson, when he died in 1861, there Anderson took, by grant, from him the contingent fee given him by the will in 1861, and when the contingency happened upon which Luke Dye would, but for that deed and his decease have been entitled to the possession of the fee simple estate, nothing remained to his heirs, all having been *conveyed to Anderson, the life tenant and to the defendant by the sale and deed 147
under the foreclosure proceedings. That he could and did so convey to Anderson, who was in possession of the premises, we think is settled by the cases of Needles v. Needles, 7 O. S., 432; Jeffers v. Lampson, 10 O. S., 101.

While mere possibilities can not be conveyed to a stranger, they can be released to a party in interest or possession.

There is no question but that J. D. Anderson was properly before the court during the entire pendency of the foreclosure proceedings; and it is therefore, immaterial whether the present plaintiffs were properly served by publication in that action or not; but we may say that we do not consider the service by publication void, and the court expressly found it was valid; at most then it is only avoidable by petition in error, and can not be questioned in this action.

Judgment affirmed.

Lincoln, Smith & Stevens, for Plaintiffs in error.

J. & R. A. Johnson, for Defendant in error.

LIFE INSURANCE—AGENCY.

[Superior Court of Cincinnati, General Term, June, 1878.]

CHARTER OAK LIFE INSURANCE CO. v. JAMES S. SMITH.

M applied for an insurance on his life, the policy to be assigned to F, who was to pay the first premium. F preferred to pay the first year's premium all cash. The policy with a receipt for the first year's premium was handed to H, with authority to deliver them to F, on his paying the premium. H delivered them to F without receiving payment upon F's promise to bring the cash at once. F having got possession of the papers assigned the policy to S, and then M died —all of which happened while the company's agents were kept ignorant of the delivery to F. S brought suit on the policy; *Held:*

1. H was not a general agent of the company with undisclosed limitations on his authority, but was a special agent with limited authority, and the delivery to F was not within the scope of his authority.
2. The receipt for the first year's premium was a voucher personal to the assured between him and the company, and was not a representation to his assignee.

148 *3. The delivery of the papers to H was not the proximate cause of the purchase by S. The proxmiate cause was the possession by F, which was obtained by the tort of F without the privity of the company.

4. The company is not estopped from proving the non-delivery of the policy, and the non-payment of the premiums.

FORCE, J:

This case comes up on a petition in error to reverse a judgment at special term. The action was brought upon a policy of the Charter Oak Life Insurance Company upon the life of Stephen McGroarty, assigned to Smith Fowler and by him to James S. Smith, the plaintiff below. The pleadings present numerous issues, and the record brittles with multitudinous exceptions, but all that, we find it necessary to say, can be said in connection with three of the defenses. 1. The defense that the policy never was delivered, and, therefore, never became operative. 2. That the first year's premium was never paid, and therefore the policy never became operative. 3. That McGroarty made a false statement in his application in this, that he falsey declared he had never made an application to any other company.

The last will be considered first. Hedrick, who acted as broker between the parties, testified that he gave the agents of the Charter Oak Life Insurance Company a full statement of all that had been done; that he informed them that McGroarty had signed a written application to the New York Mutual Life Insurance Co., which application had been forwarded to the general agent, disapproved by him and forwarded to the head office, where it was referred to the physicain of the company, and, after examination, was indorsed with leave to withdraw, and remained so indorsed among the files of the company, upon which statement the agent of the Charter Oak wrote in the appropriate blank in the printed form of application, that McGroarty had never made any previous application. The agents of the Charter Oak, on the other hand, testified that these facts were not made known to them, but that they were told that no application had ever been made at all.

Although the cases are not entirely uniform, yet, undoubtedly, the very great preponderance of authority is that when the plaintiff
149 makes a fair statement of facts, and the agent of the *company receiving the application uses his judgment upon this oral statement and omits it altogether, or modifies it, or determines for himself what is the proper interpretation or the legal effect of such oral statement, and writes it down according to such interpretation; or if he fraudulently omits it altogether, or writes something else in place of it, so that by the act of the agent of the company a false statement is put into the application after the applicant had made to the agent a fair and truthful statement, the company is not allowed to say that the statement in the application is not true, and it is of no consequence whether such statement is a representation or a warranty, because the effect of such testimony is not to prove a different contract from the written contract, but its effect is simply to disable the insursance company from proving the falsity of the statement in the written application.

Upon that matter we think the charge of the court was correctly given. But the court further charged as matter of law that a written proposal, which we ordinarily call an application for insurance, which has been written out and signed, and sent to the company, but has not been refused or accepted, is not an application. So that, as a matter of law, if McGroarty, had sent on such an application to the New York Mutual Life Insurance Company, and that the company had not acutally refused or accepted it, he had not made an application. We do not agree to that statement of the law. When a proposal of this sort is written out, an application is prepared; when this is presented to the company for its action an application is made. And this charge was material, because while there was a conflict of testimony between the parties as to whether or not the applicant had made a fair statement to the company, so that we would, perhaps, acquiesce in a verdict the jury might find either way, yet this charge took that matter away from the jury and left them no opportunity to consider it.

As to the other grounds, it is entirely clear upon the evidence that the first year's premium never was paid, and has not yet been paid; and that the policy was never delivered, or at least was never delivered by the authority or with the consent or knowledge of the company. But as to the matter of the payment of the premium, it is said that when the company delivers *to the assured a policy which recites on its face that the premium is paid, the company is estopped from denying the validity of the policy by saying it is not paid. But it is claimed, on the other hand, that the policy in this case was never delivered, and, if never delivered, then the estoppel as to the payment of premium does not exist. In answer to this it is said that, under the circumstances of this case, the company is estopped from saying the policy was not delivered, for it is said that the plaintiff Smith purchased in good faith from Fowler the policy, which was in Fowler's possession, accompanied by a receipt for cash premium and indorsed with an assignment from McGroarty to Fowler, whereby it is claimed that Smith had the title as *bona fide* assignee, whatever were the facts between McGroarty or Fowler and the company. The evidence is that the agent of the Charter Oak Company handed Hedrick the policy, together with a receipt for cash premium for the first year, with authority to deliver them to Fowler, upon his actually paying the cash, Fowler having preferred to pay all cash for the first year. Hedrick, however, upon his own responsibility, delivered the policy and receipt to Fowler without actual receipt died, the agent of the Charter Oak meanwhile being kept ignorant of the delivery to Fowler.

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Baron Parke, in his very much quoted opinion in Freeman v. Clarke, said, "Negligence to create an estoppel must be the neglect of some duty cast upon the person who is guilty of it," and "whatever a man's real intention may be, if he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be precluded from contesting its truth."

Hence to make an estoppel there must be a neglect of some duty upon the part of the person who is to be estopped; and the party who claims that he was misled by a representation must show a representation which he was entitled to rely upon as a representation to him. Was the company guilty of neglect of a duty cast upon

it? The writing out of a policy was not a fault; the writing out of a
151 receipt was not a fault. It was necessary *that these papers should be prepared. It is not the writing, but the delivery of the paper, that constitutes the representation, and these papers were never delivered with the consent or knowledge of the company.

Moreover it does not appear in any event that any representation was made to Smith. The receipt upon which reliance is especially placed, was a vouch to the assured, not a representation to his assignees. As in Kuhl v. Jersey City, N. J. Eq., 84, where a party negotiating the sale of city property gave his check to the tax collector for all accrued taxes. The negotiation being completed on the faith of this receipt, the vendee paid cash, taking the tax receipt as a voucher. The vendor's check not being paid, the city levied on the property for the taxes, and the vendee, being in possession, asked for an injunction on the ground that the city, having issued its receipt, upon the faith of which the purchase was completed, was estopped from saying the taxes were not paid. The court of appeals refused the injunction on the ground that the receipt given by the city to the taxpayer is a certificate of title to him between him and the city, and not like negotiable paper, a representation to any one who purchases it. It was like a statement made by A to B and overheard by C. C could not claim that what he overheard was a representation to him, however much he may have been misled by it.

Where it is claimed that a principal is estopped by the acts of his agent, the rule is sometimes expressed that the principal is responsible for that appearance of authority which is caused by himself, but not for that appearance of conformity to authority which is causd only by the agent. In accordance with this statement of principle, it has been held both in England and the United States that where a ship-master or the receiving clerk of a common carrier issues a bill of lading for goods which have not been received, the ship owner or common carrier is not estopped, even against *bona fide* assignees of the bill of lading, from proving that the goods were not received, and hence the bill of lading has no validity. For the authority of the master or clerk to issue bills of lading is limited to cases where the property named in it has been received, and when one is issued without actual receipt of the goods, his
152 act is not an appearance *of authority caused by his principal, but only an appearance of conformity to his authority caused by himself.

Moreover, an act to create an estoppel must be the proximate cause of the change of circumstances in the party who pleads the estoppel. Hence it was held in Swan v. N. B. Australasian Co., 2 Hurl. and Colt, 175, that where a party desiring to sell certain stock, executed several transfers in blank and delivered them to the broker whom he employed to negotiate the sale, and the broker having fraudulently got possession of other stock belonging to the same party, fraudulently filled up one of the blank transfers with the description of such other stock, and so fraudulently disposed of it, the party who so trusted the broker was not bound by such sale even as against innocent purchasers for value, who purchased on the faith of the executed transfers in possession of the broker. For the purchase was induced, not merely by the executed blank transfer in the hands of the broker, but also by the independent fraudulent acts of the broker. In the present case the purchase by Smith was not induced by the act of the company. Smith did not purchase from the person with whom the company deposited the policy and receipt, but

from a third party, who knowingly obtained the papers without authority, and who assigned them knowing that he was not entitled to them. The deposit of the papers with Hedrick was, therefore, not the proximate cause of the purchase by Smith, but an independent tort by a third party intervened and induced it.

In general an estoppel, either by representation or by act, must be a representation or act which the party pleading estoppel has a right to rely upon. Now a party purchasing a non-negotiable chose in action has no right to rely upon the appearance of the paper which he buys. He takes it knowing that he takes it subject to equities. Any other rule would obliterate the distinction between negotiable and non-negotiable contracts.

The charge of the court that the possession of these papers by Fowler gave Smith a title, is therefore, we think, erroneous.

Judgment reversed.

Harmon, J., concurred.

Yaple, J., having been of counsel did not sit.

*LIMITATIONS. 153

[Superior Court of Cincinnati, General Term, January, 1878.]

†J. B. KILBREATH v. SAMUEL FOSDICK.

The effect of the statute of limitations can be avoided by proof that the person setting it up fraudulently, concealed from plaintiff the evidence of his cause of action.

HARMON, J:

This case is reserved on demurrer to the second amended petition, in which the plaintiff claims to recover from the defendant the sum of $6,000 upon an account of certain dealings between the defendant and the Ohio Life Insurance and Trust Co. during its existence.

The account shows upon its face that it is barred by the statute of limitaitons, but the plaintiff seeks to avoid the effect of the statute by alleging that the defendant was his predecessors, with others, as trustee of the Ohio Life Insurance and Trust Co., and that while such trustee Fosdick wrongfully and fraudulently induced and procured his co-trustees to credit him on the books of the company with the sum of $8,000 when he was not entitled either in law or in fact to any such credit.

Plaintiff alleges that when the books and affairs of the company came into his hands, they showed by reason of such fraudulent entry that Fosdick, the defendant, was a creditor instead of a debtor, as he in fact was.

The question arises whether the effect of the statute of limitations can be avoided by proof that the person setting it up fraudulently concealed from the plaintiff the evidence of his cause of action. The authorities are in considerable conflict upon the subject, in some states the courts holding that the effect of the statute cannot be so avoided, and in others that it can. But the superior court of Ohio seems to recog-

†Petition in error refused by Supreme Court without report. 13 Bull. 298.

nize the latter doctrine as the true one. Whether it is necessary for the plaintiff to allege not only such fraudulent concealment, but also that the exercise of due diligence upon his part would not have enabled him to discover his rights before the statute barred them, it seems to us that in this case the allegations are sufficient for that purpose. The plaintiff was a trustee. He is presumed to have had no knowledge of the affairs of the company except such as he could obtain from an inspection of the books. Those books, as fraudulently changed, concealed the fact of this indebtedeness, and the plaintiff alleges that he always relied upon the correctness of the entries as aforesaid, and failed to discover the cause of action until shortly before he brought the suit.

154 *We think he had a right to rely upon the book, and even if this allegation of the use of due diligence is necessary, the petition fairly contains it. We think that such facts are a good reply to the plea of the statute and are properly inserted in the petition to prevent a demurrer on the ground of the bar of the statute, not so much on the principle that the act of the debtor stops the statute from running, as is expressly provided in cases where the ground of action is fraud, as that the defendant is not permitted to avail himself of his own wrong. Such an action may be considered in the light of an action upon an account barred by the statement and our code permitting equitable relief also be sought, asking that the defendant be restrained on account of his fraud from setting up the bar of statute, which would be good to him at law. The demurrer to the second amended petition will be overruled, and the cause remanded, with leave to answer.

Hoadly, *Johnston* & *Colston*, for Plaintiff.

Stallo & *Kittredge*, for Defendant.

EVIDENCE.

189 [*Cuyahoga County Common Pleas, May Term, 1878.]

†JOHN KELLY ET AL. v. JOHN INGERSOLL, ET AL.

The Production of Books and Papers—A Construction of Section 360 of the Code, etc.

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212 ## *FUGITIVE FROM JUSTICE.

[Superior Court of Cincinnati, Special Term, 1878.]

‡COMPTON, AULT & CO. v. D. H. WILDER.

Where an alleged fugitive from justice is extradited, under the Constitution of the United States and act of Congress passed in pursuance thereof, and taken from one state or territory to another, a private person, who directly or indirectly caused the criminal charge to be made and extradition proceedings to be instituted, can not there, when the accused is brought into the state demanding the

†The opinion in this case will be found, 1 Clev. 210.

‡The decision in this case was affirmed by the Supreme Court. See opinion 40, O. S., 130. The Supreme Court opinion is cited in 39 O. S. 273, 281; 46 O. S. 38, 42.

surrender under such proceedings, summon or arrest, on civil process, the surrendered person to respond to a civil action, brought by the former against the latter, before conviction or acquittal, until the alleged criminal has had a sufficient *opportunity to answer the charge against him, and a reasonable time to leave, if he desires, the jurisdiction of the state into which he has 213
been so involuntarily brought. In every such case service of a summons or order of arrest to recover a civil claim or debt will be set aside, on the ground of being an abuse of the power granted by the Coustitution of the United States and the act of Congress.

YAPLE, J.

It appears that D. H. Wilder, upon a requisition of the governor of Ohio, directed to the governor of Pennsylvania, was arrested there and brought to Ohio to answer to a criminal charge for an alleged act made indictable and punishable by the laws of Ohio, the alleged offense having consisted in a claim that he had misrepresented his wealth to Compton, Ault & Co., and induced them to become parties to a note for some $5,000, which they were compelled to pay. For that reason he was brought here. The defendant waived a preliminary examination and was bound over to answer the charge before the grand jury of the county and the court of common pleas, if the grand jury should find a true bill. He gave bond thereupon.

After he had given his bond and was discharged—on the same day—Compton, Ault & Co. brought this suit to recover from Wilder the amonnt of money they claimed they had lost by reason of his representations. They averred further, that the obligation was incurred by his fraudulent acts and misrepresentations. They had an order of arrest issued. Wilder was arrested and summons was served upon him. He files a motion now to have the service of the summons and the service of the order of arrest set aside, and asks that he be discharged.

The arrest was made on the same day he was bound over, and had given bond on the criminal charge, and it appears prior to the time that a through train would start for Corry, Pennsylvania, from Cincinnati, Mr. Wilder being a resident of Corry, Pennsylvania, where he had lived some years.

The motion is resisted. Of course, it is not claimed that a suit cannot be brought and an order of arrest may not be sworn out and prosecuted, provided a valid service can be obtained. But the defendant says a valid service cannot be obtained under the circumstances under which this one was obtained.

It may be remarked that Compton, Ault & Co. were the *movers in procuring the requisition and the institution of the criminal charge against Wilder and 214
in having him brought here. It was at their instance that the power of the state of Ohio was invoked, and the governor of Pennsylvania acted, and in consequence of which Wilder is here.

Now, this question is one of the most serious and important that can arise, going far beyond the rights of either of these parties, and there is a necessity for the Supreme Court of the United States again settling this question. We, in Ohio, are left without any decision of our Supreme Court upon the subject. There may be and is, a conflict of the authorities in other states, although the cases out of which the conflict seems to arise differ materially in their facts, and it may be that they are not so strictly irreconcilable as would appear if due attention is paid to the circumstances of each case in which the decision was made. Those decisions are to us advisory and, of course, the well-considered judgment of any court, especially one of last resort, is entitled to very great weight.

This is a subject on which I have reflected long before this case arose, in fact for years past. The Constitution of the United States provides generally for this subject of extradition. There are two clauses relating to the subject. Article IV., section 2, provides that a person charged in any state with treason, felony, or other crimes, who shall flee from justice and be found in any other state, shall, on demand, of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime. That provision is imperative. The other clause relates to fugitive slaves and apprentices, and provides that no person held to service or labor in one state, under the laws thereof, escaping into another state, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered upon the claim of the party to whom such service or labor may be due. The first clause is stronger than the second, in saying that the delivery shall be on the "demand" of the executive; the other is on the "claim."

These are express provisions of the Constitution. All the states surrendered to the general government their power over this subject, and vested in it the federal government for the common and equal benefit of all the states, they judging, and
215 *perhaps wisely, that the federal government would look upon the executive and judicial authority of all the states as entitled to equal credibility, and that a uniform mode or rule of governing the subject would be adopted.

Now, if Congress had never legislated under this provision of the Constitution, States might still, in aid of the general purpose, have passed such general laws as to them might seem proper. But Congress, early after the adoption of the Constitution, legislated upon this subject, covering both the cases of fugitives from justice and the cases of persons held to service or labor, either as slaves or apprentices. One great trouble and source of doubt and litigation was the feeling, constantly growing, in favor of the slave who might escape, and for whom sympathy was enlisted, even as against the law.

But Congress legislated upon the subject, and we had legislation as it is now. The Supreme Court of the United States in the case of Prigg *against* Pennsylvania, 16 Peters, decided that the legislation of Congress, under the Constitution, was exhaustive; that States could not change it by adding to it, so as in any way to interrupt it, but that Congress alone could do so; that there was no power, the States having given it all up, remaining in them to legislate after Congress had regulated the matter by statute. The case of Prigg came under the Fugitive Slave Law. The legislature had provided that if a slave were taken on the claim of his master and not brought before an officer, as the Fugitive Slave Law required, the party who took him should be deemed a kidnapper, and, on conviction, punished by confinement in the penitentiary. The Supreme Court of the United States, Judge Storey announcing the opinion, declared the law unconstitutional and void. Judge Storey says:

'In a general sense this act may be truly said to cover the whole ground of the Constitution, both as to fugitives from justice and fugitive slaves. That is, it covers both the subjects in its enactments; not because it exhausts the remedy which may be applied by Congress to enforce the rights, if the provisions of the act shall in practice be found not to attain the object of the Constitution, but because it points out fully all the modes of attaining those objects which Congress, in their discretion, have as yet deemed expedient or proper to meet the exigencies of the
216 *Constitution. If this be so, then it would seem, on just principles of construction, that the legislation of Congress, if constitutional, must supersede all State legislation upon the same subject, and, by necessary implication, prohibit it; for if Congress have the constitutional power to regulate a particular subject, and they do actually regulate it, in a given manner, and in a certain form, it cannot be that the State legislatures have a right to interfere, and, as it were, by way of compliment, to the legislation of Congress, to prescribe additional regulations, and what they deem auxiliary provisions, for the same purpose. In such case the legislation of Congress, in what it does prescribe manifestly indicates that it does not intend that there shall be any further legislative act upon the subject-matter."

Now, the United States Revised Statutes, sections 5278 and 5279, prescribe how this extradition shall be effected; how long the party shall be detained, what evidence shall be forthcoming, and what the Governor of a State shall do when the demand is made upon him by the executive of another State.

The question as to what is the effect, not in the case of fugitive slaves, but in the case of fugitives from justice, of the legislation on the governors of States on whom such demands are made; whether discretionary or ministerial, was passed upon in the celebrated case of the Commonwealth of Kentucky *vs.* Dennison, Governor of Ohio, where a party had been accused in Kentucky for an offense made criminal alone by statute and unknown to the common law. Under the advice of the Attorney General, Governor Dennison refused the demand of Kentucky to surrender the fugitive to Kentucky, and the case was thereupon taken by Kentucky to the Supreme Court of the United States in order to try the question between the two states, and this is what the court decided at page 66, 24 Howard's Reports: "It was the duty of the executive authority of Ohio upon demand made by the Governor of Kentucky, and the production of an indictment duly certified, to cause the prisoner to be delivered to the agent of the Governor of Kentucky, who was appointed to demand and receive him. The duty of the Governor of Ohio was merely ministerial, and he had no right to exercise any discretionary power as to the nature or character of the crime charged in the indictment."

217 *Our Supreme Court has decided recently that the governor has no discretionary powers; that the provision of the Constitution, and these acts of

Congress are imperative, and that the governor must deliver up the party, aud the act of Congress, section 5279, says, that when the prisoner is delivered to the agent, and any person who, by force, sets him at liberty or rescues the fugitive from such agent, while so transporting him, shall be fined or imprisoned.

It seems that the state of Pennsylvania has a law requiring an affidavit to be filed in all these extradition cases; that the object of the extradition is for the sole purpose of prosecuting the crime for which the party is extradited, and not for the purpose of subserving any private rights, such as the bringing of suits. What power Pennsylvania may have to pass such a statute need not be inquired into. It was complied with in order to enable this state to punish the crime alleged to have been committed in it, and, as will readily be seen, much more at this time than at the time the Constitution was adopted. Intercommunication between states is such that a crime may be committed in one state, and, in twenty-four hours, the perpetrator may have gone into a number of states.

Therefore, this law must be fairly carried out. Governor Young, in two or three instances, undertook to investigate whether or not the demand on him from the executive of another state, under the Constitution and laws of the United States, was for the purpose of vindicating the criminal laws of the state demanding the accused, or was some private person setting that engine in motion to collect a debt, and he took upon himself the decision of that question, not considering that it was a question for the authorities of the state making the requisition to determine after the party had been removed there; and the Governor of Massachusetts has acted, in the past few days, upon the same view as to his duty under the law. These considerations make the matter a grave one, and unless this law is fairly carried out and kept strictly to the performance of its original purpose, we readily see that, in a very short time, there will be nobody deliverable, except at the mere will of the governors on whom demand may be made. There will be no obligation to deliver any party under the law, and, the consequence will *be very serious in this 218
day of rapid transportation. So there must be a fair interpretation of the law.

When governors, therefore, acting mandatorily or merely ministerial, and a requisition is made, and, in pursuance of that requisition a party is sent to another state, is it not the duty of the courts in the state to which the man is sent, he being, perhaps, a stranger, away from friends, to see that by no possibility the spirit and provision and the purpose of the Constitution and the acts of Congress be evaded or overthrown? It seems to me very clear that that is the case, and if it be adopted generally as the practice there will be no hesitancy in complying with this somewhat harsh and summary provision of the law. If that is seen and practiced by the courts, there will be no fear by the governors, for they will see that the authorities are as trustworthy in one state as in another, and that no man's rights will be violated.

If a stranger, who had nothing to do with these extradition proceedings, had found Wilder on that day here and served him with process and got out a capias, whether or not Wilder could have set aside that service, because he had been brought here on a requisition originating from sources with which the plaintiff had nothing to do, we need not determine; nor if he had been tried and acquitted and then these parties should thereafter issue a capias, or if he had been arrested for another crime against this state. That is not this case. The case is still broader in behalf of his rights, than if he was a mere suitor at court, whether as a voluntary citizen or as a criminal. He is not a citizen of Ohio. He comes here by virtue of a very extraordinary power—the power of the United States acting through the Executive of the state of Pennsylvania, and one that he cannot resist—and then the party who procures the requisition brings a suit before he has time to return, and the question is whether this defendant can say that that is an abuse of the extradition, and he cannot be held to answer to the claim.

These plaintiffs who got out the requisition say they did it simply for the purpose of the criminal prosecution, and not with any ultimate designs for a civil suit, and it was not until after the bail was given that they formed the intention of bringing a civil suit, and they claim that for that reason they should hold him. 219
*It seems to me that to allow that as valid, even taking it for granted, which I have to do, that it is all true, is opening the door to a very easy abuse of this power. A man may simply be careful not to form or aver any purpose until certain contingencies occur.

I take this to be the rule, that where parties procure the extradition process, and have a party brought into another State on a criminal charge growing out of some of their property or money rights, these parties have no right to institute a

civil suit, having its origin in the alleged crime. I think a person who would undertake to sustain process, if it can be done, should have had at least no direct or indirect connection with the procuring of the extradition and the bringing of the party to this state to answer, for it comes simply to this, that it would enable a citizen of Cincinnati to extend the area of Ohio's laws beyond the state, and bring the citizen of Pennsylvania into its jurisdiction, and there compel him to respond to civil demands.

We must bear this in mind: Wilder lives in Corry. If he has violated any of the rights of these parties, or owes them anything, the courts are open there and will administer justice as faithfully as we can do it.

The rule I have indicated will have to be adopted. When criminals are extradited and brought into another state, those who were the cause of having the requisition sued out, directly or indirectly, are forbidden to institute a civil suit until the party has a reasonable time to return. Of course he would have until the train went out. After viewing this matter in all its consequences, I feel constrained to set aside the service of summons and the service of arrest and to discharge the defendant.

As this action defeats substantially the claim of the plaintiffs, at present, in this court, the case may be taken up on error. There is no question that I should like to see decided by the Supreme Court of the State of Ohio more than this.

E. G. Hewitt and *Tilden, Buchwalter & Campbell*, for Plaintiffs.

Mathews, Ramsey & Mathews, for Defendant.

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273 *GUARDIAN AND WARD—SURETIES.

[Hamilton Common Pleas Court, 1878]

W. H. DOWELL, GUARDIAN, v. CATHERINE GUIOU, EXECUTRIX, ET AL.

Under the act of April 12, 1858, concerning the relation of guardian and ward, where the probate court releases one of the sureties of the guardian without notice to the co-surety and without his consent, and without notice or consent accepts a new bond, executed only by the guardian and a new surety, the remaining surety upon the original bond becomes thereby released from any default thereafter of the guardian.

This was a question involving the right to the probate court to release one of two sureties on a bond and take a new bond executed only by one surety. In 1859 Josiah R. Hunt was appointed guardian of the plaintiff's wards, giving as sureties on his bond David B. Guiou and Francis McAnally. In 1866 McAnally was released from the bond upon the order of the probate court, but without notice to Guiou, and Enoch Groenedyke accepted in his place. Thereafter, in 1870, Hunt failing to account for the estate of his ward, and the plaintiff having succeeded to the guardianship, the suit was instituted by the plaintiff upon the original bond executed by Guiou and McAnally, to recover the amount of Hunt's default, $1,500. Guiou having died, his executrix was made a party. She set up the release of McAnally by the probate court without the consent of her husband, and claims, therefore, that his estate was not liable. To this answer the plaintiff demurred. McAnally is in default for answer.

JOHNSTON, J.:

The bond of Guiou and his co-surety, McAnally, was a joint as well as a several bond. It is well settled in the law that where two or more persons are jointly, or jointly and severally bound, if by any act between the

obligee and the principal, whereby the joint obligation is severed, * and one or more of the obligators released without the consent of 274
the others, it amounts to a release of all. The statute providing for the release of a surety on a guardian's bond provides that a new bond shall be given. The question is whether such new bond shall be executed by two or more sureties, as required when the original bond was given. The statute provides that the guardian shall give bond, with sureties, to be approved by the court. The statute providing for a new bond provides for such bond as the court may order, seeming to leave it in the discretion of the court as to the number of sureties thereon. In this case, without consultation or the assent of Guiou, McAnally, the cosurety, was released, and another taken in his stead. By comparing this statute with the statute relating to the taking of new bonds from public officers, and with the statute relating to the release of one or more partners from a partnership debt, it would seem that, to prevent the operation of the common law with reference to the release of one or more joint obligors, the new bond provided for the guardian's act was a new bond executed by the new surety and the guardian, and to be executed by the remaining surety if he intends to continue liable as surety for the guardian, and that the legislature did not certainly mean that a joint obligation could be severed, a part of the sureties remaining liable on the original bond, and a part becoming liable by the new bond.

In the partnership statute referred to, the act provides that the release of one partner shall not release the other. There is an absence in the guardian's act of any provision of this kind, strengthening the claim that by a new bond is meant an entirely new bond executed by the new sureties as well as by any of the original sureties desiring to remain liable. While the probate court accepted a bond with but one surety, it nevertheless was a good bond, for it was decided by Judge Spencer in 1st Handy, 25 Comegys v. Bigelew, and afterwards in 5th O. S., that, while a statute may require a bond to be given with two or more sureties, yet the acceptance of a bond with one is good, and the supreme court of Pennsylvania, in 5th Watts, 21, the case of a government official's bond, requiring that there should be two sureties, decided that it was simply directory, and that the taking of a bond with one surety was binding upon the surety and a good bond.

*A surety, where there are several, has the right to select with 275
whom he shall jointly obligate himself. A surety, both in law and equity, is a favored party, for he rarely receives anything for assuming that obligation. To release, therefore, one with whom he has chosen to become jointly bound, without his consent, and put upon him another without consultation, is in disregard of his rights, if not an invasion of the constitutional provision that the general assembly shall have no power to pass laws impairing the obligations of contracts. Certainly if the legislature could not pass such an act, a court could not make an order that would have such effect.

Demurrer overruled.

C. W. Moulton and E. P. Bradstreet, for Plaintiff.

Judge Hilton, Contra.

FUGITIVE FROM JUSTICE—JURISDICTION OF COURT.

[Hamilton Common Pleas Court, 1878.]

EX PARTE VANVLECK.

1. In proceedings for the extradition of a fugitive from justice under the statute of Ohio (72 O. L. 79), the judge before whom such fugitive is brought cannot determine the question of the prisoner's guilt or innocence, nor can he investigate the motives of the prosecution.
2. The act of congress passed in pursuance of section 2, article IV., of the constitution of the United States, gives to the governor of the state upon whom the requisition is made no discretion to inquire into any question further than the identity of the fugitive and the regularity of the requisition papers. Any attempt, by state laws, to clothe him with greater jurisdiction would be in conflict with the act of congress.
3. When the state courts are empowered to examine into such a case by state law, they can exercise no wider jurisdiction than that theretofore possessed by the governor.
4. The judge can and must hear testimony and determine whether the person in charge of the sheriff is or is not the person described in the warrant of the governor.
5. Quære: Can the court go behind the warrant of the governor and examine the requisition and the accompanying papers to determine if the warrant be regularly and lawfully made?

276 *LONGWORTH, J.:

This is a proceeding for the extradition of an alleged fugitive from justice on a requisition from the governor of Pennsylvania, under article IV., section 2 of the constitution of the United States, and also under the law of this state passed in 1875, and found in volume 72 of the state laws, page 79 which requires the prisoner to be taken before a court.

It would appear that Chas. W. VanVleck was indicted by the grand jury of Clarion county, Pa., for obtaining goods under false pretenses; that the proper proceeding was had under the law of that state, and a requisition was issued to the governor of Ohio; that the agent of the state of Pennsylvania proceeded to Columbus and laid the requisition before the governor. Numerous affidavits were taken, and the facts were largely, if not wholly, heard befor the governor and the attorney-general, and on the advice of the latter officer the warrant was issued.

The defendant claims the right to show that no offense was committed, that the question is whether this is a proceeding under the constitution in good faith, to surrender a fugitive from justice, or to obtain his arrest for the purpose of coercing the payment of a debt, and that the defendant did business in the oil region of Pennsylvania, and after having expended about $100,000 in that community in putting down oil wells, etc., he failed for about $25,000; and that the prosecutor procures this indictment on grounds that were wholly untenable, as the defense desired to show. The proceeding, it was claimed, was not instituted in good faith, but with the ulterior purpose of coercing the payment of a debt, which the defendant was unable to discharge, and in the hope that others would pay it for him.

The great question in the case was as to the right of the court to hear testimony bearing upon the guilt or innocence of the party accused of a crime.

It was also claimed on part of the defendant that the papers were insufficient, for the reason that they were not the originals, but copies of copies, while the statute contemplates that the originals shall be examined and referred to the judge, to pass not only on their identity, but their genuineness. The indictment *was the only paper to be relied 277
on, and this was substantially and radically defective. It did not aver what it should have averred, that the prosecuting witness relied on the representations of Van Vleck.

Under the statute of congress passed in pursuance of section 2, article IV., of the constitution, it is provided that whenever a man is charged with crime in one state, and flees from that state into another, it shall be the duty of the governor of the state into which he has fled, on the presentation of a requisition from the governor of the state when the escape took place, together with a copy of the charge—if the party is indicted by a grand jury, it must be a copy of the indictment—to issue a warrant for the arrest of the accused. It is a matter of discretion with the governor of the state in which the crime took place, whether he shall issue a requisition. He must determine whether the man has committed a crime under the laws of that state, and whether he is a fugitive from justice. The late statute in Ohio changes the rule somewhat, for it makes it the duty of the governor, on presentation of the document, not to surrender the party forthwith, but to issue his warrant to the sheriff, who shall bring his prisoner before a judge who may discharge or deliver him over, as the case may be. The extent of the statute is that the power delegated by the act of congress is transferred to a judge of the supreme court or judge of the common pleas. If the construction of that statute be that the judge has greater power than the governor possesses, then that statute is manifestly in contravention of the act of congress and the supreme law of the land. There is no better rule of construction than that where one construction would make the act constitutional and another would make it unconstitutional and void, the court will, if possible, construe it so that the act may stand. Now, if they construe the words in the act to mean that the court shall examine the proceeding to see whether the papers are in accordance with the act of congress, and the defendant is the man charged, then the act is constitutional. If they construe it that the judge is to determine whether the man ought to be surrendered, then the act is in contravention of the statute of congress, which makes it mandatory on the executive of one state to deliver over a party charged with the commission of crime in another. All records *of the different states 278
have the same force and effect in the sister states that they have in their own; and if it appears from these papers that the governor of Pennsylvania has certified that this man is a fugitive from that state, indicted by a grand jury, and a copy of that indictment is presented, it seems to me the court can not inquire into the law of Pennsylvania to determine whether the certificate of the governor be true or not, or whether this indictment does charge a crime, but that the certificate of the governor on these facts, which lie within his knowledge, or presumably so, and which the law presumes this court knows nothing about, shall be received as conclusive evidence. As a matter of course the presumption is always in favor of innocence. Though an indictment is found against an individual he is presumed innocent until he is found guilty. It is, therefore, to be presumed that this defendant can success-

fully defend himself against the charge, and in this state the presumption is conclusive, because we have no power to hear evidence to repel the presumption. Nevertheless, the party is charged with the commission of a crime in Pennsylvania, and the governor certifies that he is a fugitive from justice. Now, he must answer to the state of Pennsylvania. All the power which this court has under the statute of 1875 is simply the power previously exercised by the governor, the power to hand the party over to the agent of the state of Pennsylvania.

As to the objection that these papers are not the papers presented to the governor, but are simply certified copies, and there is no statute which authorizes the court to receive this secondary evidence in lieu of the original, I think the objection may be answered in this way: The rule of evidence is that the best evidence must always be produced, but where that can not be had, secondary evidence may always be offered. It was the rule of common law, in the absence of any statutory provision, that an exemplification of a state paper was always admissible as original evidence, because the state paper is in the archives of the state, and no *subpœna duces tecum* will lie against the governor or the secretary of state to produce in court a state document, and in the absence of any act making the state paper original evidence it would be against public policy to require the original papers to be produced in a court of jus-
279 tice. I think *that copies certified by the governor and countersigned by the secretary of the state are admissible. I am clear in my own mind, and if mistaken I hope I shall be corrected, that under the statute of 1875 the only power the court has to inquire into the identity of the prisoner, and whether the papers presented are the papers mentioned in the act of congress. Whether I have the power to examine into these papers is not without a doubt in my mind, but that I have no other power I am satisfied. I give the accused the benefit of the doubt by looking into the papers, and being of opinion they are just such papers as the law of congress describes. I have nothing to do but to judicially determine whether this is the man, and having found that he is, to order him to be handed over to the agent of the state of Pennsylvania. This will be the order of the court, but that the defense may have the opportunity of taking the case to the supreme court, the order will not take effect until the defendant's counsel shall have had a reasonable time to make their application.

The defendant's counsel, having concluded not to take the case to the supreme court, the order was entered, and the accused was delivered over to the agent of the state of Pennsylvania.

*CONSTITUTIONAL LAW—CINCINNATI SOUTHERN RAILWAY CO.—BONDS. 320

[Superior Court of Cincinnati, General Term, October, 1878.]

Yaple, Force and Harmon, JJ.

MATTHEW THOMS ET ALS. v. MILES GREENWOOD ET ALS.

1. The constitution of the state of Ohio permits appropriate local or special legislation, the inhibition being against granting *corporate power* by such legislation.
2. The act of May 4, 1869 (66 Ohio L. 80), conferred the corporate power upon cities of the first class, having a population exceeding one hundred and fifty thousand inhabitants, of providing in the manner therein authorized a line of railway, and authorized the borrowing of ten millions of dollars for that purpose, but it was a general law having uniform operation throughout the state, and hence not in conflict with section 26, article 2, of the constitution; and being thus general was not a special act, and hence not in conflict with article 13, section 1; but it did not prohibit any city taking advantage of said act from expending *more* than ten millions of dollars. There was no limit to the cost of *providing said line of railway.*
3. The policy of the law of 1869, and the subsequent legislation supplementary thereto, is, that the location of the line of railway, the construction thereof, the temporary leasing of the parts completed, and of the entire road when completed, the borrowing and expenditure of money therefor, and the issuing and sale of city bonds, to be issued or paid out for the same, should not be dependent upon, or subject to, the frequent change of legislators, city officers and policies, and the dangers of interested and powerful combinations seeking the control and ownership of the railway, but that a *fixed* and *permanent board* of *trustees*, created by the *state* of *Ohio*, and appointed in the manner and as required by the original act, its members *removable only* as therein provided when any of them has failed in the performance of his trust, should be created, continued, and vested with all the powers necessary to the full and complete accomplishment of the objects contemplated by such statutes. The legislature provided for *permanence* of the agency, and not for changeability, such as the mutations of elections and clashing interests, and opposing and conflicting opinions would almost surely bring about frequently, to the inevitable injury, increased expense, and possible total failure of the authorized enterprise.
4. A city of the class described in said act of May 4, 1869, having taken advantage of the said act, and having expended the sum therein authorized, had brought into being a specific local creation under the authority of that law.
5. Where the solicitor of a city prosecutes under section 159 of the municipal code (66 Ohio L. 175) an action to final judgment, no taxpayer of the corporation has the right to maintain any action for the same causes, but all become bound by the judgment finally rendered in such case. All questions and matters involved in the determination of such suit, or that could or might have been raised thereby, are concluded and finally settled by the judgment rendered in said case as to all persons whomsoever, the same being *res adjudicata.* The city solicitor in such case is the representative of the aggregate taxpayers and inhabitants; so where, subsequent to a decision, said judgment standing unreversed, certain taxpayers of a city having requested the present city solicitor of such city to bring an action for the same causes as in the former suit, and, upon his refusal, they prosecute the same, such taxpayers will be held to stand in precisely the same relation to the taxpayers and people of the corporation and to the decision of said former case, that the present solicitor would have done had he brought and prosecuted the suit, and are equally bound by that judgment.
6. *Stare decisis* and the law of *res adjudicata* both apply as to all matters presented for decision upon the record of the first case, and the determination thereof by a court of competent jurisdiction is conclusive upon the said city and all its tax payers and inhabitants, then, since, now, and hereafter.

7. *Res adjudicata* binds parties and privies, *stare decisis* governs the decisions of the same question in the same way in actions between strangers to the record.
8. A court will adhere to a decision made by its predecessor, even though they may be of opinion such decision was erroneous, if, upon the faith of such decision, large investments have been made and property and rights accquired thereunder, as its reversal would create greater wrong, and inflict more serious and permanent injuries than mere theoretical legal correctness could confer in benefits.
9. Where such first suit charged that certain acts of the general assembly of the state of Ohio, passed May 4, 1869, and March 25, 1870, were unconstitutional and void, and a general demurrer was interposed and judgment rendered on it, the judgment will be held to have settled all questions arising upon said acts, involving a consideration of the constitution of the state and of the United States, and the performance of the duties required of such city and its officers under said acts, and the action of the court appointing the trustees referred to therein, and receiving their bonds, and the acts of said trustees to the commencement of said suit; but where said petition simply alleged that the consent of a certain State had been obtained to the exercise by said trustees of their powers under said act of May 4, 1869, in said state, and that a like consent had been applied for from a certain other state, but the terms of such consents were not set forth, said judgment will not be held to have determined the legal effect of the terms of such consents as actually given.
10. Where the appointment of said trustees is admitted, the evidence of their appointment is immaterial. The law under which said trustees were appointed not directing upon what minutes of the court the appointment shall be entered, and the law directing that the *judges* of said court shall appoint, it is in the discretion of said judges to direct what book of minutes the same shall be entered in.
11. The acts of April 18, 1873 (70 Ohio L. 139); of February 21, 1876 (73 Ohio L. 13); of April 24, 1877 (74 Ohio L. 115); of April 18, 1878 (75 Ohio L. 115); and of May 15, 1878 (75 Ohio L. 559), all being supplementary to said original act of May 4, 1869, though general in form are local and special, applying to the local and special creation under the act of 1869, but are not within the inhibition of article 13, section 1, of the constitution, which provides that corporate powers shall not be conferred by special act, because neither of said acts confer corporate powers.
12. A corporate power cannot be conferred unless it be conferred upon a corporation created by the act conferring the power or some other act. Article 13 of the constitution relates alone to corporations.
13. The same power, whatever its nature might be, conferred upon a non-corporate board or body, would not violate that article of the constitution, while if conferred upon a corporation, private or *municipal*, by special act, would violate that provision. It is not the nature or character of the power, but of the recipient of the power that determines whether the constitution be violated or not.
14. The state legislature has conferred upon such board "*powers*", by the exercise of which they may, in the events, upon the conditions, in the manner, for the objects, and to extent by the legislature prescribed, create obligations and impose duties and burdens upon such city, but these are not, in the legal meaning of the term, in any sense, powers conferred upon *it—the city*.
15. None of the laws passed by the general assembly of the state of Ohio supplementary to the said act of 1869, or by the states of Kentucky or Tennessee relating to the line of railway authorized by said act of May 4, 1869, confer any power, corporate or otherwise, upon the *city* owning the line of railway, or any *agents* appointed by *it*. The said board of trustees was created and its powers conferred, not by the *city* owning the line of railway, but by the *state of Ohio*, and such trustees were required by the state of Ohio to be appointed and qualified by a court of the state of Ohio. Such board is an agency of the state, not of such city, but for the attainment of such city's object and interests as decided upon by itself in providing said railway. This is authorized under section 27, article 2, of the constitution, even if such trustees were officers, which they are not. 21 Ohio St. 14; 29 Ohio St. 102. Such trustees need not be residents of the city owning said line of railway.

16. The fact that the exercise of such powers casts upon the city the burden of paying the expenses thereof by taxation, confers no corporate powers. 29 Ohio St. 102.
17. Such board of trustees is not created a corporation or invested with any corporate powers, either by the laws of Ohio, Kentucky, or Tennessee. They are simply trustees, invested with certain enumerated and defined powers, without any property interests other than a naked legal title, all of which they are to employ primarily in behalf of their beneficiary, and secondarily for the holders of the bonds which they have negotiated, and for the lessees of the parts of the railway which have been completed, and these have the right to the maintenance of the board as created and continued by the act of 1869. When their trust duties are fully performed and completed, the city owning the line of railway will be their "successor" under the laws of Ohio, Kentucky and Tennessee.
18. The stamping of the city seal upon such bonds by the trustees does not make the board a corporation, as such alone does not create a corporation. It is a mere method of certifying their genuineness, and adds to the difficulty of counterfeiting them. It confers no character upon them other than what a wax or scrawl seal would have done had the law required such.
19. The act of May 15, 1878, not conferring any corporate powers, is not in conflict with article 13, section 1, of the constitution, by reason of requiring in section 2 thereof a certain act to be done "within twenty days" after its passage.
20. The states of Kentucky and Tennessee have conferred no rights or powers upon any corporation, but upon an unincorporated board of trustees, who can acquire no rights adversely to their beneficiary. Said states and the trustees have done or authorized nothing in those states which Ohio has not granted them the right and power to do.
21. The laws took effect from their passage. The question submitted to the people was whether their provisions should be made available.
22. The legislature having in specific terms authorized a certain sum of money to be borrowed, and the bonds of such city to be issued, it is not for a court, when the object is constitutional and lawful, to say that such issue is an abuse of the taxing power; the right to restrict the power of taxation in such cases lies solely with the legislature.
23. The fact that the law of May 15, 1878, provides for completing said line of railway to a junction with any other road of simular gauge, so as to admit of the passage of trains from one terminus to the other terminus of said railway, does not prevent the full completion to the terminus originally designated, nor prevent the expenditure for such purpose of the balance remaining in the hands of said trustees, or any other funds in their hands after completing the road to such junction, as provided in section 4 of said act.
24. The fact that the legislatures of the states of Kentucky and Tennessee have reserved the right to alter, amend, or repeal, does not place the said road and property at the mercy of the said states.
25. "The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith, and they must be consistent with the scope and object of the original enactment. Sheer oppression and wrong cannot be inflicted under the guise of alteration or amendment. Beyond the sphere of reserved powers, the vested rights of property in such cases are surrounded by the same sanctions, and are as inviolable as in other cases." 5 Otto, 319, 324.
26. The clause in the Tennessee law limiting the rights, privileges, and franchises granted to a term of ninty-nine years, and not longer, is by virtue of a constitutional provision of that state, the policy of which has been adopted in this instance by Kentucky. The law of 1869, or any supplemental act, does not prohibit, but by clear implication authorizes the trustees to provide a line of railway in perpetuity of rights and franchises, or for years, in their discretion.
27. These provisions have no reference to the railroad *property* acquired, or that may be acquired, for the benefit of such city. That remains and will remain its own. The limit of ninety-nine years is fixed, in view of the certainty that by such time circumstances will have so changed as to require the cessation of privileges now granted, and to necessitate a readjustment and a new grant, with suitable conditions.

28. States have the power to fix rates of charges for passengers and freights, and to provide against unjust discriminations against their citizens and rival railroads connected with railroads by intersecting railroads. 4, Otto 113, 164.
29. The right of a resident of one State to institute suit against a citizen of a sister state in the federal courts of such sister state cannot be taken away by state legislation.
30. The fact that the act of Tennessee makes judgments rendered in that state prior to the lien and right of the mortgage lien of the bondholders of the ten million bonds, and that of Kentucky prior to certain classes of cases, to any mortgage of any lessee or licensee, does not render invalid the issue of the two million authorized by the act of May 15, 1878. The Tennessee law was passed prior to the issue of any bonds, and the holders took them subject thereto, and that of Kentucky was passed in advance of any lease or license granted to operate the road, and the city got par for her ten million bonds.
31. The passage by the Ohio legislature of the $6,000,000 and the $2,000,000 supplemental statutes, after the legislative consents of Kentucky and Tennessee were given, is an approval, by the Ohio legislature, of the terms of such consents; and that providing such line of railway subject thereto is not an abuse of the taxing power, or the power to borrow money by the city.
32. The rights of the contractors referred to in section 2 of the act of May 15, 1878, cannot be affected by this suit, they not being parties hereto. "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights." Code of Civil Procedure, sec. 21 (75 Ohio L. 608). Yet construing the first and fourth sections of the said act together, the said trustees have the right to pay the contractors referred to in the second section of said law, for the work to be performed in the completion of said road under said contract, in the bonds to be issued under said act.
33. None of the legislation herein referred to is in conflict with article 1, section 10 of the federal constitution, prohibiting any state, without the consent of Congress, entering into any agreement or compact with another state, or with article 1, section 8, which grants power to congress to regulate commerce among the several states.
34. Each state in this instance has acted for itself alone and independent of the other. They have made no agreement with each other.
35. The power granted to congress under article 1, section 8, is not exclusive. A state may at all times regulate the commerce carried on within its borders.

STATEMENT.

This is an action brought by the plaintiffs, who are taxpayers of the city of Cincinnati, "*on behalf of the corporation*," under and by virtue of section thirty-five (35) of the municipal code (75 Ohio L. 219), which reads as follows:

"SEC. 35. In case he" (the city solicitor) "fail, upon the request of any taxpayer of the corporation, to make the application provided for in the preceding section, it shall be lawful for such taxpayer to institute suit for such purpose, in his own name, *on behalf of the corporation:* Provided that no such suit or proceeding shall be entertained by any court until such request shall have first been made in writing."

The action provided for in the above quoted section and * the preceding one—section thirty-four (34)—is one for *an order of injunction* "to restrain the misapplication of funds of the corporation, or the abuse of its corporate powers, or the execution or performance of any contract in behalf of the corporation in contravention of the laws or ordinances governing the same, or which was procured by fraud or corruption;" and upon the city solicitor, who represents the corporation officially, is first cast the duty of bringing every such action, but when he refuses, or neglects, or fails to do so, after being requested in writing by a taxpayer of the corporation, such taxpayer is given the right to take the place of the solicitor and to maintain such action on behalf of the corporation, but not in his individual right.

These plaintiffs, being taxpayers of the city of Cincinnati, and having complied with all the requirements of the statute to enable them to sue on behalf of the corporation, have brought this action to enjoin and restrain the issue of certain bonds

of the city of Cincinnati in aid of the construction, etc., of the Cincinnati Southern railway, and the execution of a certain contract between the alleged trustees of such railway and Huston & Co., for the construction of the Cincinnati Southern railway between Somerset, in the state of Kentucky, and Boyce's Station, in the state of Tennessee, some five miles from Chattanooga, in the last named state.

1. The bonds, the issue of which is sought to be enjoined, are one hundred and fifty-three (153) of the seven and three-tenths (7 3-10) per cents, of five hundred dollars ($500) each, authorized under the statute of May 4, 1869 (66 Ohio L. 80), entitled "an act relating to cities of the first class having a population exceeding one hundred and fifty thousand inhabitants;" twenty-six (26) city bonds of one thousand dollars ($1,000) each, known as the six per cent gold and pound sterling bonds, provided for in and by the act of February 24, 1876 (73 Ohio L. 13), entitled "an act supplementary to the act relating to cities of the first class having a population exceeding one hundred and fifty thousand inhabitants, passed May 4, 1869," which authorized the issue, in addition to the $10,000,000 provided for in the law of 1869, of $6,000,000 of bonds of the city, the proceeds to be applied to the completion of the Southern railway; and the issue of the $2,000,000 of bonds of said city provided for by the statute of May 15, 1878 (75 Ohio L. 559), entitled "an act supplementary to an act entitled 'an act supplementary to the acts passed February 24, 1876, and April 24, 1877, supplementary to the act relating to the cities of the first class having a population exceeding one hundred and fifty thousand inhabitants, passed May 4, 1869,'" and to repeal section nine (9) and a portion of section four (4) of said act, passed April 18, 1878. The act of April 18, 1878, is found in 75 Ohio L. 115, and the act of April 24, 1877, in 74 Ohio L. 115. There is also an act relating to this subject found in 70 Ohio L. 139.

2. No relief can be, or is sought in this action against the obligations of such portions of the $10,000,000, and $6,000,000 of bonds, authorized by the laws of 1869 and 1876, as have been negotiated.

3. The petition avers that the defendants, Miles Greenwood R. M. Bishop, E. A. Ferguson, Henry Mack, and A. H. Bugher, claim to be trustees and agents of the city of Cincinnati, and as such authorized to act for it as follows: "To locate a line of railway from the city of Cincinnati, through the states of Kentucky and Tennessee, to the city of Chattanooga, in Tennessee, to lease said railway, and have issued, in the name of said city, bonds under the corporate seal of said city, to the amount of" (about) "sixteen millions of dollars, and have sold the same, or transferred them directly to contractors, in payment of work done upon the road, and to purchase roads finished and unfinished; and also claim the right to issue bonds of said city, under its corporate seal, in the amount of two millions of dollars, in addition to the sixteen millions already issued and sold, and to sell said additional two millions of dollars of bonds, and use the proceeds thereof in completing said line of railway; although they know that said two millions of dollars will not complete said road, and that when said amount is expended, the road to Chattanooga will be unfinished and worthless, unless other large sums are expended upon it;" that, under their claim of right to act as the agents and trustees of the city of Cincinnati, such alleged trustees have in whole or in part, located a line of railway from the city of Cincinnati to the city of Chattanooga; that they claim to have expended the entire amount of the sixteen millions of dollars realized from the sales of the bonds heretofore issued and sold, upon the construction of said road, and the same is now unfinished; that they have proceeded to advertise for bids for such a completion of the line of railway as will admit of the passage of trains from one terminus to the other terminus of said railway, and claim to have received a bid from R. G. Huston & Co., to do said work for the sum of $1,671,998.11, and have conditionally accepted said bid, notified the defendant, R. M. Moore, mayor of Cincinnati; that in pursuance of the act of May 15, 1878, an election by the people of the city is appointed for the 14th day of August, 1878, to determine whether or not the sum of $2,000,000 of city bonds shall be issued, to be expended in the construction of the road; that the defendants know that the road cannot be completed in a good workmanlike manner, by the expenditure of such sum of money, and the bid and conditional contract contemplate only such temporary construction as will permit the passage of cars to Boyce's Station, in the state of Tennessee; that after said contract shall be fully completed large sums of money, in addition, will be required to be expended to fully complete the road; that all these acts are illegal, and involve the misapplication of the funds of the city; that the acts of May 4, 1869, the act supplementary thereto, passed April 18, 1873 (70 Ohio L. 139), the act of February 24, 1876, April 24, 1877, and the act of May 15, 1878, are in violation of the constitution of the state of Ohio,

and void; that if said laws are constitutional, yet, under them, the defendants have no authority to do the several things they are doing, and proposing to do, as the laws require, as a condition precedent to the building of any railroad, by any city, that the city council shall, by resolution passed by a majority of the members elected thereto, declare it to be essential to the interest of said city that *a line* of railway *to be named in such resolution*, should be provided between termini therein designated; that no such resolution has ever been passed by the city council of the city of Cincinnati; that such laws require, as another condition precedent, that such *line* of railway, *specified in such resolution of the council*, shall be submitted to a vote of the qualified electors of the city, which has never been done; that such laws require the trustees to enter into a joint bond to the city for the discharge of their duties, which bond they have never given; that those acts only inferentially authorize the building of a road by any city in the states of Kentucky and Tennessee, but do require, that, in the building of such road, as a condition precedent, that *the city* shall obtain from the state the right to build such road, and to acquire, and hold and possess *in fee, in perpetuity*, all the necessary real and personal property and franchises; that no such right has been obtained by the trustees from the states of Kentucky or Tennessee; that the state of Kentucky grants the right of way and railroad franchise to the trustees, requiring them, and every lessee, to agree not to bring any suit in the United States courts, and not to transfer to such courts any suit brought against them in that state, forfeiting all rights granted if these conditions are not observed, and prohibiting all discrimination in favor of through freights or passengers *from other railroads connecting with said railway;* that Kentucky reserves the right to forfeit the grante for any violation of the terms of the grant, she being the judge of such violations, and reserves the right to change, alter, or modify her grant and to regulate, by general laws, the rates of charges for transportation of freights and passengers on said railway; and also reserves the right to alter, amend, or repeal the grant at pleasure; that the state of Tennessee has similar reservations and restrictions (except in the relation to the non-bringing or removal of causes in or to the courts of the United States), and specially limits her grant, as does Kentucky, to ninety-nine years, and also gives priority to all judgments recovered in her courts, over the mortgage reserved to the city for her advances; that these restrictions, limitations, and reservations render the right of building the road valueless, and not such as was contemplated by the Ohio laws; that all the grants and franchises of the states of Kentucky and Tennessee are made, not to the city of Cincinnati or her agents, but to the trustees as a corporate body; that such body is not an agency of Ohio, and all gifts of money, or loans of credit of the city to such corporation, are in violation of the laws and constitution of Ohio; the law of May 4, 1869, the only general law on the subject, requires that no road should be built that would cost more than ten millions of dollars; that the act of May 15, 1878, is a special act, and does not take effect until ratified by a vote of the people; that if the grants of Kentucky and Tennessee, with the restrictions, limitations, and qualifications therein set forth, are to the city of Cincinnati, then, the same constitute a compact, and are in violation of that clause of the constitution of the United States which secures to Congress the exclusive right to regulate the commerce of the different states with each other (article I, section 8, and also of the provisions of section 10, article 1, United States Constitution), and are, therefore, null and void; and that the act of May 15, 1878, is unconstitutional, for the further reason, that it authorizes the issuing and sale of city bonds for the full sum of $2,000,000, without regard to the amount required to complete the road, the Huston bid being only for the sum of $1,671,998.11, and to that sum the terms of the law should limit the issue of bonds. Also, that the trustees should require Huston & Co. to pay them $400,000 in money for the materials on hand to be used in the construction of the road, which, it is averred, will make a surplus above $2,000,000. The plaintiffs then pray among other things, for a perpetual injunction.

4. The answer puts in issue all the material averments of the petition.

5. After the bringing of the suit, an election was held in pursuance of the law of May, 1878, and the $2,000,000 proposal was carried. Then the parties presented the case for trial upon an agreed statement of facts. They, with the exception of the exhibits, made part of such statement, and which will be referred to as fully as is deemed necessary in the opinion, are as follows, omitting the first and second paragraphs, which relate alone to plaintiff's right to sue, and to the claim of legal right on the part of the defendant's trustees, to do substantially, what it is alleged they intend to do.

3. That on the 4th day of June, 1869, the city council of the city of Cincinnati, which was and is a city of the first class, having a population exceeding one hundred and fifty thousand inhabitants (a majority of all the members elected thereto concurring), passed the resolutions, a true copy whereof is hereto attached and made a part hereof, marked Exhibit A.

4. That in pursuance and by virtue of said resolutions, the mayor of said city did publish his proclamation in all the daily newspapers of said city, for more than twenty days prior to the day named therein, for a special election, a copy whereof is hereto attached and made part hereof, marked Exhibit B. And that said special election was held in pursuance of said proclamation and notice, and afterward, to wit, on the 28th day of June, 1869, the said mayor sent his message to the city council of the said city of Cincinnati, certifying under his hand and the corporate seal of the said city, that he had given notice of the time and place of holding the said special election as above stated, and the city clerk of said city council laid before the said city council at a meeting thereof duly convened on the said last mentioned day, the returns of said election; whereby it appeared that at said special election there were cast fifteen thousand four hundred and thirty-five (15,435) ballots of the qualified electors of said city for providing said line of railway, and fifteen hundred (1,500) ballots against providing said line of railway, whereupon the said city council declared by a resolution that the result of said special election was that a majority of thirteen thousand nine hundred and thirty five (13,935) of the votes cast at said special election was in favor of providing said line of railway.

5. That thereafter the city of Cincinnati filed in the superior court of Cincinnati, in cause No. 24,749 of said court, a petition reciting the facts above set forth, and praying for the appointment of five trustees of the Cincinnati Southern Railway; and thereupon, on the 30th day of June, 1869, the court, by an order entered on its minutes in said proceeding, appointed the defendants, R. M. Bishop, Edward A. Ferguson, and Miles Greenwood, together with Philip Heidelbach and William Hooper, to be the trustees of the Cincinnati Southern Railway, as provided in said act; and thereafter the said Wm. Hooper resigned, and W. W. Scarborough was appointed, who subsequently resigned, and was succeeded by Alphonso Taft who subsequently resigned, and said court appointed Godfrey Weitzel in his place, who declining, the court appointed John Schiff, who served to the date of his death: to wit: February 9, 1878, when the court appointed A. H. Bugher to fill the vacancy thus caused.

On March 11, 1876, Henry Mack was appointed in place of Philip Heidelbach, resigned.

Also, that the court in said case ordered that said trustees severally enter into bond, to the said city of Cincinnati, in the sum of one hundred thousand dollars, with four sureties, each to be approved by the court, for the faithful discharge of their duties; and Miles Greenwood thereafter presented his bond as trustee, with sureties, a true copy whereof is hereto attached and made part hereof, marked Exhibit C. And each of the other parties originally appointed as trustees presented a similar bond, whereupon the court made the following entry, to wit (Min. 518):

"This day, came the trustees of the Cincinnati Southern Railway, who were heretofore appointed, and presented their said bonds, the following named persons as sureties for—

"1. Richard M. Bishop, as trustee aforesaid; Carlos H. Gould, Wm. L. Dickinson, James A. Frazer, and William Glenn.

"2. As sureties for Edward A. Ferguson, as trustee aforesaid: Charles W. West, Anthony D. Bullock, Henry Lewis, and John Schiff.

"3. As sureties for Miles Greenwood as trustee aforesaid: Robert Mitchell, Lewis Worthington, William Woods, Joseph C. Butler, and Peter Gibson.

"4. As sureties for Philip Heidelbach, as trustee aforesaid: Jacob Seasongood Jacob Elsas, Abram Ackerland, and Samuel Thorner.

"5. As sureties for Wm. Hooper, as trustee aforesaid: Leonard B. Harrison, L. G. E. Stone, David H. Taylor, and Thomas R. Briggs.

"And the court being satisfied that such sureties are sufficient, approve the said bonds with sureties aforesaid, and order that the city solicitor receive and deposit said bonds with the treasurer of said city of Cincinnati, as provided by the statute."

And said bonds were so received and deposited; and the said Henry Mack and A. H. Bugher, Alphonzo Taft, W. W. Scarborough and John Schiff, upon their respective appointments, as aforesaid, executed similar bonds, with four sureties,

approved by a like order of said court, and said trustees have given no other bond or bonds as such trustees.

6. That exhibit "D," hereto attached and made a part hereof, is a true copy of the record in the cause of *J. Bryant Walker, solicitor of the City of Cincinnati* v. *City of Cincinnati et al.*, in the superior court of Cincinnati, 26,007, and that the judgment therein was, upon proceedings in error, affirmed by the supreme court of Ohio, and remains in full force and effect.

7. That exhibit "E," hereto attached, and made a part hereof, is a copy of the proclamation of the mayor of Cincinnati, for the election held under the law of February 24, 1876. That the further steps provided by said act were duly taken, and the election held, and the result ascertained as therein provided, and 21,704 votes were case in favor of issuing the bonds provided by said act, and 9,013 votes were cast against issuing said bonds.

8. That the whole of the ten millions of bonds provided by said original act of May 4, 1869, have been issued and sold by said trustees, except 153 of the 7's, for $500 each, which are now deposited as security for appeals in the state of Kentucky; and all of the six millions of bonds provided by said act of February 24, 1876, have been issued and sold by said trustees, and the proceeds thereof expended, except 26 for $1,000 each, which are of the issue known as the six per cent gold and pound sterling bonds, the market price of which is under par, and therefore said trustees being prohibited by law from disposing of the same for less than par, have been unable to sell same.

9. That under the law of April 18, 1878, the required advertisements and proclamations were made and published, as conditions precedent to holding an election thereunder; that said election was held, and eleven thousand one hundred and seventy-nine (11,179) of the citizens voting thereat voted yes, and eleven thousand three hundred and forty-nine (11,349) voted no, and no bonds were issued under said act, and said defendants (trustees) do not claim the right to issue any bonds or borrow any money under or by virtue of said act.

10. That the defendants, constituting said board of trustees, advertised for bids for the completion of said road, under and in accordance with the act of May 15, 1878, a correct copy of which advertisement is hereto attached, and made a part hereof, marked exhibit F, and the specifications therein referred to are the same attached to the contract with R. G. Huston & Co., hereinafter referred to and made a part hereof.

11. That exhibit G, hereto attached and made a part hereof, is a correct copy of the form of bid submitted by R. G. Huston & Co., under said advertisement, and of the contract entered into by said R. G. Huston & Co., in compliance with said bid.

12. That the said trustees did conditionally accept the bid of said R. G. Huston & Co., as the lowest and best bid, in their judgment, from responsible parties, for the performance of said work, as therein provided, and the said R. G. Huston & Co. furnished satisfactory security for the fulfillment of the contract, if it should be awarded to them; and thereupon the said trustees notified the mayor of Cincinnati thereof, a copy of which notification to the mayor is hereto attached and made a part hereof, marked exhibit H, and the mayor of Cincinnati, within ten days after the receipt of said notice, issued his proclamation for a special election, and caused the same to be duly published, a copy whereof is hereto attached and made a part hereof, marked exhibit I; and a special election was held at the time and place specified in said proclamation, at which election the question of the issue of said bonds was submitted to a vote of the qualified electors of said city, and said vote was taken at the usual places of holding elections, in each ward of said city, and of the ballots passed at said election, sixteen thousand two hundred and twenty-four (16,224) had printed thereon, "For issue of $2,000,000 bonds, yes," and ten thousand four hundred and twenty-four (10,424) had printed thereon, "For issue of $2,000,000 bonds, no." And the returns of said election were made to the city clerk of said city, and by him laid before the common council of said city, who declared by resolution that the result of said election was that a majority amounting to five thousand eight hundred (5,800) of the votes cast at said special election was in favor of the issue of said bonds; and thereupon the said defendants (trustees) finally accepted and confirmed the bid of said R. G. Huston & Co., theretofore conditionally accepted, and executed the contract for the completion of said line of railway with R. G. Huston & Co., in pursuance of said bid, a copy of which is hereinbefore set forth.

13. That exhibit J, hereto attached and made a part hereof, correctly states the condition of said road at the date of the contract with R. G. Huston & Co.

14. That the defendants (trustees) propose and intend, unless restrained by order of court, to issue bonds under said act of May 15, 1878, in the sum of $2,000,000, and to sell the same, or so many thereof as they may find necessary for the completion of said road, as provided in said act. That said trustees did, since the filing of this petition, issue a proposal for bids for the said $2,000,000 of bonds to be issued under said act of May 15, 1878, a copy of which proposal is hereto attached and marked exhibit K; and that at the date upon which said bids were by said proposal to be received, there were no bids offered for said bonds, and no bids have been issued or sold.

15. That one of the defendants (trustees) prepared the original drafts of the laws of Kentucky and Tennessee upon this subject, and caused them to be transmitted to the legislatures of those states, and that the laws were passed at the request of the board of trustees, except as they were amended by the legislatures; and that the copies of said laws attached hereto are the same as drafted by said trustee, except in the following particulars:

The act of Kentucky, passed February 13, 1872, was amended by inserting in the recital which precedes the first section all that part commencing with the words "Provided the trustees of said road," and ending with the words, "and taxpayers of said city;" and also that part commencing with the words, "The general assembly reserves the right," and ending with the words, "passengers on said railway." And the eleventh section was amended by adding to said petition all after and including the words, "And provided further, that any mortgage." And the thirteenth section entire was inserted in the act, and the fourteenth section was amended by adding all after and including the words, "Provided, however." And the fifteenth section was amended by inserting all after that part commencing with and including the words, "And it is hereby made a condition." And the sixteenth section was amended by inserting all of that part commencing with the words, 'the persons or company operating," and ending with the words, "or coming from any others" and also all that part after and including the words, "and it is hereby made a condition." And the seventeenth and nineteenth sections entire were inserted in the act.

And the act of Tennessee, passed January 20, 1870, was amended by inserting, the eleventh, seventeenth, and eighteenth sections entire.

7. The act of May 4, 1869 (66 Ohio L. 80), in the first section, among other things, provides, "That whenever in any city of the first class, having a population exceeding one hundred and fifty thousand inhabitants, the city council thereof shall, by resolution passed by a majority of the members elected thereto, declare it to be essential to the interests of such city *that a line of railway* to be *named* in said resolution, should be provided between *termini* designated therein, it shall be lawful for *a board of trustees, appointed as herein provided*, and *they* are hereby authorized to borrow as a fund for that purpose, *not to exceed the sum of ten millions of dollars*, and to issue bonds therefor, *in the name of said city, under the corporate seal thereof*, bearing interest at a rate not to exceed seven and three tenths per centum per annum, payable at such times and places, and in such sums, as shall be deemed best by said board." * * * And the same "shall be secured by a mortgage on the line of railway and its net income, and by the pledge of the faith of the city, and a tax, which it shall be the duty of the council thereof, annually, to levy, sufficient, with said net income, to pay the interest and provide a sinking fund for the final redemption of said bonds." It then provides that no money shall be borrowed on bonds issued until after the question of providing the line of railway *specified in the resolution* shall be submitted to a vote of the qualified electors of the city, at a special election to be ordered by the city council thereof, of which not less than twenty days' notice shall be given in the daily papers of the city, and a majority of the electors shall decide in favor of said line of railway.

The *second* section provides that if such vote shall be in favor of providing such line of railway, the city solicitor shall forthwith file a petition in the superior court of said city, or, if there be no superior court, then in the court of common pleas of the county in which such city is situate, praying that the *judges* thereof will appoint five trustees, etc., and it shall be the duty of said *judges* to make the appointment, and to *enter the same on the minutes of the court*. It then enacts that they, the trustees, "shall enter into bond to the city in such sum as *the court* may direct, with one or more sufficient sureties, to be approved by the court, conditioned for the faithful discharge of their duties.

By section *three* "said trustees and their *successors* shall be the trustees of the said fund, and shall have the control and disbursement of the same." It then provides how and for what they shall expend the fund, to wit; "In procuring the right to construct, and in constructing a single or double track railway, with all the usual appendages, including a line of telegraph between the *termini* specified in said resolution; and for the purpose aforesaid shall have *power and capacity* to make contracts, appoint, employ, and pay officers and agents, *and to acquire, hold, and possess all the necessary real estate and personal property and franchises, either in this state, or in any other state into which said line of railway may extend*," etc.

Section *four* makes such trustees a board, who are to choose one of their number president, who shall be the acting trustee, etc. They are required to keep a full and accurate account of their receipts and disbursements, and make a report of the same to the city auditor, annually, and whenever requested by a resolution of the city council. By section *five*, they are empowered to take security from officers, agents, or contractors, and they are forbidden to become surety for any such officers, agents, or contractors, or from becoming interested, directly or indirectly, in any contract concerning said railway. And *they are made responsible only for their own acts.*

Section *six* enacts that, " whenever the city solicitor * * shall have reason to believe that *any one* of said trustees has failed in the faithful performance of his trust, it shall be his duty to apply to the court that appointed said trustee, by petition praying that such trustee be removed, and another appointed in his place." It then provides for filling vacancies in the board of trustees, and gives the right to any holder of the bonds, or tax-payer of the corporation, if the solicitor fail, after being requested to do so by a bondholder or such taxpayer, to make application in either of the foregoing cases.

Section *seven* relates solely to the right of appropriation of lands, etc.

Section *eight* gives the right to purchase railways which can be adopted as part of the line.

Section *nine* relates to leasing portions of the line as completed, to cease on completion of the line.

Section *ten* gives the city council power to pay the expenses of the election out of the general fund of the city, to be repaid out of such trust fund when raised.

8. By an act supplementary to the act of May 4, 1869, passed March 25, 1870 (67 Ohio L. 28), it was enacted "that the city council of any city of the first class, described in the act to which this act is supplementary, may, after trustees have been appointed, as provided in said original act, advance to said trustees, out of any funds of said city, such sum as may be necessary, not exceeding fifty thousand dollars, for carrying the object for which they are appointed into effect; and said sum shall be repaid out of the trust fund provided for in said original act, when raised."

9. On April 18, 1873 (70 Ohio L. 139), another act supplementary to the original act of May 4, 1869, was passed. It gave to the holders of all the bonds authorized to be issued under the statute of 1869, the right to hold, by way of mortgage, without any conveyance, the line of railway specified in the resolution of the city council," etc., "and the net income thereof, and all the estate, right, title, and interest therein of the city and of the board of trustees of said line," etc.," without any preference one above another by reason of priority of date of any such bonds, or of the time when such holder became the owner of the same, or otherwise howsoever." Then such mortgage is made to take effect as property and rights are required, and such bonds may be made payable, principal and interest, in gold or lawful money.

Section *two* provides for deeds and contracts and for proceedings in condemnation, which may be in the name of such city or *board of trustees.* Section *three* relates to the occupancy of streets and public grounds belonging to the city, by such railway, if such trustees find it necessary to occupy them.

Section *four* gives the trustees power to provide, by contract, for completing and leasing the whole line of railway for which they are trustees, and prescribes the manner and form of doing so.

10. On February 24, 1876 (73 Ohio L. 13), another act supplementary to the act of May 4, 1869, was passed, which enacts "that it shall be lawful for *the* board of trustees appointed under the act to which this is supplementary, and they are hereby authorized to borrow, *as a fund for the completion of the line of railway for which they are trustees*, a sum in addition to the amount authorized by said original act, not to exceed six millions of dollars, and to issue bonds therefor, *in the*

name and under the corporate seal of the city owning the line of railway. Said bonds * * * shall be secured by the pledge of the faith of the city, and a tax which shall be annually levied *by the council of said city*, * * * sufficient to pay the interest thereon, and provide a sinking fund for their final redemption; * * * provided that no money shall be borrowed on bonds issued until after the question of borrowing said money and issuing said bonds shall be submitted to a vote of the qualified electors of said city at a special election," etc., and a majority of said electors shall decide in favor of borrowing said money; * * * and provided that none of the bonds authorized by this act shall be sold for less than par, in lawful money, or bear a greater rate of interest than seven and three tenths per centum per annum.

Section *two* provides for the trustees leasing the whole of the railway after its completion, in terms substantially similar to those prescribed by the act of April 18, 1873.

Section *three* relates solely to the manner in which such trustees shall sue or be sued.

11. On April 24, 1877 (74 Ohio L. 115), the legislature passed another act supplementary to the act of May 4, 1869, providing "that *the* board of trustees appointed under the act to which this is supplementary, shall have power to contract for completing and leasing the whole line of railway for which they are trustees, after its partial construction, and before its final completion, upon the conditions and in the mode provided for in the *fourth* section of the act of April 18, 1873," and it then provides for what such trustees shall do before making such contract; and section *two* of the act of February 24, 1876, is repealed.

12. On April 18, 1878 (75 Ohio L. 115), another supplementary act was passed authorizing the borrowing of $2,000,000 additional, if ratified by the votes of a majority of the electors in such city, for the construction of such railway; but the election having resulted adversely, no attempt to borrow money under such statute is intended by such trustees. Section *two* of that act gives *the trustees* power, under the limitations and in the manner therein provided, to acquire and hold, by lease, in the city owning such railway, lands for terminal facilities, etc.

Section *three* relates to the compensation of the trustees and the mode of fixing the same.

Section *four* requires, before the execution of any lease or license to use any part or all of such railway by the trustees, that the board of trustees of the sinking fund "in such city" shall approve the same.

Section *five* prescribes how any street, alley, or other public way, space, or ground belonging to such city may be used or occupied.

Section *six* relieves the owners or holders of the bonds from the responsibility of looking to the application of the proceeds thereof.

Section *seven* repeals section *nine* of the act of May, 4, 1869, which related to the leasing of the road.

Section *eight* gives the trustees power, with the approval of the trustees of the sinking fund, to rent or lease temporarily the right to use and operate, as fast as portions of the line are completed—such portions upon such terms as they may deem just.

13 The statute creating the board of trustees of the sinking fund was enacted May 3, 1877, and is found in 74 Ohio L. 157.

14. The consideration of these laws, or so much of them as remain in force, is not involved in the determination of this case. No question as to the necessity of the board of trustees of the sinking fund approving any lease to be made by the railway trustees may ever arise. The provision may prove satisfactory to both boards, the city, and the holders of the bonds. These plaintiffs, in this case, have nothing to do with that matter, nor has this court until the question shall be properly presented to it by the proper parties.

15. On May 15, 1878 (75 Ohio L., 559), another act was passed "supplementary to an act entitled an act supplementary to the acts passed February 24, 1876, and April 24, 1877, supplementary to the act relating to cities of the first class having a population exceeding one hundred and fifty thousand inhabitants, passed May 4, 1869, and to repeal section nine and a portion of section four of said act, passed April 18, 1878."

The *first* section of this act provides: "That it shall be lawful for *the* board of trnstees, appointed under the acts to which this is supplementary, and they are hereby authorized to borrow, as a fund for the completion of the line of railway for which they are trustees, a sum, in addition to the amounts authorized by said acts, not to exceed $2, 000,000, and issue bonds therefor *in the name and under the corporate seal of the city* owning the line of railway; * * * and (said bonds) shall be secured by the pledge of the faith of the city and a tax which shall be annually levied by the council of said city on the real and personal property, * * * sufficient to pay the interest thereon, and provide a sinking fund for their final redemption: * * * provided that none of the bonds authorized by this act shall be sold for less than par," etc.

The *second* section requires that, "*within twenty days* after the passage of this act, the said trustees are directed and required to advertise, or, * * * for proposals for the completion and construction of said railway *to a junction with any other railroad of similar gauge, in the vicinity of the terminus of said railway, and extending thereto, so as to admit of the passage of trains from one terminus to the other terminus of said railway.*" It theu authorizes the trustees, conditionally, to accept the lowest and best bid for the completion of such work, provided such bid shall not exceed $2,000,000.

Section *three* provides that when such bid or bids shall have been conditionally accepted, the mayor of the city owning such line of railway shall be notified and required to issue his proclamation for an election, which shall be within twenty days from the date of the proclamation etc., "and if a majority of the electors shall have voted in favor of the issue of said bonds, the said board of trustees shall be authorized and required to formally and finally accept and confirm such conditionally accepted bid or bids, and to execute a contract or contracts accordingly."

Section *four* obliges "the said board of trustees to apply *the bonds*, or the proceeds from the sale of the bonds herein provided, exclusively in payment for the work in the completion of said railway, in pursuance of said contract or contracts, until the same are fully performed and said work completed, excepting the sum of $50,000, which they are authorized to expend in terminal facilities and in the purchase of rights of way, by the act of April 18, 1878, and which authority is hereby confirmed, under the conditions of the act passed on April 18, 1878."

16. And in 75, Ohio L., 400, section *nine* (9), the following provision is found:

"The aggregate of all taxes levied, etc.," * * * "in cities of the first grade, of the firstclass, twelve mills, and such further rate as may be necessary to provide for the payment of the interest, and to create a sinking fund for the redemption of bonds issued, and that may be issued *under the act relating to the Cincinnati Southern Railway*, passed May 4, 1869, and the acts amendatory thereof and supplementary thereto."

17. At the time of the passage of the act of May 4, 1869, Cincinnati was, and yet is, the only city in Ohio having a population of one hundred and fifty thousand; but the terms of that statute authorized any city, which, at any time in the future, might acquire such a population, to avail itself of its provisions, and was, therefore, a general law conferring corporate power and not, on that account, in violation of article 13, section 1, of the constitution of the state; and it was a general law, having a uniform operation throughout the state, within the meaning of the constitution.

18. On June 4, 1869, the city council of the city of Cincinnati, in pursuance of the terms of the law, by resolution, declared, "that the said city council hereby declares it to be essential to the interests of the said city of Cincinnati, that *a line* of railway, to be known as the Cincinnati Southern Railway, shall be provided *between the said city of Cincinnati and the city of Chattanooga, in the state of Tennessee.*"

19. The next day, June 5, 1869, the mayor of the city of Cincinnati issued his proclamation for the required election, to be held on June 26, 1869. The resolution of the council and the proclamation of the mayor, following the requirements of the statute, presented the question to be voted upon thus: "Special election to decide for or against a line of railway between Cincinnati, Ohio, and the city of Chattanooga, state of Tennessee—

"*For providing said line of railway.*

"*Against providing said line of railway.*"

The election resulted in favor of providing the line of railway.

20. After the appointment of the trustees, after the several consents, by legislative acts, to build and operate such railway, upon the terms and conditions specified in such acts, in such respective states, by Tennessee and Kentucky, after the location and adoption of the line of actual construction through those states, and after the expenditure in the construction of the railway of so much of the $10,000,000 as left it certain that that sum was insufficient to provide such line of railway, which the city had been empowered to provide, and had declared it necessary for its interests to provide, and in doing which it had expended nearly $10,000,000, in compliance with the terms of the act of February 24, 1876, the mayor of the city, on March 3, 1876, issued his proclamation for an election. The form of the ballot prescribed was as follows:

"*An additional appropriation of six millions of dollars for the construction of the Cincinnati Southern Railway—Yea.*

"*An additional appropriation of six millions of dollars for the construction of the Cincinnati Southern Railway—Nay.*"

21. The appropriation was carried by the vote of the electors, and nearly the entire sum of six millions raised by the sale of the bonds has been expended in the construction of the road. From the date of the passage of the statute down to the bringing of this action, no steps were taken in any court, and no formal objection even was ever made to the issuing of such bonds for the money borrowed upon them, though the same opportunity so to do existed during all such time as amply as now. The two sums so raised and expended have been found sufficient only to complete the road to Somerset, in the state of Kentucky, leaving it but partly constructed between that place and Chattanooga.

22. It further appears that some five miles from Chattanooga, at a place on the line of this railroad called "Boyce's Station," there is a railroad of a gauge similar to that of the Southern road, running into Chattanooga, and, if this road can be completed to that station, a present means will then be provided for the transportation of freights and the carriage of passengers to and from Cincinnati and Chattanooga, after which, with the means then remaining in the hands of the trustees, the road can be completed to Chattanooga. Upon this state of facts, the law of May 15, 1878, seems to have been passed. Under and by virtue of the provisions of that act, the trustees advertised, received bids, and conditionally contracted with R. G. Huston & Co. for the construction and completion of the road from Somerset, Kentucky, to Boyce's Station, in the state of Tennessee, for the sum of $1,671,998.11. And on the 3d day of August, 1878, the mayor of Cincinnati issued his proclamation for an election, to be held on August 14, 1878, to determine whether or not the bonds should be issued. The form of the ballot was:

"*For the issue of $2,000,000 bonds—Yes.*

"*For the issue of $2,000,000 bonds—No.*"

The result was in the affirmative.

23. Thereupon the trustees and Huston & Co. executed the contract contemplated by the conditionally accepted bid. But three provisions of that contract have been objected to by the plaintiffs—

First—They claim that they agreed to accept the bonds at par, if the trustees should elect to pay them in bonds, and that their bid may have been higher than if they were to be paid in cash.

Second—That they agree to take and pay the trustees for rails and ties and materials, in the hands of the trustees, for constructing the road, a large sum of money, amounting, they claim, to $400,000.

Third—And that the contract only provides for the completion of the road to "Boyce's Station," and not to Chattanooga.

24. They brought this suit before the election of the 14th of August, and consequently before the execution of that contract. These subsequent proceedings and acts are not questioned by a supplemental petition, but in the reply to the answer. No objection to this method of pleading is raised by the defendants, who go to trial upon an agreed statement of facts, and therefore any objection that might have been raised as to the mode of pleading has been waived by the defendants.

25. When Cincinnati, under the law of May 4, 1869, had declared and determined that it was essential to *its* particular interests that *it* should provide itself with a line of railway between between Cincinnati and Chattanooga, and had decided

upon the issue by the trustees of the $10,000,000 of its bonds to provide such line of railway, it became necessary to procure the separate, independent consents of Kentucky and Tennessee thereto, as such road would necessarily run into or through both states, the statute having expressly given the trustees the necessary powers, "either in this state or into any other state into which said line of railway may extend." Accordingly, Tennessee, by an act of the legislature of that state, passed January 20, 1870, after reciting the provisions of the Ohio statute, and the subsequent action of the Ohio authorities, enacted "that the said board of trustees" (naming them individually) "and *their successors*, by the name of the 'trustees of the Cincinnati Southern Railway,' 'be and they are hereby authorized to extend, construct, and maintain, within the state of Tennessee, the said line of railway,' etc., and to exercise the powers vested in them under and by virtue of the said act of the general assembly of the state of Ohio, *subject to the provisions and restrictions in this act provided.*"

Section *two* provides for the right of the trustees to make the necessary surveys for the location of the road.

Section *three* provides that the trustees may acquire, by purchase or gift, and hold any land in the vicinity of or through which the route selected by them may pass, also to occupy streets, roads, public grounds, turnpikes, etc., and to condemn private property, not exceeding two hundred feet in width, for the road, to be first paid for.

Section *four* authorizes changes in the location of the line of the road, before or after completion, if the same be not a departure from the general route originally selected by them.

Section *five* gives the power to purchase other railroads in the line of such railway, preserving intact previous liens thereon, and requiring a majority in interest of the stockholders of such purchased roads to consent to their sale.

Section *seven* provides that the respective holders of the bonds (the $10,000,000), "are hereby entitled to hold, by way of mortgage, etc.," in the same language that is employed in the Ohio act of April 18, 1873, with the additional proviso that such mortgage should not affect the lien of any vendor for land sold to such trustees.

Section *eight* confers the right upon counties, cities, and towns to give or subscribe in aid of such railway.

Section *nine* limits the amount of such subscriptions and prescribes how they shall be made.

Section *ten* limits the time and provides for the extension thereof, within which the road shall be completed, and fixes the gauge of the same at five feet in width—the gauge which has been adopted for the entire line.

Section *eleven* provides that the *maximum* charge for transportation on said railway shall not exceed thirty-five cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement *for every hundred miles*, and five cents a mile for every passenger—apparently a high *maximum*.

Section *twelve* forbids the taxing of such railway beyond the rate imposed on other roads in the state.

Section *thirteen* provides that the trustees may sue and be sued, contract, and take and hold property, and convey and transfer the same by the name of the "Trustees of the Cincinnati Southern Railway;" that they shall keep an office in Chattanooga, where they may be served with process; and that they may sue or be sued in any county through which the road shall pass, and service may be had upon any depot agent. The time for commencing actions is made the same as against other railroad companies. Conveyances must be signed by at least three of the trustees.

Section *fourteen*, among other things, enacts that, "the word 'trustees' shall mean the trustees, *for the time being*, appointed *under the said act* of the General Assembly of the state of Ohio, and shall include the said *board* of trustees and their *successors*." "The expression 'act of the General Assembly of the state of Ohio,' shall mean the act, etc., passed on the 4th day of May, 1869. And the expression 'line of railway, shall mean the line of railway between the city of Cincinnati, in the state of Ohio, and the city of Chattanooga, in the state of Tennessee."

Section *fifteen* denies this road state aid, under the general improvement laws of Tennessee.

Section *sixteen* provides "that no discrimination shall be made against the citizens of the state of Tennessee in the carrying of freight and passengers upon said railroad, or any part thereof, and the legislature reserves the right to enforce this provision by all necessary legislation "

Section *seventeen* enacts that the state of Tennessee shall have the same legislative control in this railroad interest that it holds in other railroads in the state.

Section *eighteen* provides: "That the rights, privileges, and immunities granted by this act shall continne for and during the period of ninety-nine years, and not longer, and shall, during that time, be subject to be declared forfeited by any court of competent jurisdiction, upon bill filed on the relation of any citizen of Tennessee, on behalf the state, for any failure on the part of the said trustees, their successors or assigns, to comply with the terms, stipulations, and obligations imposed herein for the benefit and security of the state of Tennessee, or the people thereof. * * * And the (s) judgment rendered against the trustees of said Cincinnati Railway, *or by whatever name it transacts its business*, and the property, real and personal, belonging to such trustees, *or railway* within this state, shall be enforced and be liable for the satisfaction of said judgment; the existence of any mortgage on said railway and appendages, *as provided for in this act*, to the contrary notwithstanding and before entering on any land in this state, said trustees shall accept the provisions of this act."

The act of Kentucky, passed February 13, 1872, as amended March 25, 1872, and February 4, 1873, before the trustees would accept the same, is substantially the same as the act of Tennessee, except, first, in the preamble it is provided that "the General Assemby reserves the right to change, alter, or modify this act, and to regulate, by *general laws*, the rates of charges for the transportation of freight and passengers on said railway." Second, section *eleven* provides, "that any mortgage" (the bond mortgage provision being the same as in the laws of Ohio and Tennessee) "that may be made by any *lessee* or *lessees* of said line of railway, or persons or company operating it, *on the rolling-stock*," etc., shall be inferior in priority to judgments that may be obtained against *them*, etc., for wages, materials, and supplies in running said road; for damages for breaches of contracts of affreightment, for injury, loss, or destruction of any property put on the cars for transportation, or for any injury to persons or property occasioned in the running of said road. This provision, it will be seen, is much narrower than the law of Tennessee, and does not apply to the lien of the holders of the $10,000,000 of bonds.

The *sixteenth* section enacts that "the persons or company *operating* said railway, or any part thereof, as lessee or otherwise, shall receive and carry all passengers and freight coming or brought to it or them to be carried, and they shall make no discrimination against citizens of Kentucky in carrying freight or passengers on said line of railway, or any part thereof; nor shall they make any *unjust* discrimination in favor of through freights or passengers, against any way freights or passengers, or against freights or passengers from other railroads connecting with said railway in this state; but they shall charge and receive only the same, and no more, for the same services in transporting freight or passengers going to or coming from *one connecting road*, that they charge or receive upon those going or coming from any other" (connecting road).

It then forbids the bringing of any suit, for a cause of action arising in Kentucky, by the *lessees* of the road from the trustees, in the courts of the United States, or to remove any cause brought against them (such lessees) in Kentucky courts to a United States court, and provides a forfeiture of all rights acquired under such *lease*, for a violation of this provision. Section *seventeen* incorporates the ninety nine year provision in the same language that is employed in the Tennessee act; and section *nineteen* provides: "The General Assembly reserves the right to alter, amend, or repeal this act, as provided in an act entitled an act reserving power to amend or repeal charters and other laws, approved February 14, 1856."

27. After the passage of the act of May 4, 1869, and the appointment by the judges of this court of five trustees thereunder, after such trustees had given bond with sureties to the approval of the court, after the election authorized by that statute, and after the passage of the act of March 25, 1870, authorizing the city council to advance to such trustees, out of any fund of the city, a sum not exceeding $50,000, for carrying the object for which they were appointed into effect, but before any bonds were issued or money borrowed for any of the purposes contemplated by the law, J. Bryant Walker, then city solicitor of the city of Cincinnati, as such city solicitor, and as a taxpayer of the corporation, on the 12th day of April, 1870, under

a section of the municipal code substantially the same as the *thirty-fourth* section hereinbefore * referred to, brought an action in this court against the city of Cincinnati, the city auditor, and the trustees of the Cincinnati Southern railway, naming them, praying for an injunction to restrain the expenditure any of such moneys, claiming that the acts of 1869 and 1870 were "unconstitutional and void, and that the advance of such money is (was) a misapplication of the funds of the corporation and in contravention of the laws governing the same, and is (was) not proper corporate use." The complete record in that case is before us, as a part of the agreed statement of the facts in this case; and from the record it appears that the petition in that case set forth in words and figures, literally, all the material sections of the law of 1869; also the law of 1870; the proceedings in the appointment of the trustees; the giving of separate bonds by them, with their respective sureties, as evidenced by the journal entries of this court, which were fully set forth; the receipt of the city treasurer to the solicitor for such bonds, naming each trustee; the resolution of the city council declaring it to be essential to the interests of the city of Cincinnati that a *line* of railway, to be named "The Cincinnati Southern Railway," should be provided *between the said city of Cincinnati and the city of Chattanooga*, in the state of Tennessee; the proclamation of the mayor for the election and the form of the ballots, and the result of the election, and also that the trustees had procured the consent of the state of Tennessee to construct the road in that state, and were applying to the state of Kentucky for a like consent, but not setting forth the Tennessee act in words or substance.

A general demurrer was interposed to the petition, and the cause was reserved to the general term of this court, where, in January, 1871, the demurrer was sustained, the relief prayed for denied, the petition dismissed, and a judgment for costs rendered against the plaintiff. The court were unanimous, and gave an elaborate opinion, pronounced * by Judge Taft, in which the other judges concurred, and which carries with it induitable evidence that the case was carefully and fully considered by all the judges who composed this court at that time. The cause was then taken to the supreme court of the state on petition in error, and the judgment of this court was there affirmed by the unanimous opinion of the full bench, all of the five judges concurring therein; and no bonds were issued or attempted to be issued until after such decision of the supreme court.

YAPLE, J.

It seems to the court obvious from a careful examination of the act of May 4, 1869, and the subsequent legislation of this state upon the subject, that the policy established and required to be maintained, is, that the location of the line of railway, the construction thereof, the temporary leasing of the parts completed, and of the entire road when completed, the borowing and expenditure of money therefor, and the issuing and sale of the city bonds to be issued or paid out for the same, should not be dependent upon, or subject to, the frequent changes of legislators, city officers and policies, and the dangers of interested and powerful combinations seeking the control or ownership of the railway, but that a fixed and permanent board of trustees, created by the state of Ohio, and appointed in the manner and as required by the original act, its members removable only as therein provided, when any of them has failed in the performance of his trust, should be created, continued, and vested with all the powers necessary to the full and complete accomplishment of the objects contemplated by such statute. The legislature, doubtless, realized, what experience has so thoroughly taught, that if such boards be liable to commit mistakes, from want of proper judgment and acquaintance with the work in which they are appointed to engage, the right and the exercise of the right to change them at will, to appoint others in their places, or to confer their powers and duties upon other agencies, is sure to result, if not in the total defeat of the object desired to be accomplished, at least in adding greatly to its cost, beyond what could arise if in the hands of such permanent board,

having a fixed plan and system. Under such latter method, capitalists are willing to advance money on more favorable terms, and with greater freedom and confidence, as they have a stable basis upon which to rest their trust, while the former system would, if they could be induced to venture at all, launch them upon a sea of uncertainty, while it would tend to the destruction of the city's credit. The legislature has, therefore, seen fit to provide for permanence of the agency, and not for changeability, such as the mutations of elections and clashing interests, and opposing and conflicting opinions would almost surely bring about, frequently to the inevitable injury, increased expense, and possible total failure of the authorized enterprise. Such board of trustees is not created a corporation, or invested with any corporate powers, either by the laws of Ohio, or of Kentucky, or Tennessee. They are simply trustees, invested with certain enumerated and defined powers, without any property interests, other than a naked legal title, all of which they are to employ, primarily, in behalf of their beneficiary, the city of Cincinnati, and, secondarily, for the holders of the bonds, which they have negotiated, and for the lessees of the parts of the railway which have been completed; and these have the right to the maintenance of the board as created and continued under the act of 1869. When Ohio authority shall determine that their trust duties have been fully performed and completed, the city of Cincinnati, the beneficiary of the trust, and the full and complete equitable owner of the trust property, shall will be their *successor*, within the meaning of the laws of the three authority, states of Ohio, Kentucky, and Tennessee. When that time have arrived, is a question to be determined solely by Ohio but is not yet ripe for our determination.

The stamping of the city corporate seal upon such bonds, by the trustees, does not make the board a corporation, as such seal alone does not create a corporation. It is a mere method of certifying their genuineness, and adds to the difficulty of counterfeiting them. It confers no character upon them, other than what a wax or scrawl seal would have done, had the law required such.

We will next consider what has been settled for us in this case, if anything, by the decision of the supreme court of the state, in the case hereinbefore alluded to, Walker, etc., v. City of Cincinnati et al., 21 Ohio St., 14, for that case, as has been stated, was decided by the unanimous opinions of our predecessors in office, holding this court in general term, and their decision affirmed unanimously by the supreme court of the state. While the legal profession, at that time, in this and other states, were divided as to the correctness of the decision, and while many may still doubt and continue to doubt it, this court is bound, and must follow and be governed by it, upon every constitutional and legal question which it fairly embraces, whatever our legal opinions may have been, or are. It would be just cause to startle and alarm every person having rights or property in the land, were we to attempt to overrule the decision of this court in that case, it being equal in numbers and authority with ourselves, and to disregard the supreme court, which is superior in authority to this court, and is the tribunal of last resort, the highest in the state, and when the rule, which even supreme courts have prescribed for themselves, is that, though they may be of opinion their predecessors have erred in a previous decision, yet, if, upon the faith of

such decision, large investments, as in the case of this Cincinnati Southern Railway, have been made, and property and rights acquired thereunder, they will adhere to such previous decision, as its reversal would create greater wrong, and inflict more seroius and permanent injuries than mere theoretical legal correctness would confer in benefits; and especially when the doubting court is no more numerous and of no greater authority than was the court at the time it did not doubt, but held distinct views of the law upon the same subject.

Walker brought that action as *city solicitor* of the city of Cincinnati, under the then 159th section of the municipal code, which, we have seen has been reenacted. Having done so, and the case being prosecuted to final judgment, no taxpayer of the corporation had then or thereafter the right to maintain any action for the same causes, but all became bound by the judgment finally rendered (sec. 160, former municipal code). In this case, being requested by the plaintiff, taxpayers of the corporation, in writing, the solicitor failed to bring this action, when, under the section 35 above referred to (formerly section 160), these plaintiffs brought the suit; and they stand in precisely the same relation to the taxpayers and people of the corporation, and to the decision in the Walker case, that the present solicitor would have done had he brought and prosecuted the suit, and are equally bound by that judgment.

We need, on this subject, only to repeat what this court stated in its opinion, in general term, in Smith v. Cincinnati et al.: "Under the power conferred upon him by section 159, the city solicitor may sue the city itself, though it is not mentioned how he shall entitle the action" (quoting Walker v. City of Cincinnati, 21 Ohio St., and other cases). "The solictior represents the aggregate taxpayers and inhabitants, rather than the city as a corporate unity."

"Section 160 requires the taxpayer to sue in his own name, 'on behalf of the corporation.' * * * This requirement is obviously to bind everybody by the decision of the taxpayer's suit. It substantially carries out the old chancery rule and enactment of the code in relation to parties. 'When the question is one of a common or general interest of many persons, etc., one or more may sue or defend for the benefit of all.' Code, section 37."

This case was affirmed by the supreme court. 29 Ohio St., 291, 292; and see The State v. Harmon, 31 Ohio St., 265.

We are, then, oblidged to hold that all the matters and questions which were involved in the determination of the Walker case, or that could or might have been raised thereby, are concluded and finally settled by the judgment rendered in that case as to all persons whomsoever, the same being *res adjudicata*. This rule is so well settled and so firmly established by all the decisions, both in Great Britain and in this country, as to need no citations in its support (see Babcock v. Camp, 12 Ohio St., 11). So the rule as to *stare decisis* and the law of *res adjudicata* both apply as to all matters presented for decision upon the record in that case, and the determination thereof by the supreme court is conclusive upon the city of Cincinnati and all its taxpayers and inhabitants then, since, now, and hereafter *Res adjudicata* binds parties and privies, *stare decisis* governs the decision of the same question in the same way in actions between strangers to such record.

The Walker case has settled that no provision of the acts of 1869 or 1870, or of the proceedings of the city council, or mayor of Cincinnati, or of the trustees, down to the commencement of that action, violated any provision of the constitution of the state of Ohio, or of the United States; for if they did, the injunction would have been granted and made perpetual. It settled, affirmatively, the right of Cincinnati to construct this Cincinnati Southern Railway, by procuring the consents of the respective states of Kentucky and Tennessee, beyond the limits of this state, and into and through those states; but it did not decide upon the effect of such consents, or their terms, as were then or afterwards actually granted, as to rendering the undertaking legal or illegal; for none of them were set forth, and the decision was made upon a general demurrer to the petition. It settled the sufficiency of the resolution of the city council, which designated the line of railway to be one between Cincinnati and Chattanooga; and for the obvious reason that the American, as contradistinguished from the English method of authorizing lines of railways, was intended by the legislature, for the act provided no money, or other method or means, to locate an actual line. It settled that the requirement of an election, at which the vote of the majority of the electors of the corporation voting thereat should decide in favor of providing such line of railway, before the law should be executed, was a legal and valid requirement.

It settled the validity of the qualifications of the several trustees, by each entering into a several bond with sureties. The court had ample reason for doing so, as the act provides that "they shall be responsible only for their own acts."

This provision, in section 14, is to be read with the provisions on the same subject, in section 11 of the act. The difficulty of enforcing a joint bond, in cases where one or two of such trustees opposed the acts constituting the breach, and refusing to sanction them, will readily occur to the legal mind. The bonds of the trustees of the sinking fund and all other bonds of appointees by this court have been taken in the same way.

It is not settled by that case, how or where the judges of the superior court shall appoint such trustees, as that matter was not presented by the record, neither is it here, by the agreed statement of facts, or, specifically, by the pleadings. It is agreed that they were appointed and entered into bond to the approval of the court. It would seem, that if their appointment be admitted, as it expressly is, the evidence of such appointment cannot now be material. But, it has been urged in argument that they were appointed in general term, which has no such jurisdiction. The record, on inspection, shows that they were appointed by this court, "and the judges thereof." The law does not prescribe that they shall be appointed while the judges are in special or general term, or in chambers. It does prescribe that "the court" shall cause the record of such appointment to be entered on its minutes. It does not say what minutes, whether those of the special or general term, or in a separate record to be provided for the purpose. The court, then, may, in its discretion, direct what book of minutes the same shall be entered in. The petitions for appointment were filed and numbered the same as ordinary suits brought in the court.

The vital question, it seems to us, to be considered, is whether the statutes objected to, especially those of 1876, and May 15, 1878, are in

plain violation of article two, section twenty-six of the constitution of the state, which provides that, "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," etc.; or of article thirteen, section one of the constitution. which prescribes that, "The general assembly shall pass no special act conferring corporate powers."

It is not denied but that the constitution permits appropriate local or special legislation. The constitutional inhibition is against granting corporate power by such legislation. This has been so frequently decided by our supreme court as no longer to admit of question or doubt. The State ex rel. v. Mitchell, 31 Ohio St., 608, and the cases there cited.

The act of 1869, which has been held to be constitutional, conferred the corporate power upon all cities of the first class having then, or that might thereafter have, a population exceeding one hundred and fifty thousand inhabitants, when declared, in the manner therein provided, to be essential to its interests that a line of railway should be provided, to provide the same, by the method therein prescribed, and authorized the borrowing of $10,000,000 for such purpose. This was all the corporate power that was given, or ever has been given, to such cities for such purpose. Cincinnati, being entitled to do so, availed itself of the law. No other city in the state had then, or has since had, the requisite population to authorize it to do so. When the $10,000,000 were expended in constructing the same, the line of railway had become a specific local creation under the authority of that law; but it was not completed; such line of railway had not been provided for the city of Cincinnati. What, then, was to or could be done to accomplish the authorized object? Should it fail, because the original sum authorized to be borrowed was insufficient to complete the work and achieve the end? Did the original act grant the right to do the work, but prescribe its failure by limiting its cost to such a sum as would prevent its achievement?

To assume that such is the construction of the act of 1869, would be to make that act the instrument of its own self defeat, by which nothing could be fully done, though necessitating an expenditure of $10,000,000 to be liquidated by the taxpayers of the city. The subject-matter thereafter to be provided for could not be general, or admit of a general law, uniform in its operation throughout the state, to provide for the especial exigencies and necessities of this railway, a local, special property. Local and special legislation would, necessarily, be the only legislation that could, by any possibility, be applied to the subject. And no legislation, in whatever form of words its enactments might be clothed, could be other than local or special, whether in the garb of a general law or not. The laws complained of—supplementary to the original statute of 1869—are sufficiently general in form, if that be required. The turning point of the case, in our judgment, does not lie here. It is—do the acts complained of, especially of 1876 and May 15, 1878, or any of them, confer corporate power? If they do not, they are not amenable to any constitutional objection. A corporate power cannot be conferred unless it be conferred upon a corporation created by the act conferring the power, or some other act. Article 13 of the constitution relates alone to corporations. The same power, whatever its nature, that might be conferred upon a non-corporate board or body,

would not violate the constitution (art. 13, sec. 1), while, if conferred on a corporation, private or municipal, by special act, it would violate that provision. It is not the nature or character of the power, but of the recipient of the power, that determines whether the constitution be violated or not.

Now, we have looked in vain into and through the statutes of Ohio, Kentucky and Tennessee, since and excepting the orignal act of 1869, that confer any powers, corporate or otherwise, upon the city of Cincinnati, or any agents appointed by it. The board of trustees was created, and its powers conferred, not by Cincinnati, but by the state of Ohio, and such trustees were required, by the state of Ohio, to be appointed and qualified by and before a court of the state of Ohio. They are not required, even, to be residents of Cincinnati. And in none of the three states are they made a corporation or a corporate body. The state legislature has conferred upon such board "powers," by the exercise of which they may, in the events, upon the conditions, in the manner, for the objects, and to the extent, by the legislature prescribed, create obligations and impose duties and burdens upon the city, but these are not, in the legal meaning of the term, in any sense, powers conferred upon it —the city.

This, we think, is fully settled by the cases of The State etc., v. Davis, 23 Ohio St., 434; and Ohio, etc., v. Covington et al., 29 Ohio St., 102, 111. The fact that the exercise of such powers casts upon the city the burden of paying the expenses thereof by taxation, confers, upon the authority of the last quoted case, no corporate powers.

Thus, it will be percieved that the interposition of trustees, vested with such powers as this board has been, has freed the difficulties of carrying on and completing, and leasing the railway for the city of Cincinnati of great legal obstacles. The trustee system was created in England to avoid the application of the fixed and inflexible rules of the common law, which prevented the attainment of many desirable and necessary objects. Here, it has worked out a similar result, by rendering article 13, section 1, of our constitution inapplicable to the subject.

None of the legislation, then, which is complained of, is in violation of either section 26, article 2, or section 1, article 13, of the constitution, such board being an agency of the state of Ohio, not of Cincinnati, but for the attainment of Cincinnati's object and interests, as decided upon by itself, in providing this railway. This is authorized under section 27, article 2, of the constitution, even if such trustees were officers, which the Walker decision holds they are not; see Ohio v. Covington, 29 Ohio St., 102, syllabus, 4.

This disposes of the objection urged, that the act of May 15, 1878, can, by no possibility, relate or apply to anything else than this Southern Railway, the second section of which provides that, "within twenty days after the passage of this act, the trustees are directed and required to advertise for * * * bids," etc. Had the act named one year, five years, or any other period of time, the same objection could have been urged with equal force; and if valid, in no case of a building or work undertaken by a municipal corporation under a general law, but incomplete for want of authorized funds, could any such undertaking be finished, and cities would be full of deserted foundations and shapeless ruins. See Wheeler v. Philadelphia, 77 Penn. St., 338.

It is next claimed, that the acts of 1876, and of May 15, 1878, are unconstitutional, because they are made to take effect only upon a vote of the electors of the corporation. This is a misconception of the fact. The laws took effect from their passage. It was only whether their provisions should be made available that was submitted to a vote. That was done under the act of 1869, involved in the decision of the Walker case. In that case, the question of providing a line of railway was submitted to a vote, the $10,000,000 being given by the statute if the result of the election should be in the affirmative. Here it was only the question, whether the $6,000,000, and the $2,000,000 of bonds, should be issued. The principle governing all these statutes, in this respect, is the same.

It is next claimed that the issue of the $2,000,000 of bonds will be an abuse of the taxing power and the power to borrow money on account of the municipality, because of the amount thereof, in view of the amount already expended. But the legislature has, in specific terms, authorized such amount to be issued; and under section 6, article 13 of the constitution, it is "the general assembly" that * * * "shall restrict their power of taxation, * * * borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such power."

Where the object is constitutional and lawful, it is not for a court to say that such amount as may be specifically authorized by the general assembly to be borrowed, specially empowered by the constitution to provide against the abuse of the power is such abuse. Walker case, 21 Ohio St., 46.

It is next claimed that the contemplated $2,000,000 loan is not for the purpose of completing the railway to Chattanooga, but only to "Boyce's Station," in the vicinity of that city, where it will connect with a road of similar gauge running into Chattanooga, and that therefore the act is within the principle of the decision of the supreme court, under the Boessel act, in Taylor v. Commissioners of Ross county, 23 Ohio St., 22, forbidding money to be furnished in part construction of such a work, which is to be continued or completed by another. This is, again, a misconception of the provisions of the law in question; it merely prohibits the expenditure of more than $50,000 for other purposes, "until" the road is completed to that point. It is not only not provided that the work shall stop there, which, by the contract, will cost some hundreds of thousand dollars less than the $2,000,000, but leaves no obstacle in the way thereafter of buying the connecting line, or constructing an independent one, part and a continuation of the main line to Chattanooga, which is estimated to cost $150,000, and which the agreed facts show that the trustees will then still have in hand for the purpose. We are not to presume that the trustees will violate the laws of both Ohio and Tennessee, the latter state having given no consent to the building of any road by the trustees, the terminus of which shall not be Chattanooga. To abandon such terminus would render the rights and privileges granted by Tennessee subject to forfeiture by that state. The act is, then, not subject to the objections to the law decided upon in the Ross county case, as the entire road is contemplated to be built for and owned by the city of Cincinnati.

This disposes of the next objection that the entire $2,000,000 of bonds should not be issued, because that amount will be more than suffi-

cient to complete the work under the Huston & Co. contract. The answer is, that after that contract shall be completed, the remainder of the money is to be applied to constructing the road to Chattanooga, and thus avoid the application of the decision in the Ross county case.

If found expedient, a contract to finish that small part of the line, and to lease the entire road permanently, may then be made.

It is next claimed that the laws of Kentucky and Tennessee confer no rights, privileges, franchises, or property in the railway, within their respective borders, upon the city of Cincinnati, but vest all in the trustees and their successors. This, it is maintained, strips Cincinnati of all her property rights in the railway, renders her powerless, and gives what is hers to this board of trustees. Is this so? The trustees are given there no powers not definitely and expressly conferred upon them by the laws of Ohio. The legal title and rights are vested in them necessarily that they may fully exercise the powers given them by the laws of Ohio, which are mere powers, without any beneficial interest. Were they to assume to exercise property rights as their own adversely to the rights of the full equitable beneficiary and owner, the city of Cincinnati, as we are not to presume they will, for that would subject them to removal, the city, in the courts of Ohio, or in the courts of chancery, in the states of Kentucky or Tennessee, or in the federal courts of those states, could assert and obtain its full rights and ownership of the property. This is clear, and can admit of no doubt in the minds of any one at all versed in equity jurisprudence. Had these laws granted such rights and privileges to Cincinnati by name, instead of to such trustees, to enable them to execute the mere naked powers which the state of Ohio, and not Cincinnati, had conferred upon them, serious embarrassments might have resulted after the work had been undertaken, and the $10,000,000 expended. The work, as we have seen, would necessarily be a special and local one, authorized and begun under a law of a general nature, having a uniform operation throughout the state, and to be thereafter aided in no way but by local legislation. Then an act of Ohio to authorize the raising and expending of more money by Cincinnati as a corporation, adopted as such by those states, might have been claimed, with great force, as a special act conferring corporate powers upon the city of Cincinnati. This difficulty has been obviated by the legislation of those states. They have conferred no rights or powers upon any corporation, but upon an unincorporated board of trustees, who can acquire no rights adversely to their beneficiary, the city of Cincinnati. And the trustees, by the third section of the act of Ohio of May 4, 1869, are expressly given the power and capacity to acquire the property and franchises in those states or in their own name. That section says: "The said trustees, etc., shall have power and capacity * * * to acquire, hold, and possess all the necessary real and personal property and franchises, either in this state or in any other state into which said line of railway may extend." So Kentucky, Tennessee, and the trustees have done or authorized nothing in those states which Ohio has not granted them the right and power to do.

It is next claimed that the acts of those states reserve the right to each of them to amend, alter, or repeal the same, which puts the road and all its property at their mercy. Again, is this so? The supreme court of the United States, in a recent case—Shields v. The State of

Ohio, 5 Otto (95 U. S.) 319, at p. 324—hold: "The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith, and they must be consistent with the scope and object of the act of incorporation." (Of consent here.) "Sheer oppression and wrong can not be inflicted under the guise of alteration or amendment. Beyond the sphere of the reserved powers, the vested rights of property of corporations in such cases are surrounded by the same sanctions and are as inviolable as in other cases."

These provisions mean no more than that such legislatures reserve the right, from time to time, to make such changes in their respective consenting acts as will better and more justly to all, provide for the operation of the railway within their borders. Kentucky has twice amended its original act greatly in the interests of the road, and Ohio has amended and repealed important provisions of the act of 1869, and subsequent supplementary acts. Such provisions, then, in these laws of those states, do not make the proposed loan illegal.

It is next claimed that the rights, privileges, and franchises granted by Tennessee and Kentucky to this board of trustees and their successors are but for the period of ninety-nine years, and no longer, whereas they should be perpetual to authorize the expenditure of the money in question. We have to say that the constitution of Tennessee prescribes this term for all railroads within it, and the policy has been adopted by the state of Kentucky, in its legislation in this instance.

These provisions have no reference to the railroad property acquired, or that may be acquired for the benefit of Cincinnati. That remains and will remain its own. By the fifth article to the amendments to the federal constitution, it is provided: "Nor shall private property be taken for public use, without just compensation." So those states can never appropriate the property, or use or employ it. The limit of ninety-nine years is fixed in view of the certainty that by such time circumstances will have so changed as to require the cessation of privileges now granted, and to necessitate a readjustment and a new grant with suitable conditions. The case is similar to our grants to street railroad companies for limited periods. At the expiration of such times, their property does not fall to the municipality, and it can not take or use it.

But, it is said that the laws of those states undertake to provide a limit for the maximum rates of charges for passengers and freights and to provide against unjust discriminations against their citizens, and rival railroads connected with this railway by intersecting railroads.

If this power is to be limited to the carriage of passengers and freights within the borders of each of those states, respectively, it is no more than what they would have power to do, were there no such terms incorporated in their laws in reference to this railway.

Munn v. Illinois, 4 Otto, 94 U. S., 113; Peik v. Chicago, etc., Railway, *id.*, 164.

In the latter case, it is held, "until congress shall act in reference to the relations of this consolidated company to inter-state commerce, the regulation of its fares, etc., so far as they are of domestic concern, is within the power of the state." (Wisconsin). This was a road running under a consolidated arrangement through Illinois into Wisconsin. If more be claimed for these laws than is authorized by the decisions of the supreme court of the United States, if it be attempted to regulate, under them, inter-state commerce and travel, to that extent such claim

and attempt will simply be void. See Hall v. DeCuir, 5 Otto, 95 U. S., 485, a recent decision of the supreme court of the United States, where it is held: "State legislation which seeks to interpose a direct burden upon inter-state commerce, or to interfere directly with its freedom, encroaches upon the exclusive power of congress." See also, Pensacola Telegraph Co. v. Western Union Telegraph Co., 6 Otto, 96, U. S., 9; and Welton v. Missouri, 1 Otto, 91, U. S., 275. The non-exercise by congress of its power to regulate commerce among the several states is equivalent to a declaration by that body that such commerce shall be free from restrictions.

It is next urged that the law of Kentucky forbids, under penalty of forfeiture, the right, not of the city of Cincinnati, or the board of trustees, but of any lessee or licensee operating the road, if non-resident in the state, to sue in or to remove any cause within that state to a federal court.

Since the act of Kentucky was passed, we have all been enlightened somewhat upon that subject.

In the Insurance Company v. Morse, 20 Wal. 445, the supreme court of the United States held a law of Wisconsin, imposing such a condition for the privilege of doing an insurance business, by a foreign corporation in that state, void, and it held a similar act of Ohio, confirmed by this court and the supreme court of the state, to be void. We allude to the case of Best v. New York Life Insurance Company, 2 Cin. S. C. R., 329; 23 Ohio St., 105.

We must assume that Kentucky, like Wisconsin and Ohio, will obey and follow that decision, it being based upon a provision of the federal constitution.

It is next insisted that as the act of Tennessee makes judgments rendered in that state prior in lien and right to the mortgage lien of the bondholders of the $10,000,000 of bonds, and that of Kentucky prior, in certain classes of cases, to any mortgage of any lessee or licensee operating the road, this $2,000,000 loan is unauthorized by law. The Tennessee law was passed prior to the issue of any bonds, and the holders took them subject thereto. The law of Kentucky on the subject is in advance of any lease or license granted to operate the road, and as the city got par for the $10,000,000, we fail to see where her ground of complaint lies. We see nothing in the case to justify any suspicions of the good faith and sense of justice and fair dealing on the part of either Kentucky or Tennessee. They have so far exercised, in this matter, a degree of comity toward us equal to that which we could have expected from any state in the union, and we have a right to rely upon its continuance. Finally, as an answer to the foregoing enumerated objections to the legislative acts of those states, and any and all others that can be urged, the legislature of Ohio, in the face of such legislation, long after it was all enacted, and must be presumed to have been familiar to that body, authorized the $6,000,000 and the $2,000,000 loans in aid of the completion of the work. They, therefore, governed by section 6, article 13, of the constitution, did not deem either an abuse of the power to borrow money, or of taxation, but sanctioned such loans as proper to aid the work, regulated, as the whole was to be, to the extent of the Kentucky and Tennessee legislation, by those states respectively. That legislation our legislature has, therefore, sanctioned and approved.

The next alleged grounds for rendering the issue of the $2,000,000 of bonds illegal are based upon the contract with Huston & Co., who are not parties to the action. Before their rights can be affected, they must have an opportunity to be heard in support of them, in a court of competent jurisdiction. We can only consider the subject to the extent prescribed by the code, 75 Ohio L. 608, section 21: 'The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights,'' etc. It is claimed that the contract, made in accordance with their bid, authorizes the payment to Huston & Co. by the trustees in such bonds so to be issued at par, which may have caused them to make a higher bid than if such payment was to be made in cash. It is claimed that the law of May 15, 1878, only authorizes the trustees to borrow a sum not exceeding $2,000,000, and to issue and sell the bonds at not less than par therefor. They admit that another, the fourth, section of the act, requires the trustees "to apply the bonds," or the proceeds from their sale in payment for the work, etc. We hold that the two provisions must be read together and the power of the trustees derived from both. For a strong case of the adoption of such rule of construction, we need only to refer to case of The State, etc., v. Zanesville and Maysville Turnpike Co., 16 Ohio St., 320, where words, meaningless in the section, were employed in the act, were transposed to another section, and made to control the vital rights of the parties. The two sections, taken together, give the power to the trustees to contract with Huston & Co., in this respect, as they have done The objection that the contract only provides for the completion of the road to Boyce's Station, has been sufficiently disposed of in a previous part of our decision. The agreement of Huston & Co. to receive at a named price, not claimed to be other than their fair cash value, from the trustees, and pay them for rails, ties and other materials heretofore provided by the trustees out of other funds, cannot affect the legal right to issue such bonds; for that property was purchased and paid for out of moneys previously raised on former issues of bonds, and it was the duty of the trustees, if they could do so, to turn them over to the contractors, at a fair price, rather than to keep them as a useless burden, and as a total, or nearly total, loss.

The last claim in the petition, that the issue of the full amount of $2,000,000 of bonds, should be restrained, because more than sufficient for the work, has been already sufficiently disposed of. We need only observe upon it, that it seems to be in direct conflict with the claim first made in the petition, that such bonds should not be issued, because entirely inadequate to complete the work.

It is finally urged, that all such legislation is in violation of two provisions of the federal constitution--First, article 1, section 10: "No state shall, without the consent of congress, enter into any agreement or compact with another state," etc. Second, article 1, section 8: "The congress shall have power to regulate commerce * * * among the several states."

Neither of these propositions is tenable. Ohio, Kentucky, and Tennessee has each acted independently of the other, and for itself alone. They have made no agreement with each other. We have several railroads in Ohio which were chartered by other states, and to the building of parts of which within it, Ohio consented on terms pre-

scribed by itself. Every state where the railroad system has been developed, has done the same. The same methods have been pursued in the consolidation of railroads, so as to form continuous through lines, crossing two or many states, and so as to leasings of railroads. To hold that all such action, where two or more states have acted separately, and secured such ends, to be contracts entered into between each other, would, indeed, be startling to the country, and jeopardize untold millions of dollars. But this matter was disclosed by the record in the Walker case, and is not open for our determination. Under the other provision, while it is true that congress may regulate inter-state commerce on this road, as it may upon all others, yet, until it has done so, such commerce is entirely free, and not subject to restrictions, hindrances, or impediments from state legislation. Any attempt to interpose these by a state would be void. But as to all commerce carried on wholly within its borders, a state, at all times, may regulate it.

If this assumption of the plaintiffs' counsel were true, then it would seem that the greater part of the business of this country, since its adoption, has been carried on, and is being carried on, in violation of the constitution of the United States. In earlier times, when the carrier of goods provided his pack-saddle trains, and carried on trade from beyond the mountains into the states or the west, he was violating the federal constitution, which gives congress the power to regulate, but which it did not regulate, commerce between the states. His supplanter and successor, with his covered wagon and Conestoga team, was engaged in a similar unlawful business; so were the carriers of passengers by stage coach, and so have been, and now are, nearly all the operators of through lines of railroads in the United States. We are clear that the present case involves, in its determination, no provision of the constitution of the United States.

We have, thus, gone, at length, into the consideration of all the questions urged upon us, with so much learning and ability, in the argument, and have given them our earnest attention and study, fully realizing the great importance of the case. A weighty practical question now confronts us all—whether, in the matter of this railway, it be not cheaper and easier to go on than to return. But, with this, we have, judicially, nothing to do.

We can only deal with the matter in its purest legal relation. The wisdom of the acts and management of the trustees, or their mistakes, or inefficiency, or improvident measures, if such exist, cannot now and here be considered. That could only arise before us upon a petition filed, under the act of 1869, for their removal on account of unfaithfulness in the discharge of their trusts. Nor have we any power over the subject of the good or bad policy of the undertaking to construct this road, or of any of the laws passed to aid in its construction. For all these, the legislature, the city council of 1869, the electors of the city of Cincinnati, at three several elections, and the trustees, not any court, must bear the sole responsibility. If it prove to be not what they anticipated it would be, but shall result in failure, and impose heavy burdens, instead of conferring great benefits, upon the city, the blame must be theirs; and if it shall go on to completion, and bring and maintain the prosperity to our city and her people that they anticipated it would, the honor, praise, and fame will belong to them, and constitute a priceless

reward. The injunction is denied, the petition dismissed, and a judgment for costs will be rendered against the plaintiffs in favor of the defendants.

Judges Force and Harmon concurred.

Alexander Long, *J. J. Glidden* and *Wm. M. Cory*, attorneys for plaintiffs.

W. T. Porter, *Alphonso Taft* and *E. W. Kittredge*, attorneys for defendants.

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326 *EXECUTORS AND ADMINISTRATORS—EXTRAORDINARY SERVICES—COMPENSATION.

[Clermont Common Pleas, October Term, 1878.]

†CHATFIELD AND WOODS v. SWING AND MELLEN.

1. The statutory compensation provided for executors and administrators is the criterion of the value of the services rendered by every such officer in the common course of his duty; the statute makes no distinction in persons or estates.
2. The giving a large administration bond is but an ordinary duty required of every executor and administrator in the administration of a large estate; the amount of the bond is regulated by the amount of the estate to be administered.
3. The statute does not contemplate liberal fees for the administration of a large estate; on the contrary, the percentage of fees decreases as the estate increases.
4. The statute provides that a court may make such further allowance as may be considered just and reasonable "for any extraordinary services not required of an executor or administrator in the common course of his duty."
5. Services as an attorney at law are such extraordinary services; and where the proper administration of an estate requires such professional service, the executors or administrators may themselves perform such necessary service as attorneys and be entitled to a reasonable compensation therefor.

327 *6. The preparation of the necessary papers for an application to the court, in a proper case, to sell specific chattels at private sale and the procuring an order for such sale is an extra service so far as this duty requires the aid of an attorney.

7. An application to the court by an executor or administrator for an order to sell railroad stocks at private sale is but the ordinary duty of such officer in such cases, as the statute provides that stocks shall be so sold only on such order of the court; and for this service his compensation would be the statutory percentage of the proceeds of such sale; in case the intervention of the aid of an attorney becomes necessary, then an additional fee will be allowed for such professional service.
8. In case the personal estate is found insufficient to pay the costs of administration, debts and legacies, it becomes the duty of an executor to file a petition praying for an order to sell real estate; where the petition to sell real estate also properly seeks a construction of doubtful clauses of a will and prays for a determination by the court as to the rights of certain legatees to certain chattels specifically bequeathed, and also as to the rights and interests of the surviving husband and other legatees as to the real estate of the testatrix or the residuary thereof, if any there be after the legacies are paid, this presents a case of interpleader among the parties in interest. In such a case an allowance of a reasonable attorney's fee will be made to the executors for the preparation of such petition and the giving the necessary attention to the cause in its progress through the court of common pleas, the district court and the supreme court.
9. In such an action, after the filing of the petition and the bringing of the defendants into court by process, the executors' duty is to watch the case and hasten it as rapidly as possible to a final conclusion. It would be necessary for them to be present at the trials of the case to see that the litigation goes on and that the adverse claims of the several legatees are settled, and then to procure an order for the sale of the real estate; beyond this they have no duty to perform

† The following entry in this case was made by the supreme court: "By agreement of parties the judgments below are reversed, and a decree entered on agreed terms."

in the case other than to execute the final order of the court, as one of the ordinary duties imposed upon them as executors.

10. The professional knowledge and private information acquired by an executor in the lifetime of the testatrix, as to the true solution of many complicated questions of law and fact touching the title of her real estate, and by reason whereof he is saved much labor that an attorney otherwise would have had to perform, should be favorably considered in estimating the value of the extraordinary services rendered in the preparation of the petition and in the attention to this suit concerning the real estate.
11. Appraising and selling lands in entire tracts where the boundaries are known and no surveying or subdividing is required and they lie within a convenient distance, is only the ordinary duty of an executor *or administrator, for which the statutory percentage on the proceeds of sale is his compensation. 328
12. But if an executor is required to survey and subdivide large tracts of land into lots and to appraise and sell by these subdivisions, then the additional work and time required of an executor for that purpose is extraordinary service.
13. It is customary, in the administration of large estates, to make to executors and administrators an allowance of fees for an attorney to assist them in taking out letters and for giving them instruction in regard to their duties at the appraisement and sales, and also in making out accounts of administration in complicated cases.
14. If an executor in accepting the trust is compelled to abandon his general practice of the law, such fact is not a ground for the allowance of extra fees, unless his time has been occupied in performing extraordinary service. Prospective profits in some other business, abandoned by him in order to take upon himself the office of executor, cannot be considered in fixing the amount of his compensation for the performance of such a trust. It was a trust voluntarily assumed by him, which he was at liberty to resign at any time. If the performance of the duties of it, whether the service was ordinary or extraordinary, brought him less remuneration than what his talents, his education and long experience in his profession had enabled him before that to realize, it was a loss he chose to sustain, and not one suffered by compulsion; with such losses an estate cannot be charged.
15. In the examination of experts as to the value of professional services, unless the hypothetical case put to the witnesses materially accords with the subsequent proof of what was actually done by the executors, the evidence so adduced can have but little bearing in the determination of the value of the service in fact rendered.

On appeal from the probate court on exceptions by Wm. H. Chatfield and Wm. Woods, executors of the last will and testament of Edmund B. Townsend, deceased, to the fifth administration account, filed on September 25, 1877, by Philip B. Swing and Wm. C. Mellen, executors of the last will and testament of Rebecca J. E. Townsend, deceased.

The facts are fully stated in the opinion.

Griffith & Griffith and *W. C. Mellen*, for executors.

I. A. Jordan and *Wm. Disney*, for exceptors.

COWEN, J.

In the matter of the claim of P. B. Swing and W. C. Mellen, executors of Rebecca J. E. Townsend, deceased, for extra compensation.

*These executors claim $24,000 compensation for extraordinary services rendered to the estate of the testatrix, as executors, from July 24, 1871, to July 24, 1877, a period of six years. A great amount of testimony has been taken and reduced to writing, and all the original papers and public records of their proceedings in the execution of their trust, together with voluminous private memoranda, showing each 329

specific act and conversation of the executors in reference to the estate during that time have been produced in evidence. This large body of evidence is intended to show all the services rendered by the executors, both those required of them, in the common course of their duty, and those which they claim were extraordinary. All this evidence received my close attention at the time of the trial, and has been carefully examined by me since, and I am now prepared to announce my conclusions upon it.

Rebecca J. E. Townsend executed her last will June 26, 1871, and died on the 28th day of the same month. Her will was probated in the probate court of Clermont county, on the 5th day of July following. On the 24th day of that month P. B. Swing and W. C. Mellen, who were named in the will as executors, filed their separate bonds in the probate court and received letters testamentary on the estate. Between these executors it appears to have been agreed that W. C. Mellen should perform all, or at least the greater part, of the active duties required of executors, and the evidence shows that he did perform the most of them. The services of P. B. Swing consisted chiefly in preparing and filing in the court of common pleas of this county the petition praying for a construction of the will and for an order to sell the real estate, and in giving legal advice to his co-executor in respect to his duty when asked by him to do so.

At the death of the testatrix, her estate consisted of certain chattel property, which was sold by the executors for the sum of $5,207.54; cash on deposit $5,666.40; some houses and lots, mills and distillery in Milford, Clermont county; a lot on Fifth street, Cincinnati; the "Edwards" farm, near Milford of 147 acres; the "Germany" farm of 460 acres, in Hamilton county; sixteen acres of land in Hamilton county, opposite Milford, and the Davis farm of 74 acres in Clermont county, opposite
330 the "Germany" land. All this real estate, except, the Cincinnati *lot, lies in the immediate neighborhood of the residence of W. C. Mellen. In addition to this real and personal property, there were four hundred shares of Little Miami Railroad stock, then in the hands of E. B. Townsend, the administrator *de bonis non* of John Kugler, deceased, whose widow and heir the testatrix was, and which afterwards came into W. C. Mellen's hands as executor, from William Howard, he having become administrator of Kugler's estate after the decease of Townsend. There were also some other items of cash received from Howard and from Chatfield & Woods, executors of E. B. Townsend, amounting in the aggregate to $3,620.57, and also what is called a church receipt of $1,141.24, receipted for by W. C. Mellen to Townsend as administrator of Kugler. The personalty exclusive of the railroad stock and dividends, amounted to $15,635.75, and with the stock and dividends to $56,282.75, as shown by the executors' accounts. This sum and the real estate above described constitute the whole estate administered by those executors. There were no bills receivable, no accounts, in other words, no debts owing to Mrs. Townsend's estate at the date of their qualification as executors. Nearly all the chattels were disposed of in the usual way at public sale. Those which were not sold, together with the tubs and still in the distillery which were severed from the building, were afterwards sold at private sale. The proceeds of this private sale amounted to $1,500.

The testatrix bequeathed of her estate $138,000 in money legacies, and devised the residue in the following language: "The balance of my estate shall be equally divided among all the heirs herein named." As it was evident that the personal property would be largely insufficient to pay the legacies and the costs of administration, and the final clause of the will being ambiguous and uncertain in meaning, the executors, on the 23d day of September, 1871, filed a petition in the court of common pleas, of this county, asking for a construction of the will and for an order to sell the real estate of which the testatrix died seized, above described. All the legatees and devisees were made parties defendant to this petition, and they, by their several attorneys, filed answers setting up their respective claims. A decree was made by the common pleas court on the 28th day of March, 1872. The case was then appealed to the district *court, and there tried, and by it reserved to the supreme court for decision, on the 30th day of September, 1872. 331
In June, 1875, the supreme court rendered the final decree construing the will and ordering the sale of the real estate, and the case was remanded to the common pleas. The executors then had an order of sale issued for the sale of the real estate, dated July 24, 1875. Under this order, the Milford lots and the sixteen acres opposite in Hamilton county were surveyed, appraised and subdivided, the mills and distillery buildings, Davis farm and the Cincinnati lot appraised, and the whole, except the "Davis" farm, was sold October 15, 26 and 27, 1875. The survey and appraisement occupied about thirty days. The proceeds of these sales amounted to $52,072.08. About four-fifths of the property was bought by the legatees. In February, 1876, another order was issued for the appraisement and the sale of the "Germany" farm. The survey of the Edwards farm was begun at this time, but the work was discontinued on account of threats of a suit by Mrs. Rebecca Belt, who claimed the land, or some interest in it, to enjoin the executors.

The Wests, who by the decree of the supreme court, were entitled to ten-elevenths of the residue of the estate, desired the "Germany" farm sold first, claiming that money enough might be realized from it to save the "Edwards" farm from sale. Under this order the work of surveying, subdividing and appraising the "Germany" land was commenced February 18, 1876, and completed about the 8th day of May following. Of this period less than thirty days were occupied by the executors and the appraisers on the ground.

The property was advertised to be sold on June 9th. On that day there were no bidders. On October 31, 1876, eleven of the lots into which the land had been divided were sold, but some of the purchasers did not comply with the terms of sale, and that part of the property had to be re-offered. The remaining lots were again offered on December 5, 1876, ten lots sold. The purchaser failing to comply with the terms of sale, these were offered again April 30, 1877, and two of them sold. The remainder of this land was not again offered before July 24, 1877, and was not sold until 1878. The "Davis" farm lying above Milford was offered for sale on October 26, 1876, and not *sold, and again, on March 30, 1877, and not sold, and still remains unsold. The survey, 332
subdivision and appraisement of the Edwards farm, which had been begun under the first order in the winter of 1876, was proceeded with soon after March 30, 1877, and completed April 23, 1877. This land was advertised for sale and sold in 1878.

During the six years in which it is claimed this $24,000 worth of extraordinary services were rendered, these executors had no charge or control of the real estate of the testatrix except during a period of four and one-half months, commencing with November 13, 1871, and ending with March 28, 1872, at which time they were suspended, and E. B. Townsend, who claimed as tenant by the curtesy, took possession and exercised full control over it until his death, which occurred November 25, 1873. On the 28th day of May, 1874, Chatfield & Woods, the executors of E. B. Townsend, were appointed receivers of the real estate lying in Hamilton county, and S. R. S. West receiver of the real estate situated in Clermont county, and from that time until the sale of the property they continued to receive the rents and control it. The executors for their services as receivers were allowed by the court $1,676.18. The order of the court fixing their compensation was not made until May 31, 1877, and they were allowed the further sum of $506.90 interest, making a total of $2,183.08.

Mr. Mellen, in his testimony, says, in regard to this charge, "I looked upon it, and said to Peter Swing, that it was an outrageous bill, though it was the same as Chatfield & Woods swore to here. I think it is perfectly outrageous, and we have never touched it. It stands there as a kind of fort, and they could not say anything against it, because they have done exactly the same thing; and I will say right here, if Chatfield & Woods will surrender their claim we will surrender ours to the charitable institutions of Cincinnati. It is allowed, and mine is allowed, by the court, and that on the evidence of Woods."

In his diary, May 31, 1877, Mr. Mellen, referring to this bill, says: "In this we have presented no bill for allowance, but the above receivers have put in their claim and proved the value of the same by witnesses, and the court has allowed them what they claimed and proved, and we simply say we have done fully as much as both, and say to the
333 court, if they have what they *claim, we are entitled to the same. Therefore, we make the above entry."

During these six years these executors filed five accounts in the probate court, showing their receipts and expenditures of the assets of the estate. The first account was filed January 16, 1873, and shows the following receipts and disbursements:

Receipts for Sale of Chattels	$ 5,207 54
Andrews & Co., Cash on Deposit	5,666 40
Church Receipt	1,141 24
Total	$12,015 18
Expenditures	3,314 10

The second account was filed February 26, 1874, and shows the

Amount Collected since last Settlement	$ 1,097 55
Expenditures	528 44

The third account filed March 6, 1875, shows:

Receipts since last Settlement	$ 862 07
Expenditures	336 97

The fourth account filed June 2, 1876, shows receipts since last settlement as follows:

From Little Miami Railroad Stock Dividends		$ 6,689 00
Cash on Sales of Real Estate		8,896 87
Receipts, Property sold to Legatees		10,938 67
Cash from Wm. Howard, Adm'r of Kugler		1,000 00
Cash from Chatfield & Woods		1,660 92
Little Miami Railroad Stock		20,000 00
Total		$ 49,185 46
Paid Legatees	$ 31,195 23	
Other Expenditures	2,139 40	33,334 63

The fifth account was filed September 25, 1877, and shows:

Cash from Real Estate Notes		$ 1,880 56
Cash from Wm. Howard, Administrator		178 00
L .M .R .R. Stock from Howard, Adm'r		$ 12,100 00
Dividends of Same		680 00
Total		$ 14,838 56
Expenditures		24,631 32
Total Balance on hand at this date from all the Accounts		$ 12,062 80

*Mr. Mellen claims to have rendered important service in the year 1877 to the administrator of John Kugler's estate, in the matter of exceptions filed by this administrator to the accounts of Chatfield Woods, executors of E. B. Towsend. It appears from the evidence that he did furnish an analysis of the accounts, and did aid in the investigation. He was present at the trial before the master to whom the exceptions were referred, which continued from day to day for a considerable period, and furnished Howard such information as he had. I think it was the duty of the executors of Mrs. Townsend to look after these accounts, although primarily it was the duty of Howard, the administrator. If there were over-charges in the accounts, it would eventually diminish the estate of which they were executors that much, and it was proper for them to supervise his action and give him such assistance as they could. A suit to enjoin these executors from interfering with the real estate was brought in Cincinnati by the executors of E. B. Townsend on the 10th day of December, 1873, Townsend having died on the 23d of November preceding. Mr. Mellen filed an answer in the case, and some affidavits to purge himself from contempt, charged against him for the alleged violation of the injunction. In this matter he claims he rendered extraordinary services. There were also several motions made in the supreme court by these executors in the case for the construction of the will. 334

The foregoing is a statement of the assets of Mrs. Townsend's estate, which came into the possession of the executors, and a general outline of their services rendered in administering them.

In the administration of an estate, the taking out of letters of administration, giving notice of appointment, taking possession of the personal property, and causing the same to be inventoried, appraised, advertised and sold, the filing of the inventory and sale bill in the probate court, the filing of a petition for an order to sell real estate,

where the personal effects are insufficient to pay debts and costs, the appraisement, advertisement and sale, and report of proceedings under it to the court, and the filing of accounts as required by the law and the orders of the probate court, together with all the labor ordinarily incidental to the performance of these duties, are services required of
335 every administrator in the common course of his duty. For *these services the statute provides that executors and administrators may be allowed the following commissions upon the amount of personal estate collected and accounted for by them, and of the proceeds of the real estate sold under an order for the payment of debts, which shall be received in full compensation for all their ordinary services.

"For the first thousand dollars, at the rate of six per centum; for all above that sum, and not exceeding five thousand dollars, at the rate of four per centum; and for all above five thousand dollars at the rate of two per centum. And in all cases such further allowance shall be made as the court shall consider just and reasonable for their actual and necessary expenses, and for any extraordinary services not required of an executor or administrator in the common course of his duty." The question is, what extraordinary services have these executors performed in addition to the services required of them in the common course of their duty, and what are their services worth? To determine this question, I will refer again, somewhat in detail, to such services as the evidence shows they have rendered.

Upon accepting the trust conferred upon them, they were required to give bond and take out letters testamentary. The amount of each bond was $100,000.00. They had no difficulty in giving the required security. The fact that the bonds given were large, does not make the giving of them extraordinary service. All the executors did was to bring their sureties to the office of the probate judge and have them sign the instruments, and this appears to have been done without any more trouble or labor than is incidental to every case.

Their next ordinary duty was to give notice of their appointment, take possession of the personal property, give notice of the appraisement, notify the appraisers and have them sworn, cause an inventory and appraisement of the chattels by them to be made, and the same, after being advertised, sold at public auction.

This they did, realizing from the sale the sum of $5,207.54. A clerk was employed by them and paid a liberal compensation out of the estate, to assist the appraisers in making out the inventory, and also to keep a memorandum of the sales and prepare a sale bill. An auctioneer
336 was hired to cry the sale. Mr. Mellen was present *at the appraisement and sale, superintending the work. That was his ordinary duty under the law. No suits had to be brought to collect the proceeds of the sale. The inventory and sale bill were filed in the probate court as in other cases. In all this the evidence does not disclose any extraordinary service. Mr. Mellen testifies that there was only the ordinary labor in this service. For all this, the statutory per centum is the only compensation to which the executors are entitled.

There were, however, some chattels which did not sell at public sale, and which, together with the tubs and still in the distillery, were afterward sold at private sale. This required of the executors extra service. Application was made to the probate court for an order to sell them at

private sale, and an order was granted under which the property was sold in parcels at various times. The purchasers of the still removed it without the knowledge or consent of the executors, before complying with the terms of sale. It was sold for $900, and taken into Kentucky. To Mr. Mellen there appeared to be danger of the loss of the debt. He pursued the property and succeeded in obtaining the note of the purchasers with sureties to his satisfaction. He testifies that he was engaged in this business from seven days to two weeks. I regard this service as extraordinary and valuable, and allow what he says it was worth, $200. This includes compensation for his time and labor, and also attorney fees, so far as an administrator would need the advice and assistance of an attorney in the matter. He is also entitled to extra compensation for obtaining the order to sell chattels at private sale, so far as this service required the aid of an attorney. He, being an attorney, acted as his own lawyer. He says this service was worth $25, which I think is reasonable.

Four hundred shares of the capital stock of the Little Miami Railroad Company came into the possession of Mr. Mellen from the executors of the estate of Edmund B. Townsend. It is not claimed that in the transfer of this stock to him he was put to any extra labor or service. After it came into his possession, in order to dispose of it, it was necessary for the executors to apply to the probate court for an order to sell it. Mr. Mellen, on behalf of the executors, filed a petition in the probate court in 1873, for that purpose. The matter was certified to the common *pleas on account of the interest of Judge Brunaugh, who 337
had been attorney for some of the legatees. The order was resisted at first in the common pleas, and was not granted until 1875, although there never was a trial of the case. Mr. Mellen acted as his own attorney in this case, and says that reasonable attorney fees would be $100. He states in his testimony, in this connection, that there was no duty connected with the disposition of the stock that was not purely legal service, and that no duty devolved upon him, as an executor, outside of the lawyer's services in filing a bill to sell the stock, that was more than usual. He certainly could not claim that it was an extraordinary service to make the application, as executor, to the probate court for the order, and attend at the hearing of the trial, because the statute provides that stocks shall be sold only on such order of the court. It was then his ordinary duty as executor to make the application for the order and attend on the courts for that purpose, and for this service his compensation would be the statutory percentage on the proceeds of the sale of the stock. This was $400. He drew from the railroad company about $20,000 dividends on this and other stock. This was paid on demand, and required no extraordinary service. The percentage on this is $400. The stock that was disposed of under the order of sale was transferred to the legatees on their legacies at par. I think an attorney fee of $100 not too large for obtaining the order to sell, and allow that sum.

On ascertaining that the personal assets of the estate would be insufficient to pay the legacies and costs of administration, it became the duty of the executors to file a petition, either in the probate or common pleas court, praying for an order to sell the real estate. This was done by them. To this extent they were performing only their ordinary duty,

and had there been no resistance, no litigation, and no unusual labor in obtaining and preparing the matter of the petition, and no other object sought except to obtain an order of sale, the percentage on the proceeds of sale would have been their compensation. But the petition contained very properly, I think, a prayer for the court to construe certain clauses of the will, in order to determine the conflicting claims of the legatees. This case, as before stated, passed through the courts to the supreme
338 court. The services *rendered in the progress of this case, and after its final decision in executing the order of sale, embraces nearly all the extraordinary services performed by the executors. The extra services in this suit are chiefly legal in their character. The executors, being lawyers, prepared the bill and several motions, made by them in the progress of the case, and the journal entries, containing the orders of the courts. They employed General Ward to argue one motion, for which they paid him $125.00. This is the only attorney fee paid by them. As to the value of the extra services of the executors as lawyers, in filing the petition and attending to the case in all its stages, the testimony of the experts differs materially. One of the experts says it is worth $1,000 to file such a bill, another that it is worth from $1,000, to $2,500 to file the bill and watch it until final decision, where the executors do not write briefs and make arguments; another says it is worth $5,000; another $10,000, if the executors were compelled to litigate. This difference of opinion arises somewhat from the different views lawyers have of the value of the same legal services, and from the peculiar form and scope of the general hypothetical questions put to the witnesses. From the answers given by the professional experts to those general hypothetical questions propounded by the attorneys of the executors, and also by the attorneys of the exceptors, I am unable, upon the proof of what was actually done in this suit by the executors, to determine what would be a fair compensation for their extra services, as the hypothetical case of neither side is sustained by the evidence. I have, therefore, endeavored to ascertain from Mr. Mellen's testimony and diary which he has introduced in evidence, the specific acts of legal service done, and have determined their value according to the estimate he himself has placed upon them, and by the testimony of the experts, so far as it relates to specific services. Judge Swing, in obtaining the facts and preparing the petition was occupied twenty-eight days. Some examination of the records in this and Hamilton counties had to be made. By reason of his employment many years ago as an attorney, in a suit involving the title to a large part of this real estate, he had, at the time of preparing the petition, a very accurate knowledge of the condition of the title, and was, for that reason, saved much labor that an at-
339 torney, not possessing his *information, would have had to perform. Kugler had bought and sold a great deal of real estate in his lifetime, and Judge Swing testifies that, in his opinion, a lawyer, unacquainted with his property, would have had to make a very extensive examination of the records to obtain the facts, in respect to his real estate, necessary to be put in the petition. For the use of this knowledge the executors are entitled to pay. There was no great difficulty in ascertaining the names and residence of the legatees, although many of them were non-residents of the county and state. The necessary information as to them was obtained by letter, and from the relations liv-

ing in this county and in Cincinnati. After the filing of the petition in the Clermont common pleas, the executors took no part in the litigation, except to watch the case and urge it forward to a speedy determination. Some motions were filed by the executors, one of which was to take the case out of its order on the supreme court docket. This motion was granted, and was very important to the legatees. A bill of attorney fees prepared by Mr. Mellen has been put in evidence, in which he specifically sets out the legal services rendered by the executors to the estate, and especially in this suit. It shows in detail what he considers extra service by reason of the executors, acting as their own attorneys, and their value. It is as follows:

The estate of Rebecca J. E. Townsend, deceased, to Phillip B. Swing and W. C. Mellen, debtor, as attorneys in the settlement of the estate of the said Rebecca J. E. Townsend, besides their services as executors:

1871, July 24—To making application to probate court of Clermont county for letters to executors	$ 50 00
1871, Sept. ...—To drawing petition for construction of the will of Mrs. Townsend in court of common pleas of Clermont county	500 00
1871, Nov. 9.—To service in court of common pleas of Clermont county, in reference to appointment of receivers	25 00
1872, ...—To attending case of P B. Swing & W. C. Mellen, as executors, v. E. B. Townsend *et al.*, Clermont common pleas, from 18th to 22d of March, 1872	250 00
1872, Sept. 23-26.—District court of Clermont county, and case reserved to supreme court	300 00
1872, Nov. 16.—To filing motion in supreme court of Ohio to get that court to take the case out of its order, viz., the case of P. B. Swing and W. C. Mellen, executors, v. E. B. Townsend et al., notice to Disney Ward, etc	.....
1872, Nov. 22.—Notice to attorneys at Batavia	.....
1872, Dec. 16.—Motion in supreme court at Columbus	100 00
1873, Jan. 25.—Examination of account of John Kugler's administrator at Batavia	25 00
1873, May ...—Case in probate court of Clermont county on application to sell at private sale personal property	25 00
1873, July ...—To attending case in probate court at Batavia and entry to sell L. M. R. R. stock, etc	25 00
1873, ...—To making out for E. B. Townsend, at his request, a partial report, etc	10 00
1874, March 27-28—After death of E. B. Townsend Nov. 25, 1873, W. H. Chatfield and Wm. Woods, executors of E. B. Townsend, etc. v Philip Swing et al, 42,701, in Hamilton court of common pleas, attending case, filing answers and answers to charge of contempt, injunction, etc. Petition filed Dec. 10, 1873.	1,000 00
1873, Dec. 15—Motion at Batavia to remove restraint on receivers and their suspension, etc	25 00
1873, Dec. 19—To going to Columbus and filing motion in supreme court to appoint receivers	50 00
1873, Dec. 26—To writing notices and serving same on the several attorneys, etc	10 00
1874, Jan. 17—To Columbus in supreme court to argue motion to appoint receivers, etc	50 00
1874, Feb. 17—To Columbus to supreme court	50 00
1874, Feb. 23—To Columbus in supreme court	50 00
1874, March 21-28—To attending case before Judge Force on charge of contempt (see above)	.....
1874, May 15-16—At Columbus in supreme court case of injunction, also filiug motion to sell real estate	100 00
1874, May 28—At Columbus to attend to case in supreme court on motion to sell real estate and on injunction and receivers	100 00
1874, June 10—At Batavia common pleas court in case of Swing & Mellen, executors, v. E. B. Townsend, to sell stock, etc	25 00

1874, Sept. 25—At Columbus in supreme court to get case set for trial—Mr. Pugh and General Ward not ready	50 00
341 *1874, Dec. 5—At Columbus in supreme court in case of Swing & Mellen v. E. B. Townsend et al, 6th, 7th and 8th of December	100 00
1865, Feb. 8—At Columbus in supreme court, case of Townsend	50 00
1875, Feb. 15-16—At Columbus in case of Swing et al v. Townsend, in supreme court, judges all on the bench, and set case for March 2d, and executors notified all the attorneys of the different parties	50 00
1875, March 2—Case of Swing & Mellen v. Townsend came on for the trial at Columbus before the c urt	100 00
1875, May 17—At Columbus in the supreme court about decision	50 00
1875, June 1—At Columbus in supreme court in case of Swing & Mellen executors	50 00
1875, June 16—At Columbus in supreme court and presented several doubtful points in will case for the courts to pass upon	100 00
1875, June 26 and 27—At Columbus, to make final entry, etc	100 00
1875, June 28-29—Went to Columbus to supreme court to make final entry and corrections	50 00
1875, July 10—At Batavia to court and had entry made in case of Swing & Mellen, executors, v. Townsend	25 00
1875, July 17—To attending case in Clermont Co., in case of Swing & Mellen v. Fletcher, etc	20 00
———To making out five reports to the probate court of Exr's of the estate of Mrs. Townsend, $100 each (the last July 24, 1877)	500 00
Total	$4,015 00

The value of these specific services, as stated in the bill, does not in every item correspond with the amounts which Mr. Mellen affixed to them in his diary at the time they were rendered and the memorandum of them made. For instance the 20th item of his bill is a trip to Columbus, May 15, 1874, and the charge is $100. He testifies that it appears in his diary charged at $50, and on inspection I so find it, and that he put it down first $25, and afterwards changed it to $50. Another trip to Columbus, September 25, 1874, to get the case set for trial is charged in this bill at $50; in the diary at $25. Again on December 5th the charge for a trip to Columbus is $100 in this bill; in
342 the diary it *is $50. On May 17, 1875, he made another trip to Columbus, for which he charges in this bill $50; in his diary the charge is $25. The charge for a trip to Columbus, June 16, 1875, is $100; in the diary it was originally $25, but is now partly erased. Another trip to the same place, June 25th, is put at $100 in this bill; in the diary it is erased, but he says it was originally $25. The trip to Columbus, June 28, 1875, is put in this bill at $50; in the diary it is $25. Mr. Mellen says he did not intend to keep his diary as an account book of charges for services, but desiged it simply to be a history of his transactions in administering the estate; and this bill of charges, in which some of the items are enlarged, was made out with reference to Mr. Disney's attorney fees against the estate of E. B. Townsend, and with a view to a compromise. I understand him to mean that he considers his services worth as much as Mr. Disney's, and graduated his charges accordingly. However this may be, it seems to me that Mr. Mellen's charges of his fees made at the time the labor was done, and the charges in his diary are specified as fees, in addition to actual cash expenses—are a better criterion as to the actual value of his legal services, than an account made out with reference to and in imitation of what he may have considered the more liberal fees of some other lawyer for services in another estate, or the very uncertain testimony of experts as to the value

of services in the aggregate based on a very indefinite and general hypothetical case. It may be that Mr. Mellen, reflecting on the munificent manner in which Chatfield & Woods and West, as receivers of the real estate, were compensated for their services, their joint salaries being $3,300 per year, an amount generally in excess of the rents collected by them, and which he denominates in his testimony as outrageous, concluded he was entirely too low in his charges. If what they were allowed was a proper criterion to be governed by, I should, so far as I am advised by the evidence on that matter, perhaps, agree with him in such a conclusion, and say that he could be justified in claiming the full amount of his bill. Mr. Mellen says he did not consult with his co-executor in making out this statement of fees—in fact that Judge Swing never saw it. The bill, I think, may fairly be taken as a statement of the legal services the executors rendered the estate.

*Taking the evidence contained in the diary and the testimony 343
of the experts as to what is a proper fee for attendance on the supreme court, and for such other services as are enumerated in this bill, I allow for the seventeen trips to Columbus $575; for preparing and filing the petition for the construction of the will $500; for attending the trials of that case in the common pleas and district courts $200; and for services in the injunction and contempt cases in Cincinnati, which he puts at $1,000 in this bill, $100. In vol. 1, page 167, of the diary, I find the following memorandum in regard to his services: "1874, March 28th, went to the city on the 7 o'clock train, and at Judge Force's room at 9 o'clock, and S. R. S. West on the stand as a witness, filed a large number of affidavits in self-defense and also answer to supplemental charges of contempt, and the court found me not guilty of contempt, also dissolved the injunction and also dismissed the case of Chatfield & Woods v. P. B. Swing & W. C. Mellen, case No. 42,701, Hamilton common pleas. Also at Judge Swing's office, at his request, by note. For this work taking affidavits, etc., and the perplexities and anxiety of day and night by these wicked persons, etc., time and service as attorneys in this case in behalf of executors, fees, $100." The figure one is erased, but Mr. Mellen says that was the charge."

Experts says that from $20 to $25 is a reasonable fee for making out and filing an account in an estate like this. The accounts filed by Mr. Mellen are not necessarily lengthy or complicated. I allow $100 for the five accounts. For procuring the order to sell the railroad stock $100, and for an order to sell chattels at private sale $25 are allowed. It is customary in estates of any size to allow executors and administrators fees for an attorney to assist them in taking out letters, and for giving them instructions in regard to their duties at the appraisement and sale. The charge of $50 for this service is allowed. For the other items the sums charged in the bill are allowed.

The total fees allowed for legal services, enumerated in this bill, is $1,740.00. If to this be added $200.00, which I find to be the value of the executors' extra service in the matter of the still and other chattels sold at private sale, and $200.00 for assistance in the matter of exceptions by Howard, administrator *of Kugler, to the accounts of 344
Chatfield & Woods, executors of Townsend, it will make a total of $2, 140.00 for extraordinary services up to the date of the decision of the suprem · court in the will case in June, 1875.

From that time to July 24, 1877, the only extraordinary services rendered by the executors were in executing the order to sell the real estate.

The first order of sale was issued July 24, 1875, and the Milford property, 16 acres of land in Hamilton county, opposite Milford, and the lot on Fifth street, Cincinnati, were appraised and in October of that year sold as I have above stated.

In February, 1876, the second order of sale was issued, and under it the "Germany" land was surveyed, subdivided into lots, appraised, and a large part of it sold at different times during that year and in the spring of 1877. The remainder was sold in 1878.

The "Edwards" farm was subdivided into lots and appraised in 1876 under this order, but not sold till 1878.

The amount of cash proceeds of sale of land reported in the accounts of the executors filed is $21,706.10. The amount of sales confirmed before this proceeding is $52,815.88.

Appraising and selling lands in whole tracts where the boundaries are known and no surveying or subdividing is required, and they lie within a convenient distance, is certainly only the performance of the ordinary duty of an executor or administrator when he is ordered to sell it, for which the statutory percentage on the proceeds of sale is his compensation. But if he is required to survey and subdivide large tracts of land into lots and appraise and sell by these subdivisions, it seems to me that the additional work and time required for this purpose is extraordinary service.

The testimony shows that about eighty days were occupied in the work of surveying, subdividing and appraising. Without it the appraisement could probably have been done in two or three days.

The offerings of the real estate were made Oct. 15, 26 and 27, 1875; June 9, Oct. 26, 28 and 31, and December 5, 1876, and March 30, and April 30, 1877. The purchasers at some of these sales failed to comply
345 with the terms of sale and caused the executors *considerable trouble and the property bid off by them had to be re-offered.

Mr. Mellen appears to have been very active in trying to procure the attendance of bidders at the several offerings. The sales were advertised and every reasonable effort seems to have been made by the executors to effect good sales. A considerable part of the real estate brought more than the appraised value.

It is difficult to arrive at a correct estimate of the value of the executors' extra service in this matter. They are entitled to counsel fees as well as pay for their extra labor, time and attention.

Mr. Mellen fixed no price except in the general chage of $4,000 per year for all extraordinary services.

The following question in reference to this service was put to J. G. Douglass, a lawyer expert:

"One of the executors, the other acting as counselor, devotes his time from the termination of that suit in 1875, a period of two years, to July, 1877, in surveying, appraising and subdividing under an order of the court, some 460 acres of land in Hamilton county and some 270 acres in Clermont county, in addition to a good many houses and lots, and he divides that to bring it to a sale, and sells it, and gets through

all the business. Outside of the statutory fees, what extra amount would he be entitled to for that two years' work?"

Answer—"About $1,000 a year."

Now the evidence shows that not nearly all the time of those two years was thus occupied, and the hypothetical case in that particular fails. The work was continued from time to time through these two years. It looks as if the appraisement and sales might have been made in a much shorter time. No very good reason has been given why the appraisement and sale of all the property was not made within a year after the decision of the supreme court in June, 1875.

There are, however, so many circumstances in such cases which it is impossible to get fully and clearly before the court so that it can see the exact situation of affairs that I can not say, taking in consideration the general fidelity with which the executors have discharged their trust, that there was unnecessary delay in these appraisements and sales.

*I am of opinion that $1,000.00 a year should be allowed the executors for their legal and other extroardinary services for the two years preceding July 24, 1877. I consider that a very liberal allowance for the services rendered, beyond what was their ordinary duty, and for the legal advice and assistance that executors not lawyers, but good business men, would have needed. 346

This, with the $2,140.00, makes a total of $4,140.00 for extraordinary services. These are all the extraordinary services rendered by the executors and their value, so far as I have been able to find them from the evidence.

The compensation, then, of the executors, for their services, ordinary and extraordinary, including their allowance as receivers, from July 24, 1871, to July 24, 1877, will be as follows:

Statutory percentage on $77,998.85	$ 1,678 97
Extra compensation	4,140 00
Pay as receivers for 4½ months	2,183 08
Total to July 24, 1877	$ 8,002 05

The percentage on $93,790.22, the remainder of the estate, is $1,875.80. If we add this sum to the above amount, it will make the total compensation $9,978.85.

In the hypothetical case submitted on behalf of the executors to the lawyers who testified as experts, the estate was represented to be in value of personalty about $100.000.00, and of realty from $200,000.00 to $300,000.00, and in constant litigation, so as to necessarily occupy all the time of one executor, a lawyer who had to abandon his practice to attend to the duties of his trust, and much of the time of his co-executor in giving advice; that there were numerous suits growing out of the estate, a great deal of the matter adjusted by them, compromises made, etc., etc.; in short, that there was so much litigation and business requiring the constant advice and assistance of a lawyer that nearly the whole time of one exeecutor was occupied with extraordinary services of this character.

No such state of case has been proven. There were no suits pending against the estate at the death of the testatrix. The only suits brought by the executors were the case for the construction of the will, and an order to sell the real estate, the case *against Fletcher, the petition filed for an order to sell the railroad stock and an applica- 347

tion for an order to sell chattels at private sale. Against them was the injunction and contempt case in Cincinnati, for his services in which Mr. Mellen charges in his book $100.00. Two other suits were brought against the executors during the latter part of the six years, but they employed attorneys to defend them in these cases, and one is still pending. No suits had to be brought to recover or protect any of the assets of the estate. The property was not encumbered in any way. No suits had to be brought to collect claims. Excepting the will case, the litigation was exceedingly small for so large an estate. General Ward was employed to argue one of the most important motions in the supreme court in that case.

The greater part of the railroad stock and the land was sold to legatees.

Mr. Mellen, in his testimony, says there were no extraordinary services in selling the chattels at public sale. All of the personal assets were converted into cash or its equivalent, by payment to legatees, without litigation. There were no debts owing at Mrs. Townsend's death to collect. There were no suits about the real estate except the will case. After the decision of that case by the supreme court the land was sold without interference by suit from anybody. There were no debts to pay except the current expense account existing at the testatrix's death. No claim owing to the estate that needed compromise, settlement or adjustment of any kind, says Mr. Mellen.

In the will case, after filing of the bill and the bringing of the defendants into court by process, the executors' duty was only to watch the case and hasten it as rapidly as possible to a final conclusion.

It was suggested in the questions put to some of the witnesses and in the argument, that the interest of the executors representing the legatees was adverse to the claim of E. B. Townsend to an estate by the curtesy and that the Kuglers were claiming such an interest in the land as would require the executors to resist the claim for their benefit of the estate.

If the executors had any such interest, or thought they had any, adverse to any of the defendants, they did not make it manifest by the
348 pleadings filed by them in that suit, or by any *oral or written argument presented to the courts in which it was tried, so far as shown by the evidence.

It was necessary for them to be present at the trials of the case to see that the litigation went on and the adverse claims of the legatees under the will were settled and to procure an order for the sale of the real estate as soon as possible

Beyond that they had no duty to perform in the case, and the evidence does not show that they performed any other. The legatees employed eminent attorneys, who made the arguments, orally and by briefs, upon the questions involved in the case.

On behalf of the executors it is claimed that W. C. Mellen, in accepting this trust, was compelled to abandon his business as a lawyer, worth, as he says, from $2,000 to $3,000 a year. If such was the fact, it is not a ground for the allowance of extra fees unless his time had been occupied in performing extraordinary services. Prospective profits in some other business a andoned by him to take upon himself the office

of executor, can not be considered in fixing the amount of his compensation for the performance of such a trust.

It was a trust voluntarily assumed by him, which he was at liberty to resign at any time. If the performance of the duties of it, whether the service was ordinary or extraordinary brought him less remuneration than what his talents and his education and long experience in his profession had enabled him to realize before, it was a loss he chose to sustain and not one suffered by complusion. With such losses an estate can not be charged.

The evidence shows that Mr. Mellen was engaged while executor, to some extent, in the practice of the law, though not to the extent, perhaps, that he had been before his appointment.

I do not think the estate was of such a character as would require a good business man or a good lawyer, of thirty years' experience, to devote his whole time to the administration of it. He might devote more time than was actual necessary. He might permit it to occupy his mind to a far greater extent, both by day and by night than was required. He might virtually give up all other business. But if he chose to do so, it would be his own loss.

Mr. Mellen's diary shows that, during the six years, he made *entries in it of something done or said about the estate, on one 349
hundred and fifty-six different days each year on an average. These memoranda appear to embrace the most minute matters; those which occupied only a few moments in a day and those which consumed a half or a whole day.

On more than half of these days the memoranda themselves show that what was done respecting the estate would not have interfered with a regular law practice.

Here was an estate consisting of $56,282.75 personalty and $115,506.32 in realty when converted into money, making a total of $171,789.07. Of this amount $3,000 is the estimated value of the "Davis" farm, the only property not sold.

Of the personal estate, $5,207.54 was chattels sold, $5,666.40 money on deposit obtained by check, and the balance railroad stock, dividends and money or its equivalent, transferred to the executors with but little extra trouble on their part.

The conversion of the chattels, drawing of the money on deposit by check and distribution of stock and money among the legatees, certainly ought not to have occupied the whole time or any very considerable part of the time of an executor. Their services in the will case were not of such a character as to require the whole time of the executors.

The executors did not have charge of the land during the six years except for four and one-half months, when they acted as receivers. During the remainder of the six years it was in the exclusive possession of Townsend, as tenant by the curtesy, or of other receivers who were paid for their services, for making repairs, leasing and collecting rents, paying taxes and general management, at the rate of $3,300.00 per year. The executors had no special duty in respect to it beyond filing the bill in the common pleas, until they got an order to sell, except for the short period of four and a half months above mentioned.

It does seem to me that the services required in administering such

an estate ought not to have occupied the whole time of one person, much less that of one and a considerable part of the time of another. The amount of assets accounted for in the five settlements of the executors is $77,998.85; the disbursements are $65,936.02, and the most of this to legatees. If to the amount of the executors' compensation, as allowed
350 by this *court and fixed by law, is added the other costs of administration and the claims paid, all of which must first be deducted from the assets, they will fall short of paying the legatees by over $20,000.

It appears to me that $24,000 in addition to the statutory fees of $1,678.97, which would make the compensation nearly 33 per cent. of the assets accounted for at this time, would, for the services rendered, be enormous, and is such a claim as no court in good conscience could allow.

I do not deem it necessary to decide the question raised as to the right of Hon. P. B. Swing to accept, after going into office, upon the death of the testatrix, the appointment of executor conferred by a will executed before he became a judge of the United States district court, and to charge for legal advice in the administration of the estate, as I have treated the legal services of both executors as one service.

A decree will be entered in favor of the executors for $4,140 as compensation for extraordinary services.

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411 ACTION TO RECOVER LAND—LIMITATIONS.

[Logan County District Court, 1879.]

Cole, McKenzie and Phelps, JJ.

FITZPATRICK'S HEIRS v. JAMES FORSYTHE.

1. On the trial of a civil action to recover real estate the jury may, in favor of a party defendant, who has had a possession adverse in law and in fact for twenty-one years, presume a grant from the plaintiffs whose title has been such that the statute of limitations does not run against it.
2. Where a party occupies adversely for the period prescribed in the statute of limitations, an entry of land in the Virginia military district of Ohio, not patented at the inception of the adverse possession, the jury may, on trial of an action to recover such land brought by those claiming title under the patent, against the
412 party in possession, presume a *grant from the original holder of the entry to such party in possession, and thus defeat such action.
3. In favor of a party in adverse possession of real estate for a long period, but less than twenty years, under a delinquent tax sale, it will be presumed that all the proceedings have been regular to authorize a sale and to make a valid conveyance.
4. If the tax records are destroyed in such case, and secondary evidence of their contents can not be produced, it will be presumed that all official acts have been rightfully performed, and a tax deed regular on its face will be *prima facie* evidence of valid title.
5. *Semble.*—That in such case, to support the deed, it is not necessary to resort to, or prove the loss of, secondary evidence.

The material facts are these:

April 5, 1872, the plaintiffs brought action in the court of common pleas to recover military survey 9,953, Logan county.

On the trial, April term, 1874, the plaintiffs gave in evidence, Virginia military entry 9,953, date July 19, 1819, in name of James Fitzpatrick; a survey of same entry, January 14th, recorded March 28, 1821, in surveyor's office, Chillicothe, patent date February 20, 1872, and to the plaintiffs described as heirs of James Fitzpatrick, and depositions proving heirship of plaintiffs.

Wm. Lawrence, for defendant, moved to rule out the patent.

I. It is void, because issued after the time had expired within which patents could be lawfully issued in the Virginia military district of Ohio. 2 U. S. Stat. at Large, 274, Sec. 2, p. 425; 3 Stat., 10 Stat., 143, 598-701; 1 Stat. 394; 2 Greenl. Ev., Sec. 541.

II. The patent is not indorsed by the secretary of war, as required, showing the land warrant unsatisfied. 1 Stat., 394; 10 Stat., 143.

Jeremiah Hall, for plaintiff.

BY COURT.—Motion overruled.

The defendant then offered in evidence: Entry 13,314, in name of Duncan McArthur, date June 30, 1832, survey thereof Oct. 15, 1832; patent to him July 1, 1837, proof that the surveys 9,953 and 13,314 covered the same land; record of delinquent tax sale of survey 9,953 to Duncan McArthur Dec. 12, 1831 (on which no deed was ever made); McArthur's deed of conveyance, July 4, 1837, to Irwin, with warranty for survey 13,314 and other conveyances* to defendant; that Irwin and defendant had continued in adverse possession since July, 1837; 413
about 35 years before suit was brought, that McArthur died 1838; that no claim was made by plaintiffs until after 1872; that the taxes had been regularly paid by McArthur, Irwin and defendant, all of whom had made large and valuable improvements.

The court was asked to charge the jury on the law before the argument to the jury and on the law questions.

Jeremiah Hall, for plaintiff, argued:

1. The patent to McArthur is void. Act of Congress of March 2, 1807, *proviso*, 2 Stat. 425; McArthur's Heirs Lessee v. Gallagher, 8 Ohio, 512; Galt v. Galloway 4 Pet., 331.

2. There is no presumption of any grant in favor of defendant. Hart's Heirs v. Young, 3 and 4, JJ. Marsh, 408.

He cited on various questions, page Va. Mil. Titles, 126-131, 2 Ohio R. 415; Kerr v. Watt, 6 Wheat, 550; Miller v. Lee, 6 and 7; B. Monroe, 91; Galt v. Galloway, 9 Curtis, 331; Taylor v. Fletcher, 7 B. Monroe, 82-90; 8 Ohio 412.

Wm. Lawrence, for defendant.

I. McArthur's patent is valid, the Act of March 2, 1807, was changed by Act Dec. 19, 1854 (10 Stat. 598), and Act March 3, 1855 (10 Stat. 701.

II. But if McArthur's patent is void, then the defendant has a title independently of it, which is a defense.

Some preliminary considerations are necessary.

1. An equitable title in defendant is a defense; 24 Ohio Stat., 444-5-479; Civil Code, Sec. 93; Wallace v. Seymour, 7 Ohio Pt. 1 p. 156; Duke v. Thompson, 16 Ohio 48; Holt v. Hemphill, 8 Ohio, 236; Blake v. Davis, 16 Ohio, 48; Ricard v. Williams, 7 Wheat, 244; *Idem.*, 109.

2. The land warrant on which the entry of Fitzpatrick was made may be verbally sold so as to convey an equity. Duke v. Thompson, 16

Ohio, 41; Lessee of McArthur v. Gallagher, 8 Ohio, 518-519. The assignment may be presumed, 4 Wheat, 343; 7 B. Monroe, 279; 20 Ohio, 231; 7 Wheaton, 243.

3. Possession long continued is evidence tending to prove a purchase by defendant of the outstanding equity of plaintiffs before patent issued; Bierce v. Pierce, 15 Ohio, 529-540; Duke v. Thompson, 16 Ohio,
414 41, 48, 54; McArthur v. Gallagher, *8 Ohio, 518-519; Ward v. McIntosh, 12 Ohio Stat. 238; Ludlow v. Barr, 3 Ohio, 407; Ricard v. Williams, 7 Wheat., 59,237; Broom, Legal Max., 428; 3 Stark Ev. Part. IV. 1203-1221; Courcier & Graham, 1 Ohio 330; Arnold v. Flattery, 5 Ohio, 272; 12 Ohio R. 548; Best on Presumptions, 87. The evidence is competent, and from which the jury may infer, as a fact, a conveyance. They are the judges of the fact, and by the rules of evidence, if the facts make it probable that there was a sale in some form, this is all that is required. In Angell on Limitations, Sec. 3-4, it is said: "Long possession in the eye of the law is an assurance of title, because it is in itself evidence of title, *priora praesumuntur a posterioribus.* * * And in order to render the title of the possessor complete, they (the courts), will presume * * execution of deeds, etc., agreeable to the maxim, *ex diuturniate temporis omnia praesumuntur solemniter esse acta.*

III. On the facts in evidence the jury as a question of law must presume a grant from Fitzpatrick to McArthur or his grantees, or as a question of fact may presume it.

I concede that to raise this presumption there must be a possession —adverse in law as well as in fact. There are cases where a possession adverse in fact is not so in law. I will mention three classes.

(1). The possession of a lessee after the expiration of his lease is not in law adverse to the lessor, and cannot be until possession is surrendered to him.

(2). The possession of a party under contract of purchase is in law not adverse to the vendor.

(3). So the possession of a trustee is not in law adverse to the *cestui que trust;* but subject to these and similar exceptions the doctrine of presumed grant applies.

1. It is the doctrine of the elementary books: American Law Register, Feb., 1874, p. 69, old series, vol. 22, N. S. 13; Angell on Limitations, Sec. 38-3-4-9-10; Starkie Ev., Part 4, p. 1222; 2 Greenl. Ev., Sec. 539-541n, 1 Greenl. Ev., 20-45 n; 2 Washburn Real Prop. 293 A., 39; 3 *Idem.*,51, 448; Washburn on Easements and Servitudes, 2d Ed., 72, 109, 68, 103, etc.; Best on Presumptions of Law and Fact, 87; Wood Civil Law, 123; Phillip's Jurisprudence, Sec. 147; Maine Anc. L. 284; Tudor Leading Cases, 114; Perry on Trusts, Sec. 866; 2 Greenl.
415 *Cruse Dig Book 3, p 423 n; Matthew's Presumptive Evidence, 1, 7, 271-277; 3 Dane's Abridgment, 55; Hoffman's Eccl. Law, 153, 126; Broom Legal Max., 800 852; 3 Cruse Digest, 467.

The books enumerate many reasons in support of the doctrine.

(1). Public interests require an end of litigation, interest, *reipublicæ,* etc., is the maxim which Angell declares (Sec. 9) antedates the Christian Era, is venerable for its age as it is hallowed in its purposes of peace.

(2). Public interests require that titles be settled so as to promote improvements and agriculture, Angell, Sec. 9.

(3). Truth requires courts to presume as probable that parties who long delay to make claims have abandoned or transferred them.

(4). Justice requires that parties in possession (who cannot preserve evidences of title, often in imperfect writings or by parol) shall not suffer by loss of evidence.

(5). Honesty requires that fraudulent claims shall find no favor when the evidence to defeat them is lost.

These and other reasons are supported by authorities and legal maxims hereafter cited, Angell says:

"The doctrine of prescription is founded on public policy. The spirit of the maxim, *interest Reipublicæ ut sit finis litium*, may be traced to a more remote period than the Christian Era. * * * With respect to land, there is one other public consideration in support of the doctrine of prescription * * * that during the litigation it must become waste and unproductive from want of improvement * Lapse of time is a dereliction of all ground of objection—a protection against * * * claims the injustice of which (from lapse of time) it is extremely difficult to detect and expose * *Vigilantibus non dormientibus inservit lex.* *"

And see the authority cited above from Angell.

2. It is the doctrine of the courts: Lessee of Ludlow v. Barr, 3 Ohio, 408; Courcier v. Graham, 1 Ohio, 330; Blake v. Davis, 20 Ohio, 242; Duke v. Thompson, 16 Ohio, 48, Jarboe v. McAtee, 7 B. Monroe, 279; Berthelemy v. Johnson, 3 B Monroe, 92; Edson v. Munsell, 10 Allen, 568; McArthur v. Gallagher, 8 Ohio, 512; Roods v. Symes, 1 Ohio, 316; Valentine v. Piper, 22 Pick, 93; Melvin v. Lock, 17 Pick, 255; Hill v. Crosby, *2 Pick, 466; 16 Pick, 241; Ewans v. Trumbull, 2 Johns, 313; Eldridge v. Knott, Cowp., 214; Oswald v. Leigh, 1 Term 416
R., 270, Id., 399; Coolidge v. Leonard, 8 Pick, 504; Strickler v. Todd, 10 S. & R., 63–69; Rust v. Low, 6 Mass., 90; Mayor v. Horner, 1 Cowper, 102; Campbell v. Smith, 3 Halst., 141; Olney v. Fenner, 2 R. I., 211; Tinkburn v. Arnold, 3 Greenl., 120; Pillsbury v. Moore, 44 Maine, 154; Farran v. Merrill, 1 Greenl., 17; Crocker v. Pendleton, 10 Shepley, 339; Belknap v. Trimble, 3 Paige, 577; Townsend v. McDonald, 2 Kernan, 381; Hazard v. Robinson, 3 Mason, 272; Wilson v. Wilson, 4 Dev., 154; Gayette v. Bethune, 14 Mass., 51–53; Tyler v. Wilkinson, 4 Mason, 402; Parker v. Foote, 19 Wend., 309–315; Schauber v. Jackson, 2 Wend., 13; Corning v. Gould, 16 Wend., 531; Hall v. McLeod, 2 Metc., Ky. 98; Wallace v. Fletcher, 10 Foster, 434; Winnipisceogee Co. v. Young, 40 N. H. 420; Tracy v. Atherton, 36 Vermont, 512; Townsend v. Downee, 32 Vermont, 183; Ingraham v. Hutchinson, 2 Conn. 584; Balstour v. Benstead, 1 Campl. 465; Daniel v. North, 11 East., 371; Knight v. Halsey, 3 Bos. and Pul., 172–206; Bealey v. Shaw, 6 East., 215; Wright v. Howard, 1 Sim. & Stu., 203; Wallace v. Minor, 7 Ohio Pt., 1 p. 249; 6 Ohio, 366; 5 Ohio, 456; 16 Ohio, 34; Miller's Heirs, v. McIntire, 6 Peters, 61; Harpending v. Dutch Ch., 16 Peters, 455; Humbert v. Trinity Church, 22 Wend., 485, Dutch Ch., v Mott, 7 Paige, 77; Stillman v. Whitebrook M. Co., 3 Woodb. & Minot, 538; Hussb. v. McNeil, 1 Wash. C. C. R., 70; Rausdale v. Grove, 4 McLean, 282; Baird v. Wolfe, 4 McLean, 549; Sargeant v. St. B. Ind., 12 How., 371; Hanson v. Eustace, 2 How., 208; Boulden v. Massie, 7 Wheat., 122; Hepburn v, Auld, 5 Cranch, 262; Weatherhead v. Barkiesville, 11 How., 329; Archer v. Tanner, 2 Henning & Mun., 370; Billings v. Hall, 7 Cal. 1; Ingraham v. Hough, 1 Jones, N. C., 39; Callender v. Sherman, 5 Ired., N. C., 711; Stimfler v.

Roberts, 18 Pa. St. (6 Harris) 299; Meanor v. Hamilton, 27 Pa. St., 137; Johnson v. Irwin, 3 S. & R., 291; Thomas v. Hatch, 3 Sumner, 170; Young v. Collins, 2 Brown, 28; Miller v. Bates, 3 S. & R., 63; Kingston v. Leslie, 10 S & R., 391; Ewing v. Barton, 2 Yeates, 318; Cannon v. Phillips, 2 Sneed, Tenn., 214; Lessee of Brock v. Burchell, 2 Swan Tenn., 31; Martin v. Stark, 10 Humph., 162.

417 *Process presumed Morgan v. Burnet, 18 Ohio, 535.

Curtis v. Keesler, 14 Barb., 511; Tracy v. Atherton, 36 Vermont, 503; Ricard v. Williams, 7 Wheat., 244; Wendell v. Jackson, 8 Wend., 183; People v. Dennison, 17 Wend., 312; People v. Trinity Church, N. Y. Court of Appeals, Sept., 1860; 3 P. F. Smith, 84; 1 Rawle, Penrose & Watts, Pa., 78; 4 W. & S. 336; Mather v. Trinity Church, 3 S. & R., 509; Bedle v. Beard; 12 Co. 5; Croker v. Pendleton, 10 Shepley, 339; Jackson v. McCall, 10 Johns, 377; Vandyck v. Van Buren, 1 Caines, 84; Burges v. Bennett, 1 Caines, C. 1; Grote v. Grote, 10 Johns, 492; Jackson v. Schoonmaker, 7 Johns, 12; Mather v. Trinity Church, 3 S. & R., 509; Powell v. Millbank, 12 G., 3 B. R.; 1 T. R., 339; Williams v. Presby. Soct., 1 Ohio St., 492.

The rule is so strong, that in case of a possession adverse in law and in fact the presumption of a grant can not be repelled by evidence. It is conclusive. Strickler v. Todd, 10 Serg. & R, 63–69; Rust v. Lowe, 6 Mass., 90; Mayor v. Horner, Cowp., 102; 2 Greenl. Ev., sec. 539; Wilson v. Wilson, 4 Dev., 154; Ingraham v. Hough, 1 Jones, N. C., 39, and cases collected; 22 American Register, 73. The doctrine was applied by courts of law to easements, because the statute of limitations did not apply to them. For the same reason courts must apply it in cases of lands to which the statute does not apply; the reason of the law is the life of the law.

3. Courts of equity apply the doctrine: Ridley v. Hettman, 10 Ohio, commented on; 22 American Law Register, 69, [N. S., vol. 13;] Larrow v. Beam, 10 Ohio, 502; Burnley v. Stevenson, 24 Ohio St., 479; Matthews v. Rector, 24 Ohio St., 444–5; Wallace v. Fletcher, 10 Foster, 446; Miller v. McIntyre, 6 Peters, 61–65; Rhodes v. Symmes, 1 Ohio, 281. The doctrine originated with courts of equity in 1707, and was adopted by courts of law in 1761; Wallace v. Fletcher, 10 Fostor, 446.

4. In tax sales the courts presume the proceedings regular after a long possession, even less than twenty years. Bierce v. Pierce, 15 Ohio, 547–533–543: Wallace v. Seymour, 7 Ohio Pt., 1 p. 156; Matthews v. Rector, 24 Ohio St., 445; Burnley v. Stevenson, 24 Ohio St., 474; Ward v. Barrows, 2 Ohio St., 241; Coombs v. Lane, 4 Ohio St., 112; Ridley v. Hettman, 10 Ohio, 524; Read v. Goodyear, 17 S. & R., 350;

418 Freeman v. Thayer, 33 *Maine, 76; Farrar v. Eastman, 5 Greenl. Me., 345; Brown v. Connelly, 5 Blackf'd, 391; Keane v. Cannovan, 21 Cal., 300; Coleman v. Anderson, 10 Mass., 105; Gray v. Gardner, 3 Mass., 399; Bank U. S. v. Dandridge, 12 Wheat., 70; 2 Ohio St., 241–246; 4 Ohio St., 112–148.

Blackwell, in his valuable work on Tax Titles, reviews the authorities, and says (4 Ed., 533), "that a long possession under a tax deed short of the period fixed by the statute of limitation, is a sufficient basis for a presumption of regularity," and he says this doctrine "is in unison with the established principles of law as applied in analagous cases." It is not even necessary to prove the loss of records; it will be conclusively

presumed. It is not necessary to look for secondary evidence; at best it is, or may be, imperfect. The law supplies its existence as well as its defects by presumption.

This doctrine is especially important, since the principle affects all judicial sales under which it estimated lands equal to the entire area of Ohio are transferred once in every generation of thirty years. It will apply to sales by corporation, the authority of whose officers can not be proved after a few years, etc. There is no one principle of law of such far reaching consequences, and so important in giving repose to land titles as this. By force of these authorities it must be held that the tax sale of December, 1831, was regular; that the officers did their duty, and this on grounds of public policy, even if the fact were not so. It must also be presumed that the tax deed was made, and thus a perfect title passed to McArthur.

5. There is nothing in the objection that the statute of limitations does not run against the government, nor until a patent issues—*nullum tempus occurit regi*, as decided in Wallace v. Minor, 6 Ohio, 366, S. C., 7 Ohio, Part 1, p. 249; Duke v. Thompson, 16 Ohio, 34; Clark v. Southard, 16 Ohio St., 408; Wood v. Ferguson, 7 Ohio St., 288.

This is so, for several reasons, to be considered separately.

a. The cases show that the doctrine of the presumption of a grant exists independently of the statute of limitations. The statute of limitations made no new principle, it was only declaratory of the common law. Angell on Limitations *passim.*

The maxim, *nullum tempus*, etc., was designed to protect the *rights of the government, not private individuals who sleep on their rights. It is an ignorant perversion of the maxim to make it give protection to private citizens, and hence has been held not to apply in cases affecting private persons. Bedle v. Beard, 12 Co., 5; Jarbo v. McAtee, 7 B. Monroe, 279; Starkie on Evidence, Part 4, p. 1222; 22 American Law Register, 69. 419

b. A tax title operates upon an entry before patent, and carries to the purchaser a title which will defeat the subsequent patent. Jones v. Devore, 8 Ohio St., 431; Holt v. Hemphill, 3 Ohio, 232; Wallace v. Seymour, 7 Ohio Pt., 1 p. 156; Douglas v. Dangerfield, 14 Ohio, 522: Gwynne v. Niswanger, 20 Ohio, 556; Lessee of McMillan v. Robbins, 5 Ohio, 32.

A tax title is an original title.

c. A grant has been presumed even against the government on grounds of public policy, and contrary to the known fact. 22 American Law Register, February, 1874, p. 70-71, note 84, and authorities there cited; Beale v. Beard, 12 Co., 5; Jarbo v. McAtee, 7 B. Monroe, 229; Goodtittle v. Baldwin, 11 East., 488; Roe v. Ireland, 11 East., 280; Read v. Brookman, 3 Term R., 159: Rex v. Carpenter, 2 Show., 48; Biddulph v. Ather, 2 Wils., 23; Bullard v. Barksdale, 11 Ired., 461.

d. The courts have sustained the title of parties in possessionu pon the ground that an adverse claimant, by long neglect, had abandoned the claim—equivalent to the equitable doctrine of stale equity.

Strauch v. Shoemaker, 1 Watts and S. Pa., 173; Chambers v. Mifflin, 1 Pa. (Raule, Pemrose and Watts), 79; Read v. Goodyear, 17 Serg. and Rawle, 350.

This doctrine, in its reason, its policy and its purpose, applies as well where an original claimant has paid for his land as in cases where he has

not. A party who abandons a claim thereby consents that others acquire rights, after which the original claimant is, on every principle of law, morals and justice, estopped from asserting a title.

IV. *a.* The doctrine of presumed grant should be sustained on grounds of public policy. This is especially so in a new country like Ohio, where early records were sometimes not carefully made—where some have been lost.

b. There are now in the Virginia Military district 40,000 acres
420 *covered by entries, never patented, held by occupants more than twenty-one years, who are liable to be harassed by unscrupulous parties, who hunt up fictitious heirs, get patents in their names, and bring suits. See speech of Hon. H. L. Dickey, House of Representatives, June 8, 1878; Cong. Record, vol. 7, part 5, page 4,342.

c. Parties who persistently refuse to pay taxes and wait to speculate on the advance in value of lands produced by the labor of others, do not present a favorable claim for judicial aid.

Carlisle v. Longworth, 5 Ohio, 371, and cases cited *ante* as to presumptions on tax sales; Read v. Goodyear, 17 Serg. and Rawle, 350.

d. History has shown that uncertainty of titles is the greatest impediment to the improvement of lands. This has been seen in the Virginia Military District. Waddy Thompson has described it in his "Recollections of Mexico." Men flee from a region of doubtful titles as from pestilence. Angell on Limitations, sec. 9; Hovenden v. Lord Ausley, 2 Schf. and Left., R. 629; Lewis v. Marshall, 5 Peters, 470; Hawkins v. Barnett, 5 Peters, 547.

e. I may illustrate the necessity for the doctrine of presumed grant by a case.

On the 24th of July, 1832—more than forty years ago—a paper was executed as follows—:

"Received July 12, 1832, of Henry H. McPherson, Three Hundred Dollars, in full payment of the south half of the southeast quarter of section numbered seven, and township numbered two, and range fifteen, known as the place Michael Kearns now lives on.

"Witness my hand and seal, JAMES MCPHERSON."

Nearly thirteen years passed by when James McPherson, having died, Henry H. McPherson, on May 2, 1845, filed a bill in chancery against the widow and heirs of James McPherson to obtain decree for title.

He soon after had his bill dismissed without prejudice, because he found himself involved with surety debts, which would have taken the land.

Henry H. McPherson paid the taxes from 1832 to 1872, forty years;
421 but the land being wood land, he had no actual *pedis *possessis* which would protect him under the statute of limitations. In 1872 he agreed in writing to convey the land to J. McPherson, and in a few weeks thereafter died, the only title of record being in the original James McPherson, the patentee.

In 1875 the last purchaser, J. McPherson, found himself in litigation as to this land, and liable to be ousted by action by the heirs of James McPherson.

There was but one living man who knew of the existence of the receipt of July 12, 1832, the attorney who filed the bill of May 2, 1845,

who, for a wonder, after thirty years, remembered and produced it, and thus saved the title of the last purchaser. But for this fact his title must have been lost, unless it could have been saved by the doctrine of presumed grant, and that, too, merely on proof of (1) payment of taxes, and (2) the absence of claim by the heirs of James McPherson.

There is a necessity for the doctrine, especially in cases like this, where a party in possession can not avail himself of the benefit of the statute of limitations under a void patent, and against the *prima facie* valid patent of plaintiffs.

If the court will not require or permit the presumption, what follows? Then, if the holder of an entry and survey delays procuring his patent for forty years, and can still maintain an action to recover land under it, he may do so for sixty years, or a hundred, and if this be so, then an adverse possession will be of no avail, for

> "Ten thousand years bright shining as the sun,
> With no less days to sing Hail's praise than when we first begun."

In Whitney v. Webb, 10 Ohio, 522, the court say that the doctrine of "cumulative disabilities" would let a claim run to affinity, which "is a consequence too monstrous and absurd to be admitted."

Adverse possession must raise the presumption of a grant, or "monstrous consequences" will result. The evidence of titles is liable to perish. Fire, flood, accident, negligence, all contribute to destroy the evidences of title.

The evidence of the original validity of our constitutions and laws perishes.

Change is written on everything. All earthly things decay. God only is unchangeable.

*The statute of limitations is founded on a policy approved in morals and entitled to favorable consideration by the courts, and so is the doctrine of presumed grant. Angell on Limitations, sec. 65 (Ed. of 1854); also secs. 3, 4, 9 and 10. I quote also from page 17, Minority Views to House of Rep., 784, 1 Session 43d congress; the opinion of Attorney-General Black on a post-office claim, as to loss of evidence and statute of limitations, 9 Opinions Attorney-General; Co. Litt., 6 American Law Register, February, 1874, p. 71. 422

V. If necessary, I would insist that a possession under the McArthur patent is protected by the statute of limitations. For the purpose of the statute of limitations, the McArthur patent passed the legal title. The act of 1807 only protects the prior title as between conflicting claimants, if asserted in due time. Holt v. Hemphill, 3 Ohio, 233-237; Niswanger v. Wallace, 16 Ohio, 558-561; Wallace v. Minor, 6 Ohio, 366; 7 Ohio, 249; 22 American Law Register, 71; Ridley v. Hettman, 10 Ohio, 524.

P. B. COLE, Judge, charged the jury, in substance, that: the McArthur patent is void; that it cannot be presumed; that Fitzpatrick made an assignment or grant to McArthur, or those claiming under him, because he did not claim under Fitzpatrick, but under an adverse entry, survey and patent; that the plaintiffs did not lose their right by abandonment; that in the Pennsylvania cases cited the locator had not paid for the land, but Fitzpatrick's warrant was payment. He ruled out the McArthur entry, survey, patent and tax sale.

Lawrence, for defendant—I ask the court to charge the jury that the Fitzpatrick warrant might have been assigned by delivery without writ-

ing; that if the jury find as a fact that it was assigned to McArthur, or that Fitzpatrick sold the entry or survey to McArthur, or made him any written conveyance of the land, the plaintiffs can not recover.

COLE, J.—This is so; but there is no evidence of such written conveyance.

Lawrence, for defendant—I ask the court to charge the jury that they are the exclusive judges of all disputed facts.

COLE, J.—This is the law.

Lawrence then argued to the jury: There was a sale by Fitzpatrick *to McArthur or his grantee of the warrant on which entry 9,953 was made, or a written assignment, in some form, of the entry, survey or land. I can not produce the writing; but I ask you to believe it once existed. It is probable it did, and this is all the law requires. 1 Stark. Ev., 451.

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This probability is shown:

1. By the long neglect of plaintiffs to make claim. Angell on Limitations, section 10.

2. By the fact that Fitzpatrick himself made no claim; he knew he had no right to do so.

3. The possession of defendant, without other evidence, makes it probable that he had purchased in the adverse claim. 12 Ohio S at., 238; 3 Ohio, 407; 7 Wheat., 59 [237]; Matthews on Pres. Ev., 2-8-260; Best on Presumptions, 87; Angell on Limitations, sections 3 4-9.

This is supported by four maxims, quoted by Angell: (1) "*Interest Republicæ ut sit finislitium;*" (2) "*Priora præsumuntur a posterioribus;*" (3) *Ex diuturnitate temporis omnia præsumuntur solemniter esse acta;*" (4) *Vigilantibus non dormientibus inservit lex.*" Hence it is a rule in law and equity that "he who is silent when he should speak shall be silent when he would speak." These are illustrated in Broom's Legal Maxims.

4. The McPherson case cited illustrates the probability of the existence of written sale.

5. The McArthur patent is evidence that the general land office was satisfied that Fitzpatrick had no claim.

6. The tax sale shows that Fitzpatrick had no claim.

Jeremiah Hall, for plaintiffs, argued the case cited, 14 Ohio, 509, and other cases.

Cole, judge, charged the jury again, when the jury retired, and, after deliberation, returned a verdict for defendant.

The plaintiffs then took a second trial, then permitted, as of right, by the statute.

The case was again tried to a jury, April 5, 1875, on the same evidence, the defendant being permitted to offer to the jury, subject to the instructions of the court, all the evidence he previously offered.

On this trial the defendant had also some evidence, tending to *prove that the plaintiffs were not the true heirs of James Fitzpatrick, the original owner of entry 9,953.

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Lawrence, for defendant, insisted that the plaintiffs must prove the heirship. Adams on Ejectment [282]; 2 Greenl. Ev., section 309; 1 Greenl. Evidence, section 104; Niswanger v. Wallace, 16 Ohio, 561.

The same questions were made and argued as on the former trial, and the same charge, in substance, given to the jury, who rendered a verdict for defendant.

The court overruled a motion for a new trial, and rendered judgment for defendant.

The whole case was put into a bill of exceptions by plaintiffs, who filed a petition in error in the district court of Logan county, which was heard at March term, 1876.

The court affirmed the judgment of the common pleas, and held that under the circumstances disclosed in the bill of exceptions the jury might properly have presumed a grant from James Fitzpatrick, or his heirs, to McArthur, or those claiming under him, and that upon the disputed facts the jury had not erred.

The plaintiffs subsequently applied to the supreme court of Ohio for leave to file a petition in error therein to reverse the action of the district court.

The supreme court refused permission to file such petition, thereby, in effect, affirming the judgment of the district court.

Upon the whole, the decisions necessarily affirmed the first two points stated in the syllabus, and the remaining points result from the authorities cited.

NOTES.

The foregoing case involves principles of so much importance, affecting so many land titles that it is deemed proper to notice and quote more fully some of the authorities which support them.

I.—As to Tax Sales.

It is a general rule, when not changed by statute, that a party claiming title under a tax sale must show affirmatively a substantial compliance with the law to authorize it. Those acts which are required by law to be of record must be proved by the record. A leading case on the subject is Williams v. Peyton, 4 Wheaton, 77, and numerous authorities are collected in 2 Cow. and Hill's Notes to Phillips on Evidence, p. 832 (note q) and Vol. I, p. 460; Carlisle v. Longworth, 5 Ohio, 370. But there are three modes by which this proof may be made:

1. By the proper records.

2. If lost by secondary evidence of their contents; and

*3. After the lapse of twenty-one years or the period fixed by the statute of limitations. 425

(*a*) The law will presume that officers have done their duty and a tax deed under which a right has been asserted in any form will be evidence of title; and

(*b*) In case of the loss of record evidence, even in a less period, upon slight proof it may be left to a jury to infer, as a fact, that the proceedings have been regular without supplying all by secondary evidence.

In the former case the law supplies the requisite evidence, dispenses with the primary evidence, and does not require secondary evidence. In the latter case the law permits such evidence as may be reasonably accessible, and when all this is produced it leaves the jury to determine the fact in view of all the circumstances.

These doctrines rest upon maxims and grounds of public policy and on rules of evidence. The e furnish legal evidence as much so as original record evidence. The statutes regulating tax sales do not generally prescribe rules of evidence or interfere with legal maxims resting on public policy.

The authority of Blackwell on Tax Titles has been cited in the foregoing case and need not be again quoted here.

Some of the authorities in support of the principles stated are given as follows: Coleman v Anderson, 10 Mass., 105. Decided 1813.

Action to recover land in 1810. Defendant held under tax sale deed, February, 1780. Verdict for defendant who failed to prove regularity of sale.

Sewall, J.

"The title [of defendant] is *denominated a collector's title, as expressing a case of doubt and difficulty. And collector's title must continue dubious and difficult

in the proof and evidence required to support them so long as they remain unasserted by any other limitation than that which applies in a writ of weight.*

"These deeds [tax sale] are to avail, if at all, upon the legal authorities of the constables [who made the sale]; and it was thought at the trial incumbent upon the tenant to prove all the circumstances requisite in the due execution of those authorities; and this notwithstanding the length of possession under these deeds and the long acquiescence of the parties otherwise entitled to the premises thereby surveyed.* The court are clear in the opinion * that the judge * was right in submitting such evidence as there was, although incomplete; and if the jury were satisfied that the deficiencies in the evidence were not chargeable to the fault or negligence of the party, that nothing in the power of the party to produce was willfully withheld, the jury were very properly instructed to consider everything as proved which might be rationally and fairly presumed from the facts and circumstances proved. In short, at the distance of time which had intervened between the constable's sales and the trial it was unreasonable to require evidence of the particulars which the tenant * was put to prove, especially evidence from documents not intrusted with the party or transferred with his title. The case is within the principle of * Gray v. Gardner, 3 Mass., 300."

Verdict confirmed and judgment accordingly. Gray v. Gardner, 3 Mass., 399. Decided 1807. Action to recover land. The syllabus is: "After twenty years' acquiescence by the heirs of an intestate in the possession of the real estate of their ancestor, holden under a sale by the administrator, the court will presume that the
426 administrator took the *oath and posted the notifications according to law previous to the date; evidence being given of the license to sell and of the actual sale at auction."

The court say: "When it is * considered that * the transaction took place more than twenty years since, and that the probate records are now incomplete; the court are satisfied * that the jury made a fair and legal presumption. * If presumptions under these circumstances are not to be allowed the title to many estates holden under sales by license will be shaken, if not defeated. And these presumptions are not stronger than the common cases in the English books of procuring a grant after twenty years' undisturbed possession."

Read v. Goodyear, 17 Sergeant & Rawle, 350. Decided July 3, 1828. In this case the plaintiff showed a paper title. The defendant gave evidence of a warrant to the sheriff, date July 5, 1803, to sell the land for taxes; a sale by sheriff to Ross, November 28, 1803; a deed by Ross to defendant, and proved his payment of taxes until suit brought.

Rogers, J., in deciding the case, says: "If the plaintiff can recover under such circumstances, it is obvious, it would be a premium for non-payment of the county rates and levies. He would recover back his lands without having paid or offered to pay one cent of the county assessments, for the defendant will have sustained these burdens for his benefit. For thirty years he has abandoned all claim, and in all probability we should not have heard of this suit had it not been for the increased value arising from the settlement of the country. It should be an unbinding principle of law which would sanction the recovery in favor of a person so negligent of his rights and the duty imposed upon him against the holder of the land who has regularly paid the burden assessed for public purposes. If one, claiming by warrant and survey, omit to pay one part of his taxes for twenty one years, and suffer one who has entered without title and settled on the land to pay the whole taxes during that whole period, the jury may presume he was ousted and he will be bound by the act of limitations. 10 Serg. & Rawle, 306. This, it is true, is not the point of the case, and, therefore, not cited as a binding authority; but it is referred to for the good sense in the dictum of the learned judge." * * *

"Several bills of exception have been taken to detached parts of the evidence offered by the defendant and overruled on the ground that 'an exact and punctual adherence to the laws can alone divest the title of lands on a sale of non-payment of taxes.'" That a minute conformity to the laws in ordinary cases must be proved under the act of 1796 and 1804, is too well settled to be now shaken, but that the principle under the facts governs this case may well be doubted. It has not, so far as my researches have extended, yet had the benefit of a judicial decision, whether lapse of time may not alter the rule and throw the *onus* on the warrant holder. That there must be some limit when courts of justice should apply the maxim, *omnia præsumuntur rite acta*, will appear from the consideration that otherwise the longer the possession the weaker the title. After the lapse of twenty one years it is almost impossible to prove a literal compliance with the act, and to exact a punctual adherence to the letter would be equivalent to saying that a sale for taxes should

not be supported. It would only be necessary to lie by until the evidence of the regularity of the sale was lost, when a recovery would be the necessary consequence. Time would strengthen the title of the warrant holder in the same proportion that it weakened the title of the vendee of the land. *

The court then cite, Toth., 54, S. C. Veru., 196; Pencose v. Frelqurey, 1 Veru., 196; S. C., 2 Ch. Cas., 150, and the court say:

*"The plaintiff sought to have a conveyance of his father's estate set 427
aside, which was made twenty years since, when the father was eighty years old, and *non compos mentis*; the court declared that after twenty years and two purchases it was not proper for the court to examine a *non compos meetis*, and dismissed the bill." 1 Ch. Rep, 40; 1 Ch. R. 139. S. P., 2 Ch. R, 48, the court refused to reverse a decree sixteen years old 2 Veru., 32.

"For a number of similar instances in which equity regards length of time, I would refer to Francis' Maxims in Equity, Maxim, 10, p. 38."

The court then cite in support of presumptions at law: Young v. Collins, 2 Browne, 98; Strickler v. Todd, 10 Seig. & R, 63; Miller v. Beates, 3 S. & R., 490; Kingston v. Leslie, 10 S. & R 391; Lessee of Ewing v. Barton, 2 Yeates, 318.

The court conclude: "Here in consequence of lapse of time the evidence should have been received and the jury should have been left to presume an ouster, and whether under the circumstances there was not an abandonment of all right to the land by the warrant holder."

This case shows that it is by no means necessary to prove the loss of records in order to let in the presumption that all has been properly done. Freeman v Thayer, 33 Maine, 76, decided 1851.

Trespass involving title of land.

In 1816 the land was sold for taxes, and defendant claimed under this.

The statute requires that to support a tax sale the party shall "prove that such collector complied with the requisition of the law.

The defendant proved "that the assessment * was lost * that some of the notifications required by law were duly posted * but he failed to prove * that the other requisite notifications were given."

In the court below the tax sale was sustained.

HOWARD, J..

"The defendant assumed that the statute furnished a rule of evidence for him in preventing and sustaining the title derived from the sale for taxes."

"If this question of title had arisen before the expiration of twenty years from its origin, evidence might, perhaps, have been introduced, which time and accident may have rendered inaccessible. Then the facts, unaided by pressumptions of fact, might have constituted the evidence to sustain the title originating in the collector's sale.

"It has been determined that after the lapse of thirty years from a collector's sale of land for taxes it may be presumed, from facts and circumstances proved, that the tax bills, valuation, warrants, notices, etc., were regular; that the assessors and collector were duly chosen at legal meetings; that the collector was sworn; that a valuation and copy of the assessments were returned by the assessors to the town clerk, and that everything which can be thus reasonably and fairly presumed may have the force and effect of proof. Gray v. Gardner, 3 Mass. 402; Knox v. Jenks, 7 Mass., 492; Coleman v. Anderson, 10 Mass., 105; Pepipscot Proprietors v. Ransom, 14 Mass., 147; Blossom v. Cannon, 14 Mass., 178; Battles v. Holly, 6 Greenl., 145; Soc. for Propagating the Gospel v. Young, 2 N. H. 310; Bergen v. Bennett, 1 Cain. Cas. Err., 18; The case of Corporations, 4 Coke, 78; Rex v. Long Buckby, 7 East, 45; Read v. Goodyear, 17 Serg. & Rawle, 350; 3 Sugden v. & P. 16—43, 6th Amer. from 10th Lond. edition."

Judgment on the verdict.

Ferrar v. Eastman, 5 Greenl., Main 345, decided 1828, trespass involving title to land. Defendant set up title under tax sale, deed April 5, 1780. In the court below, the court rejected the tax deed.

*WESTON, J. 428

"It is an ancient transaction; and neither the note of the proprietary, nor the deed under it are drawn with any attention to legal precision. It is well known that much of the business of these proprietors was loosely conducted; and after such a lapse of time, and for the purpose of upholding their proceedings and of titles derived from them after such long acquiesence, they are to be viewed with

great indulgence. Whether in a recent case greater precision and a more clear and perfect deduction and pursuance of authority would not be required, it is not necessary now to decide. It is not essential that all the facts necessary to sustain and justify the sale should be recited in the deed. They may be presumed or proved *aliunde*. Such as do not appear in the records and among the papers of the propriety, may, and after such a length of time will be, presumed.

"The opinion of the court is that the deed of John Knox, which was rejected at the trial, was by law admissible in evidence. The verdict is, therefore, set aside, and a new trial granted." Brown v. Connelly, 5 Blackford, 391, decided 1840.

BLACKFORD, J.

"The rule that secondary evidence shall not be admitted where primary evidence is attainable, although a sound general rule has been relaxed in some cases where general convenience has required the relaxation. The character of a public officer is one of those cases."

Keane v. Cannovan, 21 California, 300, decided 1833.

"There are many transactions of which it is impossible or extremely difficult, after the lapse of little time, to produce the proper evidence, and in favor of the regularity of which presumptions are in consequence made by the law."

Bierce v. Pierce, 15 Ohio, 533-543-547; Wallace v Seymour, 7 Ohio, part 1, p. 156; Ridley v. Hetman, 10 Ohio 524; Lessee of Winder v. Starling, 7 Ohio, part 1, p. 190; Bank of U. S. v. Dandridge, 12 Wheat., 70; 2 Ohio St., 241-246; 4 Ohio St., 112-148; Easton v. Savery, recently decided in Iowa.

In Calvert v. Fitzgerald Litt. Sel. Cas. 388-392, probate of a will was presumed on proof of sales by the executor, the records having been destroyed.

Many of the authorities hereafter cited are equally applicable under this head, and to them reference is made accordingly.

The statute of limitations, the presumption of regularity of official acts after 20 years, and the doctrine of a presumed grant hereafter noticed, all rest on the same maxims and principles of public policy, and as the statute is conclusive, so should the presumptions referred to be equally regarded as conclusive. Hence, it is that the authorities noticed show that the legal presumptions in favor of the regularity of official proceedings is *per se* original evidence or the equivalent of original evidence after 20 years, and in such case there is no necessity for a resort to secondary evidence or even to other original evidence.

And certainly when the primary evidence to support a tax sale or judicial sale is lost, the presumption in favor of regularity may well be made without reference to secondary evidence.

This must be so, because:

1. This is the logic and result of the authorities.

2. It must be so on reason. All secondary evidence is imperfect. If it be
429 produced it will come with its imperfections, and thus a party may *lose a title which the original evidence would have sustained. If the presumption be not made, lapse of time instead of being a muniment of title will impair titles, (1) by the loss of evidence and (2) by the facilities thereby afforded to advances, fictitious and fraudulent claims.

3. Any other doctrine practically defeats the whole purpose of the presumption and the maxims on which it rests. It is equivalent to saying that where the maxim *omnia acte rite*, etc., is most needed, it shall not apply. It is most needed to avoid (1) the uncertainties of secondary evidence, (2) the loss of original evidence by time, and (3) to defeat fraudulent claims.

4 It must be so on grounds of public policy.

The same rule which applies to tax sales is to apply to all judicial sales. Is a defect in or loss of judicial records never to be cured? If not, there is no safety in judicial sales. If the record of a judgment is burned, shall not a sheriff's deed of sale, especially if there be no adverse claim made for 20 years, be sufficient evidence of the existence and regularity of the official proceedings necessary to support it?

II.—PRESUMPTION OF A GRANT.

1. Where a party has been in adverse possession of lands, tenements or hereditaments, during a period equal to the statute of limitations, the law in cases to which the statute does not apply, presumes a grant to him from the original holder of an outstanding legal or equitable title. This doctrine was first adopted by the

court of chancery in 1707, and it was adopted by the court of law in 1761. Wallace v. Fletcher, 10 Foster 446.

This doctrine has been much discussed in the elementary books and adjudicated cases. Reference will be made to some of these.

THE ELEMENTARY AUTHORITIES.

The standard American work on the subject says: "Long possession in the eye of the law is an assurance of title, because it is in itself evidence of title, *Priora præsumuntur a posterioribus.* * * * And in order to render the title of the possessor complete, they (the courts) will presume * execution of deeds, etc. agreeable to the maxim, *exdiuturnitate temporis omnia præsumunter solemniter esse acta.*" Angell on Limitations, Sec. 3-4.

Again Angell says:

"The doctrine of prescription is founded on public policy. The spirit of the maxim, *Interest Reipubicae ut sit finis litium*, may be traced to a more remote period than the Christian Era." Angell Lim. Sec. 9, *Vigilantibus non dormientibus inservit lex.*

"With respect to land * there is one other public consideration in support of the doctrine of prescription * that during the litigation it must become waste and unproductive from want of improvement." Angell Lim., Sec. 9; Hovender v. Ld. Aunsly, 2 S. Ch. J. & Lifr. R., 629; Lewis v. Marshall, 5 P t., 570; Hawkens v. Barney, 5 Pet., 547. "Lapse of time is * a dereliction of all ground of objection —a protection against * claims, the injustice of which (from lapse of time) it is extremely difficult to detect and expose." Angell, Sec. 10.

The most philosophical of all our books on evidence says:

"Although no one can prescribe against the Crown, the maxim being *nullum tempus occurit regi*, yet after long continued enjoyment a grant from the Crown may be presumed. After long continued exercise of a right of advowsor by the prior of Stonely, it was held that a grant was *to be presumed. For that **430** all should be presumed to have been solemnly done, which could make the ancient appropriation good, although the original grant could not be found." Stark. Ev. Part IV. 1222; 1 Phillips, Ev., 442-455; Cow. & Hill, Notes, Part 1, page 486, Note 298 to Phil. Ev.

Another elementary writer of high authority says: "The fiction of presuming a grant from twenty years' possession or use was invented by the English courts in the eighteenth century to avoid the absurdities of their rule of legal memory. and was derived by analogy from the limitation prescribed by the statute, 21, Jac. 1, c. 21, for actions of ejectment, not upon a belief that a grant in any particular case has been made, but on general presumptions." Washburn on Easements, 103 [68].

Again he says: p. 102 [66]: "Now an enjoyment of an easement for the term of twenty years raises a legal presumption that the right was originally acquired by the title. And this, though the jury should not find, as a fact, that any deed had ever been made. And, although the user never began, in fact, as an act of trespass."

Washburn, referring, p. 108 [72], to Townsend v. Downer, 32, Vt., 183, and Tracy v. Atherton, 36 Vt., 503, and in considering "whether the presumption * is one of law or fact," says: "If it is to raise the presumption of a grant without regard to the fact whether such a grant was really made or not, it may with the strictest propriety be said that the law presumes a grant, and it would be the duty of the court to direct a verdict."

Tudor, in his leading cases, 114, says:

"It became usual for the purpose of supporting a right which had been long enjoyed." * * * * * "and upon enjoyment being proved for twenty years, the judges held, or rather directed juries to believe, that a presumption arose that there had been a grant made of the easement * which had been subsequently lost."

In the work on "The Law of Religious Societies" by Lawrence, it has been discussed at some length. 22 American Law Register (O. S., Feb., 1874; vol. 13, N. S.), 72.

THE JUDICIAL AUTHORITIES.

Courcier v. Graham, 1 Ohio 330: This was an action of covenant for breach of contract to convey land, and the question was as to the sufficiency of the title. The court say:

"The first position of the court [below] was, that no continuance of possession for any time less than where the statute of limitations would operate to bar a recovery in ejectment was sufficient to warrant the presumption of a deed. The authorities show that continuance of possession for a less period of time, accompanied by other circumstances, might be sufficient to warrant this presumption." In Bailey v. Shaw and others (6 East., 215), Lord Ellenborough says: "I take it, that twenty years' exclusive enjoyment of the water, in any particular manner, affords a conclusive presumption of right in the party so enjoying it, derived from grant or act of Parliament. But less than twenty years' enjoyment may or may not afford such presumption, according as it is attended with circumstances to support or rebut the right."

From this I infer that possession alone would not be sufficient to warrant the presumption, unless continued for twenty years, and, if so, the court were correct.

The possession under Dayton had continued for more than twenty years,
431 and this possession was accompanied by circumstances *which would justify the jury in presuming, and they probably did presume, a title in that individual."

Lessee of Blake v. Davis, 20 Ohio, 241:

In this case a question of title arose under an imperfect partition.

RAMSEY, J., said:

"Possession was taken about nineteen years before the commencement of the suit, and has been continued * * *."

Presumptions do not always proceed on a belief that the thing presumed has actually taken place. "Grants are frequently presumed," as Lord Mansfield says, "merely for the purpose and from a principle of quieting the possession. There is much occasion for presuming conveyances of legal estate, as otherwise titles must forever remain imperfect, and in many respects unavailable, when, from length of time it has become impossible to discover in whom the legal estate (if outstanding) is actually vested." On appeal to the Lord Chancellor (Erskine) the decree was affirmed. He says: "The presumption in courts of law from length of time stands upon a clear principle, built upon reason, the nature and character of men and the result of human experience. It resolves itself into this, that a man will naturally enjoy what belongs to him. That is the whole principle." Mr. Justice Story, in delivering the opinion of the supreme court of the United States in the case of Prevost v. Gratz, 6 Wheat., 604, says: "The doctrine in Hilary v. Walker, on this subject meets our entire approbation," and it is also approved by Chancellor Kent in Ham v. Schuyler, 4 J. C. R. 7, Dutch Church v. Mott, 8 Paige, 81. Again in Ricard v. Williams, 7 Wheaton, 109, Mr. Justice Story says: "There is no difference in the doctrine whether the grant relates to corporeal or incorporeal hereditaments. A grant of land may as well be presumed as a grant of fishery or of a common or of a way. Presumptions of this nature are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions;" "and where the other circumstances are cogent and full, there is no absolute bar against the presumption of a grant within a period short of the statute of limitations."

If further illustration from the books were needed upon this subject, I know not where the general doctrine will be found more perspicuously stated than in Cow. & Hill's notes to Phil. Ev., vol. 2, page 368.

Lessee of McArthur v. Gallagher, 8 Ohio 518.

In this case the validity of a patent for land in the Virginia Military District was called in question because the land warrant on which the entry was made had not been assigned to the locator. The court say:

"It must be remembered that no particular mode of assigning military land warrants was prescribed by law. It might be done by an indorsement upon the warrant itself, or on a separate paper. Nor was there anything in the law requiring it to be done even in writing. That mode was adopted most convenient to the parties. (7 Wheat., R., 122). Courts will, under circumstances sufficiently strong, presume a grant or a deed, and there is no impropriety in a proper case made in presuming the assignment, and such presumption was made in the case of Bouldin v. Massie's Heirs. (7 Wheat., R., 122,) and in that case the subject is very fully and at large discussed."

Rex v. Ioliffe, 2 B. & C., 54, cited 1 Phil. Ev., 442, note, where it is said of this case: "Lord Tenterden, C. J., speaks of modern uses as affording cogent evidence
432 of prescription, and he observes that it is fit to recommend a jury *to make the presumption. In that case the usage had existed only for twenty years."

Chambers v. Mifflin, 1 Penn. R., 29. (Rawle, Penrose & Watts.)

"Although a warrant has been surveyed, yet, if not returned, the owner may change its lines, or change its place altogether, and lay it on any other vacant land anywhere near, until it is returned, the state has no power to collect arrears of purchase money. It never can be that a man can wait thirty or forty years, and all that time be able to say, this is my land, if I please, and not mine unless I please. I will take this land and pay the state for it, if the country improves, and it rises in value, or if somebody will render it valuable by improvement, but I will not take it and pay the purchase money unless something occurs to render it more valuable.

"Nor is it the law that a man can commence procuring a title from the state, and, from pure negligence, leave it in such situation for more than twenty years, as that he is not bound to take it, and no one else can safely take it."

Jarboe v. McAtee, 7 B. Monroe, 279: Bill to recind contract of sale because title defective, as no patent had issued to vendor or those under whom he claimed. The vendor * had been in possession fifty years. The court say: "After long continued enjoyment a grant from the Crown may be presumed; 3 Stark., 1,221, 1 Greenl. Ev., 50. In regard to public grants, a longer continued peaceable enjoyment has generally been deemed necessary, in order to justify the presumption, than is deemed sufficient to authorize the like presumption in the case of a deed from private persons, 10 Johns., 377. It is the policy of the law, and necessary to the repose and security of society, that such a presumption should be indulged. * * This presumption is peculiarly proper in this state, the history of its land titles showing that the lands were often covered by several conflicting grants. * *

"After the lapse of fifty years, which is the longest period allowed by our statutes for the institution of a suit for any description of real property, the presumption of a grant from the commonwealth is authorized in favor of a possession * continued during the time."

See cases collected Cow & Hill Notes, Part 1, p. 485, Note 298 to Phil. Ev. Ricard v. Williams, 7 Wheaton, 57:

"Possession of land by a party claiming it as his own in fee is *prima facie* evidence of his ownership. * *

"Presumption of a grant arising from the lapse of time are applied to corporeal as well as incorporeal heriditaments.

"In general the presumptions of a grant are limited to periods analagous to those of the statute of limitations, in cases where the statute does not apply. *

"But if the circumstances of the case are very cogent, and require it, a grant may be presumed within a period short of the statute, presumptions * are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions."

There is another feature of this doctrine of presuming a grant.

II.—Where the possession is adverse the presumption of a grant is one of law, not merely of fact, and the jury will be instructed to presume it if not rebutted. In some cases it is conclusive.

The possession of a lessee is not in law adverse to his lessor, that of a vendee is not adverse to his vendor, that of a trustee generally not adverse to his *cestui que trust*. But a possession adverse in law and in fact *is entitled to the benefit of a conclusive presumption of a grant to support it. Cow. and Hill's Notes, Part I., p. 486. Note 298 to Phil. Ev. 433

This is so for several reasons.

I.—The authorities are so.

Washburn on Easements, 105—70.

"It may, therefore, be stated as a general proposition of law that if there has been an uninterrupted user and enjoyment of an easement" * * * * * * "for more than twenty-one or twenty, or such other period of years as answers to the local period of limitation, it affords conclusive presumption of right in the party who shall have enjoyed it."

He cites numerous authorities, and on page 109 [72] says:

"This must now be considered as established law."

In Strickler v. Todd, 10 Serg. & R., 63-69, Duncan, J., said:

"It is well settled that if there has been an uninterrupted exclusive enjoyment above twenty-one years (the Pa. Stat. Limitations) of water in any particular way, this affords a conclusive prescription of right in the party so enjoying it, and that is equal to a right by prescription."

In Rust v. Lou, 6 Mass. 90, Parsons, J., says:

"The country has been settled long enough to allow of the time necessary to prove a prescription."

In Mayor v Horner, Cowper, 102, it is said;

"So in the case of prescription, if it be time out of mind, a jury is bound to conclude the right from that presumption if there could be a legal commencement of the right."

See Oswald v. Leigh, 1 Term, R., 270.

Parker v. Foote, 19 Wend., 309:

"Where there is no evidence to repel the presumption arising from twenty years' uninterrupted adverse user of an incorporeal right, the judge may very properly instruct the jury that it is their duty to find in favor of the party who has had the enjoyment."

Coolidge v. Leonard, 8 Peck, 504.

Knight v. Halsey, 3 Bos. & P., 172-206; 3 Dane, Abr., 55, says of the doctrine that it is

"A novel invention of the judges for the furtherance of justice, and the sake of place where there has been a long exercise of an adverse right."

Parker v Foote, 19 Wend., 309:

"The modern doctrine of presuming a right by grant * * exerts a much wider influence in quieting possession that the old doctrine of title by prescription."

Curtis v. Keesler, 14 Barb., 511.

Tracy v. Atherton, 36 Vermont, 503:

"The presumption arising from such long-continued possession unrebutted, is a presumption of law, and that it is conclusive evidence or sufficient evidence to warrant the court in holding that it confers a right on the possessor."

Jackson v. McCall, 10 Johns, 377:

"Where M. died in possession of land, and his son and heir at law succeeded to the possession, and continued in the undisturbed possession of it for above eighteen years, it was held that a purchase of the title by the ancestor might be presumed; and where there was an order of the council of the Colony of New York, in 1764, for the survey of the lot, as allotted to J. P., and a survey thereof made, though no patent could be found on record, it was held that a patent to J. P. and a deed from him to the ancestor, might be presumed for the sake of quieting the possession."(a)

In a foot note to the 3d edition of Johnson's Reports [Ed. 1839, p. 277] numerous authorities are collected.

434 *III. The presumption may be made of a grant from the holder of an equitable title, as an entry and survey in the Virginia Military District in Ohio, even as against a subsequent patent.

1. The authorities so held.

These have been stated.

In Ricard v. Williams, 7 Wheat. 59, it is said the presumption is proper "in cases where the statute [of limitations] does not apply"

1. Phil. Ev. [7 Ed.] 161: Cowen & Hill's Notes, Part 1, p. 486; note 298:

There is the greater necessity for it in such cases. They are within the reason of the rule.

In Ridley v. Hettman, 10 Ohio, 524, a court of equity refused to decree the legal title in favor of the prior entry where the junior entry carried into patent had been held for a period equal to the statute of limitations, though the statute did not bind the chancery court. This was evidently on the doctrine of "stale equity," or it should be more properly on a presumed grant from the party holding the original entry. Since the case of Ridley v. Hettman, the act of congress of March 2, 1807, declares void all patents issued on lands on which there was a prior survey. The holder of a prior survey could, therefore, procure a patent and would no longer seek his remedy in equity, but would do so at law. But if he delayed to procure his patent until the period had run out for presuming a grant from him in favor of the holder of a junior survey carried into patent with twenty-one years' possession under it, he would be without remedy. His equity under his survey would pass by presumption to the occupant under the junior survey: Duke v. Thompson, 16 Ohio, 48; Blake v. Davis, 20 *Id.*, 242; Ricard v. Williams, 7 Wheat., 244. This must be so or a large class of cases will be without remedy. See note 89 *ante*, as to notice and tax sales.

The only effect of the act of 1807 was to change the remedy from equity to ejectment at law. What was before illegal in equity became illegal at law. Yet if equity would not, prior to the statute, aid a party after twenty one years to recover on his prior survey against an occupant under a junior survey, it must, since the statute enjoin an ejectment, or rather defeat it by the presumed grant, or rights will be sacrificed to mere modes of redress.

Angell in Limitations, section 38; Johnson v. Irwin, 3 S. & R. 291; Thomas v. Hatch, 3 Sumner, 170; 22 American Law Register (O. S. Feb., 1874), 72.

2. These authorities rest upon a public policy especially applicapable to the Virginia Military District.

(*a*). These principles as applied to government grants are of the utmost importance, and are absolutely essential to the repose of society. The statute of limitations does not run against the government, nor in favor of the occupant of land until the patent issues: Rhoads v. Symms, 1 Ohio, 316; Duke v. Thompson, 16 *Id.* 34. A person who had complied with the pre-emption laws of congress, and so entitled to a patent, might neglect to procure its issue, his estate travel down through generations, and when the evidence of his claim is lost a third person might enter the land, procure patent and oust him but for this salutary doctrine. So a person might enter land, receive his certificate of entry, and having paid in full, but neglected to procure patent, might need the same principle for his protection.

(*b*). So in the Virginia Military District in Ohio, in the Kentucky Military District, and in others, entries on warrants never carried into patent might be lost without remedy but for this principle. Imperfect entries need the application of the rule. This should certainly be so *where a party came into possession under "color of title," as in Bedle v. Beard, 12 Co., 5 In the Virginia Military District the prior entry appropriates the land even as against a junior entry carried into patent. 435

(*c*). In our judicial proceedings the cases are very numerous where lands are sold without any legal title of record in the party owning in fact—on the record a mere equity. Unless aided by the presumption of a grant a fatal blow is given to judicial sales.

(*d*). Cumulative disabilities are not allowed even with the letter of the Statute of Limitations in their favor, because they would permit claims to travel down through centuries, "and be productive of incalculable mischief."

Ridley v. Hettmann, 10 Ohio, 526.

The same evil will result if a grant may not be preserved in favor of a possession against the holder of an equitable title.

3. The maxim *nullum tempus occurrit regi* has no application to such a case.

(*a*). The purpose of this maxim is to protect the rights of the government, not to enable private persons claiming under it to perpetuate a claim against other parties claiming from them.

Birch v. Alexander, 1 Wash. R., 34; Cow. & Hill's Notes, part 1, p. 486, Note 298 to Phil. Ev. and Note 301 pl. 40 p. 539, where authorities are collected; 22 American Law Register (vol. 13 N. S.), 466; Gwynne v. Niswanger, 20 Ohio, 556; McClain v. Bovey, 34 Wisconsin.

Additional authorities will be found cited in the preceding pages.

(*b*). The cases, therefore, which hold that the statute of limitations does not run in favor of a party in possession before a patent has issued does not in the least affect the doctrine of the presumption of a grant. In those States, as in Ohio, where a party can at law defend his possession on proof of an equitable title with right of possession, this presumption is sufficient to defeat an action to recover possession supported by a patent issued even within twenty years before suit brought.

In view of the vast number of land titles affected by these principles, it is hoped this review may be found of some value to the profession, and of service to the cause of justice in protecting titles.

WM. LAWRENCE.

BELLEFONTAINE, OHIO, January 1, 1879.

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*ATTORNEY'S LIEN—CHAMPERTY—EVIDENCE. 469

[Superior Court of Cincinnati, Special Term, 1879.]

STATE OF OHIO v. WILLIAM M. AMPT.

1. *Limit of Official Power*—The power conferred upon state officers by joint resolution of the Legislature, O. L., vol. 70, 403, to employ assistance, legal and otherwise, in the discovery and prosecution of tax claims owing to the state, does not include the power to agree upon the compensation with the person employed after the work is done, although it would have authorized the fixing of the compensation as part of the contract of employment.

2. *Attorney's Lien*—An attorney has a lien upon the money of the State which comes into his hands, as the fruit of his services for his compensation and necessary expenses, the same as though his client were an individual, and he can apply the same in payment of such compensation and expenses.
3. *Champerty*—A contract with the state to pay an attorney compensation "contingent upon success," or "contingent upon the amount recovered, is a valid contract and not void for champerty," the reason of law ceasing when the State is a party, the law has no operation in such cause.
4. *Expert Testimony*—Upon the question of a proper contingent fee to be paid an attorney for discovering and collecting taxes retained by the county and never placed upon the duplicate or distributed as taxes, the customary rates paid to persons engaged in discovering and correcting errors of taxation for individuals upon contingent compensation is incompetent and inadmissible, the cases not belonging to the same class.
5. *Interest*—An attorney having within a reasonable time advised his client of the receipt of money collected, is liable for interest thereon only from the time of demand.

This was a suit against the defendant for the sum of $19,645.61, less a reasonable sum to be deducted therefrom for compensation as attorney. The defendant admitted an indebtedness of $60.60, for which he offered to confess judgment, and claimed the balance of the money on account of compensation. The case was tried at the December term of the Superior Court of Cincinnati, before a jury, The facts out of which the suit arose are as follows: In 1873 the State employed Ampt to collect the State's undistributed share of $396,897.93 of misappropriated taxes, called "Store Licenses," "omissions," and delinquent personal taxes which had been converted by Hamilton county to its own use, from year to year,
470 from 1856 to 1873, and of which *misappropriation and conversion the State had no knowledge or suspicion until 1873, when the facts were discovered and elaborated in detail by the defendant and made known to the state. A resolution was passed by the Ohio Legislature May 1, 1873, at the suggestion of said Ampt, for the express special purpose of enabling the State to acquire the results of his discoveries, researches and labors among the records of said county, from 1856 to 1873, and that said employment was under said resolution to collect the State's share of said taxes, amounting, with interest, to $120,343.50; by settlement or suit, the State to pay said Ampt for his discoveries, researches and labors in the finding, ascertainment, development and recovery of said claim, "a just sum contingent upon success," and upon the amount recovered. In pursuance of said employment, the defendant, Ampt, submitted a full exhibit in detail of his discoveries, researches and labors, showing a claim in favor of the State, as above stated, which exhibit, being approved by the State authorities, defendant was directed to recover the same from the county by amicable efforts if possible, otherwise by suit. The attempt at amicable adjustment having failed, three suits were brought in which the County denied all indebtedness and presented offsets against the State in excess of the State's claim against the County. Judgments were rendered in favor of the State in all three suits, less the interest, for $86,340.05, and the entire sum was paid to the State by Ampt, less $19,645.61. The proceedings were begun early in 1873, and finally completed in April, 1877. The sum of $2,000 had been paid by the State to Ampt; $500 upon the approval of the first exhibit, $500 upon the approval of the second exhibit, and $1,000 at the determination of the first suit; and this $2,000, with the sum retained, was a contingent fee of twenty-five per cent. of the

total amount recovered, including an excess of $60.60 retained by error in calculation. The matter of the compensation had been submitted to four gentlemen, upon a written statement of facts, for the purpose of ascertaining a basis of calculating the defendant's compensation, and upon this finding, which was about twenty-five per cent., the defendant claimed to predicate the amount of the contingent fee and asserted a lien upon the money in his hands, and applied the same in satisfaction of his claim.

*The state denied that the defendant was entitled to any consideration for the discovery of the claim; denied that there was any contract for a contingent fee; denied that any arrangement had in fact or in law been made for the purpose of ascertaining a proper contingent fee, and claimed that while the services of the defendant were of very great value in their character and their results, yet that a great portion of the service was clerical in its character, and not entitled to the same reward as legal services. The right of the defendant to retain the money and assert a lien thereon was admitted. 471

The testimony showed that upward of 15,000 vouchers had to be examined and passed upon in said three cases; that many of the records were missing and found by Ampt only after long search therefor; that the first case occupied the time of two referees for four and a half months; that the State's share of the missing money was $86,340.05, and the City of Cincinnati's share nearly $250,000.00; that a saving of $20,000 per year was effected by the breaking up of this system of devoting public moneys; that none of the moneys misappropriated were ever placed on the duplicate of taxes, that nearly one-half of the money was used by the County for County purposes, and the balance was used in enhancing the perquisites of county officers, and that no annual examining committee, yearly appointed by the court of common pleas, had ever detected the wrong-doing. The right to appropriate "Store Licenses" was based on section 15 of the tax law. The liability of the county for the tortious acts of its officers was involved in the cases, especially in the last one, where the money was not placed in the county fund.

The trial of the case occupied five days. The testimony of tax specialists was offered by the defendant as to the value of contingent services in the correction of errors in taxation for individual, but was excluded by the court as incompetent and irrelevant, because the case at bar did not belong to the same species. The finding of the four referees who certified to the compensation under the arrangement of Ampt with the State officers was also excluded from the testimony as a proceeding the State officers had no power to enter into.

The following was the charge of the court:

*HARMON, J. 472

The only question in this case is the amount of the fee the defendant was entitled to receive, he having a right to keep the money as he had kept it, having a lien upon it. The jury are for the purposes of this case the legislature, and are to give Mr. Ampt a fair compensation for the services rendered.

"It matters not that the State was a large body. The State stood in the same relation to him as if it were a private individual. Mr. Ampt could not recover, of course, for any time spent or services rendered in the examination of this matter while he was practicing attorney, but he had a right to the experience, both general and special, which he had

while prosecuting attorney, and he had a right to avail himself of that for the prosecution of this case. Whether it would enable him the better to try the case, or in anywise give an advantage, that advantage was a legitimate one. As to the services of a lawyer, there was no market price to be placed on them, and, therefore, the law permitted persons to be sworn to give their opinions as to what they were worth. The jury were allowed to be guided, in reaching their verdict, by the opinions of persons familiar with the value of such services. As those opinions are conflicting, it is for the jury to say, from the experience of the witnesses, the reasons they give for their opinions, and, from all the probabilities and circumstances, which opinions they will allow the most weight. The witnesses had testified that the services would be worth more if the contract were contingent than if it were an ordinary contract, so that it would be necessary, first, to determine what the real contract was, and this jury must determine from the correspondence and consultations and subsequent contract of the parties. Neither the Attorney-General nor the Auditor of the State has a right to make any agreement as to the amount Mr. Ampt should receive, as these officers were not authorized to settle with Mr. A., but simply to employ him, although, as part of the contract of employment, they might have fixed a sum as his compensation. It was the business of the Legislature to pay for the services, and the jury stood in their stead to say how much the pay should be. The testimony of the tax lawyers is also ruled out as incompetent, because, as this
473 case does not belong to the *class of cases in which the custom to which they testify prevails, that custom could not apply to this case."

Verdict for State $65.80 being the amount admitted to be due by defendant, with interest from time of demand.

Taft & Lloyd, for State.

Aaron F. Perry, Ampt & Bro., for Defendant.

RETROACTIVE LAWS—TAX SALES.

[Hamilton County District Court, 1878.]

Burnett, Avery and Cox, JJ.

STATE OF OHIO EX REL. CULBERTSON v. W. S. CAPAELLER.

The penalty fixed at the time of a delinquent tax sale cannot be altered as to the purchase by a subsequent statute.

AVERY, J.

This is an application for a writ of mandamus against the county Auditor to compel him to issue a certificate of redemption for lands of the relator sold at delinquent tax sale.

The sale was last January, at which time, by the law then in force, the penalty prescribed in case of redemption during the first year, was twenty-five per cent. By the law now in force it is fifteen per cent. (75 O. L., 494).

The relator has tendered fifteen per cent., but the Auditor refuses to issue the certificate of redemption. The question is whether the penalty

fixed at the time of a delinquent tax sale can be altered by a subsequent statute.

The power of taxation is granted to the State for public purposes, and in furtherance of the exercise of the power, the law creates a lien. To the same end provision is made for the sale of delinquent lands, and for transferring the title of the State to *the purchaser. The certificate of purchase may not convey the legal title, but is evidence of 474
an equitable one. The statute declares it shall be assignable, and shall vest in the assignee or his representatives all the right and title of the original purchaser, and upon the death of the holder it descends as a realty to his heirs. (8 O. S., 216).

Under the constitution the General Assembly can pass no retroactive laws, or laws impairing the obligations of contracts. The obligation of contracts consists in their binding force upon the party by whom made. Delinquent tax sales are contracts by which the right to the legal title is acquired, subject only to the redemption for which existing statutes may provide, and to affect the right of the purchaser by changing the terms of redemption would be to impair the obligation of the contract of sale.

"A law is void," says Judge Cooley, "which extends the time for redemption of lands sold for delinquent taxes, after the sale has been made, for in such case the contract with the purchaser, and for which he has paid his money, is that he shall have title at the time then provided by law, and to extend the time is to alter the substance of the contract, as much as would be the extension of the time of a promissory note." (Cooley Cons. Lim., 291). The same reason applies to a change in the amount of the penalty; indeed, if it were permitted to deprive the purchaser of any part of the penalty, he might be deprived of all.

The law now in force is not retrospective in its terms, and as it would be unconstitutional, if it were so, is not to be so construed. The application for the writ will be refused.

Logan & Randall, for Relator.

C. W. Baker, *Contra.*

RAILROADS—CONTRACT.

[Hamilton County District Court, 1879.]

OHIO AND MISSISSIPPI RY. CO. v. J. C. SHORT.

1. A contract by which a railroad is to send all its traffic over a connecting road, the latter to reserve one fourth of the gross earnings of the traffic and apply it to pay off a portion of construction bonds issued for building the connection is not *ultra vires.*
2. Under a contract by a railroad company to use certain earnings in the purchase of bonds of a certain issue, the bonds to be required at each purchase to be designated by lot, where all the bonds have come into the hands of one person, an action lies without designating the bonds by lot, the object of choosing by lot being to treat all bondholders alike, and is unnecessary when all are held by one person.

Petition in Error to the Court of Common Pleas.

BURNET, J.

The action was brought on a traffic guaranty, executed by plaintiff in error, indorsed on a series of bonds issued by the Cincinnati and White-

water Valley Railway Company. It appeared from the pleadings and
475 evidence in the bill of exceptions *that the Whitewater Valley Company and the Harrison Branch Railway Company, which formed a continuous line of the railway from the Harrison Junction on the line of the Cincinnati and Indiana road, to Chicago, and which, up to the time of this transaction, had access to Cincinnati, desired to obtain another entrance over the O. & M. road, and for the purpose of constructing this road, it was considered necessary to issue $200,000 of bonds of $1,000 each, secured by mortgage on the road. The project implied a working connection with the O. & M. road, and a contract was entered into by the new company, by which all the traffic brought to Cincinnati over the O. & M. should be received by the new company at North Bend and transmitted to the other road; and, in consideration of this agreement, the agreement now sued on was also entered into by which the O. & M. Co. obligated itself to reserve from the traffic received from the Whitewater Valley Company, one-quarter, which was to be applied to the purchase of $100,000 of these bonds, and at the end of each year the money applied to this purpose was to be used in purchasing such of these bonds as should be designated by lot by Messrs. King and Kinsey, the trustees. It was alleged that in March, 1875, this running arrangement between the two roads was, by mutual consent, abrogated; that on the first of June it was ascertained that there was over $8,000 of the proceeds of the traffic to be applied to the purchase of the bonds; that the trustees named in the mortgage, in compliance with traffic guaranty, designated the first eight in numerical order; that a demand was made to the officers of the O. & M. to purchase the bonds, and that they refused to do so.

It was claimed by the plaintiff in error, against whom judgment was rendered in the common pleas, that the contract was *ultra vires*, being one which the O. & M. could not enter into. This court did not see why it should be considered *ultra vires*, or why the O. & M. could not enter into it. The road of the Whitewater Company was built for the mutual advantage of the O. & M. and the line beyond Harrison Junction. The running arrangement would be beneficial to the O. & M., and the court could see no reason why that company should not obligate itself to apply a portion of the proceeds of the traffic to the purchase of bonds.

476 *It was claimed by plaintiff in error that as the bonds were not designated by lot there was no right of action against the company. It seems from the evidence and pleading that the whole series of bonds embraced in this agreement were bought by Short, the defendant in error. The purpose of this designation by lot was that whoever might be the holders of the bonds should have an equal opportunity of availing themselves of this agreement, and that the whole of the $100,000 bonds might have an equal currency in the market when offered for sale. That was an agreement first for the benefit of the railway issuing the bonds, but after their issue it was simply for the benefit of the holders, and when all the bonds had come into the hands of one person there was no longer any purpose to be subserved by designating them by lot. The court found no error in the court below, and affirmed the judgment.

Jordan, Jordan & Williams, for Plaintiff in error.

King, Thompson & Maxwell, *Contra*.

JUDICIAL SALES.

[Hamilton County District Court, 1879.]

SPRINGMEIER, SHERIFF v. BLACKWELL.

An order of the court that the sheriff shall pay taxes that are a lien on the property sold at sheriff's sale, does not impose an extra official duty, and the purchaser who was compelled to pay the taxes may recover from the sheriff the amount.

COX, J.

Blackwell brought suit in the common pleas to recover an amount he had paid as taxes on real estate he had purchased at sheriff's sale, made under an order of the common pleas. A bill of $8 was paid by the sheriff for taxes under the order of court and the balance was distributed. It turned out afterward that $159 of taxes were unpaid. This consisted of the taxes of 1875 and for 1876. The court below decided that the taxes of 1876 were not a lien on the property. That under a decision of the supreme court commission in the case of property sold before the tax of 1876 was placed on the duplicate the sheriff was not bound to pay the tax, but the tax of 1875 being on the duplicate and a lien on the property, the court decided the sheriff should have paid it out of the proceeds. It was claimed by the sheriff that it was not incumbent on him to *obey the order; that it imposed on him an extra official duty, and that his sureties would not be liable if he failed to perform it. 477

The court held that the sheriff, as a trustee, was invested with the control and custody of the money, and was bound to obey the order of court. It was his duty to hold the money until the taxes were paid, and if he paid money into the hands of persons who were not authorized to receive it, he was liable. The purchaser was entitled to receive the property unincumbered of the taxes, and was entitled to recover the amount.

Judgment affirmed.

Logan & Randall, for plaintiff in error.

J. Cutter, *contra*.

TELEGRAPH COMPANY--INDICTMENT.

[Hamilton County District Court, 1878.]

JACOB JACOBY v. THE STATE OF OHIO.

An indictment against one for sending a telegram in the name of another with intent to defraud, under section 11, of the act of March 31, 1865 (3467, R. S.) must as against a person other than a telegraph operator, show that the person knowingly sent a dispatch not authorized by the one whose name is signed.

BURNET, J.

In this case, which was prosecuted to reverse a judgment of the common pleas, Jacoby was tried under an indictment at the January term, 1877, for causing to be sent a telegram from Hamilton County to Marion County, in this state, requesting a party there to send $65 by express for board and doctor's bill, signing the name of another party, and with intent to defraud that party. The defendant pleaded guilty and

was sentenced to three months in the workhouse, and pay $100 fine and costs of prosecution.

The allegation of the plaintiff in error is, that he served out the three months and paid the costs of prosecution, and asks to be relieved from the fine. The indictment was made under the statute of March 31, 1865, for the regulation of Telegraph Companies. The indictment appeared to be framed under the eleventh section of the act, which was passed to confer certain privileges and impose certain duties on Telegraph Companies, and it imposes penalties for the neglect to perform them. The tenth section provides that if any person connected with any Telegraph Company of this state shall willfully divulge the contents of any private dispatch, or refuse to transmit or deliver the same with the view to in-
478 jure the sender, he shall be guilty of a *misdemeanor, and sentenced to imprisonment not exceeding three months, or pay a fine not exceeding five hundred dollars. The eleventh section provides that if any agent of any Telegraph Company, operator or any other person, shall knowingly transmit a false communication with intent to injure any one, speculate in any article of commerce, or send a dispatch that is not authorized by the person whose name purports to be signed to it, he shall be liable to the same penalty as in Section 10.

It is requisite, if this section will apply to others than those engaged in the duties of telegraphing, that it shall appear the person delivering the message shall knowingly send a dispatch that is forged or not authorized by the person whose name is signed. There is no allegation in this indictment of the commission of any such crime, and the sentence in the common pleas court was, therefore, clearly erroneous and the judgment will be reversed.

D. Humphrey's, for plaintiff in error.

L. W. Irwin, *contra.*

MUNICIPAL CORPORATIONS—SALOONS.

[Hamilton County Common Pleas Court, 1879.]

BAUER V. VILLAGE OF AVONDALE.

Under the grant of power to a village to regulate houses of entertainment, its ordinance requiring beer saloons to be closed between the hours of 11 P. M. and 5 A. M., is valid, and such regulation is not in restraint of trade or private rights.

MOORE, J.

This was a proceeding in error to reverse the judgment of the Mayor of Avondale. The plaintiff was prosecuted before the Mayor of Avondale under an ordinance which required saloons in the village where ale, beer and porter were sold, to be closed at 11 o'clock P. M., and not opened again before 5 o'clock A. M. Bauer was found guilty of violating this ordinance and was fined $5 and costs. This writ was prosecuted to re-
479 verse that *judgment. The plaintiff claimed that the ordinance was unconstitutional, being in restraint of trade, and that the mayor had no jurisdiction to try the case. Several similar cases are depending upon this one.

The court held that the municipal code has given the mayor of an incorporated village final jurisdiction to hear and determine any violation of an ordinance, unless imprisonment is prescribed as part of the punishment.

In this county the courts have often affirmed the general incidental power of municipal corporations to make ordinances, but have said that ordinances must be consistent with the laws or policy of the state, and they must be reasonable and not repugnant to fundamental rights. Nor must they be oppressive in their character, or in restraint of trade, or be characterized by special or unwarranted discrimination in particular cases.

The exercise of the power to enforce laws of this character is one of frequent application. The American Reports teem with cases on the subject, in full support of the enforcement of such regulations.

Being a question of reasonableness or oppressiveness, the court must judge in each case whether the exercise of the powers be reasonable. Where the power to legislate on a given subject is conferred, but the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power.

That the power to regulate houses of entertainment, given by the general assembly to villages, involving the right to so provide for their regulation as to prevent their interference with the peace and comfort of the inhabitants of the locality, is a practical question, and when cautiously exercised is one of the implied police powers exercised against "the few for the benefit of the many."

The supreme court of New Hampshire, in the case of the State v. Freeman, 38 N. H., p. 426, has had occasion to pass upon the validity of "an ordinance of the city of Dover, prohibiting restaurants from being kept open after 10 o'clock at night." The charter of that city, and the by-laws under it, do not materially differ from those in this instance. There it was claimed that the ordinance was repugnant to the constitution and *laws of the state, and that it deprived the citizens of the 480
right to "acquire property" by the prosecution of a lawful business. The court held that it was an unavoidable consequence of city ordinances that they, in some degree, interfere with the unlimited exercise of private rights which were previously enjoyed. It is one thing to deprive a party of his rights, and quite another to regulate and restain their exercise in such a manner as the common convenience and safety may require. If it is permissible to interfere in anywise with the private right of a person to carry on and manage his lawful business at such time and place, and in such manner as suits himself, we are unable to see anything unreasonable in requiring places of public entertainment to be closed at seasonable hours.

Judgment affirmed.

C. H. Blackburn, for Plaintiff in Error.

Stallo & Kittredge and Joseph Wilby, *Contra.*

FIRE INSURANCE—PROOF OF LOSS.

[Madison County Common Pleas Court, January Term, 1879.]

HAMILTON WILSON v. HOME INS. CO.

1. The mere fact of a note for an insurance premium not being paid at maturity does not of itself avoid the policy. It is the option of the insurance company to declare the policy forfeited.
2. Proof of loss not necessary, if company has been notified of loss and informed insured that they would, in no event, pay the loss.

COURTRIGHT, J.

The plaintiff, in 1872, effected an insurance with the defendant upon certain of his property, situate in Somerford Township. The premium was not paid in cash, but by a note, which contained a stipulation that if not paid at maturity the insurance should not be binding upon the defendant while the note remained unpaid. In March, 1874, one of the
481 buildings, insured *at $600, was burned, after the note had become due and unpaid. No proof of loss was made by plaintiff as required by the terms of the policy, but the plaintiff claimed the company had waived that right by notifying him that they would not, in any event, pay the loss. The defendant denies any waiver on their part, and insisted that the plaintiff could not recover for two reasons—first, that the note was not paid at the time of the loss by fire; second, that no proof of loss was furnished, as required by the terms of the policy. The court charged the jury in substance, that the mere fact that the note was not paid at maturity did not, of itself, avoid the policy; it gave the defendant the option of declaring a forfeiture, but this option must be asserted by clear and unequivocal acts. Whether the defendant has exercised such option, or waived its rights, is a question of fact for the jury, under all of the circumstances of the case. That proof of loss was not necessary to be made by the plaintiff, if the jury found from the testimony that the defendant, upon being at once notified of the loss, informed the plaintiff that they would, in no event, pay the loss, for the law would not require of the plaintiff the performance of a vain thing; that if the jury found that the defendant had not exercised its option and had waived the proof of loss, then the plaintiff was entitled to recover; but if the defendant had exercised its option or had not waived the production of proofs of loss, then their verdict should be for the defendant. The jury rendered a verdict for plaintiff for $771.00.

(The judge, in the above decision, has followed strictly the case of the Mutual Benefit Life Ins. Co. v. French, 30 O. S., p. 240—ED.)

McCloud & O'Donnell, for Plaintiff.

S. F. Marsh, for Defendant.

For pages 498-99 see page 597 this volume.

*LIBEL—PUBLIC OFFICER. 541

[Superior Court of Cincinnati, Special Term, 1879.]

GUSTAV. WAHLE v. CINCINNATI GAZETTE CO.

When an action for libel is brought upon a publication charging the plaintiff with having committed larceny, it is not a defense to such action that the matters complained of were published by the proprietor of a newspaper in his capacity as journalist, of a public officer, concerning his conduct as such, upon information and with an honest belief in their truth.

This action was brought to recover damages for certain publications made in the Cincinnati Gazette, of and concerning the plaintiff, during his term as Postmaster or Cincinnati. The petition contained several causes of action, to which the first plea of the defendant was a traverse, the second a plea of privilege, and the third a plea of justification. The plaintiff demurred to the second and third pleas.

FORCE, J.

The third plea is to the entire petition, and hence if there is a cause of action in any part of the petition not justified by the plea, the plea is not a good answer. Among the various things charged in the matter alleged to be libelous, is the charge of theft. It is undoubtedly true that where one calls another a "thief," the accompanying words may explain the way in which the word was used, so as to make it a term of general abuse, and not a charge of larceny. But in this case the charge is not merely made in general terms that the plaintiff was a thief, *but states that, having been a thief, he should go to the penitentiary; 542
that he is a felon, a person not proper to be entrusted with the transmission of money orders. It is clear, therefore that the word as used is a specific charge of larceny. In this third answer the defendant says that each and every allegation in the publication in reference to the abuse of his office by the plaintiff, in conspiring to injure the Gazette Company, in receiving and detaining the issues of the Weekly Gazette, or mailing of the annual hand book or posters sent to the office by the publishers of the Cincinnati Times, is true, as published. Now, it is alleged that certain acts were done as they were charged to have been done. But the charge as printed is not merely having done an act, but with doing it with a felonious intent. While the plea would be good as to a justification of the act, it is not good as a justification for saying that the act was done with a felonious intent. The demurrer to that plea will, therefore, be sustained.

The demurrer to the second plea presents a question of more difficulty. This plea states that the defendant, as a public journalist, published in its public newspaper the matters complained of, concerning the plaintiff in his capacity as a public officer, upon full information, in honest belief in their truth, and without malice.

The allegation that the matters complained of were published by a public journalist, is immaterial. A newspaper has no special privilege in the discussion of public measures or public men. It would be a strange rule to hold that a man might with impunity spread a story abroad with the aid of an engine of fifty thousand tongue power, while

he would be punished for whispering the same story in the ear of a single acquaintance. But the rule is entirely uniform, not only throughout the United States, but in England, Ireland and Canada, wherever our system of the law prevails, that the right of a newspaper to discuss public measures and public men, is the right that belongs to every citizen—no other or greater right.

When the occasion is such that the statements made by one concerning another come under the head of privileged communications, it is a sufficient defence to an action for libel or slander that the statements
543 were made in good faith, with a *reasonable and honest belief in their truth, though such statement be a charge of indictable crime, as larceny. Brown v. Hathaway, 13 Allen, 239; or arson and purjury, Noonan v. Orton, 32 Wis., 106.

"The word 'privilege' signifies that species of immunity attaching to a person who, by reason of the circumstances of his position, is justified in uttering or writing of another matters which, if uttered or written by a third party, would be libelous or slanderous." Blackburn, J., in Campbell v. Spottswoods, 3 B. & S., 769.

Representations concerning the conduct of a public officer made by a person interested in the proper management of the office to the authority that removes and appoints the officer, if made with good motives, and not from resentment or for private ends, are privileged. Harrison v. Bush, 5 El. & Bl., 344; White v. Nicholls, 3 How., 266; Cook v. Hill, 3 Sandf., 341.

It would seem, therefore, that under a representative government, every citizen being interested in the official conduct of public officers, statements made concerning the official conduct of an officer while he is yet in office, would come under the head of privileged communications; that is, such statement would not be actionable, though otherwise libelous, if they be made in good faith, from good motives, with an honest and reasonable belief in their truth. But the question is, what is the rule, in fact, as established by the authorities?

It is instructive to go over the later English cases and observe that, as the representative character of the British government becomes more pronounced, the right to discuss public measures and public men is more distinctly recognized.

In Kane v. Mulvaney, Irish R. (C. P.), 462, decided in 1866, the Common Pleas of Ireland say: "Upon principle we entertain no doubt that the right to comment upon the public acts of public men is the right of every one of Her Majesty's subjects, and though no case has been referred to, we do not fear to make a precedent establishing the right; and we, therefore, hold that the fact of the circumstances of the publication, not having been shown, will not make the defense bad." P. 468.

In Harle v. Catherall, 14 L. T. (N. S.), 801 (which I have to take from the text books and from Fisher's Digest, not having *access to the new
544 series of the Law Times). Baron Martin, of the Court of Exchequer, held that the way-warden of a district is a public officer, and that a communication by a tax-payer published in a newspaper charging that a way-warden had paved and drained his own premises with the public money, was a privileged communication; and in an action for libel against the proprietors of the newspaper, it was ruled that there was no limit to the comments on the public acts of a man who held a

public office, unless the jury found that such comments were made maliciously.

The court of common pleas, in a series of cases running from 1861 to 1876, declared the same rule.

Plaintiff was a clerk in the foreign papers' office. Defendant, in a communication in a newspaper, charged that the plaintiff, by reason of his bias and training, was an unsafe person in such an office; that he had to be watched; that there was a risk that he would destroy the records under his charge, if he had not already partially done so. Such destruction is in England a crime. Plaintiff brought an action for libel. Chief Justice Erle, of the common pleas, charged the jury: "Every person has a right to comment upon the acts of a public man, which concern him, as a subject of the realm, if he does not make his comments the vehicle of malice or slander. The defendant in this case contends that he comes within this rule; that he, as a subject of the realm, having an interest in the foreign state papers, with which the plaintiff was intrusted, had a right to refer to and comment on the plaintiff's employment and the plaintiff's character in that office. And I am of opinion that the occasion would justify the comments, provided they can be brought within the limits laid down by the law in this class of cases. The rule is, the comments are justified, provided the defendant honestly believes that they are fair and just. With that limitation the law allows the publication." Turnbull v. Bird, 2 Fost. & Fin., 508, See p. 523-4 (1861).

This statement of the law was affirmed by the common pleas *in banc* in Henwood v. Harrison, L. R. 7, C. P., 606; Davis v. Duncan, L. R. 9, C. P., 396, and in Purcell v Sowler, L. R. 1, C. P., Div., 781. In the last case,decided in 1876, the plaintiff was physician to the poor in a country district, and, *charges against his official conduct having 545
been presented to the district board, a reporter obtained a copy of them and published them in the defendant's newspaper. The Court held that the rule of privilege did not apply "Where the person of whom the defamatory matter is written is a person whose position and character are of general interest to the whole country, or where the subject matter dealt with is one of general interest to the whole country, the matter is privileged. But the conduct of a medical officer who has charge of the poor of a single remote district is not of such general interest, and is not privileged."

Contemporaneous with this series of decisions of the common pleas was a series by the judges of the Queen's bench, not so definite in statement, but at all events not in harmony with the rule announced by the common pleas. In Seymour v. Butterworth, 3 Fost. & Fin , 372, Lord Cockburn, in 1862, charged the jury that it is not disputed that the public conduct of a public man may be discussed with the fullest freedom, but this freedom did not give a writer the right to impute motives; and if, for example, a writer should charge a member of Parliament with corrupt motives for a particular vote, such a charge should never be treated lightly by the verdict of a jury when the charge could not be substantiated. And next year, in Campbell v. Spottswoods, reported in the same volume, p. 421, he said (p. 432): "It cannot be said that because a man is a public man, a public writer is entitled not only to pass judgment upon his conduct, but to ascribe to him corrupt and dishonest

motives." Campbell v. Spottswoods, being reserved to the court *in banc*, this ruling was affirmed. Cockburn, C. J., and Crompton, J., said a publication imputing base and sordid motives to a public officer is actionable unless proved to be true. Blackburn, J., and Mellor, J., said that the publication of statements concerning a public officer does not come within the scope of privileged communications. And Mellor, J., added: "As far as I am aware, this is the first time it has ever been contended that a libel which imputes the obtaining of money under false pretenses, and is not excused by being true, nor made on occasion in which the exigencies of society required it, is excused by the fact that the person making it believed it to be true." 3 B. & S., 769.

546 *In Wason v. Walter, L. R., 4 Q. B., 73, decided in 1878, Lord Cockburn, pronouncing the written opinion of the court, said: "Our law of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognized. Comments on government, on ministers and officers of state, on members of both houses of Parliament, or judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or *ex-officio* informations, and would have brought down fine or imprisonment on publishers and authors. Yet, who can doubt that the public are the gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile citizens, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties?" The case was the publication of a debate in Parliament, with comments. The ruling was that the publication of the debate was privileged, and the comments were not actionable, if the writer believed them to be true, and the jury should find them to be, "Under the circumstances of the case a fair and legitimate criticism on the conduct and motives of the party who is the object of the censure."

Finally, the case of Purcell v. Sowler was taken from the common pleas to the court of appeal, which now takes the plea of the former court of exchequer chamber, and was decided in 1877. L. R. 2, C. P., Div., 215. Lord Cockburn, in his opinion, said he was very anxious to have it distinctly understood that he disapproved of and rejected the reasoning of the common pleas while affirming their judgment. He held that the administration of these poor laws is of national concern, though the question is made concerning it in only a particular district. But that the publication of *ex parte* affidavits concerning such administration, read before a meeting of a board which was not necessarily public, was not privileged. And Bramwell, J. A., said: "If this had been a discussion on the plaintiff's conduct, *the facts not being in controversy*, the matter was a subject of such general public interest as would have given a

547 *right to comment upon it, and fair and *bona fide* comment would have been justified."

So that the rule in England, after a contest of sixteen years, seems to have settled down to this. If a writer undertakes to make statements of facts concerning the conduct of a public officer, he must be prepared to prove the truth of his statements. If he undertakes to criticise admitted facts, he is privileged to state anything that comes within the scope of fair and *bona fide* comment.

In the United States it has been held in one state that statements made concerning the official conduct of public officers come fully within the rule of privileged communications. The supreme court of New Hampshire declared, "In this country any citizen has the right to call the attention of his fellow citizens to the maladministration of public affairs or the misconduct of public servants, if his real motive in doing so is to bring about a reform of abuses, or to defeat the re-election or re-appointment of an incompetent officer. If information, given in good faith to a private individual of the misconduct of his servant, is 'privileged,' equally so must be a communication to the voters of a nation concerning the misconduct of those whom they are taxed to support and whose continuance in any service virtually depends upon the national voice." Palmer v. Concord, 48 N. H., 211.

The court that pronounced this opinion was quite ready to establish a new precedent, and to abandon existing precedents when they appeared to conflict with the reason of the law. In State v. Pike, 49 N. H., 399, the same court, upon another question, the question of insanity, discarded all precedent and created a new rule. The opinions in Palmer v. Concord and State v. Pike, are admirably reasoned, but they stand alone and unsupported in American jurisprudence.

Throughout the United States the rule is that charges published concerning the conduct of a public officer, are not privileged; and if an action of libel is brought upon them, it is no defense that they were published in good faith, in an honest and reasonable belief in their truth. Usher v. Severance, 20 Maine; 9, Littlejohn v. Greely, 19 Abb. Pr., 41; Rearick v. Wilcox, 81 *Ill., 77; Wilson v. Noonan, 23 Wis., 105; Aldrich v. Press Printing Co., 9 Minn., 133. Such matters are not a defense to the action, but only matter in mitigation of damages. 548

As early as 1834 this rule was declared in Ohio by the supreme court on the circuit. Seeley v. Blair Wright, 683. It has not been overruled or qualified. A different rule cannot now be declared by a *nisi prius* court. That can be done only by a court which has authority to make precedents.

The demurrer to the second ground of defense is also sustained.

Tilden, Buckwalter & Campbell and Hoadly, Johnston & Colston, for plaintiff.

Sage & Hinkle and Jordan, Jordan & Williams, for defendants.

BILLS AND NOTES—EVIDENCE.

[Hamilton County District Court.]

Burnett, Avery and Cox, JJ.

BOVEY BRICK CO. v. FOUNDRY WORKS.

Parol testimony is admissible to show that at the time of the delivery of a promissory note to the payee, the note was not to be considered *as delivered* until it was signed by other parties.

ERROR to the Superior Court of Cincinnati.

Cox, J.

This case comes into this court on petition in error to reverse a judgment of the superior court of Cincinnati.

In that court a suit was brought upon two causes of action. The
549 first was upon a promissory note, dated January 1, 1874, for *$1,892.58, purporting to have been made by the Bovey Queen City Pressed Brick Company, payable one year after date, to the Chillicothe Foundry & Machine Works and signed by the Bovey Queen City Pressed Brick Company, by William M. Corry, president, and George Weber, treasurer. The second cause of action was to recover $2,200 for the the price and value of a brick machine made for the company by foundry.

Upon the trial of the case the plaintiff having introduced the note to sustain the first cause of action, the defendant thereupon, to maintain the issue upon its part, offered to prove to the jury by one A. B. Ratterman, and other witnesses who were ready and willing to prove the same, that the note in question, which was made payable to the order of the plaintiff, was signed by Corry as president and Weber as treasurer, and was delivered to J. McLean Welsch upon the express agreement, then made, that it was not to take effect as a delivered instrument until it was approved and signed by said Ratterman as such secretary. There was no proof to show that Corry and Weber were not authorized to make such a note, the note being in payment of all accounts between the parties for material and work. It further appeared that upon the presentation of the note to Ratterman for approval he refused to approve the same and never did sign the note, and that by reason thereof it never became operative as a delivered instrument. The plaintiff objected to the introduction of this testimony, which objection was sustained and the testimony ruled out, to which ruling of the court the defendant excepts. Judgment was entered in both causes of action for $4,300. A motion for new trial and exceptions taken.

It will be seen that the testimony proposed to be offered by defendant was to prove a parol agreement entered into between the parties at the time of the alleged delivery of the note, that although the note as signed was put into the hands of plaintiff's agent, it was agreed that it should not be considered as delivered until signed by Ratterman, and that Ratterman would not sign it. This is a question which has been mooted a great deal, and very many decisions upon both sides are cited to us, many of them come up squarely to a dead lock, each deciding different ways,
550 and, in the multiplicity of authorities upon both *sides, the court has been, as we think we ought to be in all cases, compelled to resort to first principles as far as we can in deciding the question.

Now, there are many important elements entering into the making of a promissory note. In the first place there must be a good and valid consideration. There must be parties who are competent to contract. It must be in writing. It must be payable at a fixed or stated time, and must be for a fixed or stated amount. It must be signed by the parties. It must be delivered to the person who is legally entitled to receive it, and all these are essential elements in order that a promissory note may be effectual.

The books all lay down the principle that it is essential to the validity of a note that it should be delivered, and that that delivery should vest in the holder (the party seeking to recover upon it), such a title as will authorize him to recover at law upon it and to receive its contents. It is essential to the delivery that the minds of both parties should assent in order to bind them, and if through any cause one party does not assent, the act of the other party is nugatory.

Now the question presented is whether, when a party holds a promissory note, a defense can be made upon the ground that, at the time of the alleged delivery, it was not in reality delivered, and whether parol testimony of an agreement entered into at the time the note was alleged to have been delivered, can be introduced to show a conditional delivery, or that no delivery was in fact made.

As to almost every constituent element of a note the law is well settled that parol testimony may be introduced in defense. While the rule is clearly stated by all the authors that parol testimony cannot be introduced to vary or contradict the terms of a written instrument, yet the law is well settled that you may introduce parol testimony as to the consideration of a note, as to the sanity of the party, as to the legality of it, and as to whether the parties signed it at all or not, and, if it be claimed that it was not delivered to the person claiming to hold it, you may prove that it had been left upon the counter of a bank and taken away; that it has been lost and that the party claiming to hold it, found it, that it was stolen, and you may prove the want of *title of the party claiming to hold 551
it, and yet, some authorities hold that you cannot prove by parol that at the time it was passed to the payee there was a cotemporaneous agreement that it was not to be considered as delivered until the fulfilling of another condition, because that would vary the terms of a written contract. So the 49th Missouri, 87, in a case like this, decides the case squarely, "first, because you cannot vary the terms of a written contract; and, second, because a promissory note, like a deed, cannot be delivered in escrow to the payee. You may deliver it to a third party, to be held until the conditions are performed, but you cannot deliver it to the payee himself."

Now, in regard to the first proposition, as to whether the testimony offered tends to vary or contradict the terms and conditions of a written contract, we do not think it does; nor is it intended to do so. The delivery is essential. It is necessary to give the party a title to the note. It is not a necessary constituent in the making of the note or contract. It has no value until it is delivered. Now, if you may show that it was lost and a party found it; if you may show that it was stolen and a party obtained it in that way; if you may show that it was dropped and the party obtained it in that way,—it seems to us difficult to understand why the delivery, being a matter which is not set forth in the note, but being an independent fact, necessary to the validity of the note, cannot be proved by parol. The delivery of a note is generally not in writing. When a man makes his note the delivery is a matter in parol, and our supreme court has decided that where an act done is admissible, anything that is said at the time of the commission of that act is also admissible in evidence. In the 26th Ohio State, the question was raised, when parties sought to introduce parol testimony, to show that a contract of subscription to a railroad company was to be delivered to the plaintiff for his use and benefit. The document did not set out that it was delivered. The delivery was denied by the defendant. It was sought to introduce evidence to show that it was never delivered to the party who claimed to own it, and the objection was made there that the party could not show that by parol, because that would vary or contradict the terms of a contract. But the court say on page *234: "The introduction of 552
parol testimony to prove the delivery of the instrument, and thus

establish the mutuality of engagements between the parties, was no infringement of the rule of evidence which forbids the use of parol contemporaneous evidence to contradict or vary the terms of written instruments."

This essentially, we think, sustains the proposition in this case.

Now, there are many other decisions in regard to the same matter, not only in England and this country, but also in our own state. Where a party makes a note payable to an heir, puts it in his desk with instructions that it be given at his death to a particular heir, and after death it is delivered. It has been held that such heir cannot maintain a suit upon the note, because it was not delivered in the lifetime of the maker, and that is a fact which can be shown by parol testimony.

In some cases the point is urged very strongly, that, where the note is handed to the payee, it is like the delivery of a deed to a grantee, it is an absolute delivery, and cannot be recalled, that a promissory note, like a deed, in order to be delivered subject to a condition, must be delivered to a third party.

There is a very great difference, it seems to us, between the principle of the two. In the first place, a promissory note, when it is delivered to a party with the consent of the party delivering it, is simply a promise. The payee does not get the money then, but he gets a promise to pay money at a future time; but, when a deed is delivered to a party, the delivery of the deed at once vests him with the title. Delivery of a deed is part of the execution of the instrument, and, when it is delivered to the grantee, it vests the title to the land in him. If it be not desired to invest him with the title, the deed may be put into the hands of a third party to hold until the condition arises upon which it is to be delivered, the title in the meantime being suspended. But there is no such reason in regard to the delivery of a promissory note, and this principle is distinctly laid down in the 11th Common Bench Reports, 370:

"The plaintiff declared upon an agreement made by the defendant to transfer to him a farm which the defendant held under Lord Sidney upon the terms and conditions of an agreement under which the same was held by the defendant under Lord Sidney. Held, that in support of his claim
553 to damages *for a refusal on the defendant's part to perform the contract, it was not necessary for the plaintiff to produce the agreement under which the defendant held. The defendant pleaded that the agreement declared on was made subject to the condition that it should be null and void if Lord Sidney should not, within a reasonable time after the making of the agreement, consent and agree to the transfer of the farm to the plaintiff. Held, that it was competent for the defendant to prove by extraneous evidence this contemporaneous oral agreement. Such oral agreement operated as a suspension of the written agreement, and not in defeasance of it."

The agreement that this note should be signed by Ratterman operated not as a defeasance of the note itself, but as a suspension of the delivery until Ratterman should sign it.

There is another case in the 6th Ellis & Blackburn, 370, bearing upon the case. That was an action on an agreement for a sale. The plea was *non assumpsit*. On the trial the plaintiff produced an agreement signed by the defendant. The defendant gave evidence that plaintiff and defendant having negotiated as to the purchase, agreed upon the

terms, and it was arranged that they and a third person, A, should meet, when, if A approved of the property, they would make a bargain on those terms. At the meeting the plaintiff did not attend until A had gone. It was then arranged that plaintiff and defendant should draw up a memorandum of the agreement of sale, but that it should not be a bargain until A, being consulted, approved. A did not approve. The judge directed the jury to find for the defendant, if satisfied that it was arranged that the writing should be no agreement until A approved. Held: A right direction.

In deciding the case, Erle, Judge, says: "If it be proved, that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is, that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all, is admissible."

Crompton, J., said: "I know of no rule of law to estop parties from showing that a paper, purporting to be a signed agreement, was in fact signed by mistake, or that it was signed on *the terms that it should 554
not be an agreement till money was paid or something else done. When the instrument is under seal it cannot be a deed until there is a delivery; and when there is a delivery that estops the parties to the deed, that is a technical reason why a deed cannot be delivered as an escrow to the other party. But parol contracts, whether by word of mouth or in writing, do not estop. There is no distinction between them except that where there is a writing it is the record of the contract. The decision in Davis v. Jones, 17 Com. B., 625, is, I think, sound law, and proceeds on a just distinction; the parties may not vary a written agreement; but they may show that they never came to an agreement at all, and that the signed paper was never intended to be the record of the terms of the agreement, for they never had agreeing minds. Evidence to show that, does not vary an agreement, and is admissible."

Lord Campbell, C. J., said, "I agree: No addition to or variation from the term of a written contract can be made by parol; but in this case the evidence was that there never was any agreement entered into. Evidence to that effect was admissible. * * * That being proved, there was no agreement."

We think upon principle, therefore, clearly that this testimony was admissible to show that there never had been any agreement between the parties to deliver, but that the agent of the plaintiff was a mere custodian to hold the property until it had been signed, or met the approval of the other party; that there never was any delivery in law of the instrument upon which suit is brought. We think, therefore, the court erred in ruling out the testimony, and for this reason the judgment should be reversed.

There it a second cause of action stated in the petition, and exceptions are assigned with reference to it, but the verdict is for a gross amount, including both causes of action, and the judgment is entered upon that.

Judgment reversed.

J. J. Gliddon, Attorney for plaintiff in error.

E. A. Guthrie, Attorney for defendant in error.

555 *RAILROADS—NEGLIGENCE.

[Hamilton County District Court, 1879.]

†THE C., C., C. & I. R. R. CO. v. ALFRED WALWRATH.

1. Negligence may be inferred from the happening of an accident which in the ordinary course of things would not have happened without negligence, and if in such case the party injured be free from fault, the imputation falls upon the party charged with the exclusive management and control of the agency or thing in respect to which the accident happens.
2. Where, without any fault of his own, the upper berth of a sleeping car falls upon a passenger sitting in a seat assigned him by the conductor of the car, and there is no explanation of the accident except that a subsequent examination of the berth disclosed no mechanical defect of the springs and catches, negligence in fastening the berth, or in not observing it had become unfastened, may be inferred against those in the exclusive management and control of the berth and car.
3. A passenger who had purchased a ticket upon a railroad, and paid for a berth, and taken his seat in a sleeping car that was part of the train, was injured while *en route* by the falling of an upper berth. The car was owned by the railroad company, but the inside fittings and berths belonged to a sleeping coach company, which, under a contract between the two companies, had entire charge of the interior of the car, and furnished its own employes; the railroad company agreeing it should be entitled to collect for its own use such fares as were usual for like accommodations upon competing lines, and that such rules should be mutually agreed upon as would best favor the renting of seats and coaches. It was a rule of the railroad company that every passenger in a sleeping car should have a first-class railroad ticket. Held, that the sleeping coach company was not in an independent employment, but was a subordinate agency selected by the railroad company, which was responsible for any negligence of the employes to the same extent as for its own employes.

ERROR to the Superior Court of Cincinnati.

AVERY, J.

Walrath recovered a judgment in the superior court against the railway company for $6,0 '0, as damages sustained by the falling upon his head of the upper berth
556 of a sleeping car while *he was sitting in the car as a passenger from Cleveland to this city, on the evening of September 2, 1875. The extent of the injuries sustained, or whether, indeed, he sustained any, was disputed at the trial, but the jury had the fact of his testimony together with the testimony of medical witnesses of repute, that the injury had resulted in partial paralysis, depriving him of control over a portion of his bodily functions, and, therefore, upon those points the verdict must be taken as conclusive.

The only questions to be considered are whether there was any evidence of negligence, and if so, whether it was negligence for which the railway company was responsible.

The court was asked to charge the jury that there was no presumption of a railway company's negligence from the mere fact of an accident happening to the plaintiff while he was a passenger in the sleeping car; that the burthen of proof was upon him to show, in the absence of any defect in the mechanism of the car, that there was negligence of the railway company's employes, and that the occurrence of the accident raised no presumption of such negligence; that the jury must ascertain in what the negligence of the company's employes consisted for which the company was responsible; that there was no evidence of the negligence of the railway company's employes; that the railway company was not responsible for any negligence of the employes of the sleeping coach company, and that it was responsible only for the negligence of its own employes.

The court refused all these charges, and charged that, while the mere statement that an accident had happened to a man upon a railroad would not raise any pre-

†The judgment in this case was affirmed by the Supreme Court. See opinion 38, O. S., 461.

sumption of negligence, the circumstances as detailed in the evidence might raise a presumption; that if the plaintiff, while sitting in his proper place as a passenger, was injured by the falling upon his head of a berth which ought to have remained in its proper place above, there was a presumption of negligence, for which the company would be chargeable; that, if there were no defect in the mechanism of the car, but if it were a reasonable presumption that the berth had not been properly fastened, or had become unfastened and its condition had not been observed, assuming that it might have been observed by the exercise of reasonable care, the jury would have the right so to presume; that the *sleeping car was a part of the train, and 557
the railway company was responsible as well for care in the construction and running of the car, as for care of the employes to whom was entrusted the management.

The first charge asked was an abstract proposition, since the question was not as to any accident, but as to the accident. The second charge was simply a continuation of the first and subject to the same objection. To the third charge it may be answered that it is not incumbent upon the plaintiff, after showing an injury which implies negligence, to go further and show in what the particular negligence consisted, where, from the circumstances of the particular case, it may be out of his power to do so. Feidel v. The Middlesex R. R. Co., 109 Mass., 398–406.

The other charges asked involve a proposition the direct converse of the charge given by the court, and if that charge was law, the charges asked were properly refused.

Negligence is an affirmative fact, but it may be shown negatively, that is, by excluding every reasonable probability that the injury would have happened except for negligence. If, in the ordinary course of things, the injury would not have happened, but for the negligence of some one, and the party injured shows himself free of it, the imputation falls upon the party who, in respect to the agency or thing by which the injury happens, is charged with the exclusive management and control. This is a principle of frequent application in the relation of passenger and common carrier. 13 Peters, 181; 22 Wallace, 341; 11 Pickering, 106; 11 Allen 317; 109 Mass., 398; 66 Maine, 74; 64 Penn. St., 225; 76 Penn. St., 510; 25 Cal., 460; L. R. 2 Q. B., 412; 4 Q. B., 381; Cooley on Torts, 663–5; Wharton on Negligence, 422, 661.

It is not, however, confined to the relation between passengers and common carrier. "Where it is shown that anything is under the management of one party or his agents, and an accident happens, which, in the ordinary course of things, does not happen if those intrusted with the management exercise proper care, it, of itself, affords reasonable evidence, in the absence of the explanation, that there was a want of proper care." 3 H. &. C., 596; 2 Ib.721, Cooley on Torts, 663. The presumption arises, says Judge Cooley, because, in the great *majority of cases, 558
the fact accords with the presumption, and, therefore, any different presumption, in the great majority of cases, would be a false one.

In the present case the evidence of negligence was the fact that the upper berth fell upon a passenger who had been, for some distance out of Cleveland, sitting in his seat beneath it, to which seat he had been assigned by the conductor of the car. In Kendall v. The City of Boston, 118 Mass., 234; a bust of Franklin, that had been placed on the outside of one of the upper balconies of the Boston Music Hall, fell upon the plaintiff, who was sitting in the audience beneath it. The court, while, recognizing the principle that the occurance of an accident affords presumption of negligence against those having the exclusive management and control of the agency or thing, from defect in which, the accident happened, non suited the plaintiff upon the ground that it was not shown whether or not the audience had rightful access to the balcony where the bust was placed, and, therefore, it was not shown that the act of some third person may not have caused the injury. But here no one rightfully had access to the upper berth, while it was in place, except the employes of the sleeping car, nor could any obtain access to the car without their permission; and all who were there were under their direct supervision and control. They were, therefore, chargeable, not simply with the observance of care in their own management of the berth, but also of care in observing that no one in the car had meddled with it.

There may be cases where the fact of inspection of machinery by which some accident happens will rebut the presumption that arises from the fact of accident; as, for instance, the inspection of the axles of a railway car may rebut the inference which arises from an accident by the breaking of the axle. The presumption of negligence may require more or less evidence to rebut it according to the nature of the particular matter or thing. In the operation of railway trains, accidents to

axles are sometimes inevitable, and, therefore, a simple inspection, previous to the accident, may be of itself sufficient to locate the particular cause, 64 Penn. St.. 225.

In this case, however, while an inspection, which was made after the accident, developed the fact that there was no latent or *other defect in the machinery by
559 which the berth was fastened, there was, as it seems, no inspection in respect to whether the berth had, by the carelessness of some employe, or by the intermeddling of some third person, become unfastened. The assistant superintendent of the sleeping coach company testified that it was his duty upon the return of the car to Cleveland upon every trip—it being a car running to Cincinnati and return—to pass through the car and inspect it, but he says that he confined himself to passing through the car, and unless something amiss was reported by the conductor, he took everything to be right. The conductor does not testify that he inspected the car at all. The porter testifies that he observed the condition of the berth whenever he put it up or took it down, but he says that he only took it down, and put it up in the evening when it was made up for the night, and in the morning when it was restored to its proper place.

Now this car had returned from a trip—it is not stated what interval had elapsed—from Cleveland to Cincinnati and back, and had started out upon a new trip at the time this accident occurred. How much time had elapsed since the porter last put up the berth, and how much had elapsed since the assistant superintendent had last walked through the car, there is no evidence to inform us, and, so far as appears in the bill of exceptions, there was none to inform us, and, so far as appears in the bill of exceptions, there was none to inform the jury. We are not able to say, therefore, that the verdict of the jury was not sustained by the evidence, there being nothing but the fact that the accident happened, without any explanation on the part of the employes of the company.

The employes, it was testified, were persons of competent skill, and yet, in a case where a stage coach overturned upon the road, it was held that the presumption of negligence was not rebutted by showing the reputation for care and skill of the driver. In respect to the want of explanation it was said that the presumption of negligence arose from the mere fact of the accident, and that, while it was open for the defendant to rebut this presumption by showing that the cause was inevitable, it was for him to explain in his defense, and not for the plaintiff in making out his case. In order to rebut the presumption of negligence, the defendant must
560 show that the overturning of *the stage was the result of inevitable casualty, or of some cause which human care and foresight could not prevent. In doing this the defendant must necessarily explain how the coach overturned, and, if he failed to do it, the presumption of negligence remained. Boyce v. Stage Company, 25 Cal., 460-8.

This car was put upon the road by the railway company under a contract with one Doubleday, to whose rights the Woodruff Sleeping and Parlor Coach Company succeeded.

The sleeping coach company owned the berths and inside furniture of the car, and, by contract was to keep them in good running order and repair.

It was to furnish employes to collect sleeping car fares and wait upon the passengers in the sleeping car, at its own cost, and these employes were to be subject to the rules made by the railway company for the government of its own employes.

It was agreed between the companies that the sleeping coach company should be entitled to collect from every passenger on the car such fares as were usual for like accommodation upon competing lines, and that such further rules and regulations should be mutually agreed upon as would best favor the renting of seats and couches.

In the case of Thorp v. The New York Central and Hudson River R. R. Co., 5 Rep., 464, the Supreme Court of New York held that a railway company was responsible for an act of violence committed upon a passenger by the porter of a Wagner Car. In Kinsley v. The Lake Shore and Southern R. R. Co., 7 Cent. Law Journal, 281, the Supreme Court of Massachusetts held that a railway company was responsible for the loss of a traveling bag of a passenger, which he had committed to the care of an employe of a sleeping car company, while he stepped out to dine. In the one case it was said that the contract between the railway company and Wagner was private and personal; that the cars were run by the railway company, and not by Wagner; that they were run for the joint account and interest of both; and that the railway company was liable for the acts of the porter of the Wagner Car to the same extent as though such porter had been hired by, and was in the immediate employ of the railway company. In the other case it was said that the contract of

the passenger was with the railway *company, and that the liability of the railway company to him was not, in the absence of express notice, affected by the fact that other parties owned the car and provided, at their own expense, the conductor and servants. 561

In this case the passenger had a ticket purchased from the railway company, and that company had undertaken to discharge its duty of common carrier toward him. He had also purchased a ticket from the sleeping car company, but this did not create an independent contract of carriage. He did not select the car for himself. It was a car provided by the railway company as part of the train. It was true that he was not permitted to ride in the sleeping car without paying sleeping car fare; but, on the other hand, he was not permitted to ride there without paying first-class railway passenger fare.

That the railway company did not consider the matter as merely one between the passenger and the sleeping coach company, is shown by the evidence of the general superintendent of the railway company. He says it was a rule of the railway company, that if a second-class passenger was found in the sleeping coach, the railway conductor was to collect from him first-class fare; and he says the purpose of this was "to prevent a man getting first-class accomodation by paying a partial price."

Where landlord and tenant jointly occupy the premises together, the landlord is responsible for an act of negligence by the tenant. 10 Allen, 378. Where a railway company permitted another to occupy its track, and, by the negligence of such company, passengers upon the trains of the company owning the road were injured, the company owning the road was held responsible. 5 Wallace, 90, R. R. Co. v. Barron.

The same principle, and for the same reason, will apply here. The contract between the railway company and the sleeping coach company was made by the parties at their own instance, and with a view to their own advantage. It appears that no part of the compensation received by the sleeping coach company from passengers went to the railway company, and yet there were other benefits. The contract itself recites at the outset that the railway company is desirous of having its line *equipped with sleeping and parlor coaches under one management, and the stipulations undertaken by the railway company are recited to be undertaken in consideration of the benefits to be derived from the agreement. 562

There is a reason of public policy against permitting common carriers to avoid the obligations they have undertaken to a passenger, by substituting some intermediate agency. The sleeping car company here was not engaged in an independent employment, but was simply an intermediate agency substituted by agreement between the two companies The principle of *respondent superior* should apply. The railway company should be chargeable with the negligence of the employes of the sleeping coach company to the same extent as if they had been employed by it. They may not have been in the immediate employment of the railway company, but they were employed in a subordinate agency to the same end,—the transportation of the passenger, for which the railway company had engaged.

Judgment, therefore, affirmed.

H. H. Poppleton, Stallo & Kittredge, and M. C. Shoemaker, Attorneys for plaintiff in error.

Follett & Dawson, attorneys for defendant in error.

STREETS—CHANGE OF GRADE—DAMAGES.

[Hamilton County District Court, 1879.]

†THE P., C. & ST. L. RY. CO. v. JAMES HAMBLETON.

Obstructions by change of grade as a cause of action do not include obstructions of streets not adjoining plaintiff's property, unless he can show a damage different in kind from the rest of the public.

A petion to reverse a judgment of the Superior Court.

†The decision in this case was affirmed by the Supreme Court in Railroad Co. v. Hambleton, 40 O. S 496. The Supreme Court decision is cited in 45 O. S. 309, 320.

BURNET, J.

The defendant in error, in Decem ber, 1873, brought suit against the Pittsburg, Cincinnati & St. Louis and the Little Miami Railroad Companies, to recover damages
563 for injury to *several lots of land on the south and north sides of Fulton Avenue, lying between French and Hazen Streets; alleging that in 1843 the L. M.R. R. Co., in persuance of an agreement between that company and the village of Fulton, by which it was permitted to occupy the avenue with its track, fixed the grade of the avenue to correspond with its track as then laid; that Hambleton afterward made improvements upon his lots conformable to the grade so fixed; that in the year 1869 the Little Miami R. R. Co. leased its road to the P., C. & St. L. R. R. Co., and that, subsequently to January, 1870, the latter company changed the grade of the avenue and of their track, raising the grade from fourteen to twenty-two inches, and by this means forcing the earth over on the premises of Hambleton, on the south side of the avenue, injuring the walls of his house and bearing down his fences, making it necessary to substitute an expensive stone wall for the fences, and to shove up his house; and the change of grade rendering the access from the avenue to his premises on both sides more difficult and inconvenient; and that by the negligent construction of the gutter or drain, on the north side of the avenue, and obstructions put in it, as well as by the change of grade, the water was thrown over upon his premises, greatly to his injury, and he claimed $1,500 damages. In 1878 an amended petition was filed, in which he alleged that, by the change of grade of Fulton Avenue, his access from French and Hazen Streets was obstructed, and that two additional rails had been laid upon the track of the company, parallel to, and within a few inches of, the former rails, so as to make the passage to and from his premises more difficult and dangerous, and claiming $1,000 further damages. The plaintiff in error answered, admitting the lease and the occupation of the avenue, and denying the other allegations of the petitions, and pleading the statute of limitations of four years.

The bill of exceptions shows the allegations of the petition, as to the ownership of the plaintiff below and his improvements, were true; that by an arrangement between the authorities of the town of Fulton and the railroad company, the latter were permitted to occupy Fulton Avenue, under an agreement that they should make a satisfactory grade of the avenue, and that the company did, under supervi-
564 sion of the officers of the village, *make a satisfactory grade; but that subsequently the original grade was changed by raising it, and two other rails were added. It appeared from the evidence that the grade had been, in fact, elevated from fourteen to twenty-two inches, and that the top of the foundation wall of the house on the south side of the avenue, which before was above the grade, is now below the grade, and that the walls of the house had been materially injured by the pressure of the additional earth against them, and the overflow of water, and it had become necessary to substitute a wall for a fence on the front of the vacant portion of the lot. It was also in evidence that the access to Fulton avenue, from French and Hazen streets, had been rendered more difficult by the new grade, and the avenue itself, so obstructed by the additional rails, and so imperfectly graded, that vehicles could not with safety approach the premises of Hambleton, on the south side of the avenue.

To all the evidence tending to show damage by the obstruction of French and Hazen streets, the defendants below excepted; and at the close of the evidence for plaintiff, the defendants moved to rule out that testimony, which motion was overruled and exception taken. The court below charged that for all changes in the grade, and additional obstructions or burdens put on the street in front of the plaintiff's premises within the period of twenty-one years from the commencement of his action, he had a right to recover, having a property in the street itself as appurtenant to his premises, which right could not be taken away without compensation.

In this the charge of the court was correct. The original occupancy of the street by the railroad was permitted by the village, and the grade then fixed was by authority, and became the legally-established grade. The plaintiff was warranted in constructing his improvements with reference to that grade, which he did. He then had a right in the street appendant to his premises; a right of ingress and egress to and from his premises over it, separate and distinct from any right enjoyed by the public; a private right of the nature of an incorporeal hereditament legally attached to his contiguous grounds, and the erections thereon. This easement, appendant to his lot, unlike any right of one lot owner in the lot of another, is as

much *property as the lot itself. Crawford v. the village of Delaware, 7 O. S., 469; Street Railway v. Cumminsville, 14 O. S., 524. This right of property is protected by the constitution, and can not be taken without compensation. 565

After the erection of plaintiff's improvements, every raising of the grade, and every additional obstruction put upon the street, injurious to his right of access, was an appropriation, *pro tanto*, of his property, for which he was entitled to recover. Each successive appropriation was an adverse possession taken of so much of his property, which, though wrongful at the time, by continuance of twenty-one years, would ripen into a title by disseizin. He is limited, therefore, to a recovery for such appropriations, by changes of grade and obstructions, as have occurred within twenty-one years from the bringing of his action, because the title by disseizin would be a bar to his action for acts prior to that time. To a claim to recover compensation for appropriations more than twenty-one years before commencement of the action, the answer would be: "We have a good title by disseizin; a grant from you would not make it better; you are not entitled to compensation."

But there is no other limitation. For appropriations within twenty-one years the plaintiff may recover compensation. Although he may not oust the defendants from possession, because their track is placed upon the street by legal authority; yet each additional obstruction and change of grade injurious to him, is a wrongful appropriation of his property. By bringing his action for compensation, he recognizes the right to hold possession, and converts the disseizin into a lawful title. Thus the bringing of his action, and the origin of his cause of action, are simultaneous.

The Court charged the jury that for injuries to his premises from the pressure of the additional earth put upon the stseet, and from the overflow of water and filth from the drain or gutter, the limitation would be four years. This charge also was correct.

The Court refused, upon motion of the defendants, to rule out the testimony as to alleged damage from the obstructions in French and Hazeni streets, but charged the jury that plaintiff might recover for such obstructions. Nelther of these two *streets adjoined the property of the plaintiff. This refusal to rue out the evidence, and the charge given, were erroneous. The rule of law is, that for obstructions not immediately in front of the premises of the plaintiff, and, therefore, not amounting to an appropriation of his property, he cannot recover, unless he can show a damage to himself, different in kind, and not merely different in degree, from the damage sustained by the general public. It does not appear that the plaintiff suffered any damage directly to his premises by the obstruction of French and Hazen streets, or any damage different from that which was suffered by the public generally. 566

The verdict of the jury was a general verdict, and, under the testimony and charges of the Court, may have included damages for the alleged obstruction of French and Hazen streets. The judgment, based upon the verdict, must, therefore, be reversed.

Matthews, Ramsey & Matthews, for plaintiff in error.

Hoadly, Johnson & Colston, *Contra*.

BASTARDS.

[Holmes County Common Pleas Court, October Term, 1878.]

SARAH PATTERSON v. THOMAS J. BUCY.

The putative father of a still born bastard is not liable to a prosecution by the mother under the Bastardy Act of 1878.

The plaintiff, an unmarried woman, filed her complaint in writing before one of the magistrates of Holmes county, O., charging that she was pregnant with a bastard child, and that Thomas J. Bucy was its father.

The defendant was arrested and brought before the justice, who made inquiry into her complaint, from which it appeared that on the 9th

day of April, 1878, she was delivered of a still-born child, and that the defendant was its father, whereupon he entered into a recognizance for
567 his appearance in this court. *The case, being called, was submitted to a jury, who returned a verdict of guilty against the defendant. The testimony submitted to the jury, as well as the examination of the complainant before the justice, proved that the child was still-born, and that the birth happened prior to the complaint being filed before the justice. The defendant, by his counsel, now comes and moves the court for an arrest of the judgment for the reasons, to-wit:

First—That the verdict is against the law.

Second—That it is against the evidence.

VOORHES, J.

The question presented to the court is simply: Is the reputed father of a bastard child which is born dead, to be held liable to the mother in such sum as the court may order; or, is he released from the statutory liability under the Bastardy Act by reason of the child being still-born?

The bastardy statute passed by the legislature, and found on page 740 of the acts of 1878, provides for making a complaint by an unmarried woman, the arrest of a defendant, and for his final presentment in this court for trial. Section 13, of the same act, provides that if the accused in this court shall confess his guilt, or if upon a trial the jury shall find him guilty, he shall be adjudged the reputed father of the child, and shall stand charged with the maintenance thereof in such sum as the court shall order and direct, with the payment of the costs of prosecution, for the payment of which he may be required to give security, and upon his default to do so, he may stand committed to the jail of the county.

Under this section of the statute it is the manifest intent of the framers thereof that before the reputed father of a bastard child could be dealt with, as is therein provided, the child must be born and be alive.

The former bastardy statute contained the words: "That when complaint was made before a justice of the peace by an unmarried woman that she was pregnant with a bastard child, which, if born alive, would be a bastard." This language has not been incorporated into the present bastardy statute. She can now affirm in her complaint simply that she is pregnant with a bastard child. But does this omission from the
568 present statute *change it so as to afford a remedy against a defendant merely upon her complaint that she is pregnant with a bastard child? We think the omission makes no such change in the statutes, for the reason that she may now, as she could before, make her complaint, and procure the arrest of the defendant, have him placed under bond for his appearance in this court; when this has been done she can not now, nor could she before, take a further step to have the defendant adjudged the putative father of her child until it is born; so we think there is no difference in the former and the present legislation on this subject. If the parturition brings forth a dead *fœtus*, it is one and a very different thing, than if she shall give birth to a living child, when this court may administer the remedy afforded to the child and the mother in the statute. It is claimed that section 16, of the Bastardy Act of 1878, provides that the death of the bastard child shall not be cause of abatement or bar a prosecution for bastardy if the mother is living,

but such death may be considered by the court in fixing the amount with which to charge the defendant.

Had this child been alive when born, and afterward died, leaving the mother living, very clearly this section would save the liability against the defendant. Looking at this statute in the light of a remedial statute, and entitled to a liberal construction, still, will any reasonable liberality of construction enable us to hold the defendant liable, when it is clear from the evidence that the child was dead before its birth? And if dead before its birth, can it be claimed that its death was the death of a bastard child? If so, then this prosecution should be sustained; if not, then the defendant, however much his conduct is to be condemned in morals, is not liable to the order of this court to pay money to the complainant.

The 17th section of the same act provides that upon the death of a bastard child, after judgment and before the expiration of the time for the last payment, the court may reduce its amount; from this it is evident that the law contemplates a bastard child to be one that had lived after its birth.

By section 15 it is provided that the death of the mother shall not abate the prosecution if the child is living, and section 16 makes a like provision, that the death of a bastard child shall not abate the prosecution if the mother is living. The question distinctly presented by 569
this motion is now apparent. Is the still-born issue of an unmarried woman a bastard child in the contemplation of this statute, or is it necessary to make the issue a bastard child that the mother be unmarried and that the child be born alive; and is it necessary to give effect to this section of the statute that the child should be born alive and that it should afterward die? In other words what is a bastard child?

In determining this question we are much aided by the learning of our kindred profession found in their works on medical jurisprudence. The statute uses the word death as a noun. "The death of a bastard child shall not bar a prosecution," it is here used as the opposite of life, and we must have life before we can have the death of the same object; in other words the child must have lived as a bastard child before we can have its death as a bastard child. We inquire, then, what is life, and what is death, and from this we may determine whether or not we can have a bastard child without it being born alive. Life in a general sense is that state of animals in which its natural functions and motions are performed or in which its organs are capable of performing their functions. A man's life is his present state of existence, the time from birth to death; while death is that state of animal being in which there is a total and permanent cessation of all the vital functions, when the organs have not only ceased to act, but have lost the susceptibility of renewed action. See Chitty's Med. Jurisprudence.

Thus we see, to be in life the child must have had the natural functions and motions which are common to a child in life, and a change from this condition, to constitute the death of the child, must be a permanent cessation of all the vital functions which constitute and manifest life. In other words, we must have first, a living child, and then the same child dead before the provisions of the bastardy statute can have the force and effect intended by its powers.

It is further laid down in Chitty's Med. Jurisprudence, "that the

term birth is the act of coming into life. But still the stage of proceeding is not accurately defined, and it may be questionable whether the term birth in some statutes has not been erroneous. For the sake of
570 certainty we would define it to be *the arrival of the child at that stage after parturition when its existence and capacity to continue life, separate and apart from the mother, have been distinctly established and which consists not only of breathing, but also in the exercise, at least for once, of all the functions essential to the continuance of life, and among others principally the circulation of the blood, the existence of which, at least *prima facia*, is essential to prove the infants capacity to continue life."

If this is correct, and not in conflict with the statute, then is it manifest that in order to have the life of a child it must be born with a capacity sufficient to enable it to continue life separate and apart from the mother? It must appear not only that it breathed, but that it was delivered, that its blood circulated, raising a *prima facia* case at least of a capacity to continue life, and that after having such a state of existence there was a total cessation of all the vital functions.

The statute speaks of the death of the mother and the life of the child; the death of the child and the life of the mother, and the death of the child after the order and judgment of the courts; so that we think that it was the intention of the legislature, that, if a child should be born alive and then die, such death should not absolve the defendant from prosecution, while, at the same time, if the child was not born so as to be a bastard child, there never was under this statute a liability against the putative father on behalf of the surviving mother.

It is laid down as authoritative that the natural time of gestation is thirty-nine weeks and one day, during this time it is called an embryo and *fætus*. If delivery occurs within the first six weeks, it is a miscarriage; between that time and at the end of the sixth month, it is called an abortion; if shortly after that, a premature birth; but during the whole time after the first six weeks it is called a *fætus*, and is so called until it is born alive, when it is called a child.

If the issue is still born at any time after the first six weeks, could it be anything more than the delivery of a dead *fætus*; and if born alive and out of wedlock, could it be anything but a bastard child?

If illegitimate and born alive, and shall then die, very clearly, this
571 statute would uphold the prosecution, and require *him to pay to the living mother such sum as the judgment of the court might deem right.

It is claimed by the plaintiff that from the authority found in 19 O. S., 583, we would be warranted in sustaining the verdict and award judgment for such amount as will reimburse the plaintiff for her lying-in expenses. This is true when the issue is a living child, but does it warrant a verdict if the issue, of "wantonness is a spawn of whoredom" that lives not? We think not, and the verdict is set aside as being against the law of the land.

Stillwell & Hoagland, for plaintiff.

Hon. D. S. Uhl and D. D. Voorhes, for defendant.

*EXECUTIONS. 592

[Hamilton County District Court, 1879.]

Burnet, Avery and Cox, JJ.

CINCINNATI v. WESLEY M. CAMERON.

Ground purchased by the city of Cincinnati, under an act of legislature authorizing the issue of bonds for the purchase of ground whereon to erect public buildings, is exempt from levy by a judgment creditor of the city.

AVERY, J.

Cameron is a judgment creditor of the city, and has levied upon that portion of the open square between Eighth and Ninth streets, and between the city buildings and Plum street. The *court of common pleas has enjoined advertisement and sale under the levy, and 593
Cameron has appealed to this court.

Equity may enjoin the sale of land upon execution where the only effect would be to cast a cloud upon the title. (2 Ohio, 171; 5 Ohio, 178). The test of the question is said to be whether, in an action of ejectment by the purchaser, the owner of the land would be obliged to offer evidence to prevent a recovery. (15 Cal., 127; 20 Cal., 484).

The ground upon which relief is claimed by the city is that it holds the property in trust. But the trust does not appear upon the face of the conveyance from Jacob Burnet, by which the city holds the title, and, therefore, if this sale were allowed to proceed, and the purchaser should bring an action of ejectment, proof would be required from the city.

The proof consists of a local act of the legislature, passed on the 22nd of March, 1850, together with an ordinance of the city council, passed immediately after. The act of the legislature authorized the city to purchase ground whereon to errect public buildings for the use of the city, and to issue its bonds in payment therefore to the amount of $60,000. The ordinance authorized the purchase, in pursuance of this authority, of the property in question, securing the bonds which were issued in payment by a mortgage for twenty years upon the property itself.

In some states the power to issue executions against municipal bodies is denied. (25 Ill., 595; 28 Penn. St., 207). But the better opinion is that the right to recover a judgment carries with it the right to the ordinary process to enforce judgment. (Dillon Mun. Corp., Sec. 446). Indeed, in this case it must be assumed that there was power to issue the execution, since the issuing of execution is the exercise of jurisdiction, and to hold otherwise would be to call in question collaterally the jurisdiction of the Superior Court from which this execution issued. Assuming then that the execution is not a void process, the question is whether the property is subject to levy.

That property which can not be taken without interfering with the discharge of public functions on the part of a municipal body, should be protected, is a proposition which is commended alike by reason and authority. In New York the seizure *of a fire bell tower was set 594
aside. In Louisiana the seizure of the office furniture of the clerk of the parish was enjoined. (14 N. Y. Sup. Court, 73; 4 La. Ann. 84).

Nevertheless, this levy does not touch the city building and, so far as the use of the building is concerned, the rest of the lot might be taken without interferring with the discharge of any public function. The reason for the exemption is not, however, in the existing necessity for

public use, but in the fact that the property has been devoted to such use and whether the property has been so devoted by the act of the constituted authorities of this city, or by act of law, the reason is the same.

The ground did not cease to be held for erection of public buildings because a public building was erected only on a part of it. In the judgment of the constituted authorities of the city, to whose discretion such matter must be left, the use in that manner might be the best adapted to the use for that purpose. No one would contend that if the building were erected in the center of the square, a judgment creditor could pare ground upon the sides and sell off strips under a levy. The building is not in the center, but the manner in which the property should be used must be left to the constituted authorities, to whom the property is committed for use.

There may be property of the city held by it for income or for the purposes of sale, or not connected with the discharge of municipal functions, that may be subject to levy, but certainly a lot or parcel of ground held for the purpose of erecting public buildings, is not property of that character. Municipal lands of the city of San Francisco, held in trust for the use of the public, were considered exempt from levy. (15 Cal. 530). Where the south part of one of the original squares of Indianapolis, dedicated for a market space, was exchanged under act of the legislature for the north part of another, it was held that, although the deed of exchange made no mention of the trust, the act of the legislature entered into it, and annexed the trust, and that so being held for a special purpose, the property could not be diverted from that purpose by a forced sale. (13 Ind., 620). Trust property, generally, is not subject to siezure at
595 the instance of a creditor of the trustee, and where the trust *is so connected with the use of property, that taking the property extinguishes the trust, the property will be exempt.

Attention has been called to the sections of the statute by which fire engines belonging to cities, villages or fire companies are exempt, and to other sections by which school houses are exempt, the inference desired being that, by excepting these classes of property, all other classes are included. But the inference is altogether too broad, for it would include every other class of property except the two classes which the statute makes reference, notwithstanding any necessity that might exist for the discharge of public functions.

Attention again has been called to sections of the municipal code, under which council may, upon recommendation of the Board of Public Works, sell or lease any real estate in the city in such manner and for such prices as may be directed by ordinance. (75 O. L., 395-396). But this does not confer upon a creditor the right to compel a forced sale. The power of sale is in the discretion of council, which is to be put in motion by recommendation of the Board of Public Works, and to be executed by ordinance in the nature of law. Trust property still continues to be trust property, notwithstanding there may be a power of sale in the trustee. The power of sale is to be exercised by the city at the discretion of its officers, and not against the city at the discretion of whoever may have a judgment.

The injunction against the levy will be made perpetual.

Bates, Perkins & Goetz, for the city.

Matthews, Ramsey & Matthews, *contra*.

POLICE COMMISSIONERS.

[Hamilton County District Court, 1879.]

Burnet, Avery and Cox, JJ.

PATRICK J. HOGAN v. JOSEPH B. CARBERY.

Police Commissioners of the City of Cincinnati, by act (74 O. L. 42), to be appointed for fixed terms by the Governor, and by act (75 O. L. 238), to be thereafter elected by the electors of the city, may be removed for official misconduct by the Governor; but before such removal, it is essential that there should be charges made, and an opportunity given to defend.

BURNET, J.

The plaintiff files a petition in the nature of an information in *quo warranto*, alleging that on the 28th of November, 1878, *and prior 596
thereto, he held the office of police commissioner in the city of Cincinnati, to which he had been appointed as one of the five members of the board, for the term of five years, and that his term of office had not yet expired; but that, on the 28th of November, the Governor of the state made the following communication to the other four members of the board:

In the name and by the authority of the State of Ohio, Richard M. Bishop, Governor of Ohio: To whom it may concern, greeting:

COLUMBUS, OHIO, NOVEMBER 28, 1878.

Patrick J. Hogan:

Sir—You will hereby take notice that you have this day been removed from the office of Police Commissioner of the city of Cincinnati, for official misconduct.

In testimony whereof I have hereunto set my hand and caused the Great Seal of the State of Ohio to be affixed, at Columbus, this 27th day of November, in the year of our Lord, 1878.

R. M. BISHOP, Governor.

By MILTON BARNES, Secretary of State.

It is further alleged that the other four members of the board, assuming that there was a vacancy, appointed the defendant, Joseph P. Carbery, to fill that vacancy until under the law, there could be an election. The plaintiff claims this act of the Governor was without warrant of law, and that, therefore, his title to the office still remains good, and that the defendant, who has enterd upon the performance of the duties of the position, was improperly appointed, and usurps the powers and functions of the office. It is asked that the defendant be removed and the plaintiff reinstated. To this petition a demurrer is filed, setting up two grounds: First, want of jurisdiction of this court; and secondly, that the petition sets out no sufficient cause of action.

The law of 1877 provided for the appointment of a Board of Police Commissioners by the Governor, the number to be five, and the persons appointed to hold their offices respectively for the periods of one, two, three, four and five years, at the expiration of which several times there would be a reappointment of others to take their places. The law of 1878 recognizes the appointments made under the former law, and provides that when a vacancy shall occur, as provided for by that law, it shall *be filled by an election. Both of these laws contain a pro- 597
vision that the Governor may remove any commissioner for official misconduct.

It was claimed on the part of the present incumbent of the office that this court has no jurisdiction by *quo warranto* to inquire into the legality of the appointment of the defendant or the removal of the plaintiff; that the governor of the state is the repository of the supreme executive power of the state under the constitution, and is one of the three great

departments among which is distributed all powers conferred by the constitution, and that he is independent of the other two; that his action cannot be controlled by the legislature nor by the judiciary.

The present code of Civil Procedure (page 815, section 5), provides that a person claiming to be entitled to a public office, unlawfully held and exercised by another, may by himself or an attorney at law, upon giving security for costs, bring an action therefor. If the legislature can confer upon this court the power to entertain the present inquiry, this section does it.

In the case of Commonwealth v. Fowler (10 Mass., 300), a case somewhat analogous to this was presented. It was claimed in that case, as in this, that the Governor was one of the three departments of the government, of equal power and authority in his sphere with the court, and not liable to the supervision of the courts, and that his acts could not be inquired into by judicial authority. The court in that case say: "The objection is that an information in the nature of a *quo warranto* does not lie against an officer appointed by the supreme executive authority of the commonwealth, and it is said that as the executive has the exclusive right to appoint, so it must have the exclusive right to determine when a vacancy in office exists, the filling of which pertains to that branch of the government. Our government is founded upon principles not known to the laws of any other country. The sovereignity of the commonwealth remains in the people. The several departments of the government, the legislative, the executive and judiciary, are agents of the people in their respective spheres. When the legislature enacts a law not authorized by the constitution, it is the part of the judiciary to declare it void; so when the executive, in any act, overleaps the
598 *bounds prescribed to it by the laws and the constitution, it is likewise the part of the judiciary to declare such act or appointment null and void. Where one is charged with usurping an office in the commonwealth, there must be authority in this court to inquire into the truth of the charge. The party charged has a right to demand that this inquiry shall be made by a jury of the country, so far as it shall involve facts." See also 5 O. S., 528, State of Ohio *ex rel.* v. Salmon P. Chase.

In this case, the authority of the Governor to appoint or remove the officer in question is derived solely from a law enacted by the legislature, and which law might just as well, if the legislature had seen fit, have placed the power in some other person. It is not, therefore, one of the great constitutional rights of the Governor in the exercise of which it may be claimed that he is entirely independent of the other two departments of the state government, and in saying this it is not intended to say that in the exercise of his powers derived directly from the constitution, the Governor may in all cases be independent of the courts.

It is competent for this court, in the present case, to inquire by what right Mr. Carbery holds the office of Police Commissioner; so that, so far as the petition is demurred to on the ground of want of jurisdiction, the demurrer will be overruled.

The next question that arises is: Does the petition set out such a state of facts as warrants this court in determining whether the action of the government in this instance, and the consequent action of the board of Police Commissioners, can be sustained? By the common law there can be no doubt that the rule is, where a person holds his office not

at the pleasure of an appointing power or subject to his discretion, but to be removed for cause, being appointed during good behavior or for a definite term, that before he can be removed there must be charges made against him; he must have notice of the charges, and have an opportunity to defend himself. There can be no controversy that this is the common law on the subject. It is claimed that in the states of this union a different doctrine has been held, and we have been cited to a multitude of cases. We have not been able to find in all the cases to which we have been cited, one well-considered case in which the opposite doctrine has been *clearly announced. On the contrary, the rule in this country, as well as in England, where an officer has been appointed, 599
either during good behavior or for a definite term, with the power to remove him for certain specified causes, is that before he can be removed there must be a definite charge made against him, he must be notified of the charge, and he must be given an opportunity to be heard in his own defense. The question arose in Kentucky, and was decided in 8th B. Monroe, 672, where the court used this language: "The secretary being removable for breach of good behavior only, the ascertainment of the breach must precede removal; in other words, the officer must be convicted of misbehavior in office, and we shall not argue to prove that in a government of law a conviction whereby an individual may be deprived of valuable rights and interests, and may, moreover, be seriously affected in his good name and standing, implies a charge, a trial and a judgment, with an opportunity of defense and proof. The law, too, prescribes the duties and tenure of office, and this funishes a rule for the decision of the question involved." See also 3 Littell, 328. In the State v. Bryce, 7 Ohio, pt. 2, p. 84, the court say "that the proceeding is essentially adversary in it character. The justice of the common law permits no investigation of facts which may be followed by loss of right, or by the infliction of a penalty, to be conducted *ex parte*. It is essential to its validity that the party should be duly summoned. If the relator had forfeited his office by neglect of his duties, it was necessary that the corporation after reasonable notice to him, and an opportunity for hearing, should investigate the fact, and determine his title to the office by sentence, and thus create a vacancy; and until this was done the relator was entitled to his seat." The contingency did not happen in which the legislature might lawfully appoint a trustee, and he was reinstated in his office. See also 32 Pa. St., 478; 12 Pick., 244, 263; 1 Dillon on Mem. Corp., Sec. 188.

Now, in this case it appears that the plaintiff was appointed under the law of the state for a term of five years, which term had not yet elapsed; that the Governor of Ohio, in a letter addressed to him, but communicated to the other members of the board, declared his office vacant because of his misbehavior in office. It does not appear that any charges had been filed, and the defendant received no notice of the filling of any, nor *was there any opportuniy given to him to meet 600
charges and refute them, or for any hearing whatever.

Under these circumstances we are to construe the law under which the Governor assumes to make the removal. The office originally was conferred by appointment by the governor. By the law as passed in 1878, after the expiration of the several terms for which these officers were appointed, the office was elective. The provision of the law which gives to the Governor the power to remove is not restricted by the terms

of the law to the removal of the parties then in office, but applies as well to those who should be elected by the people as to those who were the creatures of his appointment. It must, therefore, be construed with reference to the power conferred by it, which is the power to remove an officer elected by the people. The action of the Governor is not merely in his own discretion. The power that he exercises under the law is of a judicial nature, and the condition must exist to warrant his exercise of the power. His action cannot be *ex parte*; because it is proposed to deprive an officer of a valuable right, and to depose him from the performance of important public duties. Under the language, therefore, of the decisions, it was necessary that the charge should be definitely made; that the party against whom it was made should be informed of a definite charge; that he should have notice such as would enable him to present to the Governor his defense; and that, before the Governor acted upon it, he should be heard. All these particulars, except simply the announcement in the final action of the Governor of the cause for removal, have been disregarded. We do not assume that, where the governor has proceeded in the form in which the law requires, his action is subject to review by this court. All that this court has a right to inquire into is, whether he has proceeded in due form of law. If he has so proceeded, whether his judgment was correct or erroneous, could not be determined by the court. The demurrer will be overruled and the petitioner reinstated, unless there is a desire on the part of the city to answer.

Mr. Bates, on the part of the defendant, stated that he did not think the city desired to file any answer.

C. Baker, counsel for plaintiff.

Bates, Perkins & Goetz, *contra*.

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601 * **WILLS—APPEALS.**

[Hamilton County District Court, 1879.]

Burnet, Avery and Cox, JJ.

JULIA K. BANNING ET AL. v. CLINTON KIRBY ET AL.

An appeal from the court of common pleas to the district court, in a suit to contest a will, brings the whole case and all the parties before the court, and a motion to dismiss the appeal will not be sustained, unless by the consent of all the parties.

MOTION to dismiss the appeal from the Common Pleas.

BURNET, J.

The suit was brought to contest the will of Timothy Kirby, deceased. The city of Cincinnati and Louisa H. Callahan and her husband, being devisees under the will, were made defendants, and filed their answers and cross-petitions, praying that the will might be sustained. During the progress of the trial leave was granted to Mrs. Callahan to withdraw her answer and cross-petition, without prejudice to her rights, which was accordingly done; but she and her husband remained parties in the cause. The verdict was adverse to the will and a decree was entered setting it aside. The city gave notice of appeal, and thereupon the court fixed the amount of the appeal-bond, and the bond was given, and the cause brought to this court.

The city, with the assent, it seems, of all the parties, except Mrs. Callahan and her husband, moves to dismiss the appeal. She says the

appeal by the city operated to bring the whole cause into this court, and that the appeal cannot be dismissed without her concurrence.

The statutes in force at the time of the enactment of the present code of civil procedure govern the question. The fourth section of the act regulating appeals to the district court, passed March 23, 1852 (2 S. & C., 1166), gives to a party "whose interest is separate and distinct from that of the other party or parties, the right to appeal the part of the case in which he is interested, and it shall be allowed by the court, which shall fix the penalty and condition of the bond, and make such order as to the papers and pleadings, and supplying copies thereof, and in all other respects, in view of a division of the case for the purpose of appeal, as may be deemed right and proper." Where the whole case was appealed no copies of *the papers and pleadings were made, but all the original files were transmitted to the appellate court. In the 602
case at bar there was no provision made by the court for copies of papers or pleadings, or any division whatever of the case for purposes of appeal. Merely the amount of the bond was fixed.

It is insisted in support of the motion, that inasmuch as the interest of the city, as devisee under the will, is distinct and separate from that of Mrs. Callahan, the devises to each being of independent and separate properties, the interest of the city is separate and distinct within the meaning of the statute, and, therefore, the proper subject of separate appeal. To determine this, we must look at the character of a suit to contest a will.

A will is first offered for probate in the probate court. If admitted to probate, it is at once an operative instrument. If rejected by the probate court, there is an appeal to the common pleas, and it will be finally admitted or rejected in that court. The probate is forever binding, unless within two years some person interested shall appear and contest the validity of the will; saving, however, to infants, married women, and persons absent from the state, or of insane mind, or in captivity, the like period after their respective disabilities are removed. The mode of contesting is by bill in chancery or petition in the common pleas. An issue is to be made up "whether the writing produced be the last will of the testator or not," which shall be tried by a jury, whose verdict shall be final between the parties, unless the court shall grant a new trial, or the cause be appealed to the district court. Appeals may be had to the district court, as in other suits in chancery, when the same issue will be tried again, in the same manner.

In the original offering for probate, whether in the probate court, or, on appeal from that court, in the common pleas, the proceedingis *ex parte* and *in rem*. A suit to contest is *inter partes*, but yet is substantially a proceeding *in rem*. 20 O. S., 219, 222.

It is said that in Holt v. Lamb, 17 O. S., 375, the court held that a proceeding to contest a will binds only the parties to such proceeding; and, therefore, although such parties, as between themselves, are estopped from setting up said will, when it has once been set aside by such proceeding, yet, as to all other persons *in interest, it is to be regarded 603
as a still subsisting will, and their rights stand wholly unaffected by the proceeding. From this it is sought to be inferred that interests of parties claiming under or against a will are separate and divisable. That decision seems only to recognize the general doctrine that a person's rights can only be affected by a judgment or decree in a cause to

which he is party; and that the character of a suit to contest a will, and of the issue required to be made up, does not preclude the application of that doctrine to such a suit. But the verdict is upon one issue, and affects alike all parties to the suit, interested to sustain the will on one side, and all interested to annul it on the other side. Whatever may be the interests, whether in common, joint, or several, of the different parties, either in the estate, if the will should be set aside, or under the will, if it should be sustained, in a suit to contest, the different individuals range only as two parties, on the opposite sides of only one issue.

In Bradford v. Andrews, 20 O. S., 219, Judge Welch says: "Where a petition for such a contest is filed within the statutory period of limitation, although only part of the persons interested are made parties thereto, the right of action is saved as to all who are ultimately made parties, notwithstanding some of them are not brought into the case until after the period of limitation is expired. If any person interested appears, and in good faith files his petition for a contest, the statute entitles him to a trial, and the verdict of a jury, touching the validity of the will; and that verdict will be binding upon all parties who may be before the court as such, at the time of its rendition. The interest of the parties is joint and inseparable. Substantially, this is a proceeding *in rem*, and the court cannot take jurisdiction of the subject matter by fractions. The will is indivisable, and the verdict of a jury either establishes it as a whole, or wholly sets it aside. To save the right of action to one, is necessarily to save it to all. The case belongs to that class of actions where the law is compelled either to hold the rights of all parties in interest to be saved, or all to be barred."

On page 220 Judge Welch continues: "But, say the counsel for defendants in error, the plaintiff below dismissed his petition, *after
604 the expiration of the two years, and this put an end to the action and left the matter standing as it would have stood had no petition ever been filed. When the jurisdiction of the court has once attached in such a case, I suppose it is not in the power of the petitioner to withdraw the action against the will of the other paties in interest. The status of the parties, as plaintiffs or defendants, is merely nominal. Those named as defendants have a right, equally with the nominal plaintiff, to insist upon a contest. Otherwise there would be no safty to the defendants who happened to be identified in interest with the plaintiff, except in the commencement of separate similar actions, or the filing of a cross-petition, by each." See, also, Meese v. Keefe, 10 Ohio, 362.

It seems to follow that if the interest of the parties is joint and inseparable, so that saving the rights of one saves the rights of all who may become parties to a suit, and one party may not dismiss a suit to the prejudice of another; so neither can one party appeal without taking up the whole case, nor can he upon whose notice and whose bond the appeal has been granted, without the consent of the other parties, dismiss his appeal.

But it is said that the appeal bond in this case binds the sureties only to the condition that the city of Cincinnati "shall prosecute its appeal to effect, and abide and perform the order and judgment of the appellate court, and shall pay all moneys, costs and damages, which may be required of or awarded against it;" and has no reference to the acts or responsibilities of the other parties; and that, therefore, the other parties are not in the appellate court.

In Ewers v. Rutledge, *et al.*, 4 O. S., 210, it was held that one of two or more defendants, against whom jointly a judgment has been rendered in the common pleas, may appeal the case to the district court, and his appeal will vacate the judgment—its lien, however, being preserved—and take up the whole case. To perfect the appeal in such case, it is not necessary for the appellant to give a bond, that will cover the defaults of his co-defendants; it is sufficient if it cover his own." In that case it was decided that the court below erred in dismissing the appeal in default of a new bond.

*In the case at bar the sureties upon the bond obligate themselves only to answer for the default of the city of Cincinnati; but 605
that does not invalidate the appeal of the whole cause, nor furnish a reason for dismissing the appeal.

All parties not assenting to it, the motion to dismiss the appeal is overruled.

Logan & Randall, for Mrs. Callahan.

Bates, Perkins & Goetz, for city.

Matthews, Ramsey & Matthews, for Kirby.

HOMESTEAD EXEMPTIONS—RENTS.

[Hamilton County District Court, 1879.]

NATHAN POWELL v. SAMUEL T. HAMBLETON ET AL.

When real estate is levied on, and afterward a petition is filed to marshal liens, in which an order of sale is issued, and the judgment debtor claims the benefit of the homestead exemption, the date from which rent is to be calculated to be paid by the debtor, should be as of that when the order of sale was issued, and not that of the original levy of the execution.

ERROR to reverse a judgment of the Superior Court.

Powell obtained judgment against Hambleton and levied execution upon three pieces of property, upon one of which Hambleton resided, occupying it as a family homestead. Upon the third piece of property there was also a residence, but it was not used as a homestead. Mitchell & Rowland had a mortgage upon the second tract. Subsequently Powell filed a suit in the superior court for the purpose of marshaling liens. Upon the tenth order of sale the homestead was sold. Hambleton then moved to the third tract and claimed that as a homestead. In the meantime a receiver was appointed to take possession of all the property. The order was, however, suspended in order that, on the eleventh order of sale, Hambleton might claim a homestead in the third piece of property.

The eleventh order of sale was returned in April last, showing that Hambleton had been accorded a homestead in the third piece of property, and the property being indivisible, Hambleton was required to pay a rent of $20 per year. Mitchell & Rowland moved to direct the receiver to take possession of the property set off to Hambleton *unless he 606
pay rent from the 16th of February, 1873, the date of his original levy on the property. The court below decided that Hambleton was only to pay rent from March, 1878, when the order under which the property was sold was issued. The case came up on exceptions to this ruling.

Judge Cox announced the opinion of this court, holding that the ruling of the court below was correct, and affirmed the judgment.

Coffin & Mitchell & Holmes, for plaintiff.

Collins & Herrin & Hoadly, Johnston & Colston, for defendants.

FACTORS—CONVERSION.

[Superior Court of Cincinnati, Special Term, 1879.]

MILLER BROS. v. JAS. H. LAWS & CO.

1. An auctioneer or factor who sells stolen goods is liable to the owner for their value, though he merely sells them for another, without knowledge of the theft, and pays over the proceeds to his employer.
2. The first section of the Act of March 12, 1844, 1 S. & C., 420, known as the Factors Act, does not apply to consignments of stolen goods, but only to consignments of goods by persons to whom they have been intrusted by the owners.

Plaintiffs, merchants in Evansville, Indiana, sue for the value of certain goods stolen from them by one Hunt, a clerk in their employ, and by himconsigned to defendants, auctioneers in this city, who sold them on his account, and paid over to him the proceeds; all, so far as shown by the petition, in good faith and ignorance of the theft.

Defendants demur generally to the petition.

HARMON, J.

The question presented by the demurrer is, whether an auctioneer or commission merchant who receives stolen goods, sells them, and pays over the proceeds to the thief, all in good faith *and ignorance of
607 the theft, is liable to the real owner for their value.

It is contended for the demurrer that the auctioneer in such cases is a mere bailee, claiming and assuming no ownership in the goods, but acting merely as the agent of another, and, therefore, not guilty of conversion, which must consist in: 1st, wrongfully taking; 2d, wrongfully converting *to his own use*, or, what is equivalent, assuming ownership; or, 3d, wrongfully detaining: 1 Chitty on Pleading, 153; Kennett v. Robinson, 2 J. J. Marsh, 86; Gloze v. McMillion, 7 Port. (Ala.), 279. In other words, it is claimed that the transfer from the thief to the buyer, through the auctioneer's hands, is, in law, a direct transfer from the thief to the buyer, the goods entering and leaving the auctioneer's hands like water a pipe.

In every case of stolen goods purchased in good faith, one of two innocent persons must suffer, but as between the buyer and the real owner the law has, we think wisely, ordained that the loss shall fall upon the buyer. This, no doubt, is because the buyer has an opportunity of inquiry and of requiring indemnity before parting with his money, while the owner is utterly without will or choice as to parting with his goods. At all events, it is well settled that no matter how many times stolen goods may be bought and sold, for full consideration and in the best of faith, every one through whose hands they have so passed is liable to the real owner for their value. Each one has, in law, been guilty of converting them to his own use.

It is equally well settled that the mere passage of stolen goods through one's hands will not make him liable for their value. A carrier who transports them for the thief is not liable unless he deliver them in spite of notice of the theft. A mere depository is not liable without such notice. The cases cited for the demurrer are of those kinds. Such persons do not deal with the title. They are not put upon inquiry as to the title. It is none of their business who owns the goods. It is their duty to keep or carry the goods upon being tendered the lawful hire. It has been held that even knowledge that the goods are stolen does not make them liable; that only notice from the real owner not to deliver them will have that effect. Loring v. Mulcahey, 3 Allen, 575. The same rule would apply, no doubt, to a mere *broker, though he negotiates a sale of the goods, for he has no possession of them. He is a mere go-between for the seller and buyer. 608

Auctioneers and factors, however, do have possession of the goods for the very purpose of transferring title. They may and do sell them in their own names. They may sue in their own names for the price. Story on Agency, Sec. 34; Hulse v. Young, 16 Johns, 1. It is their right and duty to assure themselves as to the title, and conversion being in the nature of a tort, agency is not recognized. There seem to be only four cases in America squarely in point, and they all suppert this view: Hoffman v. Carow, 20 Wend. 21 and 22 id., 285; Rogers v. Huie, 1 Cal., 429; Coles v. Clark, 3 Cush., 399; Koch v. Branch, 44 Mo., 542. The case of Spooner v. Holmes, 102 Mass., 503, cited for the demurrer, was decided upon the ground that coupons, like bank notes, are not governed by the same rules as chattels. The court acknowledged the correctness of Coles v. Clark and Hoffman v. Carow, as it did also in Stanley v. Gaylord, 1 Cush., 536.

The recent case of Fowler v. Hollins, L. R., 7 Q. B., 616, and on appeal / L. R., E. & I. Appeal, 787, was decided upon the ground that defendants, in fact, bought as principals, but the question now under consideration was fully discussed and the English authorities reviewed. See especially the opinion of Brett, J., p. 775. While there was a difference of opinion as to the liability of a mere broker contracting for a principal, it seems to have been conceded by all that an auctioneer or even a sheriff, who sells and delivers goods, intending thereby to pass the title, is liable for conversion.

Demurrer overruled.

Defendants afterwards answered that the goods were consigned to them by the thief, Hunt, in his own name; that not knowing that Hunt was not the real owner, they sold the goods and paid him the proceeds, and thereby became entitled to a set-off for the amount so paid Hunt, it having been a lien by virtue of the act of March 12, 1844, 1 S. & C., 420.

To this part of the answer plaintiffs demur generally.

*HARMON, J. 609

The Act whose construction is required by the demurrer is entitled "An act to prevent fraudulent practices." The first section provides that every person in whose name any merchandise shall be shipped shall be deemed to be the true owner so far as to entitle the consignee thereof to a lien for any money advanced to such shipper. The proviso of the second section, limiting such lien to advances made without notice that the shipper is not the real owner, is complied

with by the answer. The language of the statute is certainly broad enough to cover the case of stolen goods shipped by the thief in his own name and advanced upon in good faith by an innocent consignee, but in construing statutes it is not safe, in all cases, to be governed by the language alone of any part by itself. The evil sought to be remedied and the language of other parts of the statute must be considered, and these, sometimes, show a much narrower construction to be the true one than that at first apparent. Text must often give way to subject-matter and context: Burgett v. Burgett, 1 O., 480. Moreover, when a statute has been adopted from the laws of another state, the construction given it by the courts of that state is presumed to have been adopted also: People v. Coleman, 4 Cal., 46; Att'y Gen'l v. Brunst, 3 Wis., 787; Leavenworth Co. v. Miller. 7 Ks., 479.

The act in question was copied *verbatim* from the New York statute of April 16, 1830, and that, in turn, is substantially the English statute of 6 Geo. IV., c. 94. These statutes are known in the books as the "Factors Acts." Being in derogation of the common law, courts seemed to have always looked upon them with disfavor and to have given them a strict construction: 1 Am. Leading Cases, H. & W.'s Notes, 678.

Why our general assembly did not adopt the title as well as the language of the New York act it is difficult to perceive, as that was much more appropriate than ours. It was "An act relating to the practices of agents and factors." It is evident, however, that the same object was in mind here as there. That object, as stated in Cartwright v. Wilmerding, 24 N. Y., 526, and Stevens v. Wilson, 6 Hill, 512, was to ratify and make certain, in the cases to which it relates, the common
610 law rule that *where one of two innocent persons must suffer through the act of a third, it shall be he who, by confiding in such third person, made the injury possible. This is very clear as to section 3, which provides that every agent or factor intrusted with the possession of goods, or of the documentary evidence of title to them, for purposes of sale, shall be deemed the true owner so far as necessary to protect the rights of persons dealing with them in ignorance that they are only agents. This section, as well as the first, has been relied upon by counsel for defendant, but does not apply, because, while it is alleged that Hunt was plaintiff's agent, it is not alleged that he was intrusted with the goods for the purposes of sale.

It is to be regretted that the language of the first section is not so explicit as that of the third, and that, unlike the latter, it has never received direct judicial construction. In Covill v. Hill, 4 Denio, 324, Bronson, C. J., declared that the first section was not intended to apply to the case of stolen goods, but only to shipments by agents intrusted with the goods by the owner. That opinion was not called for in that case, but it is entitled to great weight as the opinion of an eminent judge, and is clearly consonant with the other parts and general object of the act. This court is not prepared to hold, merely because the language is broad enough, that the general assembly intended to overthrow one of the fundamental laws of property; that no one can be deprived of his property without his consent, or to provide a way for thieves to perfect a title to their plunder. A perfect analogy to this restrictive construction is found in the construction given to the mechanic's lien law, which provides that any person furnishing labor, etc., shall be entitled to a lien,

etc. It is settled, however, that this language applies only to the immemediate creditors: Stephens v. U. R. R. S. Y. Co., 29 O. S., 227.

Demurrer sustained.

L. Maxwell, for the demurrer.

P. H. Kumler, *contra.*

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*SUBROGATION. 611

[Pickaway County Common Pleas Court.]

DAVID B. WAGNER ET. AL. v. EDWARD M. OLDS.

Held: A surety who has paid the debt of his principal, and has a claim against his co-sureties for contribution, may be subrogated to the rights of the judgment creditor against his co-sureties.

COURTRIGHT, J.

The petition alleges that at the February term, A. D. 1878, of this court, the defendant obtained a judgment against the plaintiffs, one Nancy M. Reinck and D. J. Crouse, in the sum of $1,061.93 and costs of suit; that an execution was issued to the sheriff of Ross county, who levied the same on certain personalty described; that Crouse paid the judgment in full to the defendant, and the writ was returned. That the plaintiffs were the sureties of said Crouse; that the judgment having been paid, it should be entered satisfied. That the defendant has caused an execution to be issued directed to the sheriff of this county, and that the sheriff is threatening to levy said execution upon plaintiff's property, and that said Nancy M. Reinck has no property out of which any part of the judgment can be realized. Upon application of the plaintiffs, a temporary restraining order was allowed.

The defendant answering admits that Crouse has paid him the amount of the judgment on execution, but that Crouse claimed to be a co-surety with the plaintiffs of said Nancy M. Reinck, and that at the time he (Crouse) paid the said judgment, he demanded of the defendant an assignment and transfer of said judgment, which was made, and that Crouse holds said assignment to enable him to collect two-thirds of said judgment and costs from the plaintiffs, as such co-sureties. He denies that he caused the execution to be issued against the plaintiffs, but the same was issued under the directions of Crouse, in order to compel the plaintiffs to contribute the said two-thirds of said judgment and costs, and that he has no interest in this controversy and ought not to be subjected to any costs, and that Crouse *is a necessary party defendant 612
to the action. It is further averred, that at the time of the commencement of this action the plaintiffs had full knowledge of all of these facts.

To this answer the plaintiffs interposed a general demurrer, and the question presented by the demurrer is, can a surety who has paid the debt of his principal, and has a claim against his co-sureties for contribution, be subrogated to the rights of the judgment creditor as against his co-sureties?

It is well settled that a surety may be subrogated to the rights of

the judgment creditor against his principal. This doctrine no longer admits of a doubt in this state; it has been settled by a long line of decisions, and recently by legislative enactment.

But the question presented by the case at bar is a new and novel one, and, so far as we are able to learn, has never been made in any of the courts in this state. We are then, of necessity, obliged to look elsewhere, and learn, if we can, what rule should prevail.

Chief Justice Marshall, in the case of Lidderdale v. Robinson, 2 Brockenbrough 159, said:

"When a person has paid money for which others are responsible, the equitable claim which such payment gives him on those who were so responsible, shall be clothed with the legal garb with which the contract he has discharged was invested, and he shall be substituted, to every equitable intent and purpose, in the place of the creditor whose claim he has discharged. This principle of substitution is completely established in the books, and being established, it must apply to all persons who are parties to the security, so far as is equitable. The cases suppose the surety to stand in the place of the creditor, as completely as if the instrument had been transferred to him, or to a trustee for his use. Under this supposition, he would be at full liberty to proceed against every person bound by the instrument. Equity would undoubtedly restrain him from obtaining more from any individual than the just proportion of that individual; but to that extent his claim upon his co-surety is precisely as valid as upon his principal." See also Hess' Estate 69, Pa. State. 272, Howell v. Reams 73, Nor. Car. 391.

A surety who pays his principal's debt is entitled to be subrogated to all the rights and remedies of the creditor against his *co-surety
613 in the same manner as against the principal. Wright v. Grover & Baker S. M. Co. 82, Pa. St. 80.

We see no reason why the rule just stated should not be adopted. The right to substitution is the important thing. Why require the paying surety to resort to an independent action to enforce contribution, when it may be done in the same action, thereby preventing a multiplicity of suits and additional costs? Certainly the court would interfere and prevent the party from receiving any greater sum than the contributive share of his co-surety.

While there may be some doubt as to the soundness of this doctrine, yet we are of opinion that it should prevail. The demurrer will, therefore, be overruled.

Smith & Morris, for plaintiffs.

Page & Abernethy, for defendants.

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52 *CONSTITUTIONAL LAW—BOARDS OF CONTROL.

[Hamilton County District Court, 1879.]

Burnet, Avery and Cox, JJ.

STATE OF OHIO, EX REL. v. BROWN, ET AL.

1. The act of March 13, 1872, "to establish boards of control and to prescribe th ir duties," does not violate Art. X., sec. 2, of the constitution, in requir-

ing the members of the board to be elected at the annual April election instead of at the October election.

2. The act does not confer corporate powers, and, therefore, does not contravene Sec. 1 of Art. XIII., of the constitution, which prohibits the passage of any special act conferring corporate powers.

3. It is not a law of a "general nature." Neither is the act establishing Boards of County Commissioners and prescribing their duties, a law of a "general nature," within the meaning of the constitution, although it is a general law, applicable throughout the state. Therefore, the act to establish Boards of Control, which is a special act, and operates as a limitation, in Hamilton County, upon the powers of the commissioners, is not for that reason unconstitutional.

Quo warranto. On demurrer to petition.

BURNET, J.

It is alleged that the defendants are illegallly exercising the functions of the office of members of the Board of Control of Hamilton county, and in support of the allegation it is claimed that the law under which they are acting is a violation of three several divisions of the constitution of the state, viz.: Article X., section 2; Article XIII., section 1; and Article II., section 26.

The act nominally "to establish *Boards* of Control, and to prescribe their duties," but in effect to establish a Board of Control in Hamilton county (69 O. L., 40) was passed March 13, 1872. It was afterward amended in some particulars, but not so as to affect materially the questions presented in this cause. *It provides "that in each county in this 653
state containing a city of the first class, having a population exceeding one hundred and eighty thousand, there shall be, in addition to the Board of County Commissioners, a Board of Control, to consist of five members, who shall be elected at the annual election in April, by the qualified electors of any county in which, by the provisions of this act, a Board of Control is established, and they shall hold their office for three years, and until their successors are elected and qualified."

Section 7 provides: "The Board of Control shall have final action and jurisdiction on all matters involving the expenditure of money, or the awarding of contracts, or the assessing and levying of taxes, by the said Board of County Commissioners; every contract shall be awarded to the lowest responsible bidder, on his giving sufficient security for his performance of the same; provided that the said Board of Control may reject all bids."

Section 8: "No contract or release made, or liability incurred, nor any appropriation or allowance, nor taxes levied or assessed by the Board of County Commissioners, shall be valid and binding unless a majority of all the members of said Board of Control present shall vote in favor thereof; and no contract or release made, or liability incurred, or appropriation or allowance made, which involves an expenditure of money to the amount of one hundred dollars or more, nor taxes levied or assessed, shall be approved by said Board of Control until the next meeting, after such matter or things come before said board, unless a majority of all the members shall vote for the same."

The effect of the law, in reference to those subjects embraced in its provisions, is to give to the Board of Control an absolute veto upon the acts of the County Commissioners; whereas, in the other counties of the state, the authority of the commissioners, in regard to those matters, is uncontrolled and absolute.

It is claimed, in the first place, that the act is unconstitutional, in requiring the election to take place at the annual April election.

Article X., sec. 2, of the constitution, provides that county officers
654 shall be elected on the second Tuesday of October, until *otherwise directed by law, by the qualified electors of each county, in such manner and for such term not exceeding three years, as may be provided by law.

This section confers upon the legislature the power to fix another time than the second Tuesday of October for the election of county officers, but it is claimed that a proper construction of the language requires that there shall be but one time for the election of all county officers, and any change must include all.

Township officers *must* be elected on the first Monday of April, members of the legislature on the second Tuesday of October, and the governor and other State executive officers on the second Tuesday of October. Section 15 of the schedule provides, "*Until otherwise provided by law*, elections for judges and clerks shall be held and the poll-books returned, as is provided for governor."

If the claim be correct, that the authority given to the legislature to change the time for the election of county officers, requires them to fix the same day for the election of all county officers, the objection is a fatal one, and the members of the Board of Control illegally assume the powers they exercise; for the time fixed for their election is different from that fixed for most, if not all, other county officers. Any election held at a time not in accordance with the requirement of the constitution, is unauthorized and void. State *ex rel.* McNeal *v.* Donbaugh, 20 O. S., 178.

But is this a necessary or correct construction of the section in question? We have seen that the constitution also provides for the election of judges and clerks on the second Tuesday of October *until otherwise provided by law.*

Under the authority of the constitution, the legislature has frequently provided for the election of additional common pleas judges in different counties and subdivisions of the state. The time for these elections has not always been on the second Tuesday of October, but has been fixed at various periods, and sometimes upon days when no other officer was to be elected. We have not heard it intimated, at any time, that these elections were void, nor do we know that they have ever been questioned.

We have been referred to the debates of the constitutional
655 *convention upon this section. We have carefully read the reports of the debates. The first proposition in the convention was to fix the election upon the first Monday in April, at the same time with the township election. The sentiment of the members was divided between the spring and fall elections. The township elections were fixed irrevocably for April, and election for members of the general assembly and most other state officers was fixed irrevocably for October. In reference to county officers, the opinion finally gravitated toward the fall, but it was objected that it would not be wise to tie the hands of the legislature so that they could not, at any time, change it; and hence the introduction of the words, "until otherwise directed by law."

The former constitution did not fix the time for the election of any county officer except sheriff and coroner, and expressly left the time for

the election of town and township officers to be determined by the legislature. Under that constitution it was clearly competent for the legislature to appoint the election of other county officers upon different days from that on which the sheriff and coroner were elected. In the debates of the constitutional convention we have been unable to find any expression of opinion that the discretion of the legislature should be limited, or that they might not fix different times for the election of different county officers. Where the language of a constitutional provision is ambiguous or uncertain in its meaning, it is legitimate to resort to the expression of the members of the convention which framed the instrument, to learn what it was understood by them to mean. But the convention merely framed the instrument, and had no power to enact it and give it binding force. This was the work of the whole people of the state, and each elector was governed in his vote by his own understanding of its meaning. It is different in the case of a law enacted by a legislative body. The debates of the constitutional convention, therefore, are not of the same value in determining the meaning of the provisions of the constitution as the debates of the general assembly in determining the meaning of a law enacted by it. But, giving these debates their fullest value, we are unable to find that they furnish any argument to sustain the construction claimed for this section.

*The language, in itself considered, does not appear to be ambiguous, nor to require the construction contended for; but, on the 656
contrary, its most obvious and natural construction is otherwise. While the section does appoint the second Tuesday in October for the election of county officers, it authorizes the legislature to change it, and places no restriction on the exercise of the authority thus given.

It is the province of the courts to declare a law to be void which is plainly unconstitutional. But unless it is plainly so, the judgment of the legislature is respected and the law stands. Especially should this be the case where no great natural rights are involved. In this case we do not think such necessity is imposed on us. It is the opinion of the majority of the court that under this provision of the constitution the legislature may fix a different time for the election of some county officers, without changing the time for all.

But, it is said, the law violates the first section of Article XIII of the constitution, in that it is a special act conferring corporate powers.

It is contended that the case of the State *ex rel.* The Attorney General v. The City of Cincinnati *et al.*, 23 O. S., 445, is substantilly like this. The law under consideration in that case required the rules and regulations adopted by the trustees of the Commercial Hospital of Cincinnati to be submitted to the city council of Cincinnati for their approval, and declared that when they were approved by that body, they should have full force in law, as other ordinances of the city. The effect of the law was to put the rules and regulations for the government of the hospital under the legislative control of the city council of Cincinnati. The rules and regulations were required to originate with the trustees, but they could have no binding force until passed on and approved by the council, and when so approved were declared to have the same force as other ordinances of the city. The court held that the act assumed to confer corporate power on the city council of Cincinnati. The legislative power of the city in its corporate capacity is vested in the

council. The power attempted to be conferred is not vested in the *members* of the council as *individuals*, but is sought to be vested in the coun-
657 cil *in its legislative and corporate capacity. The act, therefore, being a special act, was in conflict with section 1, Article XIII, of the constitution, and was void.

In the same volume, page 434, in the State *ex rel.* v. Davis *et al.*, the court held that a special law authorizing the trustees of the hospital to make the "rules and regulations," and to govern and control the affairs of the institution, was not obnoxious to that objection, and did not confer corporate power. And from the intimation in the opinion of Judge White as quoted above from the former case, we may infer that if the act under review in that case had conferred the power of supervision therein given upon the individual members of the city council as individuals, and not as the legislature of the municipal corporation, and the depositary of its corporate legislative powers, it would have been held to have been valid, and not in any sense to have conferred corporate power.

And therein lies the distinction between that case and the case at bar. The counties are not corporations; the counties and townships are only subdivisions of the territory of the state, organized with their separate officers, under a general system of laws, for the more convenient government of the state, and the more easy attention to the peculiar wants of its separate parts. Neither a county nor the board of commissioners of a county is a corporation proper. But the board of commissioners is clothed with the capacity to sue and be sued in their official character, and hence have been called a *quasi* corporation. In other words, while they are not a corporation, as public officers they are invested with a few functions characteristic of corporate existence. Commissioners of Hamilton County v. Mighels, 7 O. S., 109; also, 1 O. S., 89; 10 O. S., 526, 20 *ibid*, 37.

The only quality of the county commissioners which induced the supreme court to liken them to a corporation, or to call them a *quasi* corporation, is their capacity to sue and be sued. And this capacity they have not as a corporation, but as public officers, representing the county and its interests.

So, too, are the members of the board of control only public officers, representing in a more limited degree the interests of the county, having
658 no functions or capacities whatever, except *the supervisory power over certain acts of the commissioners. They are not even a *quasi* corporation, for they have no capacity to sue or be sued.

In the case of the State of Ohio *ex rel.*, Attorney General v. Covington *et al.* 29 O. S., 102, it was held that "the provisions of a statute which confer upon a board of police commissioners the power to appoint and control the policemen of a city are not in contravention of section 1, Article XIII, of the constitution, which provides that the general assembly shall pass no special act conferring corporate powers, although the expenses of the police establishment be paid by city taxation." The case at bar is clearer than that case, and we are constrained to hold that the law does not confer upon the board of control any corporate powers.

But it is contended that this is a law of a general nature, and that, as it is confined to its operation to Hamilton county, it violates the 26th section of Article II, of the constitution, which provides that all laws of a general nature shall have a uniform operation throughout the state.

Or, which is to the same effect, it is contended that the law prescribing the powers and duties of the county commissioners throughout the state, is a law of a general nature, and must be uniform in its operation, and, therefore, cannot be limited by the supervisory authority of a board of control in any one or more counties, and not in all.

The point involved in this contention is not without difficulty. But the case is not, however, without precedent in Ohio. Ruffner v. Commissioners of Hamilton County, 1 Disney, 39 and 196, furnishes a direct authority. A local law of 1848, for Hamilton county, required the commissioners, before entering into a contract involving an expenditure of $5,000, to submit the question to a vote of the people, and if that was adverse, the contract could not be made. This, without doubt, was not in contravention of any provision of the constitution of 1802, which was then in force. In 1853, under the present constitution, a general law was passed, applicable to the whole state, giving county commissioners power unlimited to contract, without requiring submission to the people. The new law did not in terms repeal the former local law. The question was, did Art. *II., Sec. 26, of the constitution, require it to be construed as repealing by implication? If the law creating county commissioners, and prescribing their functions, besides being a general law, was a law of general nature, within the meaning of the constitution, it necessarily repealed the local law by implication, because, by the force of the constitution, if operated uniformly throughout the state—in this county as well as in all other counties. *Ex-parte* Van Hagan, 25 O. S., 431. Judge Storer, at special term, and Judge Gholson, at general term, held that it did not repeal by implication the former local law, on the ground that the law, which was to be judged by its subject matter, and not by its form, was not of a general nature, but special in its character. 659

On the other hand, there is the case of Kelly v. The State, 6 O. S., 269, where a law conferring certain criminal jurisdiction on the court of common pleas in certain counties, and withholding it in others, was held to be contrary to this provision of the constitution. We take no account of Welker v. Potter, 18 O. S., 85, and State v. Mitchell, 31 O. S., 608, which have reference to municipalities, and to laws which, of course, are in their nature special. But can there be a distinction made between Ruffner v. County Commissioners and Kelly v. The State? In the latter case the court says: "The courts of common pleas in Ohio are an organization of a general nature, for the organic law provides for their existence in every county; they are an important agency in the administration of justice throughout the state, and are by law clothed with a jurisdiction over every citizen. The laws, then, which relate to and regulate their organization and jurisdiction, are laws of a general nature, and are imperatively required to have a uniform operation throughout the state."

So, too, it might be said, the system of county commissioners, for the government of the affairs of the counties, is a general one throughout the state, recognized by the constitution. But there are these differences: The judges are state officers, and the commissioners are county officers. The powers exercised by the judges in the decision of causes are not discretionary, nor modified, nor affected by the circumstances which surround the court, or the interests of any locality, but must be

660 *exercised according to certain fixed laws and rules, which are general and uniform in their character. The laws, therefore, conferring their jurisdiction are, within the meaning of the constitution, general in their nature, and must be uniform. But not so with the commissioners. They have to deal with local interests as executive or administrative officers, and are governed in their determinations by their own discretion as to what is expedient. What might be deemed expedient in one county might not be so considered in any other. The proceedings of the commissioners in the different localities will be governed by their estimate of the peculiar wants and desires of the people of those localities. In the absence of any express provision of the constitution that the counties of the state shall be governed alike by the same general laws, there is no reason why special laws may not be passed for the purpose. If special laws on the subject may be passed, then no general law that is passed is, necessarily, a law of a general nature. And even the common pleas may be charged with duties of a special local character, as in the case of the fee bill of Hamilton county, in regard to which they act in their judicial capacity.

In the case cited (1 Dis., 204) Judge Gholson says: "Of the term 'uniform operation' it would be difficult to give any satisfactory general definition. It is not confined to the taking effect, and being a law throughout the state, for every law may be said to have that operation. Is it sufficient that it may operate uniformly at the discretion of different and distinct bodies throughout the state? In other words, is a mere power to act upon subject-matters in their nature distinct and different, though, it may be, of like kind, the uniform operation of a law? Does the operation of the law consist in its effect on those who, by its means, are affected in person or estate, or in the grant of a power to produce the effect? If a like power be given to bodies created for the purpose in all the counties of the state, but the exercise of the power depends on the discretion of those bodies, and in some counties it may be exercised, and in some not; in some counties it may be exercised to a certain extent, and in others to a different extent, involving heavy burdens upon the people, or light, as the discretion of those acting under the power shall
661 determine; does the operation of the law *consist in the grant of the power or its exercise? If in the latter, it seems clear that such a law is not one having a uniform operation throughout the state. From its nature it can not have a uniform operation; and if so, then it can not be a law of a general nature within the meaning of the constitution. It may be a general law, because, in general terms, and by a general description, applicable to all, it confers powers upon distinct bodies of men; but as these bodies of men may, and, indeed, in many cases of necessity must, exercise the power differently and to a different extent, and with different effect on those to be affected, it is not a law of a general nature."

In that case the local law held not to be in violation of the constitution, and not to be repealed by implication by the general law subsequently passed, required certain propositions to be submitted to a vote of the people before they could be embodied in contracts. If this may be required of the county commissioners, equally it may be required that their proceedings in certain matters be submitted to the supervisory judgment of a board of officers elected by the people.

The reasoning of Judge Gholson is sustained by the language of Judge Thurman, in Cass v. Dillon, 2 O. S., 617. He says: "The origin of this section is perfectly well known. The legislature had often made it a crime to do in one county, or even township, what it was perfectly lawful to do elsewhere; and had provided that acts for the punishment of offenders should be in force or not, in certain localities, as the electors thereof respectively might decide. It was to remedy this evil, and prevent its recurrence, that this section was framed." See also 21 O. S., 10.

It is the opinion of the majority of the court that neither the general law prescribing the duties of the county commissioners nor the law establishing the board of control is a law of general nature within the meaning of this section of the constitution.

The demurrer to the petition will be sustained.

D. Thew Wright and A. J. Cunningham, for relator.

Judge Hoadly and C. W. Baker, for defendants.

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*FUGITIVE FROM JUSTICE. 662

[Hamilton County District Court, 1879.]

Burnet, Avery and Cox, JJ.

JOHNSON AND JOHNSON v. AMMONS.

To constitute a fugitive from the justice of a state, within the meaning of the constitution and act of congress providing for the surrender of such fugitives it is not required that the person should have fled secretly or suddenly with the consciousness of having committed the offense, or hurriedly for the purpose of avoiding apprehended process of the law. It is sufficient that, being within the jurisdiction at the alleged time of the commission of the offense, he has subsequently departed before a reasonable time for prosecution shall have elapsed.

ERROR to Court of Common Pleas.

AVERY, J.

Ammons recovered a verdict and judgment in the court of common pleas for the malicious prosecution by Jefferson and Jonathan Johnson of extradition proceedings against him as a fugitive from justice. The extradition proceedings were upon an indictment for embezzlement found in North Carolina.

Ammons was a resident of this state, and had gone to North Carolina and been employed by the Johnsons in selling sewing machines, but had left their employment and returned here. Two or three weeks afterward, they becoming advised of facts which caused them to suspect him of embezzlement, procured his indictment. Being arrested in this state, upon a requisition of the governor of North Carolina, he was taken before a judge in pursuance of the act (72 O. L., 79), and discharged. The indictment, so far as appears, is still pending.

The court charged the jury that "to constitute a fugitive from the justice of one state into another, within the meaning of the law, there must have been a fleeing by the plaintiff either secretly or suddenly, with a consciousness of his having committed the offense; or, knowing

or suspecting that he was or would be charged by the legal authorities with the commission of a crime, he flies to another state hurriedly for the purpose of avoiding the apprehended process of the law against him."

663 *To this an exception was taken by the defendants.

The testimony of Ammons was that he was not guiity of embezzlement, and had not left the state from apprehension of process of law, but to attend to private business at home; and had come openly by the usual route of travel, after a preparation of five or six days.

The charge was, therefore, material. Under it, taking his testimony to be true, he could not have been deemed a fugitive from justice.

The surrender of fugitives from justice is provided for in the constitution of the United States. The provision is that "a person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

To flee from justice has been held to require that the person shall have been actually within the jurisdiction of the state making the demand at the time of the alleged commission of the offense. 3 McL., 133; 1 Sandf., 701; 7 Reporter, 367; Wilcox v. Nolze, Sup. Ct. Ohio, Dec. 7, 1878. But it has not been held that the subsequent departure must have been secretly or suddenly with a consciousness of having committed the offense, or hurriedly, with apprehension of the process of the law.

To require consciousness of having committed crime would open up the question of guilt or innocence of the crime, a question into which all inquiry has been held to be precluded. (34 O. S., 64, 72; 56 N. Y., 182, 187). To require apprehension of the process of law would, when crime was secretly committed, permit the criminal to escape, unless when he departed from the jurisdiction there was danger of exposure.

There appears to have been a refusal by a governor of Maine to surrender the masters of a vessel charged with abducting a slave from his owner in Georgia, upon the ground that they were not conscious of having committed an offense. (6 Am. Jurist, 226, 233). An attorney general of Pennsylvania is reported to have advised the chief executive of the state that a person committing a crime in the state of his temporary sojourn, and departing to his ordinary and permanent residence in

664 *another state, could not be considered a fugitive from justice under the constitution and act of congress. (Hurd on *Habeas Corpus*, 607). But this has not been the language of courts.

In Clarke's case, upon *habeas corpus*, the prisoner denied that he had committed the offense, or had come away from apprehension of the criminal process of law; upon the contrary, that it was for private business. Nevertheless, the writ was discharged and the prisoner remanded. (9 Wend., 212).

Kingsbury's case, 106 Mass., 223, dissents from the opinion that a person committing a crime in his temporary place of sojourn, and departing to his usual residence in another state, cannot be called a fugitive. Such opinion is held not to be sustained by a reasonable construction of the constitution and act of congress.

The same opinion had been unfavorably commented upon at an earlier day, by the learned author to whose work Mr. Hurd, in the citation above noted, refers. (Lewis' Cr. Law, 266).

Kingsbury's case lays down the rule that to constitute a fugitive from justice, within the meaning of the constitution, the material facts are that "the person is charged with crime in the manner prescribed by law, and has gone beyond the jurisdiction, so that there has been no reasonable opportunity to prosecute him after the facts were known. The fact that he returned to his permanent home can not be material."

In Vorhees' case, 32 N. J., 141, 150, it is stated thus: "A person who commits a crime within a state and withdraws himself from the jurisdiction, without waiting to abide the consequences of the act, must be regarded as a fugitive from the justice of the state whose laws he has infringed. Any other construction would not only be inconsistent with good sense and with the obvious import of the word to be interpreted by the context in which it stands, but would likewise destroy for most practical purposes the efficacy of the entire constitutional provision."

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

Moos & Pattison, for plaintiff in error.

Hildebrandt, *contra*.

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*JUDGMENT LIEN—MISNOMER. 665

[Hamilton District Court, 1879.]

Burnet, Avery and Cox, JJ.

†JAMES MACK v. GEORGE SCHLOTMAN ET AL.

Judgment taken in the name by which a debt is contracted, but which is not the true name of the debtor, binds his lands, and the lien will not be affected by a subsequent conveyance in his true name to a *bona fide* purchaser.

AVERY, J.

This case comes into this court by appeal from the court of common pleas. It is a proceeding to marshal liens and subject land to sale under a judgment.

The judgment was obtained before a justice of the peace, and a transcript being filed in the office of the clerk of the court of common pleas, execution was issued and levied upon the land. Afterward the judgment debtor conveyed the land.

The true name of the judgment debtor was Gerhard Schlotman, but the judgment was taken against him by the name of George Schlotman, which he gave as his name when he contracted the debt, and by which among some of his acquaintances he was known. The conveyance was made in his true name, the purchaser not knowing him by any other, and not knowing of the judgment.

The question that arises is between the judgment creditor and the purchaser.

The lien of the judgment was created by law. The transcript being filed in the office of the clerk of the court of common pleas, the judgment became a lien upon the real estate of the judgment debtor within

† For common pleas decision sustained by this opinion, see 3 B., 737.

the jurisdiction of that court. S. & C., 1,093. The judgment debtor was not named by his true name, but it was the name that he gave, and he had not objected to the misnomer. He certainly was bound by the judgment. (2 Str., 1,218; 5 M. & G., 778; 3 Sm. & G., 16). As a judgment against him it was a lien upon his real estate.

Being a lien to him, did it differ as to a purchaser?

At common law a judgment related to the first day of the term, although signed after, and when by the statute of Westminster, 2, lands might be taken, the plaintiff was entitled to execution of whatever the
666 defendant was seized of on the first day of the *term or at any time thereafter, although before execution he had aliened to a *bona fide* purchaser. The statute of Frauds, after reciting that thereby many times purchasers found themselves aggrieved, enacted that as against *bona fide* purchasers for valuable consideration of lands, etc., judgments should not relate to the first day of the term, but should in consideration of law be judgments only from such time as they should be signed. The statute of 4th and 5th, William and Mary, enacted that no judgment not docketed and entered as therein prescribed, should affect lands and tenements as to purchasers or mortgagees. The statutes 1 Vict., chap. 110, and 2 Vict., chap. 11, provide for registering judgments, and unless registered the judgment shall not affect any lands, tenements or hereditaments.

These references are instructive. Judgments are not of themselves liens upon any property, real or personal. How far they shall so operate dependsupon legislative enactment, 2 Ohio, 71. But the lien once created is operative, except where it may have been provided otherwise by the law, andunless the case of a subsequent purchaser be provided for, the judgment lien is as good against him as against the judgment debtor.

In some states the statutes make provision. In Pennsylvania the prothonotary, so soon as judgment is rendered, is required to enter the names of the parties, amount of the judgment, etc., in a lien or judgment docket. In New York there are somewhat similar requirements for docketing judgments, which judgments are made liens only from the time of such docketing.

The Pennsylvania courts hold that unless properly docketed the judgment is without effect as a lien, so far as respects subsequent purchasers and incumbrancers. This was held with such strictness as to defeat the lien as against a purchaser where the initial letter of the judgment debtor's middle name was omitted. 7 W. & S., 406. The same consequence, it was held, would follow from the omission of Christian names, in docketing a judgment against partners, unless purchasers had actual notice. 36 Penn. St., 458. The ground was that judgments were required to be docketed for the same purpose that deeds were required to be recorded, namely, to give notice to subsequent purchasers and incumbrancers. 36 Penn. St., 461; 3 W. & S., 233.

667 *The New York courts have had less occasion for construction since the statute of that state is more explicit. Judgments there are liens only when docketed. From this, which is the conclusion reached by construction in Pennsylvania, the same results would follow. 2 Barb. Ch., 165-193; 8 Abb., 152; 13 How. Pr. 21.

In this state there are no such provisions. Judgments of courts of record become liens when rendered, and except where rendered by con-

fession the lien relates back to the first day of the term. Judgments of justices of the peace become liens when transcripts are filed in the court of common pleas. The object of requiring a transcript to be filed is not to give notice of the judgment, but to give it the effect of a judgment of that court.

The lien of a judgment is a legal charge. It operates, observes Judge Hitchcock, from the first day of the term in which entered, and no person buying subsequent to that period would be protected under the plea that he was an innocent purchaser without notice. Ludlow v. Johnston, 3 Ohio, 576. The case of the Urbana Bank v. Baldwin, 3 Ohio, 65, is an illustration. The case, as the court observed, may have been a hard one, but there could be no reason there to restrain the words of the statute, which would not apply to every other case. See also 14 Ohio, 514; 10 Ohio, 76, note; 6 Ohio, 30-31.

The general principle is stated thus: "The lien of a judgment will not be defeated by the plea of purchase for valuable consideration without notice. Such defense is a protection in equity only, and can never prevail against a legal title to which there is no obstacle preventing recovery at law." Burke v. Heywood, 1 Baily, Eq., 208.

It was a matter of no consequence, therefore, that the judgment as entered might not have been sufficient to convey notice to the purchaser. Notice was not necessary. The lien did not relate back, as would have been the case had the judgment been rendered by the court of common pleas, but otherwise it had the same effect as a judgment of that court.

The identity of the judgment debtor made the lien valid as to him, and for that reason it was valid as to the purchaser.

*Order for sale may be taken accordingly, finding the priority of the judgment. 668

Henry Snow, for plaintiff.

A. E. Cramer, *contra*.

AGRICULTURAL SOCIETIES—MORTGAGES.

[Harden County District Court, March Term, 1879.]

Owen, Beer and Dodge, JJ.

SAMUEL STEWART v. AGRICULTURAL SOCIETY ET AL.

1. County agricultural societies are, under the Ohio statute, corporations for public purposes with defined and limited powers.
2. They can not mortgage "Fair Grounds" to secure debts.
3. Such mortgages are absolutely void.

In 1878 Stewart filed a petition in the court of common pleas to recover judgment on a note executed by the Hardin County Agricultural Society, and praying for an order to sell the Hardin county fair grounds, under a mortgage executed by the society, to secure the payment of the note. Sayler, in his answer, set up a mortgage to him, executed by the society on the fair grounds, to secure the payment of a note to him which was due. The notes and mortgages were executed by the society by the president and secretary thereof, authorized by resolution of the board of

managers, and were given for money loaned and used to improve the fair grounds. The county commissioners answered that the fair grounds were paid for to a large extent from taxes raised under a local statute of May 4, 1869. (66 O. L., 89).

The agricultural society did not answer.

In the common pleas there was judgment as at law for Stewart on his note, and a decree to sell the fair grounds and *apply the pro-
669 ceeds of the sale to pay costs, the judgment of Stewart, and the mortgage claim of Sayler. The agricultural society did not answer. The case was apealed to the district court on the notice and appeal bond of the county commissioner.

John D. King, for plaintiff, cited Hays v. Galion Gas Light company, 29 Ohio State, 340; [Bank v. Chillicothe, 7th Ohio, Part 2, p. 31].

The agricultural society can make no defense for want of answer.

1. The society is a corporation under act of Feb. 28, 1846, 44 Stat. 70, and act of Feb. 15, 1853, 51st Stat. 333; First S. & C., 61-66.

They may be aided under act of April 8, 1868, 65 Stat. S. & S., 6, and this society was aided under the act of May 4, 1869. These laws create corporations for public purposes. The act of 1853 says, they shall be "capable of suing and being sued, and capable of holding in fee simple such real estate as they may have heretofore, or shall purchase hereafter, as sites whereon to hold their fairs." Section 4 provides that, upon the dissolution of a society, the title to fair grounds shall rest in the county commissioners.

The power is not given even in express terms, though it may exist to a limited extent to make contracts.

If the managers can sell or mortgage fair grounds, then the boards of education can mortgage school-houses, township trustees can mortgage township property, and county commissioners the county property. No such power has ever been recognized, and it would be ruinous to public interests to admit such a power in public corporations. The statutes in effect deny the power to raise money by mortgage, by prescribing how funds may be raised.

2. If this were a mere private corporation, it would not have authority to execute a mortgage. Strauss v. Eagle Insurance Co., 5 Ohio State, R. 61; Coe v. Columbus R. R., 10 Ohio State, 372; Price's *ultra vires*, by Greene, 123; Ohio Constitution, Art. XIII., Sec. 3.

The case cited in 29 Ohio State, 340, has a *dictum* not supported by the opinion of the court in the syllabus. This *dictum* *is contradicted
670 by Medill v. Collyer, 16 Ohio State, 612, and by every book that discusses the doctrine of *ultra vires*.

3. The facts appear, and the court must notice the want of power to execute the mortgages.

The court held: That the mortgages were absolutely void, and that the remedy of a creditor was to recover judgment and sequester the income of the society.

Judgment for Stewart on his note as at law, and petition and answer of Sayler dismissed, without prejudice as to the mortgages.

John D. King, for plaintiff.

Wm. Lawrence, for defendant.

LIFE INSURANCE—EXEMPTIONS.

[Superior Court of Cincinnati, Special Term, 1879.]

MATILDA WAGNER, ET AL. v. FERDINAND KARMAN, ADM'R, ET AL.

The proceeds of life insurance policies, taken out by a man on his own life, for the benefit of his wife and three children, in excess of the amount protected from creditors by the act of 1847, section 737, (§3628, R. S.), and another policy for the benefit of his wife and four children, there being another child born, cannot be disposed of by his will; but the earlier policy goes to exhaust the statutory exemptions, and will, to that extent go to the wife and three children, and the balance on such policy, and the proceeds of the latter will go to the administrator to pay debts, costs of administration, and a year's allowance to the widow, and the balance will go to the widow and the four children according to the statute of descents.

STATEMENT.

This cause is submitted for decision upon an agreed statement of facts in persuance of Div. III., Chap. 2, Sec. 47, of the new civil code, former code, Sec. 495.

On December 27, 1869, Frank L. H. Wagner, then a resident of Cincinnati, O., and having a wife, Matilda Wagner, and *three* children, Alma, Alfred and Paul Wagner, took out a policy of insurance upon his life in the New England Mutual Life Insurance company for the sum of $5,000, payable at his death to his widow and *three* children, the annual premium being $157.50. Shortly after this policy was taken out by Mr. Wagner, another child, Angelica Wagner, was born, and he took out another policy in the Royal Life Insurance company of Liverpool for $5,000, and by the terms of the policy the amount, together with the accumulation of profits, were to be paid to his wife and children at his death. Upon this policy he paid an annual premium of $148.

*Afterward he died testate, both policies being in force, leaving the said Matilda, his widow, and the above-named four children, all of whom, except Alma, 671
who is of age, are infants under twelve years old, and who are represented here by their next friend and guardian, Matilda Wagner. The widow and children have received from the Royal Life Insurance Company the full amount of the policy issued by it, with the accumulated profits, amounting in all to $5,600, they being the persons to whom it was payable by the terms of the policy. The defendant, Ferdinand Karman, as the administrator, with the will annexed, has received from the New England Mutual Life insurance Company $4,664.65, the amount due from it upon the policy issued by it. All the premiums were paid by Mr. Wagner out of his own means. The personal property left by Wagner at his decease does not amount to more than $100, all of which will be set off to the widow for her year's support, which year's support will require an additional amount to be set off to her. The expenses of the last sickness, funeral expenses and costs of administration are to be paid, and Wagner's general indebtedness amounts to several hundred dollars.

The deceased by his last will bequeathed to his widow one-third of the amount to be realized upon the Royal policy, and to each of the four children a sixth thereof. Of the amount to be paid by the New England Mutual, he bequeathed a fifth to the widow and each of the four children. The widow has refused to take under the will, and the cause is submitted to determine what are the respective rights of the widow, the several children, and of the administrator.

YAPLE, J.

To properly determine the case, it is necessary to consider and construe two statutes of this state, both of which are in force and apply to different subject-matter. The first is the act of February 8, 1847, 1 S. & C., 737, the first section of which enacts: "That it shall be lawful for any person to effect an insurance on his life for any definite period of time, or for the term of his natural life, to insure to the sole benefit of his widow and children, or of either, as he may cause to be appointed and

672 *provided in said policy;and the sum or net amount of insurance becoming due and payable by the terms of insurance, shall be payable to his widow or to his children, for their own use, as may be provided in the policy, exempt from all claims by the representatives and creditors of such person, provided that the amount of premium annually paid on such policy shall not exceed the sum of one hundred and fifty dollars; and, in case of such excess, there shall be paid to the beneficiaries named in the policy such portion of the insurance as the sum of one hundred and fifty dollars will bear to the whole annual premium, and the residue to the representatives of the deceased."

The second enactment is the law of April 27, 1872, 69 O.L., p. 159, sec. 30, which provides that, "It shall be lawful for any married woman, by herself, and in her own name, or in the name of any third person, with his assent as her trustee, to cause to be insured for her sole use the life of her husband, for any definite period, or for the term of his natural life; and in case of her surviving such period or term, the amount of the insurance becoming due and payable by the terms of the insurance, shall be payable to her, to and for her own use, free from the claims of the representatives of the husband, or of any of his creditors * * * The amount of such insurance may be made payable, in case of the death of the wife, before the period at which it becomes due, to his, hers or their children, for their use, as shall be provided in the policy of insurance, and to their guardian if under age, provided, however, that if such policies are procured by any person with intent to defraud his creditors, an amount equal to the premium paid on such policy or policies, with interest, shall inure to the benefit of said creditors, subject, however, to the statute of of limitations."

The act of 1847 authorizes a husband to insure his life with his own means to the extent of an annual premium of $150, for the benefit of his wife, or wife and children, as he may appoint, which insurance procured by such $150 annual premium will go to the designated beneficaries, free from all rights and claims of his creditors or personal representatives.

The act of 1872 enables the wife, with her own separate means or
673 estate, which she may have in her own right, or derive *by gift from others, or her husband, subject, in the case of his donations, to his creditors' rights to the amount of the premiums he furnishes her the means to pay, to insure her husband's life for her benefit in any amount.

Neither of the policies in this case was taken out under the law of 1872, but both are governed by the statute of 1847. And the case is, in this view of it, the same as if he had taken but one policy for $10,000 at the time he obtained the first one, paying a yearly premium of $305.50. The legal right to take insurance in the form of these policies, under the law of 1847, was exhausted by securing that for $5,000 in the New England Mutual Life Insurance Company. That has netted the sum of $4,664.65, the annual premium being $157.50. Of the amount realized the widow and three children, Alma, Alfred and Paul Wagner, are entitled to the sum of $4,430.76, to be divided equally among them. The remainder, $233.24, goes to the administrator to be administered according to law. The administrator is also entitled to the $5,600 realized upon the policy in the Royal of Liverpool, which he will administer according to law. The insured could not by will dispose of any portion of the money to be derived from either policy, the law vesting all his rights in the appointed beneficiaries named in the first policy to the extent of the propor-

tion that $150 bears to $157.50, and the excess of that and all of the amount of the second policy, by the very terms of the statute, to go to the personal representative. The whole is placed by law beyond the power of the insured to disposed of by will. By taking out the policies as he did, he placed the fruits of such insurances beyond his power to control and estopped himself from claiming the ownership of any part of the same.

This will give $5,833.24 to the administrator to pay the decedent's debts, the costs of administration, and the widow's year's support, and the balance remaining of this sum he will distribute to the widow and the four children, under and according to the statute of descents and distribution. The $4,480.76 will, in the proportion of one-fourth to each, go to the widow and three children, in being and designated as the appointees when the first policy was issued to the insured. See Union *Central Life Insurance Company v. Eckert, American Law Record, Oct., 1878. 674

A judgment entry may be prepared and entered in accordance with the foregoing decision.

C. W. Cowan, for plaintiffs.

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*MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS. 734

[Hamilton District Court, 1879]

THE CITY OF CINCINNATI *v.* JOHN MATHERS ET AL.

A municipal corporation passing an ordinance when it is deemed necessary to extend a street, as provided for by Section 2642 Revised Statutes, need not also pass the resolution to the same effect, as provided for in section 2235; essentially there is no difference between the methods, except that the ordinance is of the more solemn nature.

ERROR to reverse a judgment of the Court of Common Pleas.

In the court below the plaintiff filed her petition, alleging that common council, by an ordinance passed on the 22d of November, 1878, the yeas and nays being taken in each board, and two-thirds of the members elected to each board concurring therein, and duly approved by the mayor and board of public works, on November 25, 1878, did declare that it was necessary to condemn and appropriate to the public use, for street purposes, for the purpose of opening and extending Grand street from Nassau street to Gilbert avenue, and declaring its intention so to do, did condemn and appropriate to the public use, for the purpose of extending and opening Grand street as aforesaid, the following described premises [here describing the property of the defendants.]

*To this petition the defendant answers, admitting that they are seized in favor of the premises described, and admit the passage of 735
the ordinance described, but deny the right of the city in this, either to appropriate the same or cause a jury to be impaneled for inquiry of compensation to be paid by the city, and set up three defenses, only one of which is here relied on. As a first defense they say "That the City of Cincinnati is a municipal corporation; that Grand street north of Nassau street is one of the public streets within said corporation; that the said real estate is the private property of defendants; that the purpose

is the opening and extending of Grand street, north from Nassau street, through their private property, by the appropriation thereto of the said strip of land; and that the council of said city have not passed a resolution declaring such intent, defining therein the purpose of appropriation, and setting forth a pertinent description of the property designed to be appropriated, as required by the 4th section of the 3d chapter of the 7th division of the act of the general assembly of the state of Ohio, passed March 14, 1878, entitled 'An act to amend, revise, and consolidate the statutes relating to municipal corporations, to be known as title 12, part 1, of the act to revise and consolidate the general statutes of Ohio.' "

To this answer there was a demurrer, which was overruled, and the petition and plaintiff dismissed, to which ruling the city excepted and asks that the judgment thereon be reversed.

The 4th section of the 3d chapter of division 7, as relied on by the defendant, reads as follows: "When it is deemed necessary by a municipal corporation to appropriate private property as hereafter provided, the council shall, by resolution, declare such interest, defining therein the purpose of the appropriation, and setting forth a pertinent description of the property designed to be appropriated, and, on the passage of such resolution, the yeas and nays shall be taken, and entered on the record of the proceedings of the council." Statute, page 307.

One of the purposes specified in said chapter is for opening, widening and straightening streets.

Upon the passing of said resolution, application may be made to the court of common pleas or probate court for the appropriation.

736 *The defendants claim that it is essential to give the city jurisdiction to proceed to appropriate in court, to pass a resolution of the council in conformity with the 4th section, 3d chapter, 7th division, and that the action of the council in proceeding, first by an ordinance without a resolution, is not in pursuance of the Code, and therefore void.

The city claims that she has taken the proper steps, and in doing so, that she was and is governed, not by this 4th section, but by the 2d section of chapter 13, subdivision 1, statute 389, which points out the manner of proceeding, especially in opening and widening streets. This section is as follows:

"Section 2. When it is deemed necessary by the council of any municipal corporation to open, extend, straighten, narrow, or widen any street, alley, or public highway, within the limits of said corporation, the council shall provide, by ordinance, for the same; such ordinance shall, briefly and in general terms, describe the property, if any, to be appropriated for such purposes; and the proceedings for such appropriations shall be as provided in chapter 3, division 7, of this title."

The single question at issue between the parties is, as to whether the preliminary proceedings show resolutions in addition to an ordinance of the city council. In this respect there is apparently a conflict between two section as relied upon by the respective parties.

Essentially there is no difference as to the two methods. As between a resolution and an ordinance of the city council, the ordinance is of a more solemn and permanent nature. In the case of Oviatt v. Uppugh, 42 Ohio statute, page 232, the supreme court has decided that the preliminary resolution declaring a proposed street improvement is not a resolution of a general or permanent nature in the meaning of section 98 of the Act of 1869, which requires all by-laws, resolutions and ordi-

nances of a general or permanent nature to be fully and distinctly read on three different days, unless dispensed with by three-fourths of all the members, by vote, yeas and nays being called, and entered in the journal. "As a resolution expressive of the conclusion of the council that the improvement was necessary, its office was upon its adoption," page 240. Under the revised Code, chapter 4, section 4, the importance and permanence *of an ordinance 737
over a resolution is shown by the necessity required that all ordinances of a general nature and providing for improvements, shall be published in some newspaper of a general circulation in the corporation, and by section 7 it is made a sufficient defense in any suit or prosecution under an ordinance to show that no such publication was made. No such requirement exists as to a resolution.

But this question has been settled by the decision in Krumberg v. The City, 29 Ohio Stat., page 77. The revision of the Code does not in this particular change the old Code; it simply gives a new number of sections and titles. Chapter 47 old Code is chapter 3 in new Code. Section 512 of the old Code is the same as section 4, chapter 3, division 7; and section 583 old Code is the same as section 2, chapter 13, division 1, new Code. The supreme court in the Krumberg case say: "The appropriation of private property to public use is specially provided for in chapter 347. Sections 511 and 512 prescribe what the council is required to do when it is deemed necessary to make such appropriation; and when the property is required for the purpose of streets, alleys, or public highways, the requirements of this section seem to be modified by section 583 as amended. The provision in the resolution was in the Code of 1869 where it applied to appropriations."

BILLS AND NOTES—CONFLICT OF LAWS—INTEREST.

[Hamilton District Court.]

†SCOTT AND SCOTT *v.* JOHN PERLEE.

1. If a note be dated at a place in one state, and expressing on its face the rate of interest legal in that state, the fair presumption (although the parties reside in a different state) is, that they intended to contract with reference to the laws of the state where the note is dated.
2. Where a judgment is rendered in an inferior court for interest as of the state where the note is dated, a reviewing court will not reverse, except after clear and satisfactory testimony rebutting the presumption arising from the face of the note.

ERROR to reverse a judgment of the Court of Common Pleas.

*COX, J. 738

In the court below the defendant in error (then plaintiff) brought suit to recover of the present plaintiff in error, the balance due, with ten per cent. interest, on a promissory note, of which the following is a copy:

$1,000. FAIRBURY, ILL., Jan. 1, 1871.

One year after date we promise to pay to the order of John Perlee one thousand dollars, at ten per cent., from date. [Signed]

ANDREW J. SCOTT,
HENDERSON W. SCOTT

†The decision in this case was affirmed by the supreme court, see opinion 39 O. S., 63. The supreme court opinion is cited 39 O. S., 547, 552.

Defendants answered, admitting the execution of the note, but say that it was executed and delivered, and the contract upon which it was given was made and finally completed in Hamilton county, in the state of Ohio; and answer that by the laws of Ohio there is usury in said note to the extent of $234, and ask to have all paid over six per cent. interest credited on the principal, and that judgment be rendered only for six per cent. interest.

Plaintiff replies, denying that the contract was made, or note executed and delivered, in Ohio, but avers that the contract to loan the money was made, and the note was executed, in Fairbury, in the state of Illinois, where the legal rate of interest by contract is ten per cent.

The court below decided that the contract was made and note executed in Illinois, and subject to the laws of that state, and gave judgment for the amount, with ten per cent. interest, to which judgment defendant excepted.

The note was given for a loan of money. There is a conflict in the testimony as to where the contract was made. Perlee swears the contract was made at Fairbury, Ill., when he was on a visit to Andrew J. Scott, the principal of the note. Scott swears it was made by his brother, in Ohio, who was his surety, with Perlee, who also lived then in Ohio. Perlee, in his testimony, however, admits that the note was sent by Andrew J. Scott, the maker, from Illinois, to his brother, Henderson W. Scott, in Ohio, who then signed it as security; and that he gave the money to Henderson W. Scott to send to his brother in Illinois. Several payments were made of interest and principal by Andrew, which were sent from Illinois to plaintiff in Ohio by draft on New York.

739 *Whether this be an Illino.s or Ohio contract as to the rate of interest, is a question not without considerable difficulty to solve. While the note was signed by one party in Illinois, it was not acceptable to the plaintiff until signed by the security who resided in Ohio, and in the latter state it was so signed and delivered. It is claimed by plaintiff in error to come under the well known rule "that a contract in writing is made when all the parties have executed it, and, therefore, is not made until the latest party has put to it his name or seal, or both, as may be required." On the other hand, it is claimed that, upon the face of the note, both as to the place and rate of interest, it was intended by all the parties to be an Illinois contract, and subject to the laws of that state—a state, too, in which the principal resided, and who, in law, was primarily liable to pay it.

There is great diversity of opinion among the authorities of the many questions which arise when a note is executed by parties at different places, or when the contract is dated at a place different from that where the parties reside, and between which different rates of interest rule. The parties are intimately connected, and know the exact status of each. And it is a strong presumption that the note was not to bear the Ohio interest of six per cent.; that it was known to the parties that plaintiff had to sell bonds to raise the money, which bonds, clear of taxes, brought more than six per cent. interest.

But we think the true solution is to be found in the intentions of the parties. If a note be dated at a point in one state, and expressing on its face the rate of interest legal in that state, the fair presumption is that the parties intended to contract as they have done with reference to the laws of that state. And with this presumption we would not feel justified in reversing the judgment of a court in its favor, unless upon much stronger testimony than that adduced in this case.

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

NEGLIGENCE—CHARGE TO JURY.

[Hamilton District Court, 1879.]

OHIO & MISSISSIPPI R. R. CO. v. THOMAS HUNT.

The plaintiff placed himself in a dangerous position at the side of a railroad track in the way of an approaching locomotive and tender, the *movement of which
740 he neglected to observe until it was too late to avoid a collision. The court charged the jury "that if the servants of the railroad company at the time could, by the exercise of ordinary care under the circumstances, have avoided the in-

jury, and failed to use such care, and plaintiff was injured for the want of the use of such care by them, then the verdict will be for the plaintiff; and that it was not a question whether or not the servants of the company saw the plaintiff, or whether the plaintiff saw the locomotive and tender approaching, but it is whether or not, by the exercise of ordinary care under the circumstances, the agents of the company ought to have seen him, and whether he ought to have seen the locomotive."

Held, the charge is erroneous. The plaintiff, by the want of ordinary care, contributing to the injury, the defendent would only be liable for the neglect of its servants to use ordinary care to avoid the injury, the danger of which, and the apparent danger for their avoiding which, they saw to exist.

Error to the Superior Court of Cincinnati.

BURNET, J.

Hunt brought his action to recover damages for an injury received on the track of the defendant in the Twenty-first ward of Cincinnati. The track at the place of the accident ran along a public street of the city, leaving on its south side a width of from fifteen to twenty feet of the street free from obstruction. North of the track, and near to it, with little more than space for the passage of cars on the two roads, was the track of a street railroad leading up into the city. There was no crossing at this point, but it was common for persons here to board the street cars. Desiring to get upon a street car to come up to the city, Hunt was standing on the south of the O. & M. track, with one foot upon the end of one of its ties, with his face to the north toward the track, awaiting the approach of a street car from the west. While he stood thus, a train passed on the track of the I., C & L. R. R., which runs about parallel to and a few feet north of the street railroad track. To the east of him, on the O. & M. track, were a locomotive and tender, with the rear of the tender toward him and the locomotive facing the city, which, he says, he looked at, and thought were standing still. But the locomotive and tender had just crossed the bridge over Mill Creek, about one thousand feet away from where the plaintiff stood, and was moving toward plaintiff at the rate of about four miles an hour. The evidence was conflicting as to *whether the bell upon the engine was rung, but no other signal of its approach was given. The plaintiff and other witnesses testified 741
that the bell was not rung; the engineer and other witnesses said it was. The plaintiff, hearing the rumble of the approaching engine, turned suddenly to get out of the way, but was struck by the tender and severely injured. The jury rendered a verdict in his favor.

It is claimed by the plaintiff in error that the court erred in its charge to the jury. The general charge of the court was correct. Among other special instructions, the court was asked to charge the jury in these words: "If the jury find that plaintiff, at the time of the injury, was on a public highway, although on the track of the defendant, yet if the servants of defendant at the time could, by the exercise of ordinary care under all the circumstances, have avoided the injury to plaintiff, and failed to use such care, and the plaintiff was injured for the want of the use of such care, as above mentioned, by the servants of defendant, then the verdict will be for the plaintiff." The court gave the charge, but added: "I will say in connection with that third charge, that the rule is this: It is not a question whether or not the employees of the company saw the plaintiff, or whether the plaintiff saw the locomotive and

tender approaching, but it is whether or not, by the exercise of ordinary care under the circumstances, the agents of the company ought to have seen him, and whether he ought to have seen the locomotive."

This charge was excepted to by the defendant, and, it is claimed, it is erroneous. It is materially different from the tenor of the general charge, and from the other special charges given; yet it may have induced the jury to give the verdict they have rendered. Hence, if it is erroneous, in a matter material to the determination of the action, the judgment must be reversed.

The charge as asked by the plaintiff, without the qualification or explanation given to it by the court, might mislead the jury, in that it might well be construed to mean that the defendant would be liable for the mere omission to use ordinary care in the management of its locomotive, although the plaintiff, by the want of ordinary care, contributed to the injury, and the servants of the defendant did not perceive the impending danger *in time, by the use of ordinary care, to avoid it; and both parties, therefore, in the same default. And if there was any doubt in the minds of the jury as to the meaning, it was removed by the explanation of the court, "that it was not a question whether or not the employees of company saw the plaintiff, but whether or not, by the exercise of ordinary care, the agents of the company ought to have seen him."

742

The general rule of law is, that if the plaintiff, by his own want of ordinary care, has materially contributed to the injury he has suffered, he cannot recover. But this rule is subject to qualifications. Although the plaintiff may by his own carelessness, have put himself in a position to be injured, and thus may be said, by the want of ordinary care, to have contributed to the injury, yet if, being in that position, he was seen by the servants of the defendant, and his danger understood by them, and they, after seeing the impending danger and the necessity, on their part, to avoid it, could, by the use of ordinary care, have avoided the accident, and failed to use such care, and so produced the injury, the defendant would be liable. For, in such case, the act of the defendant's servants would partake of the character of recklessness or willfulness.

The other charges of the court were sufficiently guarded on this point, but the charge in question is fatally defective. The testimony in the case was not of such a character as to make this error immaterial. We cannot say, from the bill of exceptions, that it was so clear that the servants of the defendant were willful or reckless in running against the plaintiff and injuring him, that, as a matter of law, the court would say the defendant was liable. If, indeed, all the material facts touching the alleged negligence be undisputed, or be found by the jury, and admit of no rational inference but that of negligence, in such case the question of negligence becomes a matter of law merely (C., C. & C. R. R. Co. v. Crawford, 24 O. S., 631). But the testimony was conflicting, and the facts uncertain, and the question of negligence a mixed question of law and fact, proper for the jury under instructions from the court. It was, therefore, essential that there should be no uncertainty in the instructions given. In this case it might be doubtful which of the differing instructions the jury followed.

Judgment reversed.

* MUTUAL PROTECTION ASSOCIATIONS—WORDS. 743

[Hamilton District Court, 1879.]

STROBRIDGE & CO. v. GEORGE D. WINCHELL, ET AL.

1. Under the act of April 20, 1872, 69 Ohio Laws, page 82, which provides that any number of persons, not less than five, may associate themselves together, as provided in the 1st section of the General Incorporation Act of May 1, 1852, for the mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of the deceased members of such association; the trustees of such association are not individually liable for the debts contracted by them for such association.
2. The term restriction, used in the 1st section of the Act of May 1, 1852, is not to be taken to mean penalties or liabilities, but simply as restraining or limiting the powers of the association within the bounds of the corporate powers prescribed by the legislature.

ERROR to the Court of Common Pleas.

COX, J.

This is a petition in error to reverse a judgment of the court of common pleas.

In that court the plaintiff filed his petition, setting forth that on or about the 21st of December, 1875, the defendants associated themselves together under the name of the Widows and Orphans' Aid Life Association of Ohio, to become a body corporate under the provisions of an act supplementary to an act to provide for the creation and regulation of incorporated companies in the state of Ohio, passed May 1, 1852, as amended April 25, 1872, for the purpose of giving aid and relief to the members, and for the payment of stipulated sums of money to the families or heirs of deceased members of said association.

That, on the 17th of April, 1876 The Widows and Orphans' Aid Life Association of Ohio were indebted to the plaintiff on an account for goods, sold and delivered to said association, in the sum of $195.

That, on the 7th of March, 1878, it recovered a judgment against said association before a justice of the peace for said amount and interest and costs, and on the 4th of April, 1878, *filed a transcript of such judgment in the court of common pleas for lien and execution; and 744
that on such execution a return has been made by the sheriff of "No goods or chattels, lands, or tenements found whereon to levy."

That the judgment is unreversed and unsatisfied, and is now in full force.

That, at the date of the sale of said goods, the defendants were trustees of said association, and the debt was contracted by them as trustees; that they were trustees when said judgment was obtained, and are still trustees. Wherefore plaintiff prays judgment against said defendants for the amount of said debt.

To the petition there was a general demurrer, which was sustained by the court, and judgment rendered in favor of defendants.

In this judgment, it is claimed, the court erred. It is claimed by the plaintiff that, as there never was any stockholders, or stock issued by this association, the trustees are liable for its debts, by virtue of section 95 of the general corporation act, 1 Swan and C., page 310, which provides "That all stockholders of any railroad, turnpike, or plank road, or

any joint stock company, organized under the provisions of this act, shall be deemed and held liable to an amount equal to their stock subscribed in addition to said stock, for the purpose of securing the creditors of such company; and the trustees and directors of every society or association incorporated under the provisions of the 66th section of this act, shall be deemed and held individually liable for all debts contracted by them for their respective societies or associations."

We do not see how this association can, under the allegations of the petition, come within the provisions of this section. The first part of section 95 holds the stockholders of railroads, turnpikes, plank roads, or any joint-stock company, organized under the act of 1852, liable to an amount equal to their stock subscribed in addition to said stock. This association is not included in them. The latter clause of that section holds the trustees or directors of societies or associations, incorporated under the provisions of section 66 of the act of 1852, liable for debts of the society.

745 Originally section 66 only applies to associations formed for *gas-light and water companies. But it was amended January 26, 1865, Swan and S., page 239, so as to include associations for any religious sect or denomination, or association, fire company, or any literary, scientific, or benevolent association, other than colleges, universities, academies, or seminaries.

But, by the allegations of the petition, this association was organized under the act of April 20, 1872, 69 Ohio Laws, page 82, which provides that any number of persons, not less than five, may associate themselves together, as provided in the 1st section of the act entitled, "An act to provide for the creation and regulation of incorporated companies, passed May 1, 1852," for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of the deceased members of such association.

The 1st section of the general act referred to, simply provides "That any number of natural persons, not less than five, may become a body corporate, with all the rights, privileges, and powers conferred by, and subject to all the restrictions of. this act." The act of 1872 does not hold the trustees liable for the debts of the company, unless they can be so held by the reference to section 1, of the act of 1852, and the amendatory act, 1865, amending section 66.

By becoming incorporated under the act of 1872, and associating themselves together as provided in the 1st section of the act of 1852, the members of the association are, so far as the general corporate act applies to that kind of organization, entitled to all its rights, privileges, and powers conferred, and subject to all the restrictions of the same. The term restriction is not to be taken to mean penalties or liabilities, but simply as restraining or limiting the powers of the association within the bounds of corporate power, as prescribed by the legislature.

While, by the constitution of the state, stockholders of corporations shall be liable over and above the stock owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock, the trustees of such corporation are not to be held individually liable for its debts in the absence of express law. The law does not fix such liabilities on these defendants, and the judgment of the common pleas is affirmed.

*EXEMPTION FROM EXECUTION. 15

[Pickaway Common Pleas, May Term, 1879.]

DULGAR v. HARTMEYER.

1. A person residing in a village and cultivating, in corn, potatoes, cabbage, beans, etc., two town lots, containing less than half an acre of land, is *not* one "engaged in the business of agriculture" within the meaning of section 59 of the act relating to exemption from execution (Laws of 1878, p. 692).
2. A "buggy" is not included in the term "wagon" as employed in said section 59.

COURTRIGHT, J.

This was an action in replevin, in which the plaintiff seeks to recover the possession of "one buggy (open top) and one set of harness," of which plaintiff avers he is the owner, and that the same was taken by the defendant, as sheriff, on an execution issued from this court, and that the said buggy and harness were, at the date of the levy, and still are, exempt from execution at law. It is admitted by the parties that the plaintiff, at the time of the levy, and yet is, a married man, residing with his family, and a resident of this state. It is claimed by the plaintiff that at the date of the levy, he was, and yet is, engaged in the business of agriculture. This claim is controverted by the defendant. By agreement of the parties, this cause was submitted to the court.

From the testimony, it appears that the plaintiff, for the two years last preceeding the date of the levy, cultivated two town lots in the village of Darbyville, this county, in corn, potatoes, cabbage, beans, etc.; that the town lots contained about one-half an acre of land, a small portion of which was occupied by a shop, stable, etc., and that since the levy he has been engaged in cultivating about two acres in potatoes. It further appears that the vehicle levied upon was the only one owned by the plaintiff at the date of the levy, and that its value is $25.

Two questions are presented by the record and testimony, viz.:

First —Was the plaintiff engaged in the "business of agriculture," within contemplation of section 59 of the homestead act? (Laws of 1878, p. 692.)

*Second—Is a "buggy" included in the term "wagon," as employed in said section 59? 16

The section under consideration is as follows:

"Sec. 59. Every person who is the head of a family, and engaged in the business of draying for a livelihood, shall, in addition to the foregoing exemptions, hold one horse, harness and dray exempt from execution; every head of a family who is engaged in the business of agriculture shall, in addition to the exemptions provided for in the last section, hold exempt from execution one horse or one yoke of cattle, with the necessary gearing for the same, and one wagon; and every head of a family who is engaged in the practice of medicine shall, in addition to the exemptions specified in said section, hold one horse, one saddle and bridle, and also books, medicines and instruments pertaining to his profession, not exceeding one hundred dollars in value, exempt from execution."

Can it be said that one who is engaged in raising corn, potatoes, cabbage, beans, etc., on less than half an acre of ground in a village, is one engaged in the business of agriculture," in the business of farming?

The plaintiff testifies that that was the extent of his farming (?) for the two years immediately preceding the date of the levy; that, by reason of his want of means, he was unable to pursue the business to any greater extent. We do not believe he was engaged in the "business of agriculture,"—in farming, in tilling the soil—as contemplated by the legislature in their enactment just quoted. But the other question in the case, viz., whether a "buggy" is included in the term "wagon," is a new one in this court, and, so far as we are advised, has never been determined by any of the courts of our state, and being once much mooted by the bar and likely to arise at any time, we have taken the pains to give it a careful examination, and will briefly present the authorities we have been able to find upon the subject, together with the conclusions at which we have arrived.

In Rogers v. Ferguson, 32 Texas, 533, the court say:

"This court has, heretofore, given the most liberal construction to laws exempting the property of *citizens* from forced sales: See Cobbs v. Coleman, 4 Texas, 595. In this case, the *words 'one horse,' in the
17 statute of 1839 (Hart Dig., 1270), were construed to include also in the exemptions, bridle, saddle, stake rope and martingale, although they were not mentioned in the statute. A strict construction would have exempted only the naked horse mentioned. The liberal construction adopted by this court includes in the exemption all the articles necessary for the use of the horse. By parity of reasoning, the word "wagon," in the statute of November 10,1866 (Laws of 1866, p. 160), should be construed in its popular and most general sense, and should include all four wheeled vehicles, whether covered or placed upon springs, and for whatever use they may be employed, whether for the transportation of property or persons. The intention of the legislature was to protect all *laboring citizens* in the pursuit of their occupation, and a correct construction of the law would serve to protect the drayman and cartman in the possession of their vehcles, although they do not come within the strict definition of the word 'wagon.' In the case at bar, the evidence is clear that the vehicle in controversy was used by the owner sometimes as a hack for the transportation of passengers, and sometimes as a wagon for the transportation of wood, cotton and corn; and whether used for the one purpose or the other, it was evidently the intention of the legislature that it should be exempt from forced sale."

So in Nichols v. Claiborne, 39 Texas, 363, the court say:

"The statute of 1866, at least, by a liberal construction would have exempted one vehicle from forced sale, whether it was a wagon, in the ordinary meaning of that word, or a carriage, provided that was the only vehicle owned or possessed by the party claiming the exemption. * * *"

While we are not favored with a copy of the statute construed by the court in these cases, yet it is quite apparent that from its terms, *every citizen* of the state of Texas was entitled to the exemptions named, while it will be remembered that only particular classes are provided for by our statute.

In the case of Gordon v. Shields, 7 Kansas, 320, the court, Brewer, J., says:

"Only one question is presented in the record: Is a buggy included in the term 'wagon,' as used in the exemption law? The court be-

low found that the vehicle in suit, known as a *buggy, was 'not adapted and designed for carrying commodities, but is a single- 18
seated, covered vehicle, adapted and designed for carrying persons only.' We think the term 'wagon' a generic one, including as well vehicles for the carriage of persons as those for the transportation of commodities, and broad enough properly to embrace such a vehicle as the buggy in controversy. But we are constrained to think, after a careful examination of the statute, as well as the decisions of other courts, that the term 'wagon' is here used in a limited sense. The statute reads: 'Also one wagon, cart or dray; two plows, one dray and other farming utensils, including tackle and harness for teams, not exceeding in value three hundred dollars.' This clause obviously was designed for the protection of the *farmer*, to secure him his implements of husbandry. * * * Whether used on a farm or not is immaterial. But that the articles should be adapted to the purposes of husbandry seems to be required. * * * Only those wagons which are adapted to farm purposes are exempt."

In the case of Favers v. Glass, 22 Alabama, 621, the court hold, syllabus: "A vehicle with four wheels drawn by oxen, suited to the ordinary purposes of husbandry, and employed in the same uses to which carts, in the common acceptation of the term, are appropriated, is protected from levy and sale by the statute which exempts 'one horse, or ox-cart' from execution." In the opinion, the court (Chilton, C. J.) says: "This would not exempt pleasure carriages, nor those larger wagons drawn by horses, or even oxen, and employed solely in the carrying trade; but such carts or wagons only were within the contemplation of the legislature, as were suitable to be employed about the domestic establishment, in garnering crops, hauling wood, and the like.

In the case of Webb v. Brandon and wife, 4 Heiskell (Tenn.), 285, the exemption statute under review reads as follows: "One horse or mule, or yoke of oxen, one ox-cart, ring, staple and log chain, one two or one-horse wagon," etc.

In discussion the question as to what was meant by the terms "ox-cart" and "two-horse wagon," the court, Nicholson, C. J., says:

"In the same spirit and with the same object, we now hold *that when the legislature used the term 'ox-cart' and 'two-horse 19
wagon,' they did not intend that their language should be taken literally to mean that the cart should not be drawn by any other animals than oxen, nor that the wagon should be drawn by two horses or exactly one horse. These terms are used as descriptive of the vehicles commonly in use on farms. * * * Such vehicles being necessary as a means of obtaining subsistence, were intended to be protected from execution."

In 5 Cal., 418, Quigley v. Gorham, the opinion of the court in full is as follows. Haydenfeldt, J., delivered the opinion of the court:

"The words of a statute must be interpreted according to their common acceptation. In the act which exempts certain articles from execution, the term 'wagon' is intended to mean a common vehicle for the transportation of goods, wares and merchandise of all descriptions. A hackney coach used for the conveyance of passengers is a different article, and does not come within the equity of literal meaning of the act."

In Roberts v. Adams et al., 38 Cal., 383, the syllabus is:

"The exemption of property liable to seizure and sale by the third

subdivision of section 219 of the practice act is intended to apply only to oxen, horses or mules, suitable and intended for the ordinary work conducted on a farm.

"A stallion not used as a work horse on a farm, but kept for the service of mares, is not exempt from execution."

In the opinion of the court, Crockett, J., says:

"From this summary of the act, it is plain that its purpose was to secure to the judgment debtor the means to prosecute his vocation, and thus earn a support for himself and family. In securing to a farmer two oxen, horses and mules, with their harness, a wagon or cart, his farming implements and his seed, grain or vegetables for planting, the legislature intended, by this exemption, to enable him to prosecute his business of farming in the ordinary sense of that term; and the oxen, horses or mules which are reserved to him must be such as are suitable and intended for that use. If a contrary construction of this provision were to prevail, a farmer in failing circumstances might invest his whole estate in two valuable stallions or race horses, worth $10,000 or
20 $20,000 each, with no intention whatever to *use them for farming purposes; and by claiming them as exempt from execution, might defraud his creditors under color of law to a large amount. The benevolent design of the statute might thus be perverted to purposes of the grossest fraud. To the same effect, see Gibson v. Gibbs, 9 Gray, 62.

As we have said, only particular classes of the citizens of this state are entitled to the exemptions named in section 59; who are they? Draymen, farmers and physicians.

To the drayman, his horse, harness and dray are exempt. Why? Because without them he could not prosecute his business. To the physician, his horse, saddle, bridle, books, medicines and instruments. Why? Because without their use he could not successfuly pursue his profession. To the farmer (or one engaged in the business of agriculture), his horse or yoke of cattle, with necessary gearing for the same, and one wagon. Why? Because without them he could not successfully prosecute his business of agriculture. Then to these three different classes, the legislature has provided these several exemptions, so that the hungry creditor might not, in his eagerness to realize his claims, deprive these classes of persons of the means of gaining a livelihood for themselves and their families.

But counsel for the plaintiff urge that a farmer may use his buggy upon his farm in going to and from his work, carrying his seed, grain, implements of husbandry and the like. Quite true, so may a carpenter, plasterer, or other mechanic use his buggy in going to and from his work, conveying his working-tools from place to place, and the like. So might every citizen employ a "buggy," to a greater or less extent, while engaged in his business. Yet the legislature has not exempted a "wagon" to all citizens; but only to the farmer; had it done so, then should follow the Texas construction.

We are clearly of the opinion that a vehicle to be included in the term "wagon" as contemplated by section 59, must be one in the use of which the farmer would be enabled to prosecute his business of farming in the usual and ordinary sense of that term. And the "wagon" which is reserved to him must be such as is suitable and intended for that use.

Finding and judgment for the defendant.

Page and Abernethy, for Plaintiff.

Smith and Morris, and J. Wheeler Lowe, for Defendant.

*REINSTATEMENT OF POLICEMAN. 21

[Hamilton District Court, April Term, 1879.]

Burnet, Avery and Cox, JJ.

STATE EX REL. HILL v. POLICE COMMISSIONERS.

Under the municipal laws of 1878, a patrolman can be removed at the pleasure of the board of police commissioners, notwithstanding he was appointed under the law of 1876 which provided for his service during good behavior and ability to discharge his duties.

This was an application for the allowance of mandamus requiring the defendants to reinstate the relator as a patrolman of the police force of the city. The relator alleged that in March, 1877, he was appointed a patrolman by the board, and faithfully performed his duties until March, 1879, when he was dismissed without any trial whatever. He claimed that, by the law of 1876, under which he was appointed, his term was for good behavior and physical and mental ability to discharge his duties, and that he could not be removed unless written charges were preferred against him for misconduct, he having the ability to discharge his duties, and that he had not had an opportunity of being heard on his defense.

Cox, J.

Judge Cox announced the opinion of this court. He held that under the law of 1876 the relator's claim would have been good; but, in 1878, the Municipal Code was changed, and it was provided that appointments should be during good behavior and the pleasure of the board. The relator claimed that having been appointed under the law of 1876 he could only be removed in accordance with the provisions of that law. It was claimed incidently that the relator's holding of the office was in the nature of a contract. The defendants claimed that the legislature had the right to repeal the law of 1876, and, it having been repealed, the patrolman was subject to be removed, under the existing law, at the pleasure of the board or for a violation of duty.

So far as the claim that the relator held the office by virtue of a contract, that claim was disposed of in the case of Finnell v. The City of Bridgeport, Conn., R., where it is held that "a policeman is an arm of the law. He holds his office as a trust *from the city; he is not a 22
hired servant. No contract exists between him and the city; he can lay down his trust at any time, according to his pleasure, without exposing himself to an action for damage for breach of contract."

It was claimed that this case came within the authority of the case of Hogan against the board, decided by this court some time ago. In that case the law provided that the relator could only be dismissed for cause, and being so, the cause must be specified and the party have an opportunity of being heard. But, in this case, the law permitting patrolmen to be dismissed for cause, has been repealed, and unless the present law subject him to removal at the pleasure of the board or for misconduct, the patrolman holds his position without any limitation at all, because there is no term fixed for the office, and he remains irremovable. The legislature, having full control over the matter, evidently sub-

stituted a cause for removal different from that in the law of 1876, and that the law is within the constitutional purview of the legislature, is decided by the supreme court in the case of the Attorney-General v. Covington, 29 O. S. The relator was, therefore, not entitled to be reinstated.

Madamus refused.

C. H. Blackburn, for the Relator.

Kumler, Crossley and Ampt, Contra.

ERROR—MASTER'S FEES.

[Hamilton District Court, April Term, 1879.]

Burnet, Avery and Cox, JJ.

MITCHELL ET AL. v. RAMMELSBERG'S EXECUTORS ET AL.

No petition in error will lie to an order fixing the compensation of a master.

Cox, J.

Motion to dismiss a petition in error filed to reverse the judgment of the superior court. A cause was pending between the parties to this case. C. K. Shunk, one of the defendants, was appointed a master to take testimony and report findings. On report by the master, the court fixed his compensation at $1,000, ordering the same to be taxed as costs, to abide the event of the suit. The court further ordered that on the
23 entry of the order one-half the allowance be paid by *plaintiff, and the other half by the defendants. It was sought to reverse this judgment.

Judge Cox announced the opinion of the court. He held that the order was merely an interlocutory one. It was not an order affecting substantial rights in a special proceeding, for the proceeding in which it was made was not ancillary to the judgment, it was merely interlocutory. No one yet knew who would have to pay the costs in the case. It might be that plaintiffs in error would not have to pay any part of them. The only thing they could complain of was that they had to advance half of them. One of the defendants was a master commissioner, whom the supreme court had decided (26 Ohio Stat., 316 Diserens v. Fiedeldey) cannot be made a party.

Petition dismissed.

RECEIVERS.

[Hamilton District Court, April Term, 1879.]

Burnet, Avery and Cox, JJ.

TURPIN ET AL v. MCGILL and MCGILL.

No party to a case or person interested can act as receiver.

Cox, J.

This was a petition in error to reverse the judgment of the court below in the appointment of a receiver. M. S. Turpin filed a petition in

the court below, setting up that he was the owner of a bar at the corner of Sixth and Lodge streets; that W. C. Smith and Margaret McGill held mortgages upon the property, but the parties agreed that John McGill should take care of the property and use it for the benefit of mortgagees until it could be sold, his control of the property being for a reasonable time. The plaintiff alleged that frequent applications had been made for the purchase of the property at prices more than sufficient to cover the mortgages, but that McGill continues to run the business, enjoying the proceeds, and refuses to account and permit a sale of the premises. He asked, also, the appointment of a receiver to take charge of the premises until they were sold. The court below appointed Mrs. McGill. Error is predicated upon the refusual to set aside the appointment.

Judge Cox decided the case, holding that the appointment *was 24
in violation of the code, which provides that no party to a case or persons interested in the proceedings should be appointed a receiver in it. Judgment reversed.

MANDAMUS TO TAP A SEWER.

[Hamilton District Court, April Term, 1879.]

Burnet, Cox and Avery, JJ.

STATE EX REL. THOMS v. BOARD OF PUBLIC WORKS.

A mandamus can only be issued commanding the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station, it can not control discretion.

Cox, J.

This was an application for mandamus to compel the Board of Public Works to permit the relator to connect with the public sewer on Court street. The relator owns three lots on Court and Linn streets, one of them abutting on Linn street 112 feet. He averred that in 1858 the city constructed a sewer in Court street; that at that time Court street was a natural water course which drained his lots; that his lots required surface draining; that he made application to the Board of Public Works to be permitted to tap the sewer at that point, but that the board required, before permission would be given, that he pay $324, and, in addition, give a bond that, when a sewer is constructed on Linn street, he shall pay the amount which shall be assessed upon his property for the purpose of constructing it. He claims that these conditions are excessive, and the board has no right to impose them upon him; that he has a right to tap the sewer, and that all that can be required of him is a reasonable license fee for the privilege; that the requirements of the board is an abuse of authority, and that mandamus shoud be grranted, compelling the board to permit him to tap the sewer upon such requirements as would be equitable.

Judge Cox announced the opinion of the court. He held that the city has by its charter and Municipal Code exclusive control of the sewers. This sewer was built before the present system of sewerage was contemplated. At that time no provision was made for tapping the sewer. Previous to the adoption *of the present system of sewer- 25
age, the only provision made for tapping sewers was that in the or-

binance of 1860, so that whatever rights the relator had were regulated dy that ordinance. A mandamus can only be issued commanding the performance of an act which the law especially enjoins as a duty result ing from an office, trust or station. It cannot control judicial discretion. By an examination of the ordinance of 1860, it will be seen that no special duty is enjoined upon this board to permit sewers to be tapped. The matter is left clearly within the discretion of the board, not only to permit the sewers to be tapped, but also to cause them to be removed when the board shall see proper. The board is simply authorized to permit persons to tap sewers; they are not compelled to permit any persons to do it. That is within their discretion, 31 Ohio State, 211.

Writ refused.

J. J. Glidden, for the Relator.

P. H. Kumler, City Solicitor, Contra.

CONVEYANCES.

[Hamilton District Court, April Term, 1879.]

Burnet, Cox and Avery, JJ.

NISHTOTZ v. ULMER.

A conveyance of property claimed by a stepson not granted.

Appeal from the common pleas, where the plaintiff filed a petition asking a conveyance from the defendant to him, of a lot of land on Clinton street, in this city. He alleged that the defendant held the title in his own name, but that the consideration in fact was paid out of the money belonging to the plaintiff, derived from three sources—first, a sum given to the defendant in 1838, in Germany, when he married the mother of the plaintiff; that this sum amounted to 600 gilders ($248), given to Ulmer, to raise and educate the plaintiff, that on arrival in this country, Ulmer, the stepfather of the plaintiff, apprenticed him to a tailor, and that the wages he received on coming of age ($140) were received by Ulmer and the third source was a sum of money (about $57) which had been deposited ten years ago in the bank of Adae & Co., and he claims that these several amounts were appropriated by Ulmer for his own purposes.

Cox, J.

"There is no evidence showing that even if Ulmer did receive this
26 money he had applied it to the purchase of the property in *question. Ulmer denies that he received the $140, and claims that the whole amount was taken out in store goods by the plaintiff's mother; that he never received any of it, and the testimony does not show satisfactorily that he did. As to the money in the bank, the testimony shows that another party received it. It was claimed by the plaintiff that, before his mother died, Ulmer acknowledged that he received these amounts, and said that he would make it all right, and that he and his wife made a will that on their death the plaintiff should have the property; but, that after the death of the wife, the defendant married again;

and, after the second marriage the will was destroyed, and thereupon the suit was brought.

There were circumstances showing strongly that if Ulmer received any of this money at all, it was not appropriated to the payment of the lot in question. He testified as to the sources from which he obtained the money. He also introduced certain promissory notes made by the plaintiff to him for borrowed money, long after the alleged indebtedness of defendant to him. The plaintiff denies that he signed them, but experts testified that the signatures were his, and this fact was inconsistent with the claim of the plaintiff that the defendant was indebted to him. Taking the whole case together, the court was of the opinion that no such case was made out as would support the claim of the plaintiff that the property should be conveyed to him. Petition dismissed.

J. H. Morton, for Plaintiff.

Forrest, Cramer & Mayer, Contra.

JURY TRIALS.

[Hamilton District Court, April Term, 1879.]

Burnet, Avery and Cox, JJ.

ALEXANDER C. CLARKE v. JOHN HUFF.

Where a defense to an action against an indorser on a note is, that upon sale of property securing the note it brought a larger amount than was sufficient to satisfy the note, but the plaintiff negligently permitted second lien holders to obtain a portion of the fund, thereby preventing full payment of the note, the defendant is entitled to a jury trial.

In the court below Huff sued Clarke as an indorser on a note. Clarke claimed that the note was secured by mortgage on real estate, and under proceedings to foreclose, the property had been sold, and produced a larger amount than was sufficient to satisfy the note, but that Huff negligently permitted second lien-holders to obtain a portion of the fund, thereby preventing him from obtaining full payment of his note.

*To this plaintiff replied, denying all its allegations. The case 27
was called for trial, and defendant demanded a jury, which was refused by the court and judgment rendered for the plaintiff.

To this refusal to grant a jury defendant excepted and asked for a reversal of the judgment.

Cox. J.

Judge Cox held that the action was one for money only. There was an issue of fact joined, which the defendant was entitled to have tried by a jury, and it was error to refuse one. Judgment reversed.

USURY.

[Hamilton District Court, April Term, 1879.]

Burnet, Avery and Cox, JJ.

GEORGE R. WILDER v. JOHN HUFF.

A claim for usury not avoided simply by making a note and mortgage to a third party who has no interest therein and by him transferred.

Huff filed a petition against Wilder to recover upon a promissory note for $3,000, and to foreclose a mortgage given to secure the payment of the note. Wilder claimed that, desiring to borrow $3,000, he applied to Huff for that purpose; that Huff was unwilling to loan the money unless he would procure the note to be made to some other person, and indorsed over, and then he would purchase the note, which course was pursued, Huff paying $2,880 for the note. The note bore 8 per cent. interest. Huff claimed to be a *bona fide* purchaser of the note and mortgage. In the court below the judgment was upon the mortgage, and not on the note, the court there finding in favor of Huff for $2,880, with interest at 8 per cent. Wilder claimed that the whole transaction was usurious, and that Huff was only entitled to recover the amount of money which he actually advanced, with interest at 6 per cent.

COX, J.

Judge Cox announced the opinion of the court.

One of the findings of fact in the court below is that the indorser of the promissory note and the assignor of the mortgage had no interest in the debt, and that the sum of $2,808 only was paid to Wilder by Huff for the note and mortgage of $3,000. Huff by the finding is substantially the mortgagee of Wilder, and the rule laid down in Bailey v. Smith,
28 14 Ohio *State, R. 396, by the supreme court, is that a mortgage is not negotiable so as to cut off equities between the mortgagor and mortgagee.

It is true, the contrary doctrine is laid down by the supreme court of the United States in two cases in 16 Wallace Reports, Carpenter v. Longan, 271, and Kenicott v. The Superior Court, 452, but this court is bound by the decisions of the supreme court of our state.

The judgment of the superior court will be reversed as to the amount of interest. The contract being an illegal one, plaintiff is only entitled to a decree for the amount of money advanced by him with six per cent. interest.

ATTORNEY AND CLIENT.

[Superior Court of Cincinnati, May, 1879.]

GEO. H. KNIGHT v. WM. E. BUSER AND NEATHER & SCHMIDT.

1. When an attorney and his client reside in the same city, and can see and confer with each other at any time, the attorney is not authorized, by virtue of his general employment, to employ an expert, at the expense of his client, to aid him in the preparation of his case.

2. To enable process to properly run into another county and bring into the jurisdiction of this court a defendant who is not a resident, and not served, here, he must be properly united with defendants who are residents, or are served, here; and the defendants served here must be defendants who are necessary parties to the controversy, or have some liability or interest in the subject-matter that is adverse to the interests of the plaintiff.
3. When a defendant answers and pleads want of jurisdiction as his first defense, he does not waive his plea to the jurisdiction by pleading, in the same answer, other defenses which he may have not inconsistent therewith.

*FORAKER. J. 29

The petition in this case sets forth that the plaintiff is a solicitor of patents and a patent expert. That in 1877 the defendants, Neather & Schmidt, were sued in the circuit court of the United States for the Southern District of Ohio, for the infringment of a patent, and that he was employed by the defendants, Neather & Schmidt and Wm. E. Buser, to render certain services to them as a patent expert in said case, which services he rendered, and that they were worth the sum of $230, all of which is still due and owing to him, except the sum of about $81, which he admits said defendants have paid him. He prays judgment for the balance.

The defendants answer separately. Neather and Schmidt both deny that they ever employed the plaintiff, or had anything to do therewith, and aver that he was employed by, and rendered his services to, said Wm. E. Buser, and aver that it was expressly understood at the time that they were not to be, or become, liable to plaintiff for his services, and that he must look to Buser alone for payment.

Buser answers pleading first, that he is not a resident of Hamilton county, and that he has never been served in Hamilton county with process of summons, and by reason thereof denying that this court has jurisdiction of him in this cause.

A second paragraph denies that he *and* his codefendants employed plaintiff, and denies that plaintiff performed the services rendered by him at the request of him, Buser, *and* his codefendants, and denies that he *and his codefendants* became indebted to plaintiff in any way.

In a third paragraph he says that for certain services rendered by the plaintiff to *him*, in said suit, in the United States court, he has paid the plaintiff $95, which sum was, and is, the full value of plaintiff's services.

To this third defense of payment of $95, in full, the plaintiff replied, acknowledging payment of $95, as set forth by defendant, Buser, instead of only $81, as stated by him in his petition, but denying that it was, or ought to be, in full. Upon these pleadings the case was tried upon the evidence. The evidence disclosed that the defendant, Buser, was the owner of a * patent for an improvement in bed lounges, 30
and that he had sold to Neather & Schmidt, who were manufacturers of furniture, a license to manufacture under his patent, and that it was agreed between Neather & Schmidt and Buser, as one of the conditions of that transaction, that Buser should defend Neather & Schmidt in all litigation in which they might become, involved under the laws of the United States, on account of their use of his patent; that one Streit did sue Neather & Schmidt, in the circuit court of the United States for Southern District of Ohio, for an infringement, on account of their manufacture, according to Buser's patent, of a patent that he claimed to

have. The evidence also showed that Neather & Schmidt and Buser employed as counsel in the patent suit, to defend against the suit of the complainant, Steit, Messrs. Stallo & Kittredge; that Mr. Kittredge, who seems to have had personally the management of the case, deemed it necessary to have the services of Mr. Knight, and so informed both Messrs. Neather & Schmidt, and a Mr. Throckmorton, who, as the attorney and special representative of Buser, who lived in Chillicothe, was in the city of Cincinnati arranging for the defense of the suit.

It was agreed as the result of Mr. Kittredge's suggestion, and the conversation had upon the subject, that Mr. Throckmorton should go home and explain to Mr. Buser the necessity for the services of Mr. Knight, and the expense that the same would probably amount to, and if Mr. Buser approved of his employment, Mr. Throckmorton should so advise Mr. Kittredge, who should thereupon employ Mr. Knight in the case.

After he had returned home and seen Mr. Buser, Mr. Throckmorton advised Mr. Kittredge that Mr. Buser approved of the employment of Mr. Knight, and thereupon Mr. Kittredge employed him, and he proceeded to render the services, and to earn the compensation sued for by him.

Messrs. Stallo & Kittredge and Mr. Knight, as well as all others connected with these transactions, knew of Buser's contract with Neather & Schmidt to defend this litigation at his own expense. Mr. Neather, who, on behalf of his firm, employed Messrs. Stallo & Kittredge, explained this fact to them at the outset, and seems to have wanted
31 Stallo & Kittredge to look to *Buser for their fees, but this they declined to do, because Buser was a nonresident of the county, and unknown to them.

Thereupon, it was agreed that Messrs. Stallo & Kittredge should look for their pay to both Neather & Schmidt and Buser.

When Mr. Kittredge received instructions from Mr. Throckmorton to employ Mr. Knight, he at once notified Messrs. Neather & Schmidt of the fact, and seems to have understood that this employment of Mr. Knight was by all the defendants, and in the same manner in which his own firm had been employed. That Knight was so employed is urged upon two grounds, aside from the testimony that bears directly upon the fact:

1. That Neather & Schmidt having become liable to Stallo & Kittredge, for their fees, jointly with Buser, and being defendants in the case, both Messrs. Stallo & Kittredge and Mr. Knight had a right to assume, in the absence of any notification from them to the contrary, that they were to be also liable with Buser to Knight for his fees. And

II. It is urged, as a legal proposition, that Messrs. Stallo & Kittredge, in their capacity as counsel for the defendants, had a right to employ the asistance of Mr. Knight, it being deemed by them necessary, as it undoubtedly was, to the proper defense of the suit; and upon such employment by them, their employers would become liable, for Knight's compensation, in the same manner that they were liable for theirs.

In answer to this last proposition, I hold that whatever might be the authority of an attorney in such matters, under other circumstances, as, for instance, when a sudden emergency arose and his client could not be communicated with in time for him to receive instructions, no such

authority existed here. Where an attorney and his client are living, and doing business, in the same city, and can confer with each other at any hour, the attorney cannot, by virtue of his employment as an attorney, exercise any such authority as that which is claimed here. Aside from this lack of authority, I find from the evidence that Messrs. Stallo & Kittredge did not attempt to exercise any such authority. It was a matter which they submited to Buser through Throckmorton, and awaited Buser's answer to before proceeding in.

As to the other proposition, while the evidence does not show that Neather & Schmidt, or either of them, at any time, notified *Stallo & 32
Kittredge that they would not be liable, with Buser, to Knight for his fees, yet it does show very clearly that they notified Mr. Knight that the would not be so liable to him, and that he must look to Buser alone; Schmidt told Mr Knight so at the store, when he came there, at the outset of his employment, to get information to enable him to render the services he was to perform; and the next morning, Neather, who was absent from the store when Knight came there, and talked with Schmidt, having learned of Knight's visit to the store, went to Knight's office for the express purpose of telling Knight they would not be liable to him, and that he must look to Buser alone, and there, at his office, did so tell him. The testimony of Mr. Knight does not contradict either of these positive statements of Neather & Schmidt; on the contrary, Mr. Knight only says he has no recollection of their telling him anything of the kind, but will not say they did not tell him so.

Upon this state of evidence I find that Neather & Schmidt are not liable to Geo. H. Knight for his compensation for the services rendered by him, and that they never were liable; that they did not employ him, request him, or promise him in that behalf, either on their own account or on Buser's account, or jointly or severally with Buser.

The judgment of the court is, therefore, in favor of the defendants, Neather & Schmidt, upon the issues joined between them and the plaintiff.

As to Buser, it is admitted by him that he employed Knight, and that Knight did render him the services in the petition mentioned. There is an issue as to the value of those services, and as to whether or not Knight has been paid in full for them, and there is also a question, raised by counsel for Buser, on the evidence, as to the legitimacy of one item, or rather the half of one item, of Knight's bill; being the charge of one hundred dollars on account of the services of Knight Bros. at Washington; but the view which I have come to take of this case renders a consideration of all those matters unnecessary.

The petition sets forth that the three defendants, Neather, Schmidt and Buser, are jointly liable to the plaintiff.

The answer of each one of the defendants denies this joint liability.

*I have found from the evidence that Neather & Schmidt are 33
not liable with Buser, either jointly or severally. It follows, therefore, that Knight improperly joined the other defendants with Buser in his action.

The pleadings, returns and evidence show that only Neather & Schmidt were served with summons in this county, and that Buser, who was not a resident of this county, was served in Ross county, where he does reside. It is quite clear, both upon reason and authority, that it was not competent for Knight to obtain for this court jurisdiction of

Buser, by uniting with him as codefendants, Neather & Schmidt, residents of this county, they not being liable with him. To enable process to properly run into another county, and bring into the jurisdiction of this court defendants who are not resident, and are not served here, they must be properly united with defendants who are resident, or are served here. And the defendants, served here, must be defendants who are necessary parties to the controversy, or have some liability, or interest, in the subject-matter, that is adverse to the interests of the plaintiff. Otherwise a plaintiff might obtain jurisdiction for the courts of any county in the state, over any person, in any other county, by simply uniting with the real defendant, a nominal defendant who would be a resident of, and could be served with summons in, the county where the action would be brought.

This want of jurisdiction is the first defense set forth in Buser's answer; and it is clearly made out by the evidence.

The defense could not be made in any other way. The petition was a good petition on its face. But it is insisted that the defendant, by his third paragraph, has plead to the merits of the case, and has thereby waived his first defense, and submitted himself to the jurisdiction of this court.

A defendant should be allowed to plead—is allowed by the Code—as many defenses as he may have that are not inconsistent with each other.

If a defendant fails to plead want of jurisdiction in the *first instance* he is held to have waived it.

This, upon the principle that he shall not be allowed to come into a court which, but for his appearance, would be without jurisdiction of him,
34 and there defend the action until it has been *decided against him, and then render null all that has been done by denying the authority that he has submitted to.

But I know of no reason to prevent a defendant, who, in the *first instance*, pleads to the jurisdiction, adding as many other defenses thereto, not inconsistent therewith, as he may have.

I hold, therefore, that Buser's plea, to the jurisdiction of this court, was not waived by his further pleas to the merits of the case (4 O. S., 435; 11. O. S., 374); and his jurisdictional defense having been made out by the evidence, the judgment of this court is, that as to Wm. E. Buser this cause be dismissed, without prejudice, at the costs of the plaintiff, for the want of jurisdiction.

Stallo & Kittredge, Attorneys for Plaintiff.
E. A. Guthrie, Attorney for Buser.
S. A. Miller, Attorney for Neather.
J. J. Glidden, Attorney for Schmidt.

*TREASURER'S BOND. 94

[Hamilton District Court, April, 1879.]

Burnet, Avery and Cox, JJ.

JUEGLING ET AL. v. THE ARBEITER BUND.

In a suit on the bond of the treasurer of an incorporated society for not paying over funds of the society, received by him as treasurer, it is no legal defense to say that the funds were derived from a business not authorized by the coporate powers of the association.

Cox, J.

This case came up by petition in error to reverse a judgment of the common pleas, where suit was instituted by the *Arbeiter Bund*, a benevolent society, organized to assist its members, to recover a deficit of $3,000 against John Galvagni, the business treasurer, and his bondsmen. A judgment was rendered in * favor of the association for 95
$883, and it is sought on behalf of the sureties on the bond—H. E. Juegling and the administrators of Michael Schmidt and J. G. Sohn—to reverse it, on the ground of error. One of the grounds of error alleged was that the bond was too vague to base a judgment upon; that it did not convey the idea that the treasurer was to pay over on the 1st of January, 1876, money coming into his hands during the year 1875.

The court said the terms of the bond were not clear and explicit, and the sureties had a right to stand on the express terms. Giving the bond, however, a reasonable interpretation, it would fairly hold the party responsible for the funds coming into his hands during 1875. The principal error complained of rests upon the claim that the money coming into the hands of this treasurer was from a business that was illegitimate and beyond the scope of the corporation. The corporation was organized as a benevolent association, and it is contended that they had no power to acquire any property or use any funds than those which were for the legitimate purposes of the association. The society had a hall for public entertainments, and had rooms in the building which were rented out to different associations. They also organized a grocery, from which all the articles were furnished the members at cost price; also a saloon, at which beer and wine were sold; and all the proceeds were turned over to the association to further the benevolent purposes contemplated. It was contended that the establishment of this wine and beer saloon was contrary to the purposes of the association. There was a treasurer who received the dues and appropriated them as the society directed, and also a committee to manage and run the saloon. This business committee met once a year, and had its secretary and treasurer, separate from the regular treasurer of the association. The defendant, Galvagni, was the treasurer of this commttee for some fifteen years, and during that time received on an average some $35,000 a year, making $400,000 which had come into his hands; and it was remarkable that at the end of fifteen years there was found only a deficit of $883. There was no testimony to show that Galvagni carried on the saloon, but he was the treasurer of the funds derived from the saloon. Now, whether or not, in some other form of action it might be declared that this act of carrying on the saloon was illegal, and whether or not the corporation

might be attacked for exercising powers beyond its corporate authority, the court did not decide. But the funds coming into the hands of the treasurer as funds of the association, it does not lie in his mouth to say that the association cannot recover from him its own funds. Galvagni had been treasurer for over fifteen years, and during all that time knew that the business was carried on, and his bondsmen were also cognizant of it.

96 *Galvagni asked to be allowed $500 a year for the time he acted as treasurer. The testimony showed that he acted very intelligently and honestly during a long period, and the court would very willingly allow him a salary if it could do so; but, from the evidence, the officers acted voluntarily and without compensation, and there was no foundation laid on which the court could allow him a salary, but the judgment would be without penalty.

Judgment of the common pleas affirmed.

Von Seggern & Phares and M. Pohlman, for Plaintiffs in error.

Paxton & Warrington and Forrest, Contra.

PARTIES TO ACTION.

[Hamilton District Court, April Term, 1879.]

Burnet, Avery and Cox, JJ.

CINCINNATI SAVINGS SOCIETY v. JONES, ET AL.

1. When a mortgagor dies pending a suit it is error to take a decree without making the heirs and administrator parties.
2. An indorser of a promissory note not secured by mortgage, when not joined as a defendant with the mortgagor, has a right to prosecute a suit of error to reverse a judgment erroneously taken against the mortgagor.

PETITION IN ERROR to reverse the judgment of the Court of Common Pleas.

Suit was brought on a mortgage made by Mrs. Jones to Ludlow Apjones for $3,000, and endorsed by him to the savings society. An answer was filed by Mrs. Jones, but before decree was taken she died. A suggestion of her death was made on the record, and the court found she was dead. Apjones then asked that the case be continued and the administrators and heirs of Mrs. Jones made parties. This was refused, and a decree was entered against her and the indorser for the amount claimed.

Cox J.

Held, that there was error in this decree. There was no person in being to represent Mrs. Jones. The administrators and heirs were necessary parties to a full determination of the matter. It was claimed that Apjones, being simply indorser on the note, had no right to prosecute the case, inasmuch as the pleadings below did not set forth that he was the heir of Mrs. Jones. But he had an interest in the case. He was an indorser on the note, and was entitled to see that such proceedings were taken upon the foreclosure of the mortgages that the decree would be in conformity to the law, and the sale upon that decree give the judgment creditor a good title. Judgment reversed.

*BANKS AND BANKING. 97

[Hamilton District Court, April Term, 1879,]
Burnet, Avery & Cox, JJ.

FIRST NATIONAL BANK v. J. M. MOORE & CO.

A bank in one place, which receives for collection a note payable in another is responsible for failure to make proper presentment, by reason of which an indorser is discharged.

ERROR to the Court of Common Pleas.

The plaintiffs below, the defendants in this case, brought an action against the bank to recover damages alleged to have been sustained by its failure to collect a promissory note deposited with it. They held a note executed by a party named Ross, of DeGraff, Logan County, this state, upon which there was two endorsers. The note was deposited in the First National Bank by Moore, he giving instructions that it should be protested if not paid when due.

It appears that there was a bank in DeGraff, where the maker of the note resides, at which the note was payable, and which would be a trustworth agent for the collection of the note. The First National Bank, however, sent the note to a bank at Bellefontaine, some five or six miles distant from DeGraff. When the note matured it was not presented for payment at the proper place—the bank in DeGraff—nor was there any notice of non-payment given. The defendants called at the First National Bank after the maturity of the note several times to inquire about it, and were told by the bank that they had not heard from their correspondents in reference to it, and some thirty days elapsed before they were enabled to obtain information in reference to the note, or to recover the note from the bank. The maker of the note was insolvent at the time of its maturity, but one of the indorsers was financially good, and it thus appeared that the holder of the note would probably have made his money.

The bank claimed it had performed its full duty when it sent the note to a trustworthy and reliable correspondent in Bellefontaine for collection, and that it was not responsible for the omission or neglect of its correspondent; and it was stated that in the actual business of this kind notes are often transmitted by the bank, which receives them for collection through several other banks before they reach the final correspondent charged with the duty of presenting for collection. It was claimed for the plaintiffs below that the bank in Cincinnati having undertaken to collect this note, and not having stipulated for any restriction upon its liability, is responsible for the failure of its corresdent to perform his duty.

BURNET, J.

It was claimed in reference to collecting by banks through other banks, the general law of agency and bailments, *that he who accepts 98
an agency, if he employs agents under him, is responsible, does not apply. It would seem that in a majority of the states of thisUnion such was the case, and that it is held to be a defense to the liability of the bank which originally undertakes the collection of a note that it selected a proper agent or correspondent to whom to send the note for collection. But in this state and in the state of New York a different rule has been applied, which is in accordance with the general doctrine applying to principle

and agent, and that the correspondent selected by the bank is not a sub-agent of the owner of the note, but only the instrument through which the bank undertaking the collection assumes to perform its duty. The bank undertaking the collection is liable for the neglect or omission of its agent. The neglect of the Bellefontaine bank was the neglect of the First National Bank of this city, for which it is liable. Judgment affirmed.

USURY.

[Hamilton District Court, April Term, 1879.]

Burnet, Avery & Cox, JJ.

METZGER v. MEEKERS ET AL.

1. Where a note at eight per cent. interest is given, but ten per cent. is the interest actually agreed upon, and the excess is taken out, in advance, making the actual amount of the loan that much less than the face of the note, the transaction is usurious, and the interest will be computed at six per cent. upon the actual amount of the loan, crediting all payments, in excess of that, upon the principal.
2. Under the present code of procedure, 75 O. L., 648, 889, actions by administrators for the sale of real estate, brought originally in the court of common pleas, are appealable to the district court.

APPEAL.

BURNET, J.

The action in the court below was brought by the plaintiff for the sale of real estate of his intestate to pay debts. Meekers, one of the defendants, held a note and mortgage upon the premises. The question in the case was as to the amount to be deducted from this note and mortgage by way of usurious interest. The note was given for $7,000, money alleged to have been loaned. The actual amount of the loan was $6,820. Interest was paid at ten per cent. on the face of the note, $280, the excess over eight per cent. on the face for two years being deducted from the amount of money advanced upon the note.

Judge Burnet disposed of the case, directing that a decree be drawn for the sum of $6,820, with interest at six per cent., crediting as payments upon the principal all over six per cent., paid at any time as interest.

There was a question, however, in the case not presented by counsel, and that was to the right of appeal. Prior to the present code, where an administrator filed in the court of common pleas his petition for the sale of real estate to pay debts, that court acted as a probate court, having
99 the same *jurisdiction as the court of common pleas under the old constitution, and there was no right of appeal to the district court. The present Code of civil procedure, however, gives the right of appeal in every civil action where neither party is entitled to a trial by jury, and in the present codified laws governing executors and administrators, it provides that they may apply to the court of common pleas as well as to the probate court for an order to sell real estate to pay debts, the proceeding being denominated a civil action throughout the provisions in relation to it. If this was to be understood as the civil action referred to in the Code, within the meaning of giving the right of appeal from the court of common pleas to the district court in civil actions, then the right of appeal existed in this case, although it works a revolution in such cases in the practice of Ohio. Taking the language

of the statute, the court could not draw any distinction between the civil action referred to in this case and other civil actions, although the option was given the administrator to commence his civil action in the probate court. The right of appeal might not be perfectly clear, but the court would hold that there was a right of appeal in such an action under the present provisions of the Code, and that, therefore, the court had jurisdiction to pass upon the case.

Decree accordingly.

APPEALS.

[Hamilton District Court, April Term, 1879.]

Burnet, Avery & Cox, JJ.

CENTRAL BUILDING ASSOCIATION v. O'CONNER.

An order of the court of common pleas, in foreclosure proceedings, distributing the proceeds of sale, and finally adjusting the equities of the parties, is appealable to the district court.

This case came up on a motion to dismiss an appeal. The action below was upon a building association mortgage. The original decree in the case found the amount due and directed that in default of the payment of the same the property should be sold. The property was sold and sale confirmed, and a distribution ordered. From the decree of confirmation and distribution the appeal was taken. The defendant moved to dismiss the appeal on the ground that the only remedy of the plaintiff is by petition in error.

BURNET, J.

Judge Burnet decided the case. He held under the authority of the case of Kelly v. Stansberry, 13 Ohio, that the subsequent decree after sale made is properly the final decree fixing the rights of the parties. It is not merely a decree confirming the sale, ordering a deed to be made to the purchaser and directing the money to be paid out by the sheriff according to the findings of the former decree, but it is trial of the cause among the various *parties to it in all respects, except in one particular, that the former decree had fixed the validity of 100
the mortgage upon which the order was made and a sum due to authorize a sale to be made. The appeal was properly taken.

Motion overruled.

GUARDIAN AND WARD.

[Hamilton District Court, April Term, 1879.]

Burnet, Avery & Cox, JJ.

WEIGAND V. KYLIUS.

A guardian who has paid over to his ward all the funds in his hands is not chargeable in law or equity for the board of the ward under a contract with a former guardian.

ERROR to the Court of Common Pleas.

Philip Weigand was appointed guardian of Charles Seipe, a minor, in place of a former guardian, removed or resigned. The plaintiff below had boarded the minor, under a contract with the former guardian.

Upon Weigand's appointment, the balance shown by the final account of the former guardian was paid over by such guardian, and what was left of it, upon his ward's coming of age, was paid to him by Weigand. The payment was by bankers' draft upon Germany, where the ward was at the time. The draft was purchased and mailed ten days before the ward became of age, but could not reach him for payment until three days after he was of age. After the draft was sent, but before the date of his majority, the plaintiff below presented her claim to Weigand, and, he refusing payment, the action was brought. The amount of the draft was more than would have been sufficient to pay her claim. At the time the former guardian filed his final account, and paid over the balance in his hands to Weigand, the claim was discussed between them as a claim against the estate, but the former guardian said he would pay it when the minor became of age. At that time, also, publication was made of the filing of the final account; but, so short was the interval of minority, that the thirty days allotted for publication had scarcely elapsed when the ward became of age, and it was before the expiration of the thirty days that the draft was sent. Upon these facts the court of common pleas rendered judgment against Weigand.

AVERY, J.

One cannot be sued in his capacity as guardian so as to render the
101 estate of his ward liable. Judgment against him *as guardian would be no more than judgment against him without that addition. 5 Mass., 301; 37 Me., 406; 2 Strobh., 3; 10 Ind., 397. To charge the defendant below required, therefore, that he should have been personally liable. But he had not contracted the debt, nor had it been during his guardianship. He had not assumed to pay it, upon receiving the balance in the hands of the former guardian; on the contrary, the court found the fact to be that the former guardian said he himself would pay it. Granting that it was for necessaries to the minor, the liability was not to be shifted to the minor. 5 Ala., 42; 7 Jones (Law), 14; 42 Ga., 539. Still less was it to be shifted to the new guardian. A guardian is not liable for necessaries furnished his ward, except upon his own contract. 1 Bailey, 344; 1 Hill, S. C. 279; 4 Allen, 326; 1 R. I., 289; 8 R. I., 1; 17 Gratt., 398. A case in point is Young v. Werne, 2 Rob. (Va.), 420, which was for board under a contract with a former guardian. The action was held not maintainable. The remedy of a guardian for a debt he pays, on account of his ward, is in the probate court. 7 Pick., 47. It may be, that where the fund has passed out of his hands, as where it has been turned over to a new guardian, equity would furnish a remedy. But this would be confined to the amount in the hands of the new guardian. Conceding, for the purpose of argument, that the plaintiff below may have been subrogated to the rights of the former guardian, the defendant had nothing in his hands. He had mailed the draft to his ward, and when plaintiff's claim was presented, the fund was beyond his control. There is nothing in the finding of facts to show that, in this, he acted by collusion or unfairly. Judgment reversed.

Wolf for Plaintiff in error.

Spangenberg, Contra.

CORPORATIONS.

[Hamilton District Court, April Term, 1879.]

Burnet, Avery & Cox, JJ.

ELIZA MULLEN v. ANNA L. GAFFEY.

Agreement by the owners of a majority of the capital stock of a manufacturing corporation to elect a particular person secretary and treasurer not illegal; at least, if it is not upon a consideration of private benefit.

ERROR to the Superior Court of Cincinnati.

Action brought upon a note for $1,000, to the order of Anna L. Gaffey, who was plaintiff below. Defense, that Eliza Mullen being the owner of $29,000 of the stock of a proposed newspaper corporation, organized with a capital stock of *$50,000, but which failed of financial success, it was part of the agreement under which the money was advanced and the note given—the money being advanced to the corporation, and the note being payable only in the event of the corporation failing of financial success—that she should turn over $4,000 of her stock to a stepson of the plaintiff, and that he and she, thus owning a majority of the stock, should elect him secretary and treasurer of the corporation. Demurrer to this defense sustained, and judgment rendered upon the note. 102

Avery, J.

The point made is that the agreement was illegal, and that the note was part and parcel of it. Owners of stock, however, may vote it as they please, saving that they keep the corporation within its chartered limits. The agreement to elect a particular person secretary and treasurer was simply an agreement by the owner of a majority of the stock to vote it for him, or, rather, to turn over to him part of the stock, and then vote it together. The agreement was made with him. The case is not like Jones v. Scudder, 2 Sup. Ct. Rep., 178. There, the management of a medical college being vested in trustees, it was sought to enforce an agreement by the buyer of stock that the seller should be retained in his chair as professor. The court characterized this as an agreement to lobby with the trustees. Nor is it like the case of Fremont v. Stone, 42 Barb., 169. That was an agreement by the sellers of stock in the Union Pacific Railroad to secure the election of the purchasers as directors. The court was of the opinion that this involved the practice of some sort of device or contrivance upon the stockholders. Here, the votes of the parties themselves were sufficient for the election. The corporation was of a kind the management of which, under the law, is committed not to trustees, but to the stockholders. The parties to the agreement constituted a majority of the stockholders. Indeed, so far as appears, they were the only stockholders. Although termed an agreement to elect, it was, in substance, simply an agreement to employ. The consideration of the agreement was not the private advantage of one or more of the stockholders, not shared in by the rest. The advance of money was to the corporation itself, and to encourage its fortunes. In this particular, the case is plainly distinguished from Guernsey v. Cook, 120 Mass., 501; although that case, even by the court

which announced the decision, appears not to be implicitly relied on. See Noyes v. Marsh, 123 Mass., 286.

Judgment affirmed.

Logan & Randall, for Plaintiff in Error.

A. B. Huston, Contra.

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103 *INJUNCTION.

[Hamilton District Court, April Term, 1879.]

Burnet, Avery & Cox, JJ.

† HILDEBRAND v. WINDISCH & CO.

The execution of a judgment taken in violation of an agreement with opposing counsel, and without notice to them, will not be enjoined by a court of equity unless it be made to appear that there was a good, legal or equitable defense to the debt or demand.

ERROR to the Superior Court of Cincinnati.

Windisch, Muhlhauser & Co., brought suit in the superior court of Cincinnati to set aside a judgment obtained by Hildebrand at a former term of the same court, and to enjoin further proceedings thereon. The court, without setting aside the judgment, but permitting it to stand, enjoined its enforcement, unless Hildebrand would consent to the filing of a motion for a new trial in the original case, to an entry overruling the motion, and to the allowance of a bill of exceptions, all as of the term when the judgment was rendered.

The case was heard upon testimony as would appear from a bill of exceptions, made part of the record, but the pleadings show it stood upon petition and demurrer. The allegations of the petition were, in substance, that after the opinion of the court had been announced in the original case, in favor of Hildebrand, the papers were handed to his counsel to prepare the entry, and counsel for Windisch, Muhlhauser & Co. gave notice that they would file a motion for a new trial, and take a bill of exceptions; that thereupon negotiations for a settlement were entered into between counsel, and it was agreed that, pending such negotiations, matters should remain as they were, without the entry of judgment or signing the bill of exceptions, until efforts to settle should be found fruitless; but that, in violation of this agreement, and while propositions for settlement were still under discussion, counsel for Hildebrand handed to the court a judgment entry, and the entry was made, opposing counsel being ignorant of the fact, it being concealed from them—negotiations for a settlement meanwhile continuing— until the term had passed and they had lost their right to their motion for a new trial and bill of exceptions.

AVERY, J.

The jurisdiction of equity to enjoin judgments has been long established. The exercise has not been abridged by the special proceedings under the code for vacating or modifying in the same court, judgments

† This case was affirmed by the supreme court without report March 11, 1884.

or orders, after the term when rendered *23 O. S., 415, 432; 12 O. S., 172. What would have been a good cause of action to sustain an original bill, it has been held, would be a good cause of action under the code, 17 O. S., 485, 507. 104

The occasions on which injunctions may be used to stay proceedings at law, says Judge Story, are almost infinite. "In general it may be stated that in all cases where by accident, mistake, fraud, or otherwise, a party has an unfair advantage in proceedings in a court of law which must necessarily make that court an instrument of injustice, and it is, therefore, against conscience that he should use that advantage, a court of equity will interfere and restrain him from using it." Story, Eq., 885.

Fraud, accident or mistake, to warrant the interference of equity, must be unmixed with fault or negligence on the other part; but courts have not held that it is fault or negligence in opposing counsel to rely upon agreements with each other touching the conduct of a cause.

In Kent v. Ricards, 3 Md.Ch., 392, an agreement between counsel was made the ground of interference against a judgment taken in violation of the agreement. It was held that while an attorney who has a claim for collection cannot, without authority of his client, take anything but money in satisfaction of the debt, his power over the conduct of the cause is coextensive with that of his client. He may agree not to demand judgment or stipulate for a stay of execution, and any violation of this agreement will give the opposite party title to relief, the same as if the agreement were made with the express authority of his client.

In How v. Mortell, 28 Ill., 478, jurisdiction was entertained, where counsel having an agreement that a case should not be called up for trial by either, without notice to the other, judgment was taken by one, without notice, and in the absence of the other.

In general, however, where relief in equity is sought against a judgment, it must be shown not only that the judgment was unduly obtained, but that there was a good, legal or equitable defense to the demand. 8 Vt., 118–122; 23 Vt., 720–723; 37 Ala., 716; 11 Wis., 389. The reason is stronger where the relief is sought, not because parties were prevented from having a fair and full trial, but because they were prevented from obtaining a bill of exceptions, upon which to review supposed errors of the trial court.

The case of Oliver and Baum v. Pray, 4 Ohio, 175, is, in this particular, closely analogous to the case below. Relief was sought there because, by a mistake, the parties against whom judgment had been rendered had lost their right of appeal. But, say the court, "It is not enough that the court *has jurisdiction; we must be satisfied that the complainants have some merits, some grounds of defense to the action at law, before the judgment will be set aside. It is not enough that a party has lost the naked right of a second trial. A judgment never ought to be opened to gratify a spirit of litigation." 105

The petition of the plaintiffs below sets out the nature of the case in which the judgment against them had been obtained, and that evidence was offered; but not the nature of the evidence. They further alleged they had a defense, and that, if they were allowed a bill of exceptions it would show the judgment to be erroneous. But the petition did not allege what their defense was, nor what the errors were. The allega-

tion that they had a defense was a mere conclusion; and that the bill of exceptions, if allowed, would show errors, an hypothesis.

These allegations were not helped out by the testimony which was offered. The testimony was confined to the alleged agreement between counsel. The court did not treat the case as though errors, in the judgment complained of, were admitted by the pleadings, or ascertained. In such case it would have been competent to set the judgment aside. Upon the contrary the judgment was permitted to stand. The presumptions in favor of a judgment, attach, as well where it is assailed by bill in equity, as in any other way. Errors must be specifically assigned. If there were facts which made the judgment sought to be enjoined erroneous, they should have been alleged.

The judgment of the superior court must be reversed, and the cause remanded for further proceedings.

J. F. Follett and A. E. Cramer, for Plaintiff in Error.

I. M. Jordan and T. Q. Hildebrandt, Contra.

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135 *REMOVAL FROM OFFICE.

[Hamilton District Court, August, 1879.]

Burnet, Avery, and Cox, JJ.

STATE OF OHIO, EX REL. HOGAN V. SUTTON ET AL.

In November, 1878, an information was presented to the governor by four members of the Board of Police Commissioners of Cincinnati, charging the fifth member of the board, the relator in this action, with official misconduct in this, "That at a regular meeting of the board for public business he trespassed upon the privileges of debate and the dignity of the board by the use of improper language: Upon being repeatedly called to order by the presiding officer, and reminded of the intemperance of his words and manner, he became more furious, and said, 'God damn the board,' and 'God damn you all,' and 'I'll be God damned if I ever enter this board again,' whereupon he left his seat, violently throwing a chair on the floor, quit the room, furiously slamming the door. Subsequently he returned, but took no further part in the proceedings, and made no apology to the board." The governor, without notice to the offending member and without trial, removed him from office, and the board elected another to his place. In March following he was reinstated by judgment in *quo warranto*, the order of the governor being held void for want of notice and opportunity for
136 defense. June 26, 1879, notice was served upon the relator, and upon the *board, by order of the governor, that the charge would be heard at the executive office in Columbus, July 8, 1879, and that meanwhile relator was suspended from office, and thereupon the board, at a meeting June 27th, refused to recognize him as an active member or permit him to vote, and relator filed his petition in *mandamus* June 28th, to compel them to recognize his rights as a member. The alternative writ was allowed returnable July 1, 1879. Afterward, on the 28th day of June, the governor withdrew the first notice, and caused another to be served on relator, fixing the time for trial of the charge for July 1st, and again suspending relator from office during pendancy of the charge. July 1st, trial was had before the governor and relator removed from office. Held:

1. The offense charged in the information might be held by the governor to be official misconduct within the meaning of the statute.
2. The governor has no authority to suspend from office during the pendency of a charge.
3. The information was still pending after the former order of removal had been declared void and set aside in the *quo warranto* proceedings:

4. For mere error and irregularity in the conduct of the trial, there being an actual trial with evidence tending to sustain the charge, and opportunity for defense, the order of the governor removing, cannot be treated as void.
5. Relator having ceased to be a member of the board since petition filed, judgment cannot go in his favor except for costs down to and including the answers filed setting up the removal as a defense.

MANDAMUS.

BURNET, J.

On the 28th of June, 1879, the relator filed his petition in this court, averring that on the 1st day of April, 1878, he was duly appointed by the governor of Ohio a member of the Board of Police Commissioners of Cincinnati for the term of five years, and was duly qualified as such, and has since been acting in that capacity; that the board now consists of the defendants, W. W. Sutton and John Dorsch and himself, and two other members, viz., Daniel Weber and John H. Setchel; and that defendant, J. M. Hanson, is the clerk of the police department and secretary of the board. That on the 26th day of June, 1879, the governor of Ohio, Hon. Richard M. Bishop, caused to be sent to the board the following letter:

"COLUMBUS, O., June 26, 1879.

"Hon. W. W. Sutton, President of the Board of Police Commissioners:

"Dear Sir:—I have this day prepared and sent to Patrick J. Hogan, a member of your board, a notice that I would hear *the charges preferred against him by yourself, John Dorsch and C. Kinsinger, November 25, 1878, in my office in the city of Columbus, on Tuesday, the 8th day of July next, at 10 o'clock a. m., and that he was suspended from acting as police commissione runtil such charges were heard and decided, and this is to notify your board of the same. 137

"Respectfully,

"Richard M. Bishop,

"Governor of Ohio."

That at a regular meeting of the board, held on the 27th of June, 1879, he was denied the right to vote upon questions acted upon by the board, and the secretary, by order of the president, refused to receive or record his vote; that said Setchel moved that relator be recognized as a member and his vote received, upon which motion said Setchel and Weber voted in the affirmative, and said Sutton and Dorsch voted in the negative, and the president declared the motion lost, and said Sutton and Dorsch and said Hanson persisted in their refusal to recognize him as a member, whereby he is deprived of his rights and privileges as a member of the board. And the petition prays a writ of *mandamus* directing said Sutton, Dorsch and Hanson to recognize his rights as a member, and to permit him to vote and participate in the proceedings of the board.

On the same day, Saturday, June 28th, the alternative was allowed, returnable at 12 o'clock M., Tuesday, July 1st, at which time, upon the suggestion of an additional defense based upon the action of the governor that day, of which the defendants were just advised by telegram, and that they had been unable to prepare their answers, further time, till next day, was given for answer.

The defendants filed their separate answers admitting the allegations of the petition as to the appointment of relator, the notice of his suspension by the governor, and their refusal thereupon to recognize him as an acting member, and alleging that after the issuance of the alternative writ, on Saturday, the 28th day of June, they received from the governor another notice that said Hogan would be tried upon the

charges pending at 10 a. m., July 1st, at Columbus, and that meanwhile he was suspended from the exercise of the privileges of his office; and
138 that, on July 1st, said charges against Hogan were heard * upon the trial thereof and upon evidence offered, and the governor, finding the same to be true, removed him from his office of police commissioner. And they deny the right of Hogan to act as a member of the board.

To these answers the relator replied, denying the power of the governor to suspend him from his office, or to hear and determine the alleged charges, and alleging, first, that said charges were filed with the governor in November, 1878, and then adjudicated and, so far as the governor had authority in the matter, finally disposed of, and since then no charges had been pending against him. Second, that the pretended trial on July 1st was *ex parte*, without sufficient notice, and without the opportunity afforded to cross examine witnesses or introduce evidence in his defense, and that, therefore, he was not duly and legally removed from his said office; and third, that the charge did not state an offense which constituted misconduct in office, and for which he might legally be removed.

To the last two counts of the reply the defendants demurred. Upon argument the demurrer to the second count was overruled, and the demurrer to the third count sustained; the court holding that the conduct alleged in the charge, as set out in that count, was of such a nature as might, in the judgment of the governor, after an examination of the evidence and of the attending circumstances, be held to the official misconduct, within the meaning of the statute.

The demurrer being thus disposed of, the case then proceeded to the trial of the issues of the fact, upon the testimony adduced.

The facts as established by the evidence are substantially these: On the 27th of November, 1878, an information was filed with the governor at his office in Columbus, containing the following charge: "The Board of Police Commissioners of this city, met on the 15th of the present month, in pursuance of the rule for the transaction of business pertaining to the city infirmary, a department within and under their control. In a discussion over a matter of the terms of a small contract, Mr. Commissioner Hogan trespassed upon the privileges of debate, and the dignity of the board, by the use of improper language. Upon being
139 repeatedly cautioned and called to order by the *presiding officer, and reminded of the intemperance of his words and manner, he became more furious, and said: 'God damn the board,' and 'God damn you all,' and 'I'll be God damned if I ever enter this board again,' whereupon he left his seat, violently throwing a chair on the floor, quit the room, furiously slamming the door; subsequently he returned, but took no further part in the proceedings, and made no apology to the board for the gross indignity put upon his colleagues by the outrageous language and conduct stated. The undersigned respectfully appeal to your excellency, and represent that the dignity of their body has been disgracefully abused, and that executive action only can secure for the future immunity from like assaults, and maintain the character of a board charged with grave and important duties."

The information was drawn up the next day after the offense occurred by direction of the three members present at the meeting at which it was given, but, because of the absence from the state of the other

member of the board, it was not signed until his return, on the 25th of November, when it was signed by the three members who had been present, and was indorsed by the fourth, with the recommendation that it should be acted upon by the governor.

The minutes of the meeting on November 22d, being the first meeting of the board at which there was a quorum held after that at which the offense was given, contain this statement: "Mr. Hogan arose to a question of privilege and explained his language at a previous meeting to have been used in the heat of excitement, and that no disrespect or insult was intended for any member of the board. An uncalled-for refusal by a servant of the department to answer a proper question was the occasion of any intemperance of language used, and for this he was heartily sorry, and begged to submit his apology therefor." Before this apology the board had already taken the steps mentioned to present the information, being delayed in its prosecution only by the absence of one of their number, and it does not appear that the apology was accepted. but, on the contrary, without unnecessary delay, they presented the information to the governor.

That executive officer, on the 27th of November, the same *day 140
on which the paper was filed in his office, without notice to Hogan and without trial, proceeded to remove Mr. Hogan from his office, of which he notified him and the other members of the board. The board then filled the vacancy thus occasioned by the election of J. P. Carbery in the place of Hr. Hogan. Some two or three months afterward, in a proceeding in *quo warranto* in this court, the removal of Hogan, without trial and opportunity for defense, was held to be illegal, and he was reinstated in his office; and from that time until the 27th of June, 1879, he continued in the performance of his duties as police commissioner. On the day previous to that date the governor had notified him, as also the board, that the charges against him would be heard at the executive office in Columbus on the 8th of July, and that until the charges should be heard and decided, he would be suspended from his office. Acting upon this notice, on the 27th, the board refused to recognize him as a member, for the time being, or to receive his vote, and on the 28th this suit was begun to compel the recusant members and their clerk to recognize his right to participate in the proceedings of the board, notwithstanding his attempted suspension by the governor, during the pendency of the charge against him. The alternative writ was made returnable July 1st, at 12 M. After the issuance of the writ, on the 28th of June, between 5 and 6 o'clock in the afternoon of that day, another notice from the Governor fixing the time for the trial of the charge at 10 o'clock A. M. of July 1st, was handed to Mr. Hogan in the presence of his counsel and shown by him to his counsel. The former notice was without specific date, and had merely been signed by the governor without authentication by the state seal, or attestation by the secretary of state. The new notice was dated June 28th, and duly authenticated by the great seal of the state, and attested by the secretary of state. These defects in the first notice are assigned as the reason for giving the new one, and its suiting the convenience of the governor with reference to his other engagements and purposes, is assigned as the reason for changing the time of hearing. The governor, also by note, dated the 28th and delivered the next day, notified Mr. Hogan, that

141 because of technical informality therein, he had withdrawn *the first notice, and that the hearing would be July 1st, at 10 A. M.

The case being called for hearing at 10 A. M., July 1st, at the office of the governor in Columbus, there were present five witnesses to testify in support of the charges, and the counsel for Mr. Hogan, Mr. Hogan himself being absent. Upon the close of the trial, of which we will say more hereafter, the governor decided that the charge of official misconduct was sustained, and made an order removing Mr. Hogan from his office.

At the time the petition in this cause was filed, the charge of which Mr. Hogan was notified, on the 27th of June, was still pending, and it was sought to suspend him from the exercise of his rights as a police commissioner during its pendency. It is claimed on behalf of the relator that the governor has no authority to suspend, but that his power is confined to a removal after trial had.

The power of the governor in the premises is defined by the statute conferring it, which nowhere provides for a suspension from office while charges of misconduct are under examination, but only for a removal. We have been cited to one case where it has been held that the tribunal authorized to remove may also suspend during the pendency of the charge. But upon examination of that case it appears that it was based upon positive provisions of law.

The 69th section of the statute, under which this removal was made, provides, in reference to policemen of cities of the second grade of the first class, that a member of the police force may be removed for cause, upon written charges and after opportunity of being heard in his defense, and that the board of police commissioners shall have power to *suspend* pending the hearing of the charges. The failure to make a similar provision in the case of a member of the board of police commissioners indicates that it was not the intention of the legislature that it should exist. We do not think that the power to suspend upon charges filed is incidental to the power to remove upon conviction. The order of suspension, therefore, was illegal and void, and if there were no other reason for staying the hand of the court, the relator would be reinstated.

But the answers aver, and the evidence shows, that before the 142 *hearing of this cause, the charge against the relator was tried by the governor, and judgment of a motion pronounced. If that judgment is valid the court will not order a restoration. Since, whatever may have been the right of the relator at the commencement of this suit, he is not now entitled to a seat in board.

But the relator replies that the charge had long since been disposed of, and there was none pending; that there was, in fact, no such hearing as warranted the governor in making an order of a motion; and that the information upon which he acted did not contain a charge of official misconduct.

There was, indeed, an order of removal by the governor in November, 1878, upon the same charge; but as there was then no notice to relator, and no trial, upon the petition of relator, the order was by this court declared to be a nullity, and judgment of ouster rendered against Mr. Carbery, and relator restored to his place in the board. The effect of our decision in the case in *quo warranto* was to hold that the proceeding of the governor subsequent to the filing of the information before him was irregular and void; and that proceeding being set aside,

left the information pending as if it had never been acted upon. What reasons forfurther delay in acting upon the information, after the judgment rendered by this court, may have existed in the mind of the governor, or what may have prompted the action when taken, it is not competent for this court to consider. It only appears that a charge had been made in good faith, and that it had not been legally disposed of, and was still pending, subject to be called up and acted upon.

But was there such a trial as authorized the governor to take final action upon the charge? In Hogan v. Carbery, 7 Amer. Law Record, 595-9, we held that where an officer, appointed during good behavior, or for a definite term, is removable for specified causes only, before he can be removed there must be a definite charge made against him, he must be notified of the charge, and he must be given an opportunity to be heard in his own defense. With that decision we are still satisfied. The power of the governor in the premises is not, indeed, judicial power, but it is of a judicial nature or *quasi* judicial, and its exercise subject to similar limitations and conditions, or, perhaps, more stringent than those applicable to courts.

*The rule governing the judgments of judicial courts is this: 143
Where the court has jurisdiction of the subject-matter of an action, and of the parties, its judgment is not void, and cannot be collaterally impeached, and can only be avoided when attached, in error or review or on appeal, in the manner prescribed by law. Ordinarily, the jurisdiction over a party is obtained by the service of summons or other *mesne* process. If the court be one of general jurisdiction, and the record is silent as to service, service will be conclusively presumed in favor of the judgment when impeached collaterally; and whatever errors may have intervened, the judgment will nevertheless be held valid, when sought thus to be impeached. If the court be one of inferior or limited jurisdiction, there is no presumption of jurisdiction over the person, but it must appear by the record, or, if there be no record, *aliunde*. But given, the jurisdiction of subject-matter and of the person, the judgments of courts of either kind will be valid, however grossly irregular, or manifestly erroneous their proceedings may have been. The power to hear and determine a cause is jurisdiction; and it is *coram judice* whenever a case is presented which brings this power into action. But before this power can be affirmed to exist, it must be made to appear that the law has given the tribunal capacity to hear the complaint against the person or thing sought to be charged or affected; that such complaint has actually been preferred; and that such person or thing has been properly brought before the tribunal to answer the charge therein contained. When these appear, the jurisdiction has attached; the right to hear and determine is perfect, and the decision of every question thereafter arising is but the exercise of the jurisdiction thus conferred; and whether determined rightfully or wrongfully, correctly or erroneously, is alike immaterial to the validity, force and effect of the final judgment, when brought collaterally in question. Sheldon's Lessee v. Newton, 3 O. S. R. 499.

There is, perhaps, this difference between a cause in a judicial court and the matter referred by the statute to the governor. Jurisdiction is obtained by a court when a complaint setting forth a cause of action is preferred, and by the process of the court, the party has been duly noti-

144 fied thereof. This is *the method provided by statute, by which the court obtains authority to hear and determine the cause. For some purposes, indeed, jurisdiction attaches upon the filing of petition and issuance of summons; as, for instance, the authority to appoint a receiver, allow an injunction, or allow an order for an attachment (Spinning & Brown v. the Ohio Life Ins. & Trust Co., 2 Disney 336), which are proceedings in a cause that do not involve, or necessarily depend upon, the determination of the issue made or tendered, but are ancillary to the action, and to put the court and parties in a position to render whatever judgment may afterward be given effective. But jurisdiction, in its ordinary sense, that is, power to hear and determine, is given to the courts by statute when service of process has been made. The judiciary is that one of the three co-ordinate departments of the government, to which, by the constitution, is intrusted the construing and applying of the laws, in the administration of justice, and the determination of the rights of citizens in causes presented. To its acts, after jurisdiction obtained, is applied the legal maxim, *omnia praesumunter rite esse acta*. To superior courts this maxim applies to maintain their jurisdiction as well as their after acts; but to inferior courts and magistrates, to maintain their judgments after jurisdiction appears to have attached.

But where to a non-judicial officer is given the power to hear and determine a matter of a *quasi* judicial character, while the propriety of his determination upon the facts, that is, his determination upon the evidence presented to him, may not be collaterally questioned, it must appear that the conditions existed upon which he was authorized to make a determination, not the particular determination. When these conditions do appear, the legal maxim, that all things are presumed to have been rightly done, will apply also to his determination.

In Hogan v. Carbery, already cited, we held in reference to the authority of the governor to act upon the charge now under consideration, that it was necessary that the charge should be definitely made; that the party against whom it was made should be informed of the definite charge, with such notice as would enable him to present to the governor his defense; and that before the governor acted upon it he should be

145 heard. *These were the conditions upon which his jurisdiction to determine depended.

The relator claims that the notice was too short. The notice was on Saturday afternoon of a trial to take place on Tuesday, at 10 a. m. For a trial before a justice of the peace this would be the statutory time, and the law must be presumed to have fixed upon the time ordinarily required to enable a party to prepare for a trial of that kind. Although the place of trial was distant, the distance can be traveled by rail in a few hours. The relator had already been notified of a trial to take place at a later time, and might have been supposed to have taken some steps in preparing for it. There is no positive law upon the subject, and the majority of the court is unable to say that the notice was not sufficient to warrant the governor in proceeding with the trial.

It is claimed on behalf of the relator that he did not have an opportunity to make a defense—that he was denied the privilege of cross-examining the witnesses against him, or of introducing testimony, or of being heard by counsel. This case is not on error or *certiorari* to the proceedings of the governor, but the question is, whether his order was void—

was a nullity. For the purpose of determining this, and for that purpose only, we permitted to be given in evidence the entire proceedings and testimony upon the trial before the governor, of which there was a stenographic report, by examination upon the stand of other persons present at the trial before the governor, as well as the stenographer. The relator was represented before the governor by counsel; but he was not present to testify himself, and took no steps to subpœna or otherwise produce witnesses there. His counsel first asked for a continuance, which was denied This was a matter that was discretionary with the governor, and would not be subject to review except in a very extreme case, even on error. Having discussed the question of continuance at considerable length after it had been decided and refused, the counsel for relator moved that the trial be transferred to Cincinnati. This was promptly and not improperly denied. Counsel then moved to dismiss the proceeding on the ground that there was no charge on file. This was also promptly overruled, and very properly so. The counsel *for relator 146
then proposed to present to the governor "a general demurrer that the information, or charges, as he was pleased to call them, did not constitute a cause of action; also a further demurrer that his excellency had no jurisdiction to hear any charges against Mr. Hogan."

The governor replied that he overruled them, and, when counsel desired to argue the question, refused to hear further argument on that point.

Counsel asked, Is your mind made up about that? To which was replied, I have the advice of the attorney-general, and I have made up my mind. The question was then put by counsel, whether he had determined the whole case with the attorney-general?

Having answered this in the negative, the governor asked counsel if he had any other motion to make, and was met with a protest against swearing any witnesses at that stage. The governor directed the witnesses to be sworn, and counsel again repeated, "I protest."

This is a brief description of the opening scene of the trial.

There was five witnesses sworn, who testified fully as to the offense charged and the circumstances connected with it—the entire trial occupying about two hours. Each of the witnesses were cross-examined, and the cross-examination occupied more time than the direct testimony. If the case had been tried in this court, or in any ofthe superior courts of this state, it is probable that cross-examination at greater length might have been permitted. But the extent to which the cross-examination of witnesses may be allowed is, in some degree, within the discretion of the court or other tribunal trying a cause; and many cases have been tried in courts of record where the conduct of the court in controlling the examination of witnesses, or cutting short cross-examination, might be open to just criticism, which, nevertheless, even on error, would not be reversed.

At the beginning of the trial the governor announced to Mr Hogan's counsel that he would hear all the testimony he should present; and, at the conclusion of the testimony against the defendant, he called upon counsel to produce his witnesses, which he said he would do if time were given, but which he did not do, and, in fact, could not have done that day, as he had made no provision to have any in Columbus for that purpose.

147 *During the trial, counsel, while assuming that the governor was sitting as a court, yet, by his remarks, implied that he was both prosecutor and judge, and conducted his case on the manifest theory that he was in the presence of a partisan tribunal, and when the governor stated that he had been requested by the president of the board to decide the case, he objected to the statement in words not quite respectful. We may suppose that the assumption of the existence of antagonism, not unnaturally provoked antagonism, in a tribunal not accustomed to judicial duties or to the exercise of a judicial temper; and to this may be attributed many of the apparent irregularities that occurred in the proceeding, as detailed in the testimony before us—not as given in the travestied account furnished at the time to the public.

It is not our province to say whether, three or four months after Mr. Hogan had been reinstated under the proceedings in *quo warranto*, and seven months after the charge of misconduct, the public good required a trial of the charge; nor whether the weight of the testimony sustained the decision of the governor and justified the removal, nor how far the fact that he had apologized to the board should have recommended him to the executive clemency. The law imposes that responsibility upon the chief executive, and we can only consider whether such a trial was had as empowered him to take final action.

Upon full consideration of the case, the majority of the court is unable to say that the order of the governor is a nullity because of the want of a proper trial.

But the relator still claims that the offense charged and proven before the governor was not such misconduct in office as legally authorized a motion. We can only look at the written charge; it was for the governor to say whether the evidence sustained it, and, if proven, whether the gravity of the offense and the exigency of the public service were such as to require a removal. But Mr. Hogan was a member of the Board of Police Commissioners, whose duty it is to appoint, regulate and govern the police force of Cincinnati, that large body of officers intrusted with the enforcement of the laws and the preservation of good order in the city. The offense charged in the information is, that at a regular meeting
148 of the board for the performance *of public business, with violent and disorderly action, and not heeding the call to order by the presiding officer, in profane language, itself a violation of the criminal law, he cursed the board and all its members, and declared his purpose never to enter the board again, and thereupon left the room, slamming the door behind him; and though he afterward returned to the room, he took no part in the proceedings and made no apology. This is the charge. The court are all of opinion that the information charges an offense which the governor might hold to be misconduct in office, and for which the relator might be removed if the testimony sustained it.

The fact that the relator is no longer a member of the board will prevent the judgment asked in the petition; but inasmuch as at the time of filing the petition there was an illegal suspension from office, to remedy which was the object of the action, there will be a judgment in favor of the relator for costs against defendants, Sutton and Dorsch, down to the time of filing the answers in the case, and including the answers. Subsequent costs to be charged to the relator.

Cox, J., disagreed with the majority of the court.

EASEMENTS.

[Superior Court of Cincinnati, July Term, 1879.]

†PENDLETON ET AL. v. FOSDICK ET AL.

1. An unsealed written agreement may be sufficient, in equity, to grant an easement to use a brick wall as a party wall; so held upon the facts presented in this case.
2. When such wall is *in esse* at the time the agreement is made the use of the word "assigns" is not necessary to make the easement run with the land to the grantee of the covenantee.
3. If a covenant be otherwise sufficient, privity of estate, between the parties to it, is not necessary to make it run with the land to carry a *benefit*.

FORAKER, J

This is a suit to enjoin the defendant, Samuel Fosdick, from *the use of a certain brick wall, in the erection of a building at 149
which he is now engaged.

The other defendants are the contractors who are putting up the building.

There are two general questions presented:

First—The legal right of the defendant to make the use of the wall he is proposing to make; and, second, the sufficiency of the wall to support that proposed use.

The facts of the case, briefly stated, as shown by the evidence, are, that the plaintiffs, George H. Pendleton and Charles W. Woolley, as trustees for Mary F. Woolley, their coplaintiff, are the owners of that certain lot of ground situated on the east side of Main street, between Third and Fourth streets, extending back about one hundred and ninety feet to Hammond street, and known as the lot on which the Commercial Bank building stands. The defendant, Fosdick, is the owner of the lot adjoining the lot of plaintiffs on the north, and extending back the same depth to Hammond street.

The plaintiffs have so owned and held their lot since prior to 1862. The defendant has owned his lot since the first day of March, 1875, and derives his title from J. and J. Slevin, who were the owners of his lot in 1862, and prior thereto. In 1849, what was known as the old Commercial Bank building was erected on the lot of plaintiffs. This building fronted on Main street and extended back therefrom to the depth of one hundred feet. The side walls of the building were extended back about twenty feet further, making an area in the rear of the bank

From the end of the north wall of this area there was a fence running back to Hammond street. The bank building was three stories high, and its north wall was a thirteen-inch brick wall, built upon a twenty-one-inch stone foundation wall.

The testimony does not show what was upon the lot of the defendant prior to 1866.

In 1862, on the twenty-sixth day of December, the following agreement was entered into between J. and J. Slevin and C. W. Woolley and Mary F. Woolley, viz.:

"C. W. Woolley and Mary F. Woolley, his wife, and J. and J. Slevin are owners, respectively, of the pieces of ground each fronting on Main and Hammond streets, Cincinnati, Ohio.

*"The first two parties on the lot on which the Commercial Bank 150
now stands, and also the ground between the bank and Hammond

† This case was affirmed by the district court, 8 Dec. 486.

street. Said Slevin owns the lot on the north side of both these pieces so described. Said Woolley and wife desire to *extend* the bank building back to Hammond street, and, in doing so, will build the north wall of the houses six inches upon the lot owned by Slevin; said Slevin wishes to build to said wall when he improves his ground, and thereby participate in its use.

"Whrefore, the parties mutually agree and promise to and with each other as follows: The first-named parties may so construct their north wall upon the ground of said Slevin, without let or hindrance from him, and may so use and enjoy the same; and the said Slevin agrees and promises to and with said Woolley and wife that when he builds upon his lot he will pay them one-half of the cost of their north wall, upon the payment of which the said Woolley and wife agree for themselves, their heirs and representatives, that said Slevin may use and enjoy, in common with them, the said wall.

"As witness the signatures of the parties, this twenty-sixth day of December, 1862.

[Signed] "C. W. Woolley,
"Mary F. Woolley,
"J. & J. Slevin."

During the year 1863 the brick walls forming the area in the rear of the bank were torn down, and the bank building was extended back to Hammond street, the north wall of such extension being of the same height and in a straight line with the original north wall of the bank, and of the same thickness, except for the distance of about sixteen feet at the commencement of the extension, where the wall was made sixteen inches thick, but the increased thickness was added to the south side of the wall.

In 1866 J. and J. Slevin built, upon their lot, a five story brick building, extending from Main street back to Hammond street. Two stories of their building extended above the top of the bank building, and for these two stories they built upon the north wall of the bank building for its entire length of about one hundred and eighty-three feet. As
151 nearly as I can determine, from *the evidence, this building was commenced about May, 1866, and was "under roof" before frost.

On the ninth day of November, 1866, C. W. Woolley, who seems to have acted for the plaintiffs in all these matters, as it was quite proper he should, caused a survey to be made of the lot of the plaintiffs, with special reference, as it appears, to the ascertainment of the north line of their lot. The survey was made by Mr. Joseph Earnshaw, and the plat of it is in evidence, and shows that, according to his survey, the north side of the brick wall was three and one-half inches north of the north line of the lot of plaintiff on Main street, and that, at the Hammond street end of the wall, its north side was two and one-half inches south of the north line of plaintiffs' lot.

Subsequently, on the twelfth day of December, 1866, the plaintiffs and J. and J. Slevin entered into the following agreement, to wit:

"Cincinnati, Ohio, December 12, 1866.

"For and in consideration of the sum of sixteen hundred and sixty-six dollars and thirty-two cents ($1,666.32), which has been paid to us this day by J. and J. Slevin, we agree that they may use the north wall of the Commercial National Bank as a party wall *so long as it stands, and that we will not pull down or injure it.*

"Whenever we use that part of the wall erected by the said Slevins, we are to pay them one-half it value. The question of *ownership of the ground* upon which the wall stands is not to be affected by the common use of the wall.

[Signed] "Mary F. Woolley,
"*Per* C. W. Woolley,
"C. W. Wooley."

"We accept the use of the wall upon the terms stated above.

[Signed] "J. & J. Slevin."

"We approve of the above lease.

[Signed] "C. W. Woolley,
"Geo. H. Pendleton,
"*Trustees of* Mary F. Woolley."

The sum of $1,666.32, mentioned in the foregoing receipt-agreement, was the exact amount of one-half the cost of the *entire north wall 152
of the bank building as it stood before Slevins built upon it, according to a calculation made by Messrs. Walter & Stewart, architects, on the thirteenth day of November, 1866, in evidence.

J. and J. Slevin both died prior to 1879; one of them prior to the conveyance to Fosdick in 1875, and the other sometime thereafter.

On the ninth day of January, 1879, the building standing upon the lot of the defendant, Fosdick, and the same building which had been erected by the Slevins in 1866, was, practically, wholly destroyed by fire.

The wall which they had built on the top of the wall that had been previously erected by the plaintiffs, for the two stories of their building which extended above the bank building, was almost wholly destroyed and thrown down by the direct effects of the fire. The parts of it which did not so fall were afterward taken down.

The wall which had been erected by the plaintiffs was considerably damaged in various places and in various ways, and, at one point near the center of it, a section of it, about twenty feet long, and extending from the bottom to the top of it, was so badly damaged that it was unsafe for use.

A short time after the fire plaintiffs caused this damaged section to be removed, and the wall at that point to be entirely rebuilt, and, at other points, made such repairs as the wall admitted of, and proceeded to repair and rebuild their building, which, from the falling of walls, and in other ways, had sustained considerable injury from the fire. So that the building of the plaintiffs stands now, practically, as it did in 1866, before and when the Slevins built; and the north wall of that building stands upon and occupies precisely the same ground it then occupied, and is of the same dimensions, though, probably, not of the same strength, and is subjected to the same uses that plaintiffs made of their north wall in 1866 and prior thereto.

The defendant has commenced the erection of a five story building upon his lot, and, in doing so, has commenced to insert his joists in the wall in controversy, and is threatening to use it throughout for the purposes of his building, as a party wall, and to build onto the top of it, as did the Slevins in 1866, for the *two stories of his building that 153
are to extend above the top of the bank building.

The plaintiffs seek to enjoin him from making such use of it, and, as already stated, they claim—*first*, that he has no legal right whatever

to make any use whatever of the wall; and, *second*, that the wall is insufficient for the proposed use.

These are all the facts bearing upon the question of the legal rights of the parties, and I shall first endeavor to ascertain what these facts show those rights to be.

In order that we may the better judge what the present rights of these parties are, we should first determine the rights of the Slevins and the plaintiffs, as created by the agreements made, and the transactions had, between them.

The petition of the plaintiffs alleges that the defendant claims the right he is asserting, with respect to the wall, under the agreement of 1866, which I have recited. The answer of the defendant claims that he possesses the right under a written agreement.

It was claimed by the plaintiffs on the trial that, under this state of the pleadings, the agreement of 1862 was incompetent as evidence in the case; and it was further claimed that if not incompetent under the pleadings, as they stood, it was incompetent because it was prior to the agreement of 1866, into which everything that preceded should be considered as merged; and for the further reason that it was not executed by the plaintiff, it having been signed by only Woolley and wife in their individual capacity, and that it was not, therefore, an agreement between the same parties. It was also claimed by the plaintiffs that it was inconsistent with the agreement of 1866, and for that and still other reasons it should not be admitted in evidence.

It is true that when a written agreement has been made, everything that preceded it should be treated as merged into it; but it is also true that when it is necessary to construe an agreement, we must look to all the attendant facts and surrounding circumstances calculated to aid us in ascertaining what was the intention of the parties, as they have expressed themselves; and that intention, when so ascertained, so far as the language used will admit of it should be enforced as the agreement of the parties.

154 *While, therefore, it is true that the agreement of 1862 was not signed by all the parties to the agreement of 1866, or all the plaintiffs in this suit, yet, inasmuch as it is signed by the beneficiary of the trust estate, and by her husband, who was also one of the trustees, and the one who, from his immediate personal interest in the matter, naturally may be supposed to have had most knowledge and most to say about the involved rights of the parties; and in as much as it relates to the same matters about which the agreement was made in 1866; and, inasmuch as only four years had then elapsed, and the other circumstances were such as they were, I think it fair to assume that when the agreement of 1866 was made the agreement of 1862 was not yet forgotten, but, on the contrary, was present in the minds of the contracting parties; and that, for this and the other reasons named, without regard to whether or not it is a part of the agreement of 1866, it is competent evidence in the case, as one of the attendant and surrounding facts and circumstances calculated to aid us in construing the agreement of 1866.

By the agreement of 1862 it is stated that the north wall of the bank building is to be *extended* back to Hammond street, and that, in doing so, it will be built *six inches on the ground of the Slevins*. When we speak of *extending* a wall, I think we must be held to mean that it is to be extended in a straight line, unless there be other qualifying words,

and hence I think that was what was meant by the agreement of 1862—the bank wall, as it then stood, was to be simply to *produced* Hammond street.

It is evident, therefore, not only that the parties to that paper supposed that, in doing so, they would occupy six inches of the ground of the Slevins, but they must also have thought that the wall which was already there was occupying six inches of ground north of the line between the two lots. They could not have supposed the line to be, and the wall that was already there to stand with respect to that line, as shown by the survey of Mr. Earnshaw, since that would have made them to mean that the wall was to be extended by running it (the new part) at such an angle to the old wall as to divert it from a straight line to the distance of eight and one-half inches at Hammond street.

But when they came to make the agreement of 1866, Mr. Earnshaw's survey had been made, and at least Mr. Woolley *was acquainted with the result of it, and I do not doubt—I think I am 155
warranted in saying—that the Slevins also were acquainted with it when that agreement was made; at least, it seems to me etremely unreasonable to suppose that they were not. I think if we had the exact facts before us, in detail, they would show that about the first thing Mr. Woolley did, after he learned the result of the survey, was to acquaint the Slevins with it. But this survey was not made until the ninth day of November, 1866, and that was after "frost," and hence, after the Slevins had built, and had their building under roof.

The survey showed that the line did not run, and the wall did not stand, six inches upon the ground of the Slevins, as was supposed when they made the agreement of 1862. But the walls had been built, both the wall which the bank was to build and the wall which the Slevins were to build, and no matter whether the center of the wall was on the line between them, or the wall stood unequally upon them, or stood wholly upon the one or the other, it was then too late to make any change; the wall must be used as it stood, or they must tear down their improvements, determine where their line was, and build anew. They did the most natural and sensible thing they could have done; they concluded not to disturb their improvements or their wall, but to go on in the use and enjoyment of the same, in the meanwhile reserving their respective rights in the premises by agreement, until the time should come when these rights could be ascertained and established; and it doubtless occurred to both the parties that the best time to ascertain and establish those rights, to fix the dividing line, would be when that wall ceased to stand, and before another was erected; and hence it is, that we find it provided in the agreement of 1866 that the Slevins were to use the wall as a party wall "*so long as it stands*," and that "the question of *ownership of the ground* upon which the wall stands is not to be affected by the common use of the wall."

I find first, therefore, that the rights of the parties as to the ownership of the ground occupied by the wall are precisely the same to-day that they were on the twelfth day of December, 1866, the provisions of that agreement being mutual, intended as much for the benefit and protection of the one as the other.

*Under that agreement, therefore, no title to, or interest in, any 156
land passed from either one to the other.

But now having determined what did not pass, let us see what did.

When one man pays another one-half of the cost of an article, it is ordinarily intended that he shall acquire a one-half ownership in it. It seems right that he should, and the argument of counsel for the defendant that the Slevins became the owners of an individual one-half of the wall the plaintiffs built when they paid the plaintiffs one-half the cost of that wall appealed very strongly to the equitable judgment of the court. But I am unable so to construe that transaction. Courts will sometimes strain language to make it effect the intention of the parties, but they will never for any purpose, so construe it as to make it entirely inconsistent with itself.

The north wall, both sections of it, originally belonged wholly to the paintiffs; they built it and paid for it with their own money. It was competent for them to sell and for the Slevins to buy a half of that wall, but I do not think they did so. By the agreement of 1862 it is stipulated that upon the conditions therein named, the Slevins are to *use and enjoy* said wall in common with the plaintiffs. By the agreement of 1866, it is agreed "*they may use* the north wall of the Commercial National Bank *as* a party wall" so *long as it stands*, and that the plaintiffs *will not tear down or injure it.*

The Slevins say "we accept the *use* of the wall upon the terms stated above," and the trustees say, "we approve the above *lease.*" Thus, it appears, that throughout these agreements the right of the Slevins is spoken of as only a *use.* Where there right is so frequently, and without exceptions, spoken of as only a use it would certainly be an unwarranted construction to make it *ownership* , unless there was something in the contract that imperatively demanded such an interpretation. And there is nothing of the kind, but rather the opposite, for it was provided that whatever it was the Slevins took, they were to enjoy it only *so long as the wall might stand*, and while they were so enjoying it, the plaintiffs *were not to tear down or injure it* (the wall).

157 These term imply that the plaintiffs were the owners, and *that they intended to so remain, and that all the Slevins were to take was a right of use for limited, but uncertain time, to wit, while the wall stood.

I hold, therefore, that under the agreements the Slevins did not become the *owners* of one-half the wall, but that, instead, they acquired only the right to use the wall in common, etc., as a party wall, so long as the wall stood.

Why this was so does not matter, but it may not be improper to suggest that one reason may have been that it was then known that Woolley was contributing more than his proportion of the ground on which the wall stood, and that while Woolley was to have a right to build to and use Slevin's wall that stood on his, yet he might never do so, and consequently Slevin would be getting a much greater benefit from the wall than Woolley, inasmuch as he had as much use as Woolley of the bank wall, and the additional use of making it carry his wall for his two upper stories.

Has this use or easement yet expired?

The plaintiffs claim that this use was under a contract that was only *personal* to the Slevins, and not *real*, running with the land. They claim, in consequence, that it terminated whenever the Slevins died or ceased to be the owners of the lot, but that in equity it continued for the benefit of their assigns as a *necessity*, until the building was destroyed, and that, with the destruction of the building, the necessity ceased, and like-

wise the easement based upon it. This claim is made irrespective of the question as to whether or not the wall has ceased to stand.

The agreement is a simple contract in writing, not under seal, and does not contain the word "assigns," or any word of equivalent import.

The question is whether or not it is an agreement that runs with the land. If not, the plaintiffs are correct in their claim.

First, as to the word "assigns." Since Spencer's case, the use of the words "assigns" has not been necessary to make a covenant run with the land when it is related to a thing *in esse*. And in Masury v. Southworth, 9 O. S., 340, where the point was made that the covenant related to building s thereafter to be made, and the word assigns was not used. Judge Gohlson held *that, nevertheless, the covenant ran with the land, because the intention of the parties that it should do so was 158
manifest from the nature of the agreement. At any rate, all the authorities since Spencer's case are agreed that the word assigns is not necessary to make a covenant run with the land if the covenant relates to a thing *in esse*. The covenant here in question did relate to a thing *in esse* when it was made.

In this particular it was, therefore, a covenant that ran with the land.

Does the fact that the covenant is nothing more than a simple contract in writing, not under seal, prevent it from running with the land? If I understand the case of Platt v. Eggleston, 20 O. S., 414, our supreme court has decided the question. There, there was a conveyance of property, but the agreement under which the litigation arose was outside the deed. It was a collateral, simple contract in writing, not under seal. Our supreme court held that its effect was to give to Platt and his assigns in equity an easement for the support of half his wall on the lot retained by Young & Waite, and that, "To effectuate the intention of the parties it must, in every other respect except as to the compensation, be regarded as intended to go with the land."

In other words, the court held that the simple contract in writing, not under seal, was sufficient to grant an easement *in equity*, and that this easement, so granted, ran with the land, and passed to Eggleston under his conveyance from Platt, as an appurtenance, and that with the easement, passed also the right to the whole of the wall, and hence, that when the assignees of Young & Waite built upon that wall they were burdening the property of Eggleston, and for that reason he ought, in equity, to have the compensation. The case of Block v. Isham, 28 Ind., p. 37, was a case where the owners of adjacent lands made a simple contract in writing, not under seal, whereby one of them was to erect a party wall on their common ground, and the other was to pay him one-half its cost whenever he made use of it. The builder sold his lot, and afterwards the other built onto the wall. The grantor of the builder claimed he was entitled to the compensation.

The court held that he was not entitled to it, on the ground *that 159
the promise to pay was to the builder alone, and that it was, therefore, a personal contract with him, and only he could recover, but at the same time the court holds in that case that the effect of the agreement, though not under seal, was to create an easement, which, they say, passed from Schenck, the builder, to his grantee, which is only another way of saying that it ran with the land.

But, however the Indiana case may be, under Platt v. Eggleston, the agreement of 1866 was sufficient in form and execution to create an easement that runs, in equity, with the land. And, as they said in Platt v. Eggleston, the nature of the agreement is such that the parties must have so intended.

This brings us to the objection of plaintiffs that this agreement does not run, because there was no privity of estate between the parties to it.

While there is some conflict of authority as to the necessity of the privity of estate, to support an easement running with the land, I am of the opinion that the correct rule is that laid down in the notes to Spencer's case, viz.: That to make a covenant run with the land to carry a burden, privity of estate is necessary, but that privity of estate is not necessary to make a covenant run with the land to carry a benefit. As, to illustrate, had Woolley also sold his lot, and had his grantee built to the wall erected by the Slevins, for which Woolley was to pay one-half its value in such case, Fosdick would have been entitled to recover that money, because it would have been a benefit which had passed to him under the covenant, but he could not have recovered it from Woolley's grantee, because on that side it would have been a burden, and hence, there being no privity of estate, the covenant would not have imposed it upon him. But the easement which Fosdick claims is a benefit, just as much so as would be the compensation in the case put. Inasmuch, therefore, as this was an agreement capable in its nature of running with the land, and though not under seal, a sufficient instrument, in equity, to effect its purpose, and not affected by the omission of the word "*assigns*," because relating to a thing *in esse*. I hold that it runs with the land, to carry, to Fosdick, that which he is here claiming under it to the extent it may
160 be proper for him to use it, because that which he claims is a *benefit and for that purpose it does not matter whether there is privity of estate or not.

This covenant was to run "so long as the wall stands."

The plaintiffs claim that the easement has expired, *i. e.*, that the wall no longer "stands."

There are two reasons why I cannot sustain this claim: First, the wall was 183 feet long, and about thirty or thirty-five feet high. The whole of that wall was left practically uninjured, except the section I have referred to, about twenty feet wide, which was torn down and rebuilt. I know of no better rule to determine whether or not that wall was so injured by that fire as that it no longer stood than the rule adopted in marine insurance to determine whether or not there has been a total wreck, and that is, as I understand it, applying it here, whether or not the wall was so far destroyed as that a prudent man would not undertake to repair it and maintain it as a wall. At least, to say that the identity of a wall that cost two or three thousand dollars has been destroyed by a damage to it that can be repaired at a cost of only two or three hundred dollars, is not, in my judgment, warranted. But in the second place the wall stands upon the ground, according to the survey of Mr. Earnshaw, even more or less, of both. The plaintiff has seen fit to repair it, and to appropriate it to his own purposes, thereby maintaining it upon precisely the same ground it has always occupied. What he proposes is to terminate the *common use*, during which *only* the reservation of the question of the ownership of the ground was to stand, and this I do not think he should be allowed,

in equity, to do. I hold, therefore, that the wall did not, in fact, cease to stand by reasons of its injuries from the fire. And, further, that the plaintiffs are, in equity, estopped to say that it has ceased to stand so long as they seek to keep it in repair and maintain it upon the grounds of the defendant in the exact condition it was in when they agreed about it.

I conclude, therefore, that the defendant, Fosdick, is entitled to use the wall in question, as a party wall, in common with the plaintiffs. But it does not follow that he should have the right to use it to the extent he is preparing to use it.

It is claimed that the agreement of 1866 was made with *respect to things as they then existed, and that, for as much as the five story building of the Slevins was then already erected, the agreement was for the particular use then being had. 161

It is undoubtedly true that the use then being had was included in the use provided for, and admitted to be a proper use of the wall under that agreement; and if the wall was in the same condition now as then, and of the same strength, the plaintiffs would, probably, be estopped to say it was insufficient.

But the right granted by the agreement was given in general terms, and was to use the wall, in common, as a party wall.

There was no guaranty, on the part of the plaintiffs, that the wall would always remain suitable for the use that was made of it when the agreement was entered into; and the Slevins must be held to have contracted for the use of the wall. as a party wall, with a knowledge of its liability to just what afterwards occurred. Therefore, while the defendant must be allowed as great a use of the wall as the plaintiffs, and the plaintiffs would be estopped to deny him that, yet the defendant does not have a right to any greater use, except so far as it may be safe, and without prejudice to the rights of the plaintiff; and, therefore, the plaintiffs are not estopped, upon the facts before the court, to complain that the use the defendant is preparing to make is a use unwarranted under the changed circumstances, and prejudicial to his rights.

The plaintiffs have the right, therefore, to raise the question they have as to the sufficiency of the wall, and the court must determine it.

In doing this I shall not undertake to review, in detail, the testimony of the different witnesses, but shall simply state the conclusions to which have been brought by a careful consideration of all the evidence submitted.

The old sections of the wall were considerably damaged by the fire, but, as they now stand, with the repairs that have been made, I am clearly of the opinion that they are fully as strong as the new section; and for this new section I am satisfied that an estimate of one hundred thousand pounds to the square foot, for its crushing weight, is fair and safe; and that four is a sufficiently large factor of safety to cover flexure and every other element of insecurity that should be considered in determining *the carrying load. This gives twenty-five thousand pounds as a safe carrying load for the wall, per square foot. The maximum 162
weight to which the wall is to be subjected by the use of it proposed by the defendant, and an equal use of it by the plaintiffs, will be two hundred and fifty pounds to the square foot for each one of the eight floors, the testimony showing that the weight of the first floors should not be considered, for the reason that they rest upon the stone foundation. The

floors in the defendant's building are twenty-four feet wide, but the floors of the bank building are only twenty-two feet wide. One half the weight upon each of these floors will bear upon this wall, and the other half will be carried to the other walls of the two buildings. There will be, therefore, the weight of forty-four square feet on the wall from the bank building, and of forty-eight square feet from the building of the defendant, or ninety-two square feet in all, should the bank building be built upon the same height of the proposed building of the defendant. The result is that the maximum test to which the wall will be subjected will be ninety-two times two hundred and fifty pounds, or twenty-three thousand pounds, or two thousand pounds less than I have found, by the computation I have made, to be a safe carrying load for the wall. I find, therefore, that the wall is sufficient to sustain the use the defendant is proposing to make of it.

Both the question of law and the question of fact are, therefore, with the defendant. It follows that the petition of the plaintiffs should be dismissed at their costs; and such is the order of the court.

Matthews, Ramsey & Matthews and Thomas McDougall, Attorneys for Plaintiffs.

Stallo & Kittredge, Attorneys for Defendant.

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301 ***MORTGAGES.**

[Hamilton District Court, April Term, 1879.]

Burnet, Avery and Cox, JJ.

J. W. SIBLEY v. W. W. ELLIOTT, ET AL.

In an action to foreclose a mortgage upon real estate, after a decree was rendered and an order for sale issued, but returned "not sold," a purchaser of the property at a sale for delinquent taxes, was made party defendant on the motion of the plaintiff, and filed his answer, waiving his claim to the title under his tax purchase, and setting up his lien for taxes. The property was sold under a subsequent order for sale: *Held*, the holder of the tax certificate is entitled to be first paid out of the proceeds of sale.

ERROR to the Court of Common Pleas.

The plaintiff below, defendant in error, filed in the common pleas his petition to foreclose a mortgage given to his testator, by A. J. Jessup, making only Jessup, the mortgagor, defendant. A decree of foreclosure was rendered in favor of the plaintiff, and an order for sale issued, which
302 was returned "not sold for *want of bidders." Afterward, on motion of the plaintiff, the plaintiff in error, Mr. Sibley, was made defendant, and being served with process, filed his answer and cross-petition, in which he alleged that he had bought the mortgaged property at a sale for delinquent taxes, and making no claim to hold the title to the property, set up a lien for the taxes paid by him, and asked that it might be satisfied out of the proceeds of sale. To this there was no reply. There were subsequent modifications of the decree by which it was ordered that the property should be sold on the premises, instead of at the court house, and that the sale should be for part cash and part on deferred payments. Upon the eighth order for sale the property was sold. The sale was confirmed, and the proceeds distributed to the payment of the costs and

of the plaintiff's mortgage; the amount being insufficient to pay the whole of the mortgage debt. No part of the proceeds of sale was applied to the payment of the tax lien of plaintiff in error.

BURNET, J.

It is claimed by counsel for the defendant in error that the case of Ketcham v. Fitch, 13 Ohio State 201, settles this case; but we think not. In that case the mortgagee filed his petition against the mortgagors alone, making no mention of any tax incumbrances, and, having obtained his decree, had the property sold, and became himself the purchaser, and the sale was confirmed and deed ordered. After the confirmation an order was entered distributing the proceeds, first to the costs, next to the mortgage debt, and the residue to the mortgagors. From this order of distribution Ketcham (the mortgagee) appealed to the district court, and in that court asked leave to file a supplemental petition bringing in the holder of a tax title, to set up his lien for taxes. This was refused, and the same decree rendered as was rendered in the court below, and the judgment was affirmed by the supreme court, on the ground that the holder of the tax claim was a stranger to the decree under which the property was sold.

But the case here is different. Before the order issued upon which the sale was made, on motion of the plaintiff below, Sibley was brought into the case and required to set up his *claim, which he did. The 303
decree that had previously been rendered was subsequently modified, and the property sold under the order of the court, divested, of course, of all claims of those who were then parties to the suit. Unless plaintiff in error is paid out of the proceeds of sale, his lien is confiscated for the benefit of plaintiff below, who invited him into the suit. This would be grossly inequitable. The judgment below is reversed, but as the record furnishes the means of doing so, the decree will be modified in this court.

C. H. Avery, for Plaintiff in Error.

George T. Harrison, Contra.

ALIMONY.

[Hamilton District Court, August Term, 1879]

Burnet, Avery and Cox, JJ,

A. F. MCCOUN, ADMR., v. WEISKETTLE.

1. After the death of the husband, leaving installments of alimony unpaid, for which execution issued in his lifetime was returned unsatisfied, the decree may be revived against the administrator, and that without presenting the claim to him for allowance.
1. The revivor will not be limited to one years' arrears where there has been no unreasonable omission to collect previous installments.

ERROR to the Court of Common Pleas.

AVERY, J.

At the November term, 1870, of the court of common pleas, Bernardina Weiskettle obtained a decree for alimony against her husband, Chas. Weiskettle, in the sum of $25 monthly, together with the amount of a note for $300, owing to him, and at the time in her possession. The monthly installments were not paid, and, July 23, 1872, execution for

the amount due at that time was returned unsatisfied. July 29, 1877, Chas. Weiskettle died, and subsequently the decree was revived against his administrator. The revivor was for $2,628, which was the sum of the installments up to the time of the death, with interest counted in.

It is assigned for error that there was no power to revive, since alimony proceedings were not governed by the code of civil procedure, and although section 602 conferred power, generally, to enforce, vacate, modify or reverse judgments, that this did not apply, because, by Tappan v.
304 Tappan, 6 O. S. 64, 70, *it was required that the right should have existed previously to the code, and that the right to revive decrees for alimony did not exist previous to the code. But execution might have issued prior to the code upon just such a decree. Piatt v. Piatt, 9 Ohio 37. And whether this was because of the inherent power of a court to enforce its own orders, or because, in every essential particular, the decree had all the characteristics of a judgment at law, is immaterial. In either event there would have been the power to revive, prior to the code; in the latter case, by *scire facias*, in the former, by exercise of the continuing jurisdiction of the court. Guenther v. Jacobs, 44 Wis. 354, 358.

A second assignment of error is that the decree created no specific lien upon real estate, and being only in *personam* was to be enforced through the administratrix in the regular course of administration. Miller v. Taylor, 29 O. S. 257, 260. This may be true as to the execution of the judgment, but does not, we think, exclude the right to revive it. A remark precisely similar to that found in Miller v. Taylor was made in Guenther's Appeal, 40 Wis., 115. Yet in the subsequent case, Guenther v. Jacobs, 44 Wis., 354, 358, the right to revive was maintained.

The third assignment of error is that the revivor was premature, in that the claim had not been presented for allowance to the administrator. But the revivor was not a new action, it was only a proceeding after judgment in the old one. Certainly it could not be claimed, where, pending an action, the defendant dies, that the claim must first be presented to his administrator or executor before a revivor could be obtained, and the same reason applies here.

The fourth assignment is that the $300 note should be credited upon the installments; but the decree does not say so. Again, it is contended that it was error to decree alimony in gross, and by installments. Piatt v. Piatt, 9 Ohio 37, is, however, an authority to the contrary, and even if there were error, it is too late now to take advantage of it.

Finally, it is claimed that the revivor should have been only for one year's arrears. Without conceding that the principles applicable to alimony, in the sense which the word has obtained, in ecclesiastical courts,
305 should apply to statutory alimony *it is enough to say that, even in such courts, the limitation to one year's arrears is enforced only where there has been unreasonable omission to collect the previous installments Here dilligent effort to collect appears to have been made by execution, which was returned unsatisfied. The points assigned present no ground of error. The judgment of revivor, however, was for the amount that was due, counting interest in. The revivor should have been simply for the sum of the installments, leaving each to bear its own interest For this error the judgment will be reversed, and judgment for the proper sum will be rendered here.

Wulsin & Worthington, for the Plaintiff in Error.

Cartwright, Contra.

CONTRACT.

[Hamilton District Court, August, 1867.

Burnet, Avery and Cox. JJ.

DREYER ET AL. v. MCGILL.

An Affirmation of a Judgment.

PETITION IN ERROR to reverse the judgment of the Superior Court. In that court the defendant filed a petition against the plaintiff to recover damages for the nonperformance of a contract by which Dreyer undertook to convey to McGill certain property in Fairmount in exchange for a grocery on Sixth street. McGill alleged that the agreement was made, and that by the terms of the agreement each piece of property was appraised; that each was to take the property of the other, and that McGill was to pay the difference in money; that Dreyer took possesion of the grocery, but subsequently surrendered the same and refused to carry out the contract. For this alleged breach of the contract McGill asked $5,000. Dreyer set up an answer and cross petition, denying a great many statements of the petition. The court below dismissed the answer and crosspetition, and found that the parties did not agree in their understanding of the contract, and that there was really no contract at all between the parties. It was assigned as error that the court should have rendered judgment in favor of Dreyer against McGill.

Cox, J.

Judge Cox decided the case. He said the case was a very singular one. A great deal of testimony was taken, and there *was a great 306
conflict of testimony. Part of the contract was in writing and part parol. The appraisers seemed to have differed in many things, and the parties differed in regard to what the appraisers decided. They undertook to compromise the matter, and a great many meetings were held by the parties and their agents, and there was a great diversity of opinion as to what the compromise was. Taking the whole case through, without going into the particulars of it, the testimony was of that uncertain character that the court could not say that the court below erred in its judgment. Judgment affirmed.

H. Snow, for the Plaintiff.

Logan & Randell, for the Defendant.

LIFE INSURANCE.

[Hamilton District Court, August, 1879.]

Burnet, Avery and Cox, JJ.

†SCHULTZ v. HOME LIFE INSURANCE CO.

In an action upon a life insurance policy, where suicide is set up as a defense, the insanity of the insured, if relied on to meet the defense, must be pleaded.

ERROR to Superior Court of Cincinnati.

AVERY, J.

The action in the superior court was on a policy of life insurance containing a clause that if the insured died by his own hand the policy should be void. The answer set up that he did die by his own hand. The reply denied this allegation. On the trial, the insurance company, having offered evidence to show that the insured took arsenic, whereof he died, rested. The plaintiff, then, in rebuttal, called a witness, who detailed the conduct of the insured some days before his death, and was asked whether he acted like an insane person. The court ruled out the evidence.

The question is, whether, to defeat a proviso in a life insurance policy against death by the hand of the insured, it is necessary to plead insanity. In common language, suicide and death by one's own hand are the same. Suicide is voluntary self destruction, and it is only from the supposed intention of the parties that courts have arrived at the conclusion that in a policy it has refere nce to the moral character of the act. This is laid down by the supreme court
307 of the United States, 15 *Wall., 580; followed by a late case in Pennsylvania, 86 Penn. St., 92.

It has been held that a proviso against suicide, whether sane or insane, defeats recovery in case of suicide, even though by reason of insanity. 93 U. S., 284. It is contended the clause of this policy, "Shall die by his own hand under any circumstanced," brings it within the same rule. Possibly this clause, like some others introduces into policies, is one which courts would be disposed to construe not to mean anything, lest otherwise it might be made to mean everything. Certainly it would not apply to death by accident, although, as a matter of fact, the accident was by the hand of the insured. But there would be no more reason for restricting it in that direction than in every other.

To come back, then, to the question whether it is necessary to set up the plea of insanity. The arguments is that a defense of suicide involves the moral character of the act, since courts have held this to be the construction of the policy, and that a reply, denying such answer, puts sanity in issue. The question is not without difficulty. It is a general rule of pleading, however, that matter which would come more properly from the other side need not be stated; In other words, a pleader sufficiently substantiates a charge or defense if his pleading establishes a *prima facie* charge of defense. 1 Chitty, 245. *Prima facie* all men are sane. This *prima facie* presumption which attaches to the answer reaches to the reply. Wherefore, without special plea in the reply, the reply must be taken to have waived that issue.

The distinction may be slender between the character of an act in itself and its character in respect to the moral responsibility of the actor or agent; yet it is sound. The rule, we are inclined to think, and which the court adopts, is this, that where, in an action on a policy, the defense of suicide is set up, which would be a good defense but for the exceptional mental condition of the insured at that time, it is upon the plaintiff to set up such exceptional mental condition by plea.

Judgment affirmed.

A. G. Collins, for Plaintiff in Error.

McGuffey, Morril & Strunk, Contra.

†This case was reversed by the supreme court. See opinion 40 O. S., 217.

*FIRE INSURANCE. 308

[Hamilton District Court. August, 1879.]

Burnet, Avery and Cox, JJ.

GEORGE FRIEND v. LLOYD S. BROWN.

Proof of payment of premium to an agent under the mistaken idea that the policy had been renewed, when it had not, does not tend to show that there was a contract of renewal.

Cox, J.

The plaintiff filed a petition in the court below setting forth that he was the owner of a paper mill at Carrollton, upon which he obtained an insurance, which he kept in force by renewals, paid through the defendant, who agreed to attend to the same and to keep him advised of the time of payment; and the premium became due on the 24th of December, 1875; that in February, 1876, he paid to the plaintiff the amount of the premium, and commission for the renewal of the policy in the Kenton Insurance Company of Kentucky; that on the 16th of September, 1876, the property was destroyed by fire, when it was discovered that Brown had neglected to renew the policy, whereby he suffered a loss. Brown denied that he undertook to obtain a renewal. He admitted the payment of the money by the plaintiff, but claimed it was paid under a mistaken impression that the policy had been renewed, and that the renewal receipt had been issued but not delivered to the plaintiff. Brown also denied that the plaintiff intended to renew the policy, and claimed that the company had determined to refuse to renew if the application should be made. The case was taken from the jury under the charge of the court that the testimony of the plaintiff tended to show that there was no contract between the parties, and that the money was paid by the plaintiff under the mistaken idea that there had been a renewal when there was not; and that it did not show that defendant obtained the money on a contract to obtain a renewal.

Judge Cox announced the opinion of the court, finding that there was no error in the court below, and affirmed the judgment.

Moulton, Johnson & Levy, for Plaintiff.

Matthews & Ramsey, Contra.

INJUNCTION.

[Hamilton District Court, August, 1879.]

Burnet, Avery and Cox, JJ.

J. F. BALDWIN v. D. F. GOODHUE.

Refusal to enjoin an appurtenant to a highway affirmed.

Cox, J.

The plaintiff was the purchaser under a mortgage of certain *property conveyed by the defendant many years ago to one Taylor, on the Lower River Road, and claimed that there was appurtenant 309

thereto a roadway which was the only means of access for vehicles to his house. He further averred that the defendant was about to close up the access, and asked an injunction to prevent the same. The court below found that the way was not appurtenant to plaintiff's property, and rendered judgment for defendant.

Judgment affirmed.

Wm. D. Disney, for plaintiff.

Long & Kramer, Contra.

PLEADING.

[Hamilton District Court, August, 1879.]

Burnet, Avery and Cox, JJ.

IVES ET AL. v. STRICKLAND.

1. In a suit upon a note setting forth a copy on the back of the petition without designating it by letters or figures is sufficient, and the want of the allegation "with all the endorsements and credits therein" is not error.
2. An accepted order to pay money from a specified fund is an unconditional order for the payment of money.

PETITION IN ERROR to Reverse a Judgment of the Common Pleas Court.

Cox, J.

The petition set forth that there was due to the plaintiff from the defendant on an instrument in writing for $597, with interest, a copy of which is attached. A demurrer to the petition was sustained, and judgment rendered for the defendant that the petition does not properly set forth or attach the instrument on which the suit was brought; and, secondly, that the instrument was not one for the unconditional payment of money.

In regard to the first objection, that the instrument was not properly made part of the petition. The usual and better practice where suits are brought on promissory notes is to give in the petition a copy of the instrument, or refer to it by some letters or figures designating it, and making it part of the petition; and the question is whether setting forth a copy of the note on the back of the petition, without designating it by letter or figures, answers the requirement of the code. This petition is substantially in the form prescribed by the original code commission, and has been frequently used, and this court was of opinion that the instrument was sufficiently made a part of the petition to enable the court to determine whether it was the instrument referred to in the petition.

310 *The next point is, that this is not a paper for the unconditional payment of money.

The instrument sued on, a copy of which was endorsed on the petition, was as follows:

"Cincinnati, September 15, 1877.

"D. W. Strickland:

"Sir:—You will pay to A. Ives & Sons, the sum of five hundred and ninety-seven and 32-100 dollars ($597 32-100), that being the amount of their claim against me enjoined in your hands. This order made pursuant to an order from Frederick Butterix, assignee of the estate of C. Ives, in bankruptcy, said order now in the hands of A. Ives & Sons.

"Thomas Mullen."

On the face of this defendant wrote, "Accepted, September 15, 1877."

On a demurrer to the petition we hold this was an unconditional promise to pay. The defendant, by accepting the draft without conditions, admitted the statement contained therein to be true, and that he would pay the amount stated.

It is also claimed as error that the petition does not state that a copy of the instrument is given "with all the indorsements and credits therein." The want of this allegation is not error. In the absence of it the presumption would be that there were no indorsements on credits on the instrument sued on. Nor does it purport to have any. This question might be one of importance when in the absence of the allegation in the petition an instrument was offered in evidence with indorsements on it.

The judgment sustaining the demurrer was erroneous, and will be reversed.

TAXATION.

[Hamilton District Court, August, 1879.]

Burnet, Avery and Cox, JJ.

† MULLER v. FRATZ, TREAS.

Authority of a Board of Equalization to add to or deduct from the value of personal property returned for taxation, and evidence upon which such addition may be made.

This was a petition to reverse the judgment of the court of common pleas. The plaintiff is the proprietor of the Buena Vista and Excelsior Freestone Works on West Front street, and in 1878 made out, duly attested according to law, and delivered to the assessor of the Nineteenth Ward, a statement of all the 311
personal property held by him subject to taxation, amounting to $11,350. Subsequently to the filing of the return in June, 1878, the City Board of Equalization summoned him to appear before it and examined him in reference to his return. He asserted its correctness, and offered to submit his books and property to an examination as evidence of the correctness of the return. No other evidence was offered, and thereupon the board, without further testimony, added the sum of $1,000 to the amount returned, but did not cause to be entered on their minutes a statement of the facts on which the addition was made, the only statement on the journal of the board being in the form of a motion that the amounts set opposite the names of the persons therein stated was added to their return for the reason that the amount returned by them was considered insufficient and below the actual value. The auditor placed the addition upon the tax duplicate, and proceeded to collect the same, in addition to the amount chargeable upon the return made by the plaintiff. Thereupon the plaintiff sued out this injunction. The question in the case was whether, under the law, a sufficient statement of facts was made by the Board of Equalization to authorize the addition to be placed upon the taxable property of the plaintiff. In the court below judgment for the defendant was rendered on demurrer to the petition.

Cox, J.

Judge Cox announced the opinion of the majority of the court. He held that the statement made by the board was not such a statement as came within the meaning of the word as used in the statute, but was rather a conclusion to be derived from facts which the board either had within their personal knowledge or derived from some other source. There was no item in the statement of fact going to make up the conclusion to which the board ar-

† This case was affirmed by the Supreme Court. See opinion 35 O. S. 397.

rived. They simply said that they had added $1,000 for the reason that the amount returned by the plaintiff was considered insufficient. The board should place some item of fact upon their minutes upon which they based their conclusion to make the addition, not simply a conclusion of law without the facts.

Judgment below reversed.

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312 ***REPLEVIN.**

[Hamilton District Court, August, 1879.]

Burnet, Avery and Cox, JJ.

JOHN COFFEE v. JAMES K. PLEASANTS.

A seller of goods who brings an action of replevin against the assignee in insolvency of the buyer, upon the ground of fraud in the sale, but fails to find the property, and then proves his claim in the assignment proceedings, and obtains a dividend, cannot further prosecute the action of replevin.

ERROR to the Superior Court of Cincinnati.

AVERY, J.

The action below was brought by Pleasants to recover possession of 210 bushels of onion-sets, or, in default of obtaining the property, to recover the value of the same, $263. The sets had been sold to H. G. Stoms & Co., defendants assignors in insolvency. The claim was to rescind the contract of sale and recover the property on the ground of fraud, in that at the time of the purchase Stoms & Co. had neither the means nor the expectation of payment. This would seem to be sufficient to authorize a rescission. Talcott v. Henderson, 31 O. S., 162.

It appeared, however, that after bringing the suit Pleasants proved his claim in the assignment proceedings, and obtained a dividend of 10 per cent. by order of the probate court. This fact appearing, the defendant moved that the jury be instructed to find in his favor. The motion was overruled, and a verdict and judgment rendered against him.

The question, it is argued, was one of ratification, and was to be judged by the jury under all the circumstances. That the intention was plain not to ratify the sale, since Pleasants had at once disaffirmed it by bringing the replevin suit. That although afterward he had proved a claim, it was for property of his, in possession of H. G. Stoms & Co., and their assignee, and thus was in affirmance of his present claim of property. Whether the claim proved was for the property may very reasonably be doubted, since the sum claimed was the exact contract price, with interest, from a date thirty days after the sale, which corresponded to the terms of credit given by the contract. But however this may be, the proof was made and dividend was received in an adversary proceeding, the assignee being compelled to make payment by an order obtained from the probate court, and whether the claim was in trover, or for the price, the result was the same. *17 Bankruptcy Reg., 546; 116 Mass., 386.

313 The right to recover upon the contract for the price, or the right to recover for a conversion of the property, had been pressed to a conclusion in another forum prior to hearing the case in the court below. It was not essential that the fact should have been set up by the pleadings. 18 N. Y., 552. The plaintiff was concluded by and adjudication of his

claim in the assignment proceeding, in the same manner as he would have been by a judgment. The court below erred in overruling the motion for new trial; the verdict was against the weight of the evidence.

Judgment reversed.

Mallon & Coffey, for Plaintiff.

J. Shroder, Contra.

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*USURY. 321

[Ross Common Pleas Court, 1879.]

OHIO INSURANCE CO. v. SHOTTS ET AL.

Where the parties to a loan of money agree in fact upon a rate of interest greater than is allowed by the act of 1869, known as the "Eight Per Cent. Law" 66 Laws 91; and, at the same time, execute the note for a rate within the statute: *Held*, that such arrangement is against the policy of the statute; that parol evidence is admissible to show the fact; and that the creditor can recover at the rate of six per cent. and no more.

On March 2, 1872, the defendant, David Shotts, borrowed of the plaintiff $3,000 and executed his note and mortgage therefor, payable one year after date. The note stipulates for interest thereon at the rate of eight per cent. per annum.

The defendant answers that "at the time of the execution and delivery of the note and mortgage, it was agreed and understood between said plaintiff and himself that he was to pay interest on said note at the rate of ten per cent., payable semi-annually, and that said note should be drawn at eight per cent., payable annually."

The cause is submitted upon the petition and answer.

MINSHALL, J.

The question here presented is, where the parties to a loan of money agree, in fact, upon a rate of interest greater than is allowed by statute, and, at the same time, execute the note for a *rate within the statute, 322
whether, in such case, the creditor can recover at the rate stipulated in the note.

The first section of the act of 1869, "To amend an act fixing the rate of interest," provides that the parties to any * * * note * * * may stipulate therein for the payment of interest thereon at any rate not exceeding eight per cent. per annum. It is then provided in the third section that, in all other cases, the creditor shall be entitled to six per cent. and no more; and, finally, in the fifth section, repeals the first section of the act of 1824 to which it is amendatory. (66 Ohio Laws 91-92.)

The evident intention of the legislature, in enacting this law, was to establish a conventional as well as legal rate of interest. The former to rest upon contract, and be evidenced by a stipulation in the note; the latter to rest upon a right secured by the law; as a legal incident to all money due and payable.

If the stipulation in the note is for a greater rate of interest than the conventional one; or if in fact greater, though not apparent on the face of the note, and the fact is made to appear by averment and proof, the creditor can recover but the legal rate, that is to say, six per cent., and no more.

This was so held in Bunn v. Kinney, 15 O. S., 40, and in West v. Meddock, 16 O. S., 417, cases that arose under the statute of 1850, by which a conventional rate of ten per cent. was established.

The act of 1850 and that of 1869 are alike in substance and phraseology, except as to the rate of interest; and the latter must be construed as the former act, as *held* in Marietta Iron Works v. Lattimer, 26 O. S., 621.—See p. 626.

In the cases just cited, arising under the ten per cent. law, the note, in each case, stipulated for interest at the highest legal rate upon a principal in excess of the true sum. Here, however, the principal is the true sum and the stipulation for interest is within the statute. Wherefore, it is claimed, that the verbal agreement should be disregarded by the court, and judgment given for the amount of the note with interest at the rate stipulated therein. The argument is, that in Ohio, reserving a greater rate of interest than is allowed by law, is not forbidden by statute; that the object of the statute is to prevent the taking or receiving of
323 a * greater rate than is fixed by it, and not to punish usury as an offense by inflicting a penalty or forfeiture of any kind.

Thus in Lafayette Benefit Society v. Lewis, 7 O. R., Part 1, 81, overruling the case of Reddish's Executors v. Watson, 6 O. R., 570, the court held that under the act of 1824, a contract for a greater rate of interest than six per cent. could not be recovered, but that such contract did not affect the right under the statute to recover the rate fixed by it.

The question as to the effect of a contract for a greater rate of interest than fixed by statute, arises again in the case of The Bank of Chillicothe v. Swayne, 8 Ohio R., 252, and was fully argued by able counsel; and the same judge in delivering his opinion, as in the former case, is brought to this admission: "We agree with counsel that contracts made against good morals, against public policy, and against positive laws, are, as a general rule, void; and it is possible that if there had been no statute in Ohio previous to the one before recited, and we were now called upon for the first time to give that statute a construction, we might say that a contract reserving more than six per cent. interest on the principal sum loaned, was void, as being contrary to that statute." Hitchcock, J., *id.*, 281. The previous decision is then adhered to, because it had been so long acquiesced in, and contracts had been made with reference to it.

It is in the light of this, and the previous decision, that the court says, in Rains v. Scott, 13 Ohio R., 114: "The statute (that of 1824) fixing the rate of interest is not a statute against usury, technically so called. It does not avoid the contract, for anything except interest, beyond six per cent. per annum."

Now, that these decisions cannot control the question in this case, will be apparent, as we think, when it is considered that they were made with reference to an act that did not in terms, nor by any bare construction, fix a conventional rate of interest. Under that act interest attached, as a legal incident, to all money due, independent of any contract; and, hence, could not be affected by the character of an act, immaterial to the right, as, for example, a contract. Such is the spirit of the decisions referred to. But under the present act, as before shown, there are two rates of interest—a conventional and a legal one. These two rates rest upon
324 separate grounds. The lesser rate is *that given by law, in the absence of a contract; the greater rate is that which may, and can only be secured by a contract, evidenced as required by the statute. If the con-

ract, as made, is in excess of the rate that may be contracted for, or if not evidenced, as required by statute, the creditor is remitted to the legal rate; thus giving effect in their integrity to the decisions made under the act of 1824.

This results, as we think, from the character and effect of a contract under the present act, to pay a greater rate of interest than eight per cent. on the sum loaned. Such a contract is (1) forbidden by the statute, or if not forbidden, is (2) contrary to its policy, and, in either case, is illegal and void.

1. The language is: "May stipulate therein for any rate not exceeding eight per cent. per annum." It needs no argument to show that this language prohibits the making of a contract for a greater rate of interest than the per cent. named.

2. Its policy must be determined by the mischief intended to be remedied. This consisted in the taking of excessive rates of interest by those disposed to take advantage of the necessities of the borrower,—an evil affecting the general public as well as the borrower, as it tends to induce bankruptcy. Chief Justice Best in 1825, in delivering the unanimous opinion of the twelve judges in the House of Lords on a question submitted to them, arising under the usury laws of England, said: "The supposed policy of the usury laws in modern times is to protect necessity against avarice, to fix a rate of interest as will enable industry to employ with advantage a borrowed capital, and thereby to promote labor and increase national wealth." H. L., 3 Bing., 193. Judge Reed in Baggs v. Lindenback, 12 O. R., 156, says:" This is an act in restraint of avarice, * * * designed to prevent sharp and unconscionable men from taking advantage of misery or misfortune, to raise money out of straightened circumstances, sudden calamity or necessity."

Now as borrowers, from a notion of prudence, or else from a sense of honor, not infrequently pay usury as long as they can; and as the evil intended to be prevented by limiting the rate of interest consists in paying, not in contracting for, usury, the policy of such a law requires that, in analogy to similar cases, the sting should be placed in the temptation, by depriving the *creditor not only of the advantage he sought by his usurious contract, but also of that which he might have obtained by a valid one. The inducement to violate the law, directly or indirectly, should be removed by making a distinction between an honest compliance with its provisions and a fraudulent semblance of such a compliance. 325

Authorities are not wanting to show that a contract forbidden by statute, or contrary to its policy, is illegal and void, though no penalty is added as a punishment for its violation, and without any express provision to that effect having been inserted in the law. The invalidity of such a contract arises by construction of the law.

Thus, in Nerot v. Wallace, 3 T. R., 17, it was held that a promise made by a friend of the bankrupt when he was on his last examination, that in consideration that the assignees and commmissioners would forbear to examine him touching certain sums which he was charged with having received and not accounted for, he would pay such sums as the bankrupt had received and not accounted for, is void, not because expressly forbidden by statutes or punishable as an offense, but as being against the policy of the bankrupt laws.

So, in Hunt v. Knickerbocker, 5 John. R., 333, it is said that it is a general rule of law "that all contracts which have for their object any-

thing which is repugnant to the general policy of the common law or contrary to the provisions of any statute, are void;" and further, "if the contract be against the policy and spirit of the act, courts of justice ought not to lend their aid to enforce it."

So, in Seidenbender v. Charles' Adm'r (4 S. & R. 160), it is said by Tilghman, C. J.: "I consider it as perfectly settled that an action cannot be sustained, founded on a transaction prohibited by statute, although it be not expressly declared that the contract is void." And, in Metcalf on Contracts, 258, it is said by the author, after much research: "It may be now considered as settled by authority, as well as required by policy and legal conformity, that all contracts which contravene the provisions of a statute, however that statute may express the will of the legislature, are void for illegality." And with like spirit it is observed by Hitchcock,
326 J., in The Benefit Society v. Lewis (supra 83), *that "no court will disregard a case because those who offend against its provisions are not to be punished."

But the character of a usurious contract under the statute of 1859 is, as we think, expressly determined by the decision in Bunn v. Kinney, cited *supra*. We have already noted the sameness existing between this statute and that of 1850. The first proposition of the syllabus in that case is as follows: The act of March 14, 1850 (2 Curween 1569), only authorizes parties "to stipulate for interest at any rate not exceeding ten per cent. yearly;" hence a contract under this statute for a rate of interest exceeding this, is illegal and void. The decision in this case could not have been made upon any other principle. The stipulation in the note did not, on its face, exceed the rate allowed by statute. The usury, as appeared by the evidence, consisted in the stipulation being upon a sum in excess of the true principle; and the court remitted the creditor to six, not ten, per cent. But, if the contract were not forbidden, there is no reason why the stipulation should not have been referred to the true sum, and interest calculated on that at the rate stipulated in the note. The greater always includes the less, and a contract for ten should be good for eight, if the contract for the excess is to be regarded as indifferent. That the view here taken must have been the view of the court, finds support in the opinion as delivered by Scott, J., where he says: "This conclusion (*i. e.*, that the creditor in such case is remitted to six per cent.) is not only warranted by the logic of the case, but is required by the policy of the statute, which was not intended to hold out inducements to usurious contracts, by securing to the usurer, at all events, the highest rate of interest which he could have legally obtained by special contract." (15 O. S., 42.)

If, under the present act fixing the rate of interest, a contract for a rate in excess of the conventional one, is to be regarded as forbidden by the statute or against its policy, then the cases of Clearwater v. Cloon (2 Handy, 95), and Blackburn v. Gano (3 Cin. Law Bull., 939), to which we have been cited, were not rightly decided. They assume that a usurious contract is a matter of indifference so far as the policy of the statute is concerned; that this is subserved by preventing the creditor from recovering
327 a greater rate than is fixed by the statute; and that *the act of 1848 providing for the recoupment of illegal interest, in a suit on the note, where the interest has been paid, is an adequate and the only remedy against the payment of such interest. But, that such is not the entire policy of the present statute of Ohio, is clear, as we think, on principle and

authority. Its policy, as appears from the quotation just made, is to remove all "inducements to usurious contracts," by depriving the creditor of any part of the rate resting on contract, where he has evaded the law. The case of Samyn v. Phillips does not affect the question. It was decided at the same term, and the opinion was delivered by the same judge as in Bunn v. Kinney. It arose under the ten per cent. laws of 1850. The parties had agreed on, and the debtor had paid interest at the rate of ten per cent.; but the notes contained no stipulation to that effect. It is with reference to such a case, the judge says: "When it" (the act of 1850) "took effect, the payment of interest at the rate of eight, nine or ten per cent. was no longer in contravention of any declared public policy. It could not have been unlawful to do that which a party might have been legally bound himself to do." (15 O. S., 224). This is a very different case from that in which a party makes an unlawful contract under the disguise of a legal one. So, on the principle stated, the court properly decided that, while the notes would continue to bear but six per cent., the excess thereof in the payments that had been made, could not be recouped. It had been paid in accordance with an agreement, not against the policy of the law. It is the existence of a usurious contract and not the absence of a stipulation, which the law regards as against its policy.

It is also assumed in the cases just above referred to, that parol evidence is not competent for the purpose of setting aside the written stipulation of the parties. Much stress is placed on this in Clearwater v. Cloon, and seems to be followed in Blackburn v. Gano. This is contrary to principle and authority. It is true that parol evidence is not admissible to vary a written instrument constituted by the parties as the repository of their agreement. (2 Stark Ev., 544, 6th Am. Ed.) But to use it for such purpose is one thing, and to use it for the purpose of disguising an agreement forbidden by law, or against its policy, is another and different thing. Hence it is said: "Parol evidence *may be offered to show 328
that the contract was for the furtherance of an object forbidden by law, whether it be by statute or by an express rule of the common law, or by the general policy of the law." (1 Green. Ev. Sec. 284; and also 2 Stark Ev. 556.) "To do this," says the latter author, "is not to substitute mere oral testimony for written evidence, the weaker for the stronger, but to those that the written ought to have no operation whatsoever." *Id.* 555.

It is true that in Butherfield v. Kidder, 8 Pick 512, it was held that where the borrower had verbally promised to pay a usurious rate of interest for the loan, the note was not rendered void by the verbal agreement. This, however, is contrary to the authorities and the decisions elsewhere: Ord. on Usury, 86, 90; 3. Par. on Cont., 112, 173, 5th Ed.; Tyl. on Usury, 357; Atwood v. Whittlesy, 2 Root 37, (Conn.); Willard v. Reeder, 2 McCord, 369, (S. C.); Lear v. Yarnal, 3 A. K. Marshal, 420, (Ky.); Fountain v. Grymes, Cro. Jac.; Merrills v. Law, 9 Cowan, 65; S. C. 6 Wend., 268; Austin v. Fuller, 12 Barb., 160; Gillmore v. Woolcock, 13 Wis., 659; Lee v. Peckham, 17 Wis., 383; Macomber v. Durham, 8 Wend., 550; Hammond v. Hopping, 13 Wend., 505; Warner v. Crabtree, 1 Greenl., 171.

The case of Gillmore v. Woolcock may be taken *instar omnium*, as to the general effect of the cases just cited. The syllabus in that case is as follows: "In an action upon a note drawing interest at twelve per cent.,

the answer alleged that the note was given for a loan of money from the plaintiff upon an agreement that the defendant should pay interest therefor at fifteen per cent. per annum, and that a certain amount of usurious interest had already been paid on the contract. *Held*, that the answer was not frivolous, but showed a good defense to the action."

The principle upon which parol evidence is admitted in all such cases, is easily perceived. It is not for the purpose of establishing a *permissible* agreement between the parties, to be adopted instead of that evidenced by the writing, which cannot be done; but it is for the purpose of showing that an unauthorized parol argeement was the only agreement, in fact, made, and that the terms of the written intsrument were never, in fact, constituted the repository of any agreement between the parties.

329 *But, independent of its character, as the right to recover eight per cent. rests upon contract, parol evidence is admissible for the purpose of showing that no such contract, as appears on the face of the note, was in fact made. A greater rate of interest than six per cent. cannot be recovered in the absence of a contract evidenced as the statute requires. West v. Meddock, *supra*. But the stipulation in the note is not the contract—it is the evidence of it. The making of a contract is not a matter of form merely. It is an elementary principle in the law of contracts, that to make one there must be a meeting of minds upon its terms. When there has been no meeting of minds as to the rate of interest stipulated in the note, there is no contract therefor. An argeement to so stipulate in the note is not an agreement for the rate so inserted, but for an evasion of the law. And this may be shown by parol, without doing violence to any principle of evidence. The rule is, that parol evidence cannot be received to vary a written instrument, constituted by the parties as the repository of their agreement. 2 Stark. Ev., 544. But to use it as the "repository" of an agreement, is one thing, and to use it for the purpose of disguising an agreement, not recognized by law, is another and different thing. Such use of written evidence would convert it into a cover for abuses, and would give to a fraud on the law more favor than an honest compliance with it. For no question is made, but that if the contract that was in fact made, had been carried into the stipulation of the note, the creditor could only recover at the rate of six per cent., and no more.

One of the recognized exceptions to the rule excluding parol evidence, offered to contradict a written instrument, is where it is offered for the purpose of showing that the former ought to have no effect whatever. 2 Stark. Ev. 555. This exception is by no means of rare application. See Pressed Brick Co. v. Chillicothe F. & M. Works. 7 Am. Law Rec., 548. Some of the cases there cited are of more direct application to the question before us, particularly the case of Davis v. Jones, 17 Com. B. 625, where it is said: "The parties may not vary a written agreement, but they may show that they never came to an agreement at all, and that the signed paper was never intended to be the record of the

330 terms of the agreement, for they never * had agreeing minds. Evidence to show that does not vary an agreement, and is admissible."

The interest will be computed at the rate of six per cent.

*MARRIED WOMAN—GUARANTOR. 348

[Hamilton Common Pleas Court, 1879.]

ARNOLD, CONSTABLE & CO. v. WILDER ET AL.

1. A wife is bound by her express agreement to charge her separate estate as guarantor for her husband.
2. A pledge of her real estate to the extent of $1,000 is not a continuing guaranty, and the liability is only for the payment of not exceeding that sum.

SMITH, J.

This was a suit to subject the separate property of a married woman to the payment of a debt. C. R. Wilder & Co. being desirous of purchasing goods of the plaintiffs in New York, and the plaintiffs being doubtful of their responsibility, and knowing * that Mrs. Kate Wilder, the wife 349
of C. R. Wilder, had property, agreed to sell to the firm, provided she became responsible. Thereupon she executed a writing to the effect that in consideration that the plaintiffs would give credit to the firm of C. R. Wilder & Co., she would pledge her real estate to the extent of and for the payment of $1,000. At the time of bringing this suit there was $1-400 due the plaintiffs for merchandise sold. At the time the paper was given there was a purchase by C. R. Wilder & Co. of $634, which was paid, and certain small amounts, which were also paid. Other purchases were made and no payment. It was claimed on behalf of Mrs. Wilder, that this was not a debt for the benefit of the wife, nor for the benefit of her separate estate, but was merely a guarantee for her husband, and therefore, her separate estate was not liable. The court held that, while the case of Levi Earl, in the 30 O. S., 147, goes to the extent that unless the debt created by the wife is for her own benefit or for the benefit of her separate estate, the law will not presume, in the absence of an express argeement, she intended to charge her separate estate, yet it might fairly be implied from that decision that if there were an express contract in the paper by which it was intended to charge the wife's separate estate, then she would be bound by that charge, and such seemed to be the result of the authorities in this country and every land. The court, referring to the case of 13 West Virginia, 572, in which the court, in giving his opinion and discussing the rights and liabilities of married women, examined all the cases in the various states and came to the conclusion that this is the law in all the states except New Jersey. The court was clearly of the opinion that the guaranty was not a continuing one, but only for the payment of not exceeding $1,000. Judgment would, therefore, be rendered against Mrs. Wilder for the difference between $1,000 and the amount of the purchases paid for under the guarantee.

Jordan & Williams, for Plaintiffs.

H. C. Whitman & Howard Douglass, Contra.

350 *LIMITATION OF ACTIONS.

[Hamilton District Court 1879.]

Burnet, Avery, and Cox, JJ.

DAVID EVANS AND ANN EVANS v. WILLIAM ALBERTS.

Alberts was surety upon a debt due from David Evans to Goodall, contracted in January, 1873. In January, 1876, judgment was rendered against Alberts in favor of Goodall, a judgment having previously been rendered against the principal, Goodall. In January, 1878, Alberts filed his petition against Evans and his wife, alleging that in June, 1873, Evans, without consideration, conveyed to his wife real estate which she held in trust for him, and sought to have it applied to the payment of the judgment: *Held*, that the case does not fall within the provision of the Code limiting an action for relief on the ground of fraud to four years, although the petition charged, that "Evans, being largely embarrassed and in failing circumstances, and with the intention of hindering and delaying his creditors," made the conveyance.

ERROR to Superior Court.

BURNET, J.

On January the 19th, 1878, William Alberts, defendant in error, filed his petition in the superior court of Cincinnati against David Evans and Ann Evans his wife, David Jones and Wm. Goodall, alleging that on the 29th of December, 1874, Wm. Goodall brought his action in the court of common pleas against David Evans, David Jones and said Alberts to recover a judgment upon a promissory note executed by David Jones and said Alberts as sureties and by David Evans as principal, and that at the January term, 1876, a judgment had been rendered against said Alberts and Jones as sureties, a judgment having been previously rendered against said David Evans; that Evans and Jones were insolvent, having no property subject to execution; that plaintiff owned valuable real estate in Cincinnati subject to the lien of Goodall's judgment against him, which Goodall was about to subject to the payment of said judgment, to his irreparable injury; that the indebtedness on which the judgment was obtained was contracted in January, 1873; that said David Evans was then the owner of certain real estate in Cincinnati, described in the petition; and that on the 18th of June, 1873, being largely embarrassed and in failing circumstances, and with the intention of hindering and delaying his creditors, in the collection of their debts, he conveyed said real estate to one John A. Key, who the same day conveyed
51 it *to his wife, Ann Evans, who now holds the legal title; that though the consideration expressed in both deeds was $5,000, in fact no consideration passed, but that the conveyances were made for the purpose of vesting the title in said Ann Evans and that she holds the property in trust for the use and benefit of said David Evans, and it ought to be subjected to the payment of his debts; and he asks that she may be decreed to hold said real estate in trust for defendant, David Evans, and it might be sold to pay the judgment.

To this petition David Evans and Ann Evans filed answers, but afterward, by leave of court, withdrew their answers and filed general demurrers, which were overruled, and the answers refiled, and the cause being tried, a judgment was rendered in favor of the plaintiff, Alberts. A mo-

tion for a new trial being overruled, a bill of exceptions was allowed an filed, but has since been lost.

By agreement of counsel the case is presented in this court upon the alleged error of the superior court in overruling the demurrers to the petition; the other assignments of error, which depend for their solution upon the bill of exceptions, being waived.

It is claimed by the plaintiffs in error that the action was one of those described in the last clause of section 15 of the former Code of Civil Procedure (under which code the action was brought), namely, an action for relief on the ground of fraud, and ought to have been brought within four years of the perpetration of the fraud; and that the petition alleges the alleged conveyances by which the title was vested in Ann Evans to have been made in June, 1873, whereas the petition was not filed until January, 1878—more than four years having elapsed, and that to avail himself of the saving, that the fraud was not discovered until within four years, the petition must affirmatively allege it.

If it appear upon the face of the petition that the action is barred by the statute of limitations, the defense may be made by general demurrer. But, as it seems to us, the defendants in error have mistaken the scope of the action, and it is not one for relief on the ground of fraud. The plaintiff, it is true, avers that the debt upon which he was surety for David Eavns was contracted in January, 1873, and that Evans in June, 1873, after the contraction of the debt, "being largely embarrassed and in failing circumstances, and with the intent of hindering and delaying his creditors in the collection of their debts, made the conveyance without pecuniary consideration, although one was expressed in the deed. The circumstances under which the deeds were made are thus stated, and the intent to hinder and delay creditors is alleged; but there is no express allegation of fraud, nor is it sought to set aside the deed as fraudulent, nor to *obtain any relief on account 352
of fraud. On the contrary, the petition states that the deeds were made" for the purpose of vesting the title in said Ann Evans, and that she holds the same in trust for David Evans, and the property should be subjected to the payment of his debts; and the petitioner seeks relief by enforcing the trust in favor of Evans.

The case made in the petition, however inartificially stated, is one of an express trust ingrafted by parol upon a deed of land, and the relief demanded is that the court should so find, and then enforce in favor of a judgment creditor, in relief of a surety, whose property is about to be seized to pay his principal's debt.

The limitation of section 15 of the Code does not apply, and the demurrers were properly overruled.

The judgment will be affirmed.

PRACTICE.

[Hamilton District Court, 1879.]

Burnet, Avery and Cox, JJ.

HENGEHOLD & CO. v. GARDNER.

1. It is competent for the court after default, to refuse leave to answer, but leave having been given, it is an abuse of discretion to discriminate between defenses equally meritorious.
2. The defense of bankruptcy is not favored, and when a party makes it he must do so within the time prescribed by the rules of court.

BURNET, J.

The defendant in error commenced a suit to recover upon seven promissory notes executed by Hengehold & Co. to Jacob Gardner, her testator. There was a default for answer. Time for answer had been extended, and further default made. Subsequently counsel for plaintiffs in error sought leave to file an answer containing four defenses: First, that they had been adjudged bankrupts, and their application for a discharge was still pending; second, that the first four notes mentioned in the petition were without consideration; third, that those four notes were accommodation notes, given by them in exchange for four notes which Gardner had executed to them, which were due and unpaid, and which they offered to exchange; and, fourth, that Jacob Gardner had sold the last three notes mentioned in the petition, and at the time of his death was not the owner thereof, and his executrix was not now the owner.

The court refused leave to defendants below to answer by setting up the proceedings in bankruptcy. The court permitted counsel for planitiff to exhibit the three notes in his possession, and denied to defendants the right in the answer to plead the want of ownership in the plaintiff. At a subsequent day the case was called, and the defendants being treated as in default for answer to the last three counts, a judgment was rendered against them for the amount of these three notes, and the case was continued as to the other notes named in the petition. It
353 was claimed on behalf of the plaintiffs in error that in the *refusal to permit them to file their answer to the last three counts of the petition, and rendering judgment against them as in default, the court below erred.

The question is, whether the court, having exercised the discretion to permit the answer, it was proper to determine what defense should be made, permitting some and refusing others.

As to the first defense settting up proceedings in bankruptcy, which, when properly presented, may be conclusive of the rights of the defendant in the action, it is not one that is favored. When a party makes it he must do so within the time prescribed by the rules of court. So far as that defense is concerned, the court is of the opinion that the court below did not err in refusing to permit it to be made.

But the fourth defense is a different one. It is a defense denying the ownership by the plaintiff of certain of the notes set out in the petition. It is a meritorious defense. The Code provides that the action shall be brought by the real owner of the claim, except in certain prescribed cases, where the beneficial owner of the claim is not required to be the plaintiff

in the action. But this is not one of the excepted cases. Where the paper has been sold, although the legal title may not have passed by endorsement, the real owner is the party who must sue, and not the apparent owner. This defense should have been allowed as a meritorious defense, and the court below abused its discretion in denying the privilege of making this defense.

It was competent for the court, after default, to refuse the defendants leave to answer. But leave being given, it is an abuse of discretion to discriminate in the leave between defenses equally meritorious.

Judgment reversed.

Jordan & Bettman, for Plaintiffs in Error.

Moulton, Johnson & Levy, for Defendants in Error.

APPEALS.

[Hamilton District Court, 1879.]

Burnet, Avery and Cox, JJ.

A. H. MORGAN v. J. H. ANDRES.

No appeal lies from the dismissal of a case without prejudice, by a justice.

BURNET, J

The defendant brought suit before a justice of the peace, and a jury was demanded. At the trial the plaintiff did not appear. Thereupon the justice dismissed the case without prejudice. The plaintiff appealed to the court of common pleas, where, the defendant making a default for answer and putting in no appearance, judgment was rendered against him by default. Error was based upon that judgment upon the ground that no *appeal lies from a justice of the peace upon a dismissal 354
without prejudice, and that, therefore, the court of common pleas had no jurisdiction to try the case.

Judge Burnet announced the decision of the court, holding that the right to appeal from the judgment of justices is a right to appeal from their final judgments, and that a final judgment within the meaning of the statute granting an appeal, is a judgment which determines the rights of the parties in an action. A dismissal without prejudice determines nothing except that the party shall go out of court and pay the costs, leaving it optional with him to litigate again by another action, and, therefore, the court below erred in entertaining jurisdiction in the case and rendering judgment against the defendant.

Judgment reversed.

Tilden, Buchwalter & Campbell, for Plaintiff.

Mallon & Coffey and A. J. Tullis, Contra.

MECHANIC'S LIEN.

[Hamilton District Court, 1879.]

Burnet, Avery and Cox, JJ.

MARY C. KENNETT ET AL. v. REBHOLZ & CARR ET AL.

1. The provision of law requiring a sub-contractor to file an account with the county recorder applies only to the first sub-contractor's account filed with the owner and is intended to give notice to other sub-contractors.
2. Subsequent claimants need only file their accounts with the owner.

The plaintiff in error, Mary C. Kennett, acting by her husband, John Kennett, on the 28th day of May, 1877, entered into a written contract with Robert Tischler to erect a dwelling house for her in Avondale in this county. Tischler failed to pay parts of the amounts due from him to his different sub-contractors and material men. On the 19th day of September, 1877, Mrs. Kennett had in her hands $653.39 due Tischler under the contract, and on that day Rebholz & Carr, plaintiffs below, one of the sub-contractors, presented their claim, amounting to $77.80, verified in due form, and on the 28th day of September filed a copy of this account in the office of the county recorder. This account was not disputed by Tischler.

On the 19th day of September, Tischler drew an order for $100 in favor of Epping, another sub-contractor, which was paid by Kennett the next day, September 20th. October 1st, Epping filed his sworn and itemized account with Kennett for $92.00 as still due him from Tischler for work done on the house. This was disputed by Tischler; and the parties having met, Epping accepted from Tischler, in compromise of his claim, an order on Kennett for $75.00.

The other sub-contractors and material men filed their accounts with Kennett, but the same were not sworn to, but submitted by Kennett to Tischler and their correctness admitted by him.

The fund in Kennett's hands was not sufficient to pay all the claims.
355 But to all except Rebholz & Carr and Epping, he paid *the percentage coming to them, and offered to pay Rebholz & Carr, but they refused to accept. Assuming that Epping had already received more than his percentage in the payment on the 20th day of September of Tischler's order of $100, he refused to pay him any further percentage. Both Rebholz & Carr and Epping filed their accounts in the office of the county recorder, in proper form, to obtain a lien on the premises upon which the house was built.

November 30, 1877, Rebholz & Carr filed in the common pleas a petition to foreclose their lien, making Mary C. Kennett and her husband, John Kennett, and Theodore Epping, defendants. Epping by answer and cross-petition set up his claim for $92.00.

Judgments were rendered in favor of Rebholz & Carr and Epping for the full amounts of their claims.

Plaintiffs in error claim that these judgments are erroneous; that as to Epping there should have been no judgment in his favor, but that he had already been overpaid his proper percentage; and as to Rebholz & Carr, the amount of their judgment was too large. The theory upon

which the judgment below was rendered seems to have been that the sub-contractors and material men, whose accounts filed with Kennett were not sworn to, by reason of their failure to comply with the provisions of the statute, were not entitled to share with Rebholz & Carr and Epping.

In a case decided in this court a few years since, it was held that an order from a contractor upon the owner in favor of a sub-contractor, accepted by the owner, was equivalent to a sworn and itemized statement of the sub-contractor's account. See also McCollum v. Richardson, 2 Handy, 275. But the statute under which that case arose differed in some respects from the law of May 4, 1877, which governs this case. Does the difference in the law require a different decision? For if an order drawn by the contractor in favor of the sub-contractor upon the owner, and by him accepted, suffices to perfect the sub-contractor's lien upon the fund remaining in the owner's hands, then itemized accounts, not sworn to, but accepted by the owner as sufficent, and referred to and approved by the contractor, will have the same effect.

The law has always required the sub-contractor, in order to obtain a lien upon the fund in the hands of the owner, to file with him an "attested account," which has uniformly been construed to be, as it is now in words expressed, "a sworn account." This was the requirement at the time of the decision referred to, and continued to be down to the year 1877. Section 10 of the present law, 74 O. L., 171, provides also for the filing with the owner of a sworn and itemized account, "and *thereupon said owner shall detain from said head contractor, all sub- 356
sequent payments due him under his contract, as hereinafter provided, and as security for said account and those accounts or estimates of other sub-contractors and material men," etc., "who may intervene before the next subsequent payment under said contract, or within ten days thereafter; *and in order to notify his fellow sub-contractors or material men of such detention*, said sub-contractor, etc., on filing his account with said owner, shall immediately deposit a copy therof, *under penalty of being postponed*, to his fellow sub-contractors, etc., in the case of neglecting the same, with the rcorder of the county where such property is situate."

Section 11. That upon the deposit of said copy with said county recorder by said sub-contractor—his fellow sub-contractors— in order to be paid *pro rata* with him out of said subsequent payment or payments, shall file with said owner before the first of said subsequent payments falls due, or within ten days thereafter, a sworn account, and upon their failure so to do, shall have no recourse against said owner, for any prior payments made under his contract."

Similar provisions exist as before for the adjustment of a disputed account, and as in the laws of 1871 and 1875, payments are to be *pro rata*.

It is claimed by counsel for defendants in error, Rebholz & Carr, that in order to share with them *pro rata*, the other sub-contractors were required not only to file sworn and itemized accounts, but also to file a copy thereof with the county recorder. As to the latter requirement, a careful inspection of the law seems to indicate that it applies only to the first sub-contractor's account filed with the owner, and is intended to give notice to other sub-contractors that they may come in and share with him. The failure to do this, therefore, cannot be attributed as neglect to the subsequent claimants, and as there is no other provision of the act, applicable to them, to distinguish their case from the one formerly passed up-

on by this court, we shall hold that Kennett might waive the affidavit to the subsequently presented accounts, and pay them *pro rata* with that of Rebholz & Carr. He was also right in refusing to pay any further dividend to Epping, because the unadvised payment of September 20th had already overpaid him.

The judgment below is reversed.

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*AMENDMENTS.

[Hamilton District Court, 1879.]

Burnet, Avery and Cox, JJ.

CONSOLIDATED STREET R. R. CO. v. BARLAGE.

Where a court during the progress of a case permits plaintiff to amend his petition by interlining without a new verification, does not constitute a sufficient ground for reversal of the judgment.

Cox, J.

This was a petition in error to the court of common pleas. The action was brought to recover damages for injuries sustained to a horse belonging to the defendant, by the running of the tongue of one of the street cars into its side. During the progress of the case the court below permitted the defendant to amend his petition by inserting by interlineation that the injury was without his negligence, the amendment being made without a new verification.

Judge Cox announced the opinion of this court. He held that no substantial injury was done plaintiffs in error by permitting the amendment. After verdict rendered, the plaintiffs moved for judgment *non obstante veredicto*, and also made a motion for a new trial. These motions were overruled. The plaintiffs claimed there was error in both these rulings. The testimony showed that the plaintiffs were not responsible for negligence; that the accident was a casualty that could not have been avoided. Both motions should have been granted.

Judgment reversed.

Stallo, Kittredge and Shoemaker, for Plaintiffs.

J. L. Bogardus, Contra.

PARTIES.

[Hamilton District Court, 1879.]

Burnet, Avery and Cox, JJ.

T. SCHNEIDER v. EUGENE BUCKLEY.

The city is not a necessary party in any action brought by a contractor for work done in improving a certain street under a private contract between him and the owners of the property.

ERROR to the Court of Common Pleas.

Cox, J.

Suit was brought by Buckley to recover of Schneider for the improvement of Oak street and judgment recovered. Error was assigned in

the instruction to the jury and the refusal of the court to give the instruction which plaintiff's counsel asked. On the trial of the case the plaintiff moved to dismiss the action on the ground that the city was not made a party.

Judge Cox announced the opinion of this court. He held that the city was in nowise a party in the suit. The work was done under a private contract between the owners of the property and Buckley, the work was to be done with the approval of the city commissioner and city civil engineer. The bill *of exceptions does not show that any instructions were offered by Schneider to be given to the jury, nor was there any error in the admission or rejection of testimony. The judgment and verdict were in accordance with law. 358

Judgment approved, with penalty.

John Bevan, for Plaintiff.

Gray & Tischbein, Contra.

JUDICIAL SALE—APPRAISEMENT.

[Hamilton District Court, 1879.]

Burnet, Avery and Cox, JJ.

MILLS V. LIFE ASSOCIATION OF AMERICA.

Where the appraisers in appraising a certain house fail to go through it, and afterwards the testimony of persons who have gone through the building establishes a higher value, the first appraisement will be set aside.

Cox, J.

This was a petition to reverse the judgment of the superior court. In the court below an order of sale had been taken against the property of Mills. The appraisers who appraised the property valued it at $8,000. It was sold for two-thirds of its appraised value. A motion was made to set aside the appraisement on the ground that the appraisers had not gone into the house and examined it before setting their value on the premises.

Judge Cox announced the opinion of this court. He found from the affidavits of competent witnesses who had gone through the building, that the property was worth $10,000. Without determining the question whether appraisers must go entirely through a building situate on property they appraise, and that their appraisement is void unless they do so, the court is clearly of the opinion, that, when testimony of persons who have gone through the building, establishes a higher value on account of such examination, the first appraisement ought to be set aside.

Judgment reversed.

VOLUNTARY CONVEYANCE.

[Hamilton District Court, 1879.]

Burnet, Avery and Cox, JJ.

†EXECUTORS OF STEPHENSON v. DONAHUE ET AL.

Voluntary conveyance is not fraudulent against a creditor amply secured by mortgage; nor does it become so from the mere fact that subsequently by delay, at the instance of the debtor, the mortgage security is lost.

ERROR to Superior Court of Cincinnati.

In 1837 Ellen B. Reeder gave Charles Fox a note for $1,100, secured by mortgage. Afterward Stephenson became owner of the note and mortgage, and at the April term of 1842 of the old supreme court, obtained a decree of foreclosure, but
359 took no steps to sell under the decree. In 1848 Reeder sold the property *at auction to various persons, who had no actual knowledge of the mortgage or decree. In 1869 Stephenson obtained an order of sale from the district court, which succeeded the old supreme court, but the purchasers from Reeder coming in, the court held that as against them Stephenson had lost his right to enforce the decree, and quieted their title. This was affirmed in the supreme court. At the same time, however, the district court rendered a personal judgment, against Reeder for the amount found due in the decree, with interest, making $4 125. Upon this judgment the executors of Stephenson, he having in the meanwhile died, brought their action in the superior court, alleging that in 1844 Reeder had conveyed his residence in Mount Auburn to a trustee, for his wife and daughters, without consideration, and with intent to defraud creditors. The superior court found that, while Reeder at that time was largely in debt, and had a large amount of property—not finding either the amount of the debts or property—the mortgage was ample for the amount owing to Stephenson, who had lost the security by his own negligence. The petition was dismissed.

AVERY, J.

A voluntary conveyance by one indebted at the time is not *per se* fraudulent: Miller v. Wilson, 15 Ohio, 108. The question is always open whether sufficient property was retained to pay debts, Crumbaugh v. Kugler, 2 O. S., 373; Gormley v. Potter, 29 O. S., 597. And without showing intentional fraud, or a secret trust for the benefit of the grantor, it can not be avoided by subsequent creditors, Webb v. Roff, 9 O. S., 430. The conveyance here did not affect the holder of the note since he was amply secured by mortgage. Although he may have been induced by the debtor to delay, and so lost the security, this was a subsequent circumstance. Where the circumstances are such that a voluntary conveyance must necessarily defeat or delay creditors, actual intent need not be shown. Freeman v. Pope, L. R. 5 Ch. App. 538. But the state of circumstances to be looked at, is that existing at the time of conveyance, and not subsequent events, except such as may be held to have been in contemplation at the time. (May on Fraudulent Conveyances, 31.) The facts found do not connect the conveyance in question with the subsequent efforts to secure delay upon the mortgage, nor could it have entered into the mind of the debtor at that time there would be such delay as that the security would be lost.

Judgment affirmed.

Fox & Bird, for Plaintiffs in Error.

O'Connor, Glidden & Burgoyne, and Mallon & Coffey, Contra.

†This case has been affirmed by the Supreme Court. See opinion 40, O. S., 184.

*WITNESSES. 360

[Hamilton District Court, 1879.]

Burnet, Avery and Cox, JJ.

ADMINISTRATOR OF CLARKSON v. RUAN.

Party in interest, but not party to the suit, not incompetent to testify under section 313, Code Civil Procedure. Where the bar of a discharge in bankruptcy is waived by a new promise, it is competent to declare on the old contract, and rely on the new promise to defeat the plea of discharge.

ERROR to the Common Pleas Court.

Ruan brought suit against Clarkson for cattle sold in August, 1873. In December of that year Clarkson filed a petition in bankruptcy, and after the suit brought by Ruan, obtained his discharge. This discharge was set up by an answer. The reply alleged a new promise. Clarkson having died, the suit was revived against his administrator. Upon the trial a son of Ruan was called, who was cross-examined by the defendant's counsel to show he was interested with his father, and an objection to his testimony was interposed on the ground that he was a partner.

AVERY, J.

Whether the fact was so or not it is not necessary to inquire. Section 313 of the code made a party to the suit incompetent to testify where the adverse party was administrator, but the son was not a party to the suit. The objection to his competency was not well taken. Further objection was made by defendant to any evidence tending to show a new promise after discharge in bankruptcy. The objection was that the new promise should have been declared on. The rule in this state is otherwise. Turner v. Chrisman, 20 O., 333. The new promise was after the suit was brought, but the discharge, to defeat which, it was pleaded, was also after suit brought.

Judgment affirmed.

Archer & McNeill, for Plaintiff in Error.

Mallon & Coffey, Contra.

PARTNER AND PARTNERSHIP.

[Hamilton District Court, 1879.]

Burnet, Avery and Cox, JJ.

MAX HELLMAN v. HERMAN MENDEL ET AL.

Partner not entitled to compensation for services in closing up affairs of firm after dissolution, unless there is agreement to that effect; nor is this rule affected by the fact that he is only a special partner.

ERROR to Superior Court.

The action was on petition of Hellman and cross-petition of Mendel, each claiming a judgment against the other. The judgment was in favor of Mendel for $277 and interest. The parties, with one Elsbach, were members of a firm of Elsbach, *Mendel & Co. On the dissolution of that firm the stock was taken at a valuation by Mendel, who gave his notes, which with other assets and credits of the 361
firm, were turned over to Hellman, who was to pay off the debts of the firm and settle with the partners. The agreement of dissolution stated the amount due

each partner, but this statement was obtained by taking all the debts as good, and without taking account of the necessary expenses of winding up the concern. Some $1,700 of the debts due the firm, turned out to be bad, and the expense of winding up amounted to $1,681. The court found that each partner should bear one-third of the expense of winding up, but that Hellman was a special partner, by stipulation in the partnership agreement not to be charged with any deficiency by reason of bad debts, accounted good at the time of dissolution, and that he should not be charged with any portion of the $1,700 which had turned out to be bad.

AVERY, J.

In this there was no error to the prejudice of Hellman, since on dissolution this very $1,700 had furnished the basis of a division of profits, and he was thus left in possession of those profits without being charged with any share of the loss.

Nor was there error in finding that Hellman was not entitled to compensation for services in closing up the concern. A partner is not entitled to compensation for services in the partnership affairs, and this rule extends after dissolution as well as before, Cameron v. Francisco, 26 O. S., 190. Nor was the rule affected by the fact that Hellman was a special partner. The reason of the rule is that in taking care of partnership property a partner takes care of his own interests. Moreover, courts could not undertake to measure the value of the various and unequal services that several partners perform. If a partner is unwilling to perform unequal service without reward, he should stipulate for it. Farrer v. Farrer, 29 Gratt., 134.

Judgment affirmed.

Long & Kramer, for plaintiff in error.

D. Hyman, contra.

LIFE INSURANCE.

[Hamilton District Court, 1879.]

Burnet, Avery and Cox, JJ.

†PENNISTON v. UNION CENTRAL LIFE INS. CO.

Where the assured makes certain statements to the company's agent, which amount to warranties and which are not true, the assured is not entitled to recover on his insurance.

ERROR to the Superior Court.

In the court below the action was brought to recover upon a policy of insurance on the life of plaintiff's husband, John R. Penniston. A verdict was
362 found for the defendant by direction of the court. The policy was effected in St. Louis. The agent of the company in St. Louis was one Cross. The party who effected the insurance for Penniston was one Wilson, an insurance broker. He was not the agent of the defendant, but of any person who saw proper to employ him to get a policy for him. Wilson made the application to Cross for the policy. It was claimed that certain of the statements made in the application which by the terms of the policy are made warranties, were not true. It was claimed that the fact that the deceased was a member of a mutual association where members pay a dollar upon the death of one of their number, constituted him a person insured in another company, and that his denial, therefore, in his application of other insurance vitiated his policy in the defendant's company.

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†This case has been affirmed by the Supreme Court; but no report made, but syllabus, found 11 B. 216.

Cox, J.

Judge Cox announced the opinion of this court. The claim of the defendant was not well grounded. The company referred to was liable at any time to be dissolved or to cease to act by the refusal of any members to pay their contribution upon the death of one of their number, and that such associations were not, in fact, regarded by insurance companies as insurance companies within the meaning of the law governing insurance companies. But, so far as the claim set up by the defendant was concerned—that another company had refused to grant any insurance on the life of the deceased—there existed a more substantial ground for it. The testimony introduced by the plaintiff clearly showed that the statements made to the agent of the company upon this point were not true, and, being warranties, the plaintiff was not entitled to recover.

Judgment affirmed.

Fox & Bird, for Plaintiff.

Matthews & Ramsey, Contra.

SCHOOLS—MANDAMUS.

[Hamilton District Court, 1879.]

Burnet, Avery and Cox, JJ.

STATE EX REL. GALLOWAY V. CLARK, TREASURER.

Under the Act of April 25, 1878, 75 O. L., 120, sub-school districts may be created special districts, on petition of not less than three resident electors, in the same manner as provided for the creation of joint sub-school districts. This construction not affected by the fact that, thus, it is possible for all the sub-districts of a township to become special districts, and so destroy the organization of the board of education of the township. Nor in that event would it be necessary that *orders by the township clerk on the treasurer for the portion of the school fund allotted by the board to one of the special dis- 363 tricts should be countersigned by the president.

The relator alleges that on April 26, 1879, sub-school district No. 5 of Sycamore township, and all the other sub-school districts of the township, were created special school districts by the board of education of the township, which at the same time directed the clerk to draw an order in favor of the treasurer of special school district No. 5 for $586.98 school funds in the hands of the defendant as treasurer of the township; that afterward at an election of the special district, a board of education was chosen, which appointed the relator treasurer of the district, and the order which had been directed by the board was drawn in his favor, and that payment was refused by defendant.

AVERY, J.

The power of the board to create the special school district is the only question. The act of April 25, 1878, 75 O. L., 120, the first part of which authorizes joint sub-school districts to be created upon petition filed with the clerk of one of the township boards, provides, section 16, as follows: "A petition may in like manner be filed with the clerk o the Board of Education of any township, praying for the creation of an additional sub-district, or for changing the lines of sub-districts already existing, or for the creation of special school districts, changing the lines of village or school districts and adjoining sub-districts. If this is to be read "or changing the lines of village or school districts and adjoining

sub-districts" the provision for creating special school districts stands without qualification and the sense of the section is readily understood; on the other hand, if read not in the disjunctive, but as qualifying the creation of special school districts, the clause is without meaning. Read as qualifying, it would be "special school districts changing," that is, which shall change, or be formed by changing, "the lines of special or village districts and adjoining sub-districts." But changing the lines of special or village districts and adjoining sub-districts would still leave the territory divided between them, and not give room for any new district. The object is manifestly to create special school districts, as is apparent from section 19. It is a settled rule of construction that no interpretation, although consistent with the words used, shall be admitted which does not give the words a reasonable operation. Clauses which when read in conjunction make a sentence without meaning may be read disjunctively.

The argument most strongly pressed against construing the power to exist, is that in such case all the sub-districts of a township might be
364 converted into special districts, each having *its own Board of Education which would leave nothing for the township board. This has, in fact, happened here, and since the township board can be made up only from the local directors of sub-districts, it would seem that, by the change, no Township Board of Education, in this particular township, is left. Possibly this result was not contemplated by the legislature, but it does not affect the construction of the language used. If the words were not intended to mean what they express, the Legislature would not have re-enacted the provision, as has been done in the revision of the statutes, this time not omitting the "or," but inserting it. Revised Statutes, section 3946. It does not follow that no way is open for changing the boundaries of the special districts if the township board be abolished; since under the proviso to section 16, the petition in that case might be filed with the clerk of the Board of Education of a special district. Nor is it an objection to the order, payment of which has been refused by defendant, that it is not countersigned by the president of the township board. The objection is not that it is not countersigned, but that because the board is abolished, the signature could not be that of the president. The order, however, was drawn by the clerk of the township under order of the board, and if the board has been abolished, no other signature than that of the clerk is necessary.

Peremptory writ awarded.

Cornell, for Relator.

Jno. K. Love and Mr. Follett, for Defendant.

CREDITOR'S BILL—EVIDENCE.

[Hamilton District Court, 1879.]

Burnet, Avery and Cox, JJ.

ZIMMERMAN ET AL. V. GROTENKEMPER ET AL.

1. The probate court is authorized to refer the question as to the examination of a debtor to a referee, and the referee is authorized to take testimony and certify it to the court.

2. Testimony taken in an action or proceeding on the order of a court before a referee may be used as a deposition taken in the case.
3. A deposition may be read in any other action or proceeding upon the same matter between the same parties.

ERROR to the Superior Court.

In that court the defendants brought suit, alleging that they had a judgment against the plaintiffs upon which there was an execution levied and a return of no goods, and that Louis J. Zimmerman had property which he concealed, having assigned it to John Zimmerman for the purpose of hindering creditors. In the trial of the case below the defendants offered in evidence the papers in a case in the probate court in aid of execution brought against Louis Zimmerman, and restraining John Zimmerman from disposing of the property in *his possession be- 365
longing to Louis Zimmerman. There was also offered in evidence the order of the probate court sending the case to a referee to examine Louis Zimmerman touching his property, and also the testimony taken before the referee. It was claimed that there was error in receiving these papers and depositions.

Cox, J.

Judge Cox announced the opinion of this court. The papers were all properly admissible. By Sec. 10, Vol. 75, O. L., p. 702, the probate court is authorized to refer the question as to the examination of a debtor to a referee, the referee is authorized to take testimony and certify it to the court. The affidavit and order of reference were proper as showing the jurisdiction of the court to appoint the referee. By Sec. 28, 75 O. L., p. 657: "Testimony taken in an action or proceeding on the order of a court before a referee * * * may be used as a deposition taken in the case." And by Sec. 39, p. 659, "A deposition may be read in * * * any other action or proceeding upon the same matter between the same parties."

The case in the superior court was upon the same matter and between the same parties, and, therefore, the depositions were properly admitted.

There was considerable testimony showing that the transfer of property was without consideration, and under such circumstances as to show it was done to hinder and delay creditors. We see no error in the proceeding of the court below, and the judgment will be affirmed.

E. P. Dustin, for the Plaintiff.

Mallon & Coffey, Contra.

BILLS AND NOTES.

[Hamilton District Court, 1879.]

Burnet, Avery and Cox, JJ.

BLOCK & SONS v. ESPY, HEIDELBACH & CO.

Indorsement, for value and before due, of acceptances, payment of which had been guaranteed, and assignment of the guaranty, defeats the set off of promissory notes made to the guarantor by the payee of the acceptances, at or before the time of the guaranty, but not yet due at the time the guaranty is assigned.

ERROR to the Superior Court of Cincinnati.

Espy, Heidelbach & Co. were plaintiffs below. H. Hirsch & Co. held acceptances of one William Nast, payable to their order in four and five months from October 7, and October 10, 1877, one-half of which had been guaranteed to them by Block & Sons. These drafts, before maturity, were indorsed for value by Hirsch & Co. to Espy, Heidelbach & Co. At the same time the guaranty was assigned. At the time of making the guaranty Block & Sons held two notes of Hirsch & Co. to an amount
366 greater than the amount they had guaranteed, but these notes *were not due at the time Hirsch & Co. assigned the guaranty. Espy, Heidlebach & Co., in the superior court, set out the fact of the guaranty, indorsement of the acceptances and assignment of the guaranty, together with the fact that the acceptances had not been paid. Block & Sons, by answer, claimed to set off against their guaranty the liability of Hirsch & Co. to them. Upon demurrer to the answer the court rendered judgment for Espy, Heidelbach & Co.

AVERY, J.

The case of Fuller v. Steiglitz, 27 O. S., 355, determines this. The assignment of a non-negotiable demand, before due, defeats a set-off by the debtor of an independent cross demand, on which no right of action had accrued at the time of the assignment. In that case the debtor had purchased the cross demand after contracting the debt, and, here, was owner of it at the time. But it was still an independent cross demand. The answer was that there were mutual dealings between the parties, but not that there was any mutuality in the two transactions, or any understanding that one should be set off against the other. Judgment affirmed.

D. M. Hyman, for Plaintiff in Error.

Hoadley, Johnston & Colston, Contra.

REPLEVIN—PLEADING.

[Hamilton District Court, 1879.]

Burnet, Avery and Cox, JJ.

STRIKER v. BEATTY ET AL.

Finding of property and right of possession in replevin, on default of plaintiff merely, and without any pleading by defendants, does not preclude plaintiff from going into the question, upon inquiry of damages to defendants.

ERROR to the Court of Common Pleas.

Striker replevined a mare from Beatty and Joseph E. Heart, sheriff, in an action before a justice of the peace. The mare was appraised at $625, which amount exceeding the jurisdiction of the justice, the case was certified up to the court of common pleas. In that court Striker failed to file his petition, and, after considerable lapse of time, the court made an order finding that the right of possession was in Heart at the commencement of the action for the use of Beatty, and directed that the case be sent to a jury to assess the damages sustained by defendants. A motion to set aside this order was overruled. Subsequently the assess-

ment of damages was made by a jury, but by consent of parties it was set aside and the matter submitted to the court, which found for defendants in $1,015. Before proceeding to trial plaintiff moved for leave to file a petition, which was refused. He then offered evidence to show he was the owner of the mare and entitled to possession at commencement of the action, but *his testimony was excluded. 367
He then offered testimony as to the value of the mare, and rested. The defense offered testimony as to value, and this was all the evidence.

AVERY, J.

It was a matter of discretion whether plaintiff, after default, should have been permitted to file a petition. But upon the question of damages it was his right to offer evidence, even to the point of showing that defendants could have suffered no loss by taking the mare from them, because of the property and right of possession being in him. The finding that it was in them had been made on default of plaintiff merely, and not upon any pleading by them. It was a matter that had not been put in issue and decided upon, and on inquiry of damages was still open. Harman v. Goodrich, 1 Green (Iowa) 13; Wallace v. Clark, 7 Blackf. 298; Belt v. Worthington, 3 Gill & J. 247; Bartlett v. Kidder, 14 Gray. 449. Judgment reversed.

Jordan, Jordan & Williams, for Plaintiffs in Error.

J. J. Miller, Contra.

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*HOMESTEAD—MORTGAGE. 411

[Logan Common Pleas Court, May Term, 1879.]

WM. M. MURDOCK v. H. G. WELCH AND WIFE.

When a mortgage on real estate is executed by a husband, owning the fee simple, but not by his wife, on a foreclosure and order of sale, the wife is entitled to have a homestead assigned, but the fee simple subject to the homestead right may be sold, if necessary, to pay the mortgage claim.

On September 20, 1871, H. G. Welch, having a wife, executed a mortgage on land to W. M. Murdock on S. W. ¼ Sec. 35, Form 2, R. 8 E., in Logan county, to secure the payment of $5,600 in one year; the wife not joining in the mortgage, Welch owned the land in fee simple. March 1, 1877, Murdock filed a petition in the common pleas of Logan county, asking decree to sell the land to pay the note, and at April term, 1877, a decree was made accordingly.

March 27, 1879, a writ issued to the sheriff of Logan county to the sheriff, commanding him to sell the land.

On April 17, 1879, fifteen acres of the land were set off to Rachael Welch, the wife, by metes and bounds, on her demand.

On May 5, 1879, the sheriff sold all the land to Emery P. Lockhart, subject to the homestead right of Rachael Welch, including the fee simple title of the fifteen acres set off to her.

At May term, 1879, H. G. Welch and wife filed motion to set aside the sale, because the fee in the fifteen acres was sold.

John A. Price, for the motion, cited 66 Vol. Stat., p. 48, Sec. 1; 75 Vol., 693, Sec. 65. These sections authorized a homestead to be set off

to the wife, and declare, "no further proceedings shall be had against the homestead, but the remainder of the debtor's lands * * * shall be liable to sale." The writ of sale is a "writ of execution" within the homestead statute.

412 *The statute also says the party entitled to homstead "may hold, exempt from sale on judgment or decree, a family homestead." Sec. 1; 75 vol., 692, Sec. 62.

Wm. Lawrence in favor of confirming sale. The sale should be confirmed for several reasons:

1. By the "Ordinance of 1787" and by the common law, conveyances of land, absolute or by way of mortgage, may be made in Ohio, and the mode of execution has been regulated by many statutes. The husband can mortgage his land, thereby conveying the fee by way of pledge.

Walker's Am. Law 395; 2 Blackst., 338; 4 Peters. Abr., 5; 4 Kent, 495; Lindsley v. Coats, 1 Ohio, 243; Thompson v. Gibson, 2 Ohio, 333; Holt v. Hemphell, 3 Ohio, 232.

The Ohio Civil Code, Sec. 374 (75 Stat., 667), requires that "a sale of the premises shall be ordered," as it untechnically says, "in the foreclosure of a mortgage."

The decree, or order of sale, in this case, requires the sheriff to sell the mortgaged premises. This order is authorized by the Code.

These common law principles, the ordinance and statutes as to deeds and mortgages, the Code provision as to sale, the order of sale, and the homestead statute, are all in *pari materia*, and are to be construed together, and effect given to all. Hern v. State, 1 Ohio St., 20; Jones v. Carr, 16 Ohio St., 428; Fielder v. Coats, 18 Ohio St., 359; State v. Franklin, 20 Ohio St., 424; Marienthal v. Mosler, 16 Ohio St., 570; 8 Ohio St., 299; 10 Ohio, 173.

The homestead right given by statute is not a fee simple, it is only a right of occupancy for the life of claimant, his widow, and also in some cases for unmarried children during minority. This is clear as shown in Taylor v. Taylor, 29 Ohio St., 575. It has been held that it is lost by abandonment. Cooper v. Cooper, 24 Ohio St., 488; Jackson v. Reed, 32 Ohio St., 443; Maher v. McConaga, 9 American Law Register, 60; 75 Stat., 692-3. And so by alienation. Smyth on Homesteads, Sec. 184; Hoyt v. Howe, 3 Wis., 753; Allen v. Cook, 26 Barb. S. C.. 374; Chamberlin v. Lyell, 3 Mich., 448; Lawton v. Bruce, 39 Maine, 488; Hershfeldt v. George, 6 Mich., 456; Trustees v. Schell, 17 Wis., 308; Folsom v. Carli, 5 Minn., 333; *Tillottson v. Millard, 7 Minn., 513; Cogel v. Mickon, 11 Minn., 475; Whitworth v. Lyons 39 Miss.. 467; Titman v. Moore, 43 Ill., 170; Uhmsen v. Banks, 15 Wis., 449; 23 Cal., 277.

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There are cases which assert that it may be alienel, but they do not hold it to be an absolute fee even where the debtor owns a fee, at least under statutes like that of Ohio. Wetz v. Beard, 12 Ohio St. 431; Green v. Marks, 25 Ill. 221; Dorsey v. McFarland, 7 Cal. 342; Van Reynegan v. Revalk, 8 Cal. 75; Alley v. Bay, 9 Iowa 509; Tost v. Debault, 9 Iowa 60; Lamb v. Shay, 14 Iowa, 569.

Many authorities are collected as to the effect of mortgages in Smyth on Homesteads, 239, 240, 262. Many of them turn on the phraseology of the statutes, but, so far as any principle can be drawn from them, as applied to the Ohio statute, the right of a husband to mortgage his land

so as to authorize a sale by judicial proceedings of the fee, subject to the homestead right, is recognized.

He can make a voluntary sale of the fee.

2. The statute of Ohio regulating executions accords with this view. It provides that "lands and tenements, including vested interest therein, * * * not exempt by law, shall be * * * liable to be taken on execution." Civil Code, Sec. 420; 75 Stat. 680, Sec. 3.

It may be claimed that the case of Wolf v. Meyer, 12 Ohio St. 431, seems to forbid a sale of this fee on a mere judgment; but if so, this cannot affect the question of a sale under a mortgage.

The same may be said of Sears v. Hanks, 14 Ohio St. 298, 302; Barney v. Leeds, 51 N. H.; 12 Am. Law Reg., N. S. 256.

There are *dicta* and, perhaps, decisions to the effect that "the homestead is not only not liable to sale on execution, but it is not liable to levy." Per Lawrence, Judge, Stewart v. Wooley, 2 West. Law Monthly, 470; Wetz v. Beard, 12 Ohio St. 431. See St. Louis Central Law Journal, Vol. 6, No. 6, Feb. 8, 1878; Thompson on Homesteads, *passim*, 1 Am. Law Reg. N. S. 641, 705; 10 Am. Law Reg. N. S. 137; Conkling v. Foster, 57 Ill. R.; 12 Am. Law Reg. N. S. 257 (May, 1873); 4 Southern Law Review, N. S., April and May, 1878, p. 7; Conkling v. Foster, 12 Am. Law Reg. N. S. 256; Vogler v. Montgomery, 13 Am. *Law Reg. N. S. 244; Beecher v. Baldy, 7 Mich. 506; Hamblin v. Worneke, 31 Texas, 681; Kendall v. Clark, 10 Cal. 17; Ackley v. Chamberlain, 16 Cal. 181; Myers v. Ford, 22 Wis. 139; Codle v. McChristian, 4 Cal. 23. 414

In such cases, on this theory, the owner of a homestead may sell a fee as against an execution, and if so, he may mortgage it. This view, therefore, supports the claim now made.

And if it should be held that an ordinary execution on a judgment, at law, cannot be levied on a homestead, or if so, that "no further proceeding" can be had, still this does not affect the right to sell under a mortgage decree. The questions are not analogous. An execution can only take property subject to sale; an order of sale authorizes a sale of the property ordered to be sold.

In an execution there is no assent of the debtor to a sale; the creditor stands on his rights under the statute, and every construction is in favor of the debtor.

In the case of a mortgage, the mortgagee takes by consent of the debtor, and every construction is against the mortgagor. Seybolt v. Burtner, 4 West. Law Monthly, 551; Cassily v. Rhodes, 12 Ohio, 88; Parker v. Storts, 15 Ohio St. 351; 2 Ohio, 95.

3. The debtor is estopped by the mortgagee from interposing any objection to a sale of his interest.

In view of all this it is alike just and lawful to preserve to the wife her homestead right given by statute, and to the mortgagee, his rights given by mortgage, sanctioned by statute. This will preserve the rights of both.

4. To hold that a fee simple should slumber exempt from sale in such case as this, is contrary to public policy, because, (1) it would defeat the purpose of mortgages so essential to the value of credit, and, (2) it would practically impose a restraint on alienation, so strongly asserted and carefully guarded by the law. 4 Kent, 133; Co. Litt., 206 b, 223 a; Perry on Trusts, see 386–802, note 5; Ware v. Carin, 10 B. & C., 433; 2

Redfield on Wills, 667; Rochford v. Hackmen, 9 Hare, 475; Adams' Equity [43]; Sperry v. Pond, 5 Ohio 387; 2 Ohio St., 380; Davison v. Wolf, 9 Ohio, 75.

415 *PORTER, J.

The sale will be confirmed. The decree or judgment rendered in this case expressly orders a sale of this entire land. The wife takes a homestead right, which is less than a fee-simple, by force of the Homestead Statute. She can take what the statute gives her, but the mortgagee creditor can take what the mortgage gives him, subject to the right of the wife.

Sale confirmed.

COSTS—JURISDICTION.

[Logan Common Pleas, November Term, 1879.]

ABNER SNODDY v. J. C. MASON.

If the plaintiff, by the verdict of a jury, recover less than $100 in a civil action originally commenced in the common pleas, he may, under the Civil Code sections as to costs, recover costs, if the record shows that he had a claim for $100, which was reduced by a set-off or counter claim of defendant, although the verdict of the jury is general, and does not show the amount found of the whole claim of each party, but only for the plaintiff, a sum less than $100.

May 6, 1878, the plaintiff filed petition in common pleas to recover value of his mare and colt, converted, February 8, 1875, by defendant to his use. Value and damages claimed, $500.

Defendant Mason's answer, alleges, that on February 8, 1875, he loaned to plaintiff $72, for which Gebby gave him a note, payable June 8, 1875, with interest; that plaintiff then delivered the mare and colt to defendant by way of pledge to secure the payment of the note, and twenty-five cents per day for keeping the colt; that plaintiff failed to pay; and, on the 15th day of October, 1875, he did convert the mare and colt to his use after notifying the plaintiff to pay the note and $62 for keeping of said mare, and a reasonable price for keeping the colt. That when so converted, the mare and colt were worth only $100, and the plaintiff was
416 indebted then to defendant in $194 for said money *loaned, and the keep of the mare and colt. Prayer for judgment against plaintiff for $94 and interest from October 15, 1875.

Reply of plaintiff admits the loan of the $72 and the note, denies any sum due for keeping mare and colt, because defendant used the mare, and her services were worth $100; alleges that defendant cannot claim pay for keep after the note became due, when it was his duty to assert his rights under the pledge; alleges, that Mason agreed to loan $150 on the pledge in February, 1875, but, only loaned part (the $72), and by reason of his failure, is not entitled by the agreement to pay for keep; alleges as part of the agreement, that he was to have the use of the mare on demand; that he demanded use in April, 1875, which Mason refused, to his damage.

On the trial, there was evidence, tending to prove a conversion earlier than October, 1875; the value of mare, colt, keeping and allegations of the pleadings.

The verdict was: "We, the jury, do find and say that we find for the plaintiff in the sum of $79.87."

H. C. Dickinson and Wm. Lawrence, for plaintiff, moved the court to render judgment for costs, and cited Ohio Civil Code, sections 551,552; 75 Vol. Stat. 672, sections 9, 10.

The cases of Butler v. Kneeland, 23 O. S. R., 196, and Brenaugh v. Worley, 6 O. St., 597, do not decide against the plaintiff's right to judgment for costs. It is only when the record shows that the plaintiff on his claim recovers less than $100, that he fails to recover costs.

The jury in this case did not, as they might have done, find specifically the amount of plaintiff's claim, and the defendant's set-off or counter-claim, or equitable claim and lien for keep, but it was not necessary. It would have been a work of supererogation. The answer admits a liability of defendant to plaintiff of $100 and interest from October 15, 1875, for the mare and colt. It seeks to reduce this by a claim for keeping the mare and colt, and by the money loaned ($72 and interest).

From this it will be seen that the plaintiff and defendant both concede a claim or cause of action as a distinct claim of more than $100.

The reply admits the $72, but denies the right to compensation for keeping the mare and colt.

*It is clear that the jury have reduced the plaintiff's claim by a claim on the part of defendant. If the defendant had not admitted 417
an original liability of $100, the right to a judgment for costs might be more difficult to establish, with the verdict in the form in which it is.

Besides this, a part of defendant's claim is for bailee's lien as in equity, and a justice could not take jurisdiction. The Code of 1878, in revising the original code, section 553, drops the words: "If it shall appear that a justice has jurisdiction," and substitutes, "When the judgment is less than $100." This must only mean the same as the old section 553, and, therefore, the plaintiff must have costs, because bailee's lien was not within a justice's jurisdiction, being in equity.

John A. Price, for defendant, cited the code sections as to costs, and the cases in 6th and 23d Ohio State Reports, and claimed that there could be no judgment for costs. The bailee's lien was at law and within a justice's jurisdiction. But, if not, the plaintiff should have sued before a justice, and not in this court.

BY THE COURT.

The plaintiff is entitled to a judgment for costs.

Judgment for $79.87 and costs.

MASTER AND SERVANT.

[Hamilton District Court, 1879.]

Burnet, Avery and Cox, JJ.

LOVE V. THE O. & M. R. R. CO.

1. Where a car coupler is injured through the negligence of the car inspector, who exercised no authority over the former, such injury will be held to have resulted from the negligence of a fellow servant, and the company will not be liable, unless it was negligent in the employment of an unskillful, negligent or careless inspector.
2. The degree of diligence required of a railroad company in regard to the safety of its employees is simply ordinary diligence.

This was a proceeding to reverse a judgment of the superior court. Love was employed by the company in their yard attached to the depot in Storrs township. His particular employment was as a coupler of cars. He was under the supervision of the foreman of the yards, and at the time of the accident had his right arm badly crushed. He alleges that he was directed, in the night time, to couple two cars, one of which was stationary, and the other propelled by an engine backed up to it; that the
418 drawbar attached to one of the cars was out of *order; that his duty was to hold the link contained in the bar, and put it in the drawbar of the approaching car, and that the drawbar being broken, rendered the performance of the task more dangerous; and that he did not know of the defect; the evidence showed that his left hand had been injured by a previous accident, whereby he lost three fingers and a thumb, leaving only his little finger, with which he held the lantern when performing this operation. When employed by the foreman, the danger of the duties he assumed was spoken of, and the peculiar hazard in his case, because of the maimed condition of one of his hands. He had been previously employed in the same capacity on other roads. There was an inspector of cars at this yard to ascertain if any defect existed, but there was no evidence as to whether he performed his duty in reference to this car or not. It was claimed by the plaintiff that the accident was the result of the negligence of the company; that the accident was caused by the negligence of the inspector, and that the plaintiff could recover from the company, the inspector not being his fellow servant in the common employment of the same master.

BURNET, J.

Judge Burnet, in announcing the opinion of this court, said that in speaking of common service in conducting the active business of the road, servants somewhat disconnected in their business are necessarily included, and may, all properly, be regarded as fellow servants in operating the road. Manville v. Railroad Co., 11 O. S., 404, 425. But where one employee under the supervision and control of another, as a brakeman under the control of a conductor, is required to perform a duty, and in the performance of it meets with an accident by reason of the carelessness of the conductor, that is the carelessness of the company, because the conductor stands to the brakeman as the company itself. But in this case there was no such control exercised, and if the accident occurred by reason of the negligence of the inspector, it was by the negligence of a fellow servant the party was injured, and unless the company was guilty of neglect in the employment of an unskillful, negligent or careless inspector, it would not be liable, and of this there was no proof. It was contended that, it appearing this car was defective before the plaintiff undertook to make the coupling, the burden was thrown on the defendant to show that it was not by its neglect the defect existed. That is not the rule of law. Railroad Co. v. Thomas, 42 Ala. N. S., 672. The diligence that is required of the master with reference to the safety of those employed in his service is ordinary diligence. The degree of diligence required of a railroad company in regard to the safety of its employees is simply ordinary diligence. Where, by the negligence of a conductor or other agents in the opera-

tion *of a train an employee was thrown from the train it was held 419
that the rule of diligence applied to the company would be ordinary diligence; but if the party on the train was a passenger, the rule would be different, and the accident occurring without his fault, it would be requisite the defendant should show it was without the fault of the company. There was no evidence that the defect referred to was known to the other employees, or that the inspector was derelict in his duty. Judgment affirmed.

Hildebrandt, for Plaintiff in Error.

N. E. Jordan and W. G. Williams, Contra.

CHATTEL MORTGAGE.

[Hamilton District Court, 1879.]

Burnet, Avery and Cox, JJ.

JAMES TULLY v. ELLEN M. NASH ET AL.

An assignee can make a valid sale of property covered by a chattel mortgage.

This was a petition in error to reverse a judgment of the common pleas affirming a judgment of the probate court. The controversy grew out of an assignment and the proceedings which took place in the probate court under it. The assignment was subject to a chattel mortgage. At the instance of the holder of the mortgage, an entry was made in the probate court to the effect that, it appearing there were liens on the property transferred to the assignee, by consent it was ordered that the assignee should sell the property and bring the proceeds into court for distribution. An order was afterward made granting the privilege to the assignee to sell the property at private sale at not less than two-thirds of the appraisement, and under this order there was a sale of a portion of the property. This was confirmed. Subsequently, there was another sale of the residue of the chattel property and sale confirmed. In making a report of the sale, the items were stated to be subject to the claims of Ellen Nash and L. C. Robinson, and further subject to the expenses of the trust. A motion was made by Ellen Nash to obtain the proceeds of the property in satisfaction of her chattel mortgage, and this was resisted by the other creditors on the ground that the property sold was subject to her chattel mortgage, and her only remedy was by replevin; that the assignee was not vested with her interest, but only with the equity of redemption, and could only sell that.

BURNET, J.

Judge Burnet announced the opinion, holding that an assignee may make a valid sale of property covered by a chattel mortgage, and that the probate court, in making the order authorizing the assignee to sell, and providing that the liens subsisting on the personal property shall be paid out of the proceeds, *did not err. The common pleas affirmed 420
the judgment of the probate court, and this court affirmed the judgment of the common pleas.

C. H. Avery, for Plaintiff in Error.

Mallon & Coffey, Contra.

STREET RAILWAYS.

[Hamilton District Court, December, 1879.]

Burnet, Avery and Cox, JJ.

† TAPHORN ET AL. v. MARIETTA AND CINCINNATI R. R. CO.

Where a railroad corporation has agreed with the authorities having control of a street for laying therein their track and operating a railroad, an injunction will not be granted against the laying of the track at the instance of abutting property holders, unless the petition and proof show that access to their property is thereby injured.

This was an application to restrain the defendants from laying a track on Second street, between Wood and Park streets. The plaintiffs are the owners of the property abutting on Second street, between the two streets named. They allege that the city has made a contract with the defendants by which the defendants are permitted to lay the track in question; that it will deprive them of their access to their property and diminish the value thereof. They alleged also that they own the fee in the street, and that the use of the street by the defendants is inconsistent with their claim to the fee. The defendants deny that the laying of the track will obstruct the access of the plaintiffs, and they also deny that the plaintiffs own the fee in the street, admitting the other allegations of the plaintiff's petition. The plaintiffs claimed that they were entitled to an injunction until the defendants had condemned their property in the street and paid them for it.

Cox, J.

Judge Cox announced the opinion of this court. The streets of the city are under the control of the public authorities, whose duty it is to keep them open and in repair. The statute in reference to corporations provides that whenever any railroad company desires to occupy any street in a city, they may agree with the authorities thereof having the control of the streets for the use thereof; but this agreement is subject to any right which the abutting owners may have in the street, the railroad company being responsible to the private individuals for any damages they may suffer by reason of the agreement. This
421 *provision has never been declared to be in contravention of the constitution, and railroad companies have acted upon it ever since the adoption of the present constitution.

Whatever may be the rights of the plaintiffs in the fee of the street, whether they own it or not, the corporation is invested with the fee in trust for the uses of the public. The supreme court has decided with reference to public streets and property abutting on them, while the public have the right to use them for the purpose of locomotion, the only property that an abutting owner has in them is the right of access to adjoining property. If his right of access is injured or destroyed, that is an injury to his private property for which he is entitled to be compensated before appropriation is made. Where there is no appropriation of this access there is no property taken, and he is not entitled to have the company restrained.

† This case was cited 4 B. 988. See also 8 Rec. 489.

In this case the city ordinance provides that the track shall be laid level with the street, and so arranged as not to impede passage upon it, and the work is to be done under the supervision of the city civil engineer.

The plaintiffs must be remitted to the rights which they have under the law for damages against the corporation, and which are reserved to them not only by the corporation act, but by the ordinance in question. As to the claim of the plaintiffs that they own the fee in the street, the claim was denied by the answer. No proof being offered, their claim was not sustained. Motion overruled.

R. W. Kittredge, for the Plaintiffs.

Judge Hoadley, Contra.

REFUNDER OF TAXES.

[Hamilton District Court, 1879.]

Burnet, Avery and Cox, JJ.

†BOARD OF COM'RS OF HAMILTON CO. v. ECKSTEIN, HILLS & CO.

When a taxpayer makes a return of his property, embracing in two items, property which should only be returned once, this is not such an error as the auditor would be required to correct, and having paid the taxes on the whole property, he is not entitled to have it refunded.

ERROR.

The defendants made application to the plaintiffs for an order to the auditor to refund taxes amounting to $3,526, alleged to have been erroneously paid by defendants upon their personal property for the years 1875, 1876, 1877. The defendants alleged that when the assessor called upon them their clerk, either *from a misapprehension of the law or 422
without examining it, improperly returned the monthly value of all articles purchased for manufacture and the value of all articles on hand on the day preceding the second Monday of April which had been manufactured during the year, whereas the two items really and properly embraced only one item—the monthly average value of all articles received for manufacture. The blanks, when filled, were signed by Mr. Eckstein. The defendants claimed they were entitled to have the amount so erroneously paid refunded them.

Cox, J.

Judge Cox announced the opinion of this court. The law under which the defendants claimed relief, the law of January 16, 1873, only applied to the case of errors made by public officers, and not to the case of errors made by the clerks of private individuals. The auditor in this case was not called upon to decide what the law is with reference to the returning of property for taxation. The parties having taken upon themselves to decide what the law was and what properly should be put upon the duplicate, had determined the matter.

Judge Cox said he was very reluctant to announce the decision required of him by the law of the case, on account of the equities in favor

†This case was affirmed by the Supreme Court without report, June 5, 1883.

of the defendants, but the supreme court in the 31st O. S., 271, in the case of the Notre Dame University against the Commissioners of Montgomery county, had passed upon the question, and he could not hold otherwise. Judgment reversed.

C. W. Baker, for the Plaintiff.

H. M. Cist, Contra.

QUO WARRANTO.

[Hamilton District Court, 1879.]

Burnet, Avery and Cox, JJ.

STATE EX REL. DREW V. AMERICAN ECLECTIC MEDICAL COLLEGE.

Quo warranto for usurping the franchise to be a corporation must be against the persons guilty of the usurpation by their individual names or a name that comprehends them. When against a corporation for forfeiture of its franchise, judgment cannot be taken by default without the petition sets out the fact of forfeiture.

Petition in *quo warranto*, charging defendant with usurping, for the space of one year last past, and with still using, without charter, the liberties, privileges and franchises of being an incorporated body under the laws of Ohio, and of having a dean and faculty, issuing diplomas, etc. Submitted upon petition alone, without evidence, defendant being in default for answer.

AVERY, J.

If the case is for forfeiture of the franchises of a corporation,
423 *no cause of forfeiture is alleged. If it is against an incorporated body for assuming to be a corporation, the proper parties have not been made. For usurpation by a corporation the process must be against it by its corporate name; but for usurping to be a corporation the process must be against the natural persons committing the usurpation by their individual names or a name which comprehends them (4 Cow., 109). Nor does it help the case to say that upon information in nature of *quo warranto* against a corporation for forfeiture of franchises, cause of forfeiture may be set up by replication (10 Ohio, 535–542; 23 O. S., 121–126). At least it does not help now, when the case has not got beyond the petition. Besides, it depends upon the construction put on informations in the nature of *quo warranto*, the office of which is held to be not to tender an issue of fact, but simply to call upon defendant to show its warrant or charter for exercising the privileges and franchises named. Now, under the Code, as revised, *quo warranto* is a civil action, and proceeds not by information, but by petition (75 O. L., 814, 815). The case, indeed, has been submitted for judgment by default, which could not be unless an issue of fact were tendered, to be admitted by default.

Petition dismissed at costs of relator.

CONTRACTS—EVIDENCE.

[Hamilton District Court, 1879.]

Burnet, Avery and Cox, JJ.

DAVID SINTON v. M. EZEKIEL.

Evidence of prior conversations and negotiations regarding a certain contract are not admissible for the purpose of showing the circumstances under which the contract was made, and for the purpose of affecting the interpretation to be given it, when such testimony does not come within the rule permitting proof of surrounding circumstances to interpret ambiguities in a written contract.

This was a petition in error to the superior court. In that court Ezekiel filed his petition to recover the amount he claimed to be due upon a contract with the defendant, alleging that Sinton had invited the plaintiff to compete in making drawings for the rostrum, with the pedestal and statuary thereon, which he proposed to erect in this city; that the plaintiff, Ezekiel, in the city of Rome, prepared twenty-one drawings, which, together with a written communication explaining and expressing his ideas, he forwarded to Sinton; that thereupon Sinton entered into the contract sued upon; that the contract recited that in consideration of one thousand dollars, to be paid to Henry C. Ezekiel, the brother of M. Ezekiel, by Sinton, the said Henry C. Ezekiel, as agent for his brother, agreed that said Sinton might use the drawings and ideas, in whole or in part, for the erection of the rostrum in this city, and should the said Sinton proceed to erect said rostrum with a pedestal and statuary thereon, in accordance with or similar to the ideas *expressed by said M. Ezekiel, then said Sinton agreed to pay said 424
Ezekiel, upon the cost of the same, the sum of five per cent. This contract was executed in March, 1876.

The petition alleged that the defendant retained possession of the drawings, and afterward used the same in accordance with the contract, but refused to pay the $1,000 agreed upon, and asked judgment therefor.

The defendant, in his answer, denied that he invited the plaintiff to make the drawings, but alleged that the plaintiff himself asked the privilege of making them and competing with others in furnishing drawings; and alleged that he received the drawings before he entered into the contract sued on. He denied that he had ever made any use of the drawings, or that he was indebted as claimed. He alleged that he was obliged to abandon his project to erect the rostrum, and so informed the plaintiff, and that afterward and before suit was brought, upon the demand of the plaintiff, he returned the drawings.

BURNET, J.

Judge Burnet announced the opinion of the court.

Error, he said, was claimed by the plaintiff in error in the admission and rejection of testimony, and in the charge of the court. The court below permitted certain parol testimony to go in, on the claim of the plaintiff below that it was necessary to show the circumstances surrounding the parties at the time the contract was entered into in order that the contract might be properly interpreted.

It appeared that after the receipt of the drawings in November, 1875, by the brother of plaintiff, they were exhibited to Mr. Sinton, and he was permitted to take them to his own office for the purpose of enabling him the more carefully and leisurely to examine them, and to exhibit them to his friends for the purpose of obtaining their ideas with reference to them, in order that he might determine whether they were such as might suit him. The drawings remained in his possession until the contract was drawn. The court permitted the plaintiff below to read at the trial certain letters from his brother, M. Ezekiel, in which he was enjoined not to let the drawings go out of his possession unless he was paid for them the sum of $2,500. The defendant below objected to this testimony, but the court saw no error in admitting it.

The plaintiff below was also permitted to offer in testimony conversations and negotiations between his brother, as his agent, and Mr. Sinton, in reference to the possession of the drawings and the use to be made of them, for which the $1,000 sued for was to be paid, which occurred about the time the written contract was made. This testimony was also offered as showing the circumstances under which the contract was made, and for the purpose of affecting the interpretation to be given
425 to it, *the jury, being told that the contract must speak for itself, and that this evidence was only allowed for the purpose of throwing light on the contract, which was to be interpreted in view of the circumstances under which it was to be made.

In the opinion of this court this testimony did not come within the rule permitting the proof of the surrounding circumstances to interpret ambiguities in written instruments. Notwithstanding the caution given the jury by the court, they might very well be misled and conclude that these negotiations were to be considered by them as a part of the contract. The testimony was incompetent, and the court could not say that it was not prejudicial to Mr. Sinton, since, if allowed any weight at all, it would be to vary what we think to be the true meaning of the writing.

The interpretation given to the contract by this court is, that if Sinton should use the drawings and ideas of Ezekiel for the erection of a rostrum, he was to pay $1,000 to Ezekiel for their use. The counsel for the plaintiff below claimed that the $1,000 was to be paid at all events for the privilege of using the drawings and ideas, whether he ever built the rostrum or not. But not so. The obligation to pay the money was to be consequent upon the use and not merely upon the license to use the drawings. It did not appear either that the drawings were delivered to Mr. Sinton in pursuance of the contract, but long before, for the purpose of letting Sinton examine them more leisurely.

Judgment reversed.

J. F. Baldwin, for Plaintiff in Error.

Long & Kramer, Contra.

BILLS AND NOTES.

[Hamilton District Court, 1879.]

Burnet, Avery and Cox, JJ.

MARK BURNS v. DORINDA SEEP.

In an action upon certain notes given by defendant for furniture purchased of plaintiff, the defendant may set up as a defense that such notes were given for furniture sold for the purpose of keeping a house of prostitution.

BURNET, J.

Petition to reverse a judgment of the common pleas for error. The suit was brought upon notes given by the defendant to the plaintiff for furniture purchased by her. Her statement was that she and her sister were earning a livelihood in Covington by sewing, and that on the suggestion of plaintiff that by receiving company they would make a better living—in other words, by keeping a house of prostitution—they removed to Cincinnati and rented a house, and that to enable the defendant to carry on the business of prostitution, the plaintiff sold furniture to her, which was the consideration of the notes sued on. In the common pleas a verdict was rendered for the defendant. Judge Burnet announced the opinion of this court, affirming the judgment.

T. A. Lane, for Plaintiff.

C. W. Cowan, Contra.

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*JUDGMENT—JURISDICTION—INJUNCTION. 426

[Hamilton District Court, 1879.]

Burnet, Avery and Cox, JJ.

†R. MEYER v. F. MEYER.

Where a case has been tried twice on the theory that the court had jurisdiction, and judgment has been rendered, it is then too late to insist on the want of jurisdiction and seek to enjoin the execution of the judgment.

Judge Burnet delivered the opinion of this court, coming up on appeal. It was claimed that the court had no power to enjoin execution of a judgment, and that the proper course to pursue was to go into the court where the execution had been issued and have it recalled.

The court held that after the case had been twice tried on the theory that the court had jurisdiction, it was too late now to insist on the want of jurisdiction.

Injunction made perpetual.

Jordan & Bettman, for Plaintiff.

Hildebrandt and E. M. Spangenberg, Contra.

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†For other decisions in this case see 3 B., 985; 4 B., 368.

PARTITION—ESTOPPEL.

[Hamilton District Court, 1879.]

Burnet, Avery and Cox, JJ.

†LEONARD BAUER v. HENRY LOHR, ET AL.

Where a husband unites with his wife in signing a partition deed, he is not thereby estopped from claiming a right of way across the share allotted to another heir.

APPEAL.

Bauer purchased, in 1870, from George Klunst, a tract of land on Lickrun, at the same time purchasing a right of way over the remaining land of Klunst to the road leading to the Lickrun turnpike. The defendant, Mrs. Lohr, wife of Henry Lohr, became the owner, by partition proceedings, of a lot over which the right of way granted to the plaintiff lies, Mrs. Lohr and the wife of the plaintiff being the daughters of Klunst. The plaintiff claimed that the defendants threatened to close up this right of way, and he asked an injunction to enjoin them. The answer of the defendants, admitting the purchase by Bauer, claimed that Bauer was estopped by having, with his wife, entered into the partition proceedings, and united with her in the conveyance of property held by the defendant to the defendant, from setting up any interest in the property conveyed. Bauer claimed that he had no interest in the property held by the heirs of Klunst other than his tenancy by courtesy, and that there was no consideration in the deed made by the heirs to the defendant other than the partition made between them.

BURNET, J.

Judge Burnet announced the opinion in this court, holding that the plaintiff was not estopped by the conveyance, having united with his wife for the simple purpose of aparting to the defendant her share of the estate, from claiming a right which he holds independently of the title under which the partition was made.

Decree for plaintiff, perpetually enjoining the defendant.

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*SALES—PRACTICE.

[Hamilton District Court, 1879.]

Burnet, Avery and Cox, JJ.

HUGH CAMPBELL v. WM. CORRY.

Granting of motions to confirm sales made under orders of sale in a case.

BURNET, J.

In this case Judge Burnet announced that the motions to confirm the sales made under orders of sale in the case would be granted. With reference to the case of Corry against the city of Cincinnati for mandamus,

†This case was affirmed by the Supreme Court without report, 10 B., 364.

the court was unable to agree as to the principles and law governing the case, the case presenting important and difficult questions; and if either counsel would make the motion to reserve the case to the supreme court, it would be reserved.

The motion was made by Mr. Crossley on the part of the city. Some discussion ensued as to just what course would be pursued in the case. Counsel for Mr. Corry desiring to confer as to whether or not they would permit a judgment to be taken against them *pro forma*, dismissing the mandamus in order to the more expeditiously get a hearing in the supreme court the matter was laid over for a day or two. Finally, by consent, judgment *pro forma* was entered for defendant.

O'Connor & Glidden, for Corry.

Crossley, for the City.

John Warrington, for Plaintiff.

DEEDS—HUSBAND AND WIFE.

[Hamilton District Court, 1879.]

Burnet, Avery and Cox, JJ.

SOPHIA DOMEIER v. MARY WAGNER.

Where a wife furnishes her husband with money with which to purchase certain property and have the deed made in her name, and the husband fraudently has the deed made in his name and afterwards procures the services of a notary and has his name erased from the deed and that of his wife substituted: *Held*, that no title could be thus conveyed out of the husband, except by separate deed, but that the husband was the trustee for the purpose of purchasing this property for his wife, and that as against the attaching creditors of the husband, the wife's title to this land would be quieted.

APPEAL from Common Pleas.

Plaintiff filed a petition to subject certain property, the title of which, upon the record, was in the name of Mary Wagner, to the payment of a judgment against John Wagner for the sum of $3,500. The claim in the petition was that John Wagner purchased a lot on Calhoun street from one Scully; that he took the deed in himself; that he paid the purchase money out of his own means; that he subsequently had the deed changed, erasing his name and inserting that of Mary Wagner, his wife; that this change in the name was made about the time the plaintiff obtained her judgment. Plaintiff asked to have this property declared to be the property of Wagner, and subject to the payment of her judgment. Mary Wagner, who was the former wife of John Wagner, answered, denying that the property was the property of her former husband, claiming that it was her own property, purchased with her own means, partly derived from money which she brought to her husband when she married him, and partly money which came to her subsequent to the marriage, and part of the consideration being money which he *agreed to pay 428
her upon her signing a deed releasing her claim for dower in certain property on Bremen street, in this city; that at the time of the sale of the property on Bremen street he agreed to purchase this property from Scully and convey it to her, and that if there were any erasure in the

deed, changing the grantee from John Wagner to Mary Wagner, it was done without her knowledge; that when she received the deed she was the grantee in it, and has ever since been in the occupancy of the premises.

Cox, J.

Judge Cox decided the case. The court found, on the whole case, that Mrs. Wagner gave her husband certain notes and bonds and money for the purpose of purchasing the Scully property, the title to be made to her. The circumstance was undisputed. There was a great difference between her and her husband at that time. She was about to institute proceedings for divorce on account of his conduct with another woman. She had little confidence in him, and called her children around her and gave her husband the money, saying that if he cheated her that time she would send him to the penitentiary. He purchased the property, and the title was taken to himself, showing that her confidence was not as fully carried out as it might have been; but before delivering the deed to her he called upon a notary, who, very irregularly, to say the least, but to whom the court could not impute any improper motives, summoned before him the grantor in the deed and John Wagner, the grantee, and erased the name of John Wagner and inserted that of Mary Wagner. This would not convey the title to Mary Wagner. The deed having been conveyed to John Wagner, no title could be conveyed out of him except by a separate deed. But the court thought the testimony made out a clear case that John Wagner was the trustee for the purpose of purchasing for Mary Wagner the property, and that he should have taken the title in her name, and that as against the plaintiff and the other person who held an attachment against John Wagner, Mrs. Wagner's title ought to be quieted. Decree accordingly.

F. Lampe, for Plaintiff.

Hildebrandt, Contra.

ERROR.

[Hamilton District Court, 1879.]

Burnet, Avery and Cox, JJ.

EDWARD L. PAYTON v. E. R. MULLINS ET AL.

A petition in error will lie to the overruling of a motion made by defendant who had been arrested on an attachment proceeding.

This was a motion to dismiss a petition in error. It was filed to reverse an order of the court of common pleas. An action was com-
429 menced against Payton in that court by Mullins & Crigler to recover a judgment for some $1,900. An affidavit was * made charging Payton with having money in his possession, which he refused to apply to the payment of his debts, and having conveyed his property away with the intention of defrauding his creditors. Payton was arrested and placed in custody of the sheriff. Motion was made by him to set aside the order of the arrest in the court below, and a number

of affidavits were filed to substantiate his claim, charging that the affidavit was not true. This motion was overruled, and this petition in error was filed. The defendants in this court objected that no petition in error will lie to this court to reverse a judgment of the court of common pleas upon such an order, because it was not such a final order or a final judgment as the Code provides to which a petition in error will lie.

Cox, J.

Judge Cox announced the opinion of this court, and held under that provision of the Code found on page 804 of the 75th Ohio Laws, the proceeding to issue the order of arrest against Payton was a special proceeding. He had a right, under the statute, to file a motion to have that order set aside, and to support that motion by affidavits, and most certainly, if that motion were overruled, a substantial right of his was effected, because he was left in the custody of the sheriff, and the court knew of no other manner in which this provision of the Code might be reviewed upon the determination of the motion except upon a petition in error. The court were clearly of the opinion that it came within the provision of that statute, and was reviewable upon error in this court. There was no bill of exceptions in the case, and the affidavits were not made part of it, and, therefore, the court could only determine the motion for the dismissal of the petition in error, and that would be overruled.

Judge Yaple and C. H. Blackburn, for Plaintiff.

John Johnston and Buchanan, Contra.

BUILDING ASSOCIATIONS.

[Hamilton District Court, 1879.]

Burnet, Avery and Cox, JJ.

MILTON H. COOK v. W. H. HENDERSON ET AL.

The officers of a building association, although trustees of the property of the association, do not occupy that relation toward a purchaser with whom they deal for the sale of their individual stock.

APPEAL from the Common Pleas.

The case stood on petition and demurrer. The plaintiff alleged that, desiring to borrow a thousand dollars, he applied to one Montgomery, a money broker and treasurer of a building association, who suggested that he should become a member and obtain the money from the association; that the defendant, Henderson, was the secretary and upon the representations of the latter that by becoming a member he could get what money he *wanted, and at the expiration of the association he 430
would probably get back most of the money put in, he became the owner, by transfer from Henderson, of five shares, on which he drew the money; that the par value of the shares was $2,100, to secure which he gave the association a mortgage; that the association had been in existence three years, and that the amount he should have received was $1,300, while he did receive only $1,000, by reason of the fact that a premium of $300 was charged without his knowledge; that he continued a member for three years more, and, by paying dues for another year in advance, was permitted to withdraw, and his mortgage was canceled; that he paid during

this time dues, interests and fines, in all $1,606; that Henderson acted for him in making the payments, and this amount included $247 more interest than he should have paid; that Henderson and Montgomery were officers and trustees of the association and for the stockholders, and that they had combined together in this transaction with him, and had speculated in the shares of the association; and that by the retaining the $300 premium he had been damaged to that amount, which, with interest overpaid, was $547. The prayer of his petition was that Henderson and Montgomery be decreed trustees, and that he have a decree against them for this amount, and that the association be required to file an itemized account of its transactions with Henderson and Montgomery, and that he have proper relief against the association.

AVERY, J.

Evidently there is a misjoiner of causes of action; but the demurrer is general, and presents only the question whether against any of the defendants a cause of action is alleged. If the suit is for damages on the ground of fraud, the petition is defective. That plaintiff would probably get back his money at the expiration of the association, might have turned out not to be true, even if he had not seen fit to withdraw, but there is nothing in the petition to show that the parties making the statement had not reason to believe it to be true. Plaintiff alleges that $300 premium was retained without his knowledge, but there is no averment of deceit by the defendants. The want of any allegation of deceit would render the petition defective if it were to recover damages on the ground of fraud. Besides, the case is here on appeal, which could not be if it were for damages on the ground of fraud. The case must stand, then, if at all, on the ground that Henderson and Montgomery, as officers of the association, were trustees, and speculated in the property of the association to the detriment of plaintiff as a stockholder. The ordinary principle is that a trustee cannot deal in the trust property to his own advantage, and if he does, he shall be held to
431 *have acted for the benefit of the *cestui que* trust. This applies to the directors of a corporation. The property of the corporation is a trust fund in their hands for the benefit of its creditors and stockholders (Goodin v. Canal Co., 18 O. S. 169-182). But in this case the shares were not the property of the association, but were the property of Henderson. Besides, if they had been the property of the association, Henderson would have been trustee for the corporation, to whom they belonged, and not for the plaintiff, to whom he was selling them. While it is the rule that a building association cannot charge interest on premiums paid for precedence of loans, in this case the transaction alleged was for shares owned by Henderson. Stripped of the verbiage of the petition, the transaction was this: Henderson, having paid dues for three years on the five shares, sold them to plaintiff, and out of the par value of the shares, at he same time advanced by the association on plaintiff's mortgage, retained the dues he had paid and $300 premium, paying the balance to pla intiff. Possibly the shares, as he had sold them to plaintiff, were worth more than simply the dues he had paid; at all events, he charged more.

Demurrer sustained and petition dismissed.

A. A. Ferris, for Plaintiff.

Carr & Callahan, Contra.

LEASE—MOTION.

[Hamilton District Court, 1879]

Burnet, Avery and Cox, JJ.

WM. PARVIN v. JAMES GILMORE.

An order for the payment of rent sustained.

The defendant filed his petition in the court below in November, 1878, alleging that he was the owner of twenty acres of land in Columbia township, which he had leased for the term of sixteen years to one Wilson, subject to an annual rent of $100 and taxes; that Wilson assigned his lease to Parvin and that Parvin had made sub-leases to various parties, who were made defendants to the petition. The plaintiff alleged that the ground rent was in arrears for two and a half years, and that Parvin had allowed the land to become delinquent for taxes, and he claimed that the lease reserved a lien for rent and taxes upon the leasehold of Parvin and his sub-lessees.

In February last A. J. McGarry was appointed receiver to collect the rents. The entry appointing the receiver also found that Parvin claimed to have sold his interest to W. B. Underwood, and to have rented of him the homestead of which he was in possession for three years from August 1, 1878. The court directed the receiver to collect from Parvin $20 per month for the premises he occupied. Parvin afterwards moved to modify *the entry by striking out the order to collect rent from him for the 432
first year on the ground that a year's rent had been paid in advance. The motion was overruled.

BURNET, J.

Judge Burnet announced the opinion of this court. He found that the bill of exceptions taken to the action only recited the motion and the overruling of it. There was no other bill of exceptions filed. There was nothing to show that any testimony was heard upon the motion. Every presumption on behalf of orders of court must be exercised in order to sustain such orders upon error. For all that appeared, Parvin might have consented to the original order. It might have been heard upon full testimony, nor is it shown that any rent had been paid in advance. There was nothing before this court to impugn the action of the court below, and, giving the court below the benefit of the general presumption, the judgment must be affirmed.

SCHOOLS—ELECTIONS.

[Hamilton District Court, 1879.]

Burnet, Avery and Cox, JJ.

STATE EX REL. LANGDON V. GOODALE.

Alleged conspiracy in ousting a member of a school board.

The relator alleges that in the spring of 1870 he was elected school director for the Linwood district for three years, and performed the duties of that office until the September following his election, when, after the adjournment of a regular meeting of the directors, the president conspiring with three of the members who remained at the place of meeting, Goodale was sworn into office, and has ever since continued in the exercise of the duties of that office. The relator asked a judgment of ouster against the defendant and of induction of himself. The defendant denies that the relator was elected a member of the board, alleging that he himself received a majority of all the legal votes cast at the election referred to; that there were sixty-two cast for the respondent and that there were but sixty legal votes cast for the relator, but that there were two illegal votes cast for the relator. To this answer there was a general demurrer.

BURNET, J.

Judge Burnet announced the opinion of this court. He held tha the relator, in order to prevail, must depend upon the strength of his own title. There is no special provision for the contest of the election of a school director. The method, therefore, adopted in this case was the only method by which a contest could be had. The answer was demurred to as not setting up a sufficient defense. It appeared from the answer, which for the purpose of this decision of the demurrer, must be taken as true, that the relator was not elected, although he received
433 *the certificate of election, but, on the contrary, that the respondent was. If this were the state of fact, the certificate ought to have issued to the respondent, and in a contest such as now made, the court necessarily must go behind the certificate to ascertain for whom the majority of the votes was actually cast. It appearing by the allegations of the answer that the respondent received a majority of votes cast, unless the relator desired to reply and go to trial upon the facts, judgment of dismissal would have to be granted. Leave was taken to reply.

Crawford & Gobel, for the Relator.

Wm. E. Jones, Contra.

*MISNOMER—JUDGMENT—INJUNCTION. 477

[Hamilton District Court, 1880.]

Burnet, Avery and Cox, JJ.

PERIN AND GAFF v. JOHN EGGER.

1. An injunction will not lie against the levy of execution upon a judgment on account of misnomer, where the party has appeared.
*2. At common law the only remedy in case of a misnomer of a defendant was by plea in abatement, setting forth the true name. 478
3. Under the Ohio Code of Civil Procedure, the court may disregard any defect which is not prejudicial to the substantial rights of the adverse party.
4. The identity of the party sued and served with process is a matter of proof. The facts are sufficiently stated in the opinion.

Appeal from the Court of Common Pleas.

AVERY, J.

The Sheriff has levied upon the undivided third of certain real-estate, situate in the city of Cincinnati, owned by J. W. Gaff & Co., being the interest of Oliver Perin, one of the firm. This is a suit to enjoin further proceedings under the levy. The judgment was in favor of John Egger. In December, 1876, Egger brought his action in the court of common pleas for damages against James W. Gaff and Oliver L. Perin, describing them as partners, doing business under the firm name of J. W. Gaff & Co., and alleging that while driving upon the highway, he was driven into carelessly by Joseph Powell, a servant in their employ. Summons was issued and was returned "served the defendants, James W. Gaff, at his residence, and Oliver L. Perin, personally."

The answer of the defendants was filed by "Moulton, Johnson and Levy, attorneys for defendants." It was verified by James W. Gaff, and admitted the partnership, and that the plaintiff, Egger, was injured by collision with a vehicle driven by a servant in their employ, but it denied all other allegations.

In April, 1879, the case came on to be tried. Before the jury was sworn an entry was made as follows: "Now comes Oliver L. Perin and, by leave of the court, becomes a defendant hereto, and enters his appearance and files his separate answer."

The separate answer of this Oliver L. Perin denied that he was a member of the firm of J. W. Gaff & Co., and alleged that he bore no relation to the firm but that of clerk and bookkeeper. At the close of testimony for plaintiff, it was moved that the testimony be arrested from the jury on the ground that there was nothing to charge him, but the court overruled the motion. The jury rendered a verdict for $2,500, and before the verdict was rendered, the plaintiff, of his own motion, discontinued the suit as to "the Oliver L. Perin, who had lately appeared and filed a separate answer." After the verdict a motion for a new trial was filed by Moulton, Johnson and Levy; whereupon the plaintiff moved to strike this motion from the files, upon the ground that Moulton, Johnson and Levy had filed the motion for themselves and not on behalf of any party, which motion, the court having first given these attorneys the opportunity to state for whom they appeared, granted and entered.

*judgment upon the verdict, at the same time overruling the plaintiff's motion to amend the petition and summons and return by 479

striking therefrom the initial "L," so as to make them "Oliver Perin" and not "Oliver L. Perin." The judgment was against "Oliver L. Perin as surviving partner of the firm of J. W. Gaff & Co."

The question now is whether this judgment can be enforced against Oliver Perin, it being conceded that he is the surviving partner of James W. Gaff & Co.; but upon the other hand it being equally true that his name is not Oliver L. Perin.

Oliver Perin and Oliver L. Perin are different names; but names are only used to identify persons, and there may be other means of identity. The suit was intended to be against Oliver Perin, because it was against the members of the firm of J. W. Gaff & Co. for an injury to the plaintiff, Egger, by a servant in their employ, and the only other member of that firm besides James W. Goff was Oliver Perin. The suit was actually against Oliver Perin, because he was the one served personally with process. This fact is shown by the testimony of M. T. Antrim, the deputy sheriff, who, before he had become deputy sheriff, had been a business man on Pearl street, and to him Oliver Perin and the firm of James W. Gaff & Co., were well known, and it was also well known that Oliver Perin, of the Third National Bank, was partner with Gaff in that firm. The deputy testifies positively that he went to the Third National Bank and served Oliver Perin personally, and his positive testimony, with the circumstances which corroborate it, convince the court of the fact.

At common law, if a man was sued by a wrong name, he could only take advantage of it by a plea in abatement for misnomer. The rule in civil and criminal proceedings was the same.

The case of Price v. The State (19 Ohio 123), in which it was held that Horace Westerhaven was a different name from Horace B. Westerhaven, was where the question was not as to the name of the accused, but as to the name of a third person, the person against whose property the crime had been committed.

Under the code of civil procedure there is some uncertainty as to how advantage shall be taken of a complaint in the wrong name; it being held in New York that it can only be taken by answer. 40 N. Y., 497. In this state where suit was brought against certain persons, jointly as partners under the name of The Farmers' Saving Bank, an answer that the persons were organized and acting in the premises as a corporation, was held to present not a simple denial of the allegations of the petition, but a statement of new matter. Ridenour v. Mayo, 29 O. S., 138, 145.

480 *Whether under the Code advantage is to be taken by answer or in some other way, the defect is one that it is within the power of the court, under the liberal rules of the Code, to correct. A person may be sued by a fictitious name, if the plaintiff is unable to ascertain his true name, on stating in an affidavit that he is unable to ascertain the true name, and by inserting the true name when it is ascertained; amendments may be made before or after judgment by adding or striking out the names of a party, or correcting a mistake in the name; and there is the further provision that the court must disregard every defect which is not prejudicial to the substantial rights of the adverse party.

Oliver Perin having been served, he, by that service, was identified as the party sued. Not having set up by his answer the defect in his name, judgment went against him by the name by which he was served. It is not material to inquire whether judgment can be taken against a

party served by a wrong name, without his appearance, because in this case the answer of the defendants was filed. It is true it was verified only by James W. Gaff, and it is also true that the cause of action was not upon contract, but was for an injury done to the plaintiff, Egger, by a servant in the employ of the defendants. But the allegation of the petition was that the defendants were partners, and that this servant was in their employ as partners, and, although the answer was verified by James W. Gaff alone, it purported on its face to be the answer of both the defendants filed as it might properly be on the ground that they were united in interest, and verified as it might properly be by one of them. The attorneys who filed the answer continued to act as the attorneys in the suit until the verdict was rendered, and certainly they represented some defendant in the case. James W. Gaff had died, and prior to the trial suggestion of his death being made to the court, the court had abated the cause as to him. The action then proceeded against Oliver L. Perin, named as his partner.

The Oliver L. Perin who filed his separate answer was nephew of Oliver Perin, and had not been served. The deputy sheriff testified that he made no service upon this Oliver L. Perin, and the entry of the court shows the fact by giving this Oliver L. Perin leave to become a party and enter his appearance, and then prior to the verdict discontinuing the case as to this Oliver L. Perin leaving the verdict to be rendered against the Oliver L. Perin who was served.

The plaintiffs in error contend that Egger had his opportunity to amend, and further that the court of common pleas refused him leave to amend, and therefore, because he failed to obtain leave to amend, that he is estopped; and that because *the court overruled his motion to amend, it is adjudicated against him that the Oliver Perin upon whose property the judgment has been levied is not the Oliver L. Perin against whom the judgment was rendered. But, without entering into the motives that might have induced the court, in the midst of the various motions in the cause to pursue a direct course, our conclusion is not that the court refused leave to amend, because the Oliver Perin who now seeks to enjoin the judgment was different from the Oliver L. Perin against whom the judgment was rendered, but rather that it was not needed in furtherance of justice to grant the motion. 481

In other words, it would make no difference whether the amendment was made or not. The party being identified, his appearance being entered in the action, the issue being tried, the verdict rendered, the judgment entered, the rest followed naturally. Our conclusion is that the property is subject to the levy. The petition for injunction will be dismissed.

Moulton, Johnson and Levy, Attorneys for Plaintiffs.

Wm. Disney and J. C. Hart, Attorneys for Defendant.

SCHOOLS—TAXATION.

[Hamilton District Court, 1880.]

Burnet, Avery and Cox, JJ.

STATE EX REL. BOARD OF ED. v. CAPPELLER, AUDITOR.

Where, at the time of the levy for school purposes, of the amount estimated by the board of education of a township district; and the date fixed by law for

return of the enumeration, on the basis of which the fund raised by state levy is apportioned, the district consisted of seven subdistricts; the amount for which the auditor should give his order on the county treasurer, under the act, 70 O. L., 195, Sec. 120, in favor of the treasurer of the township district, is not affected by the fact that before the levy was collected four of the subdistricts became, in the manner provided by 75 O. L., 120, special districts.

Petition for mandamus to compel the auditor to draw an order on the county treasurer for $1,304 school funds. The auditor answered that he had already drawn his warrant for the amount in favor of certain special school districts.

AVERY, J.

The money is the balance of the school levy of 1878 for Columbia township. At the time of the levy the township district consisted of seven subdistricts, but afterward, by petition to the township board under the act, 75 O. L., 120, four of these districts became special districts. For the first half of the taxes of 1878 the auditor, in February, 1879, as required by *law, settled with the county treasurer and drew his warrant in favor of the township board. At that time the auditor did not know of the organization of the special districts. Indeed, they had not been fully organized. When the last half of the taxes of 1878 were collected, he drew his warrant for an approximate two-thirds in favor of the township board, but being notified afterward, before settlement with the county treasurer, by the treasurers of the special districts, he distributed the balance by warrant on the county treasurer, among them. The board of education of the township went on supporting the schools in the special districts without regard to their organization as special districts, so that with the money they received and the distribution made by the auditor in their favor, they have had more than their ratable share.

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The question turns upon the construction of the school laws in connection with the duties of the county auditor.

In the infancy of the school system, the organization was by separate school districts. Local taxes were levied and collected at first by the districts themselves; afterward, by the county auditor and treasurer, the same as other taxes. Each township was credited by the auditor with the amount collected on its duplicate for the use of schools, which was distributed by him to the several school districts in proportion to the number of householders in each. Chase, 1466, 1636. Subsequently, the apportionment made by the auditor to each district was directly credited to it. Chase, 1872. Finally, by the act of 1838, he was required, immediately upon the apportionment, to give to each township treasurer an order on the county treasurer for the amount belonging to the several districts of the township. Swan, 835,836. The basis of the apportionment was the enumeration of youth in the respective districts returned to him by the the township clerk. The apportionment was to be made by the auditor immediately after his annual settlement with the county treasurer.

Thus stood the law when the act of 1853 was enacted, making the separate districts, subdistricts, and organizing the township itself into a school district. S. & C., 1346. A levy upon the grand list of the taxable property of the state was provided, and the board of education of each township authorized to estimate such additional amount on the dollar of the taxable property of the township as might be necessary, not exceeding a certain limit. The state fund, apportioned among the differ-

ent counties by the state auditor, was to be apportioned by county auditors according to the enumeration of youth, and no township or other district, city or village, failing to make and return such enumeration was to receive any portion. All moneys collected on the tax duplicate of any township for the use of * schools were to be apportioned by 483
the auditor to such township.

The act of 1853 was superseded by the act, 70 O. L., 195, but in these particulars there is no substantial change.

Thus, from the beginning, it has been the duty of the auditor to apportion the school funds, but the rule of apportionment has been fixed. When the organization was by separate school districts, his duty was to apportion among the districts according to the enumeration. When the township system was organized, his duty to apportion stopped with the township, so far, at least, as the sub-districts were concerned. To each township the money for school purposes collected on the duplicate of that township was to be apportioned, leaving only the state fund for school purposes to be apportioned according to enumeration.

The time of this apportionment is not material. The auditor is required to make it annually, immediately after his settlement with the county treasurer. But the statute requires him to settle twice a year with the treasurer. Neither of these installments settled for by the auditor could be diverted, however, from the township, upon the duplicate of which the amount was levied, to special districts, organized after the levy had been certified to him, and after the enumeration and returns upon the basis of which the state fund is distributed, were complete. The tax duplicate of a township for school purposes consists of all taxable property of the township, not within a city, village or special school district. Whether taxes are collected upon such duplicate depends on whether they are levied upon it. The condition of things at the time of the levy, therefore controls. As to the state fund, only such districts as should make and return an enumeration, would be entitled, and this could only be done once a year between the first Monday of September and the second Monday of October.

This holding does not result in any hardship to the special districts in this case, because the board of education has distributed to them the proper proportion of all the funds on hand. Nor could it in any case, the provision with reference to the support of joint subdistricts, 70 O. L., 204, Sec. 35, extending by analogy to special school districts, under 75 O. L., 120.

The state of the pleadings does not require the court to consider the effect of the order when drawn by the auditor upon the treasurer, since, while the answer does allege that the auditor had drawn a warrant in favor of the treasurer of the special districts, it does not allege that it had been paid.

Writ allowed.

J. S. Demar, for Relator.

C. W. Baker, Contra.

484 # *COVENANTS OF TITLE.

[Hamilton District Court. 1880.]

Avery, Cox and Johnston, JJ.

WILLIAMS v. HOLCOMB, ADMR.

Where a grantor in possession conveys by deed containing full covenants of seisin and of general warranty, and thereafter the grantee, being in possession, mortgages the estate to a third party, as long as said mortgage remains unpaid, the right to sue and recover damages for a breach of the covenants contained in the deed of grantor, belongs to the mortgagee, and not to the mortgagor (the grantee in the deed). The covenants were real, running with the land, and passed to the mortgagee by the mortgage deed.

APPEAL from Court of Common Pleas.

In 1856 John Mitchell, being the owner of 277 acres of land in Clermont county, by deed containing covenants of seisn and general warranty conveyed these lands to John Dickbraker. In 1892 a party named Greene commenced an action in ejectment to recover the title to this property against Dickbrader in the United States circuit court for this district Various other parties owning adjacant land were also joined in this suit. In 1867, the ejectment suit still pending, Dickbrader, with others interested, instituted in that court an injunction suit to enjoin the proceedings in ejectment. While these two suits were pending, in 1869 Dickbrader mortgaged these lands to a corporation known as the Lake St. Clair and Upper River Ice Company, for $9,000, the mortgage containing the usual covenants of seisin and general warranty. In 1874 the injunction suit in the circuit court was tried and the equity of the case found to be with Dickbrader as to thirteen-fifteenths of the land, and as to the remaining two fifteenths the equity was found to be with Greene. Dickbrader, then, under the occupying claimants at law, set up a claim for his improvements upon the two-fifteenths. He elected to hold the land, and the court found that there was still due to Greene, on account of the two-fifteenths, $1,030 and costs, amounting to $1,232. This sum was decreed to be a lien upon all the land belonging to Dickbrader and involved in that suit. Before this trial and judgment of ouster, the ice company had commenced a foreclosure suit upon the mortgage in the Clermont common pleas against Dickbrader, and recovered. Greene was made a party to that suit and found to be the owner of the first lien. The Ice Company was found to be the owner of the third lien, and other liens were adjudged. The property was not sufficient to pay all
485 *of the Ice Company's mortgage, leaving a balance of some $1,700. Dickbrader having thus been ousted as to his two-fifteenths and sold out as to all, he sought to assign to the plaintiff, Williams, his claim for damages against Mitchell arising upon his covenants of warranty. The plaintiff then instituted this suit to recover upon that claim. The Ice Company being made a party, defendant also sought to recover upon the covenants of seisin and warranty, claiming that any damages arising upon the breaches thereof belonged to it, as its mortgage was due and unsatisfied when the eviction took place, which was by decree of the circuit court in 1874. Plaintiff claims that the eviction took place in 1862, when the ejectment suit was instituted against Dickbrader, that the covenants were personal and did not run with the land.

JOHNSTON, J.

Whether the covenants in the Mitchell deed to Dickbrader were real or personal, depended upon the question whether Mitchell was in posession of the land at the delivery of his deed. The agreed statement of facts shows that he was and that he put Dickbrader in possession under his deed, who remained in possession until the eviction in 1874 as to two-fifteenths of the land. If the grantor at the time of the conveyance be not in possession either in fact or in law, the covenant of seisin and power to convey are *in presenti* and personal, they are broken as soon as made, and the right of action belongs to the grantee for the breach; upon his death, the right to sue passes to the executor and not to the heir.

If the grantor be in possession at the date of the delivery of the conveyance, although he may be in by his own disseisin, those covenants are real and run with the land. Upon the death of the grantee or his assigns, the right to sue and recover damages thereon belongs to the heir and not to the executor. They pass to each successive grantee by the deed of grant, and whoever is in possession when the eviction occurs, has the right to sue upon these covenants. No action can be maintained upon the covenants as long as the grantee remains in possession. His possession may ripen into a perfect title. It is only when he is evicted of his possession by title paramount that he may sue. 3 Ohio, 211, 17 Ohio, 52.

Hence the covenant in the deed to Dickbrader being real covenants running with the land, what was the effect thereon of his mortgage to the Ice Company? The conditions, it will be remembered, long before the eviction took place, had become broken, and the debt remained unpaid. By the grant contained in the mortgage deed every interest of Dickbrader passed to his grantee, the Ice Company. All his real covenants received from Mitchell passed. He retained the possession of the land, it is true, but it has been settled that while as against the whole world, except the mortgagee, the mortgagor in possession is the *owner of the legal title, that as between the mortgagor and mort- 486
gagee, and those claiming under them, the legal title is vested in the mortgagee. 24 O. S., 114; 15 Ohio, 671; 10 Wallace, 529. Upon payment of the debt, without further act, the legal title reverts to the mortgagor. Upon nonpayment all that is left to him is the equity of redemption. Hence the legal title being in the Ice Company, when the eviction took place, and the breach having then occurred, and its mortgage being due and unsatisfied, it alone had the right to sue and recover upon the Mitchell covenants to an extent sufficient to cover the balance due on its mortgage, and to it alone belonged that right. 11 Ben. Monroe, 22. Dickbrader had lost nothing. He obtained full consideration for his deed, from the Ice Company. The Ice Company was the loser. Greene took the value of the two-fifteenths of the land from it. As the damages due from Mitchell amounted to $1,232, not enough to pay the balance due the Ice Company, there is nothing left for Jacobs, the second mortgagee of Dickbrader. Decree for the Ice Company for the $1,232.

Perry J. Donham, for Plaintiff.

Wulsin & Worthington & P. F. Swing, for Ice Company.

Temple & Temple, for Jacobs.

Boyce and Boyd, for Mitchell's Administrator.

PARTY WALLS.

[Hamilton District Court, 1879.]

Burnet, Avery and Cox, JJ.

†PENDLETON AND WOOLLEY, TRUSTEES v. FOSDICK.

Privity of estate is not necessary to make a benefit run with the land.

ERROR to the Superior Court of Cincinnati.

Error to the superior court, on the ground that the judgment was for defendant when it should have been for plaintiff. The plaintiffs are trustees of Mary F. Woolley, who owns the Commercial Bank building, on Main street. The defendant owns the Slevin building, immediately north. The plaintiffs sought to enjoin the defendant from inserting the joist of his building, which he was compelled to repair by reason of a partial destruction by fire a year ago, into the north wall of the plaintiffs' building, and building a wall on top of theirs, which, they claimed, would endanger their building. The plaintiffs claim that even if, under that agreement, Fosdick had the right to use the wall as a party wall, that use was only for and during the existence of the wall, and that by the destruction of the wall by fire that right to use was terminated. Fosdick claimed the right to use the wall as a party wall under a contract made between the plaintiffs and his grantors, the Slevins, in 1866, when the building *was originally erected, and to have paid under that contract
487 $1,766, for the privilege of so using the wall.

Cox, J.

Judge Cox announced the opinion. The Commercial Bank originally erected the wall three stories high, and for one-half the actual cost thereof the Slevens had paid, and, acting under the agreement of 1866, gone on and erected two additional stories, giving the bank the right to use those two additional stories whenever they saw proper, the bank to pay one-half the cost of the additional wall. The court below found that the wall had not been entirely destroyed, and that the wall as rebuilt was sufficient to hold the additional structure, which Fosdick undertook to erect upon it, and found in favor of the defendant. This court adopted their conclusions of law, and affirmed the judgment.

Matthews & Ramsey, for Plaintiff.

Stallo & Kittredge, Contra.

(The fully reported opinion of Judge Foraker in this case will be found in the September number of the AMERICAN LAW RECORD, page 148.)

†See 8 Rec., 148, for Superior Court decision.

MANDAMUS—LIENS.

[Hamilton District Court, 1880.]

Burnet, Avery and Cox, JJ.

THE STATE EX REL. POLLOCK v. CAPPELLER, AUDITOR.

Mandamus is not the proper remedy to adjust the claims of lien holders.

This was an application to compel the defendant to draw a warrant in favor of the relator for $477, the amount of a balance alleged to be due him under a contract for driving piles for the erection of a bridge across Millcreek, at Morton road, the amount having been allowed him according to law. The auditor answered, setting up that there were various liens filed against the amount allowed the relator by persons who had furnished work or materials to the relator in connection with the work. The auditor admitted a willingness to pay the bill as soon as he could be protected in doing so. The relator demurred to the answer, claiming that the auditor was bound to draw his warrant where the claim had been allowed, as this one had been.

Cox, J.

Judge Cox announced the opinion. It is the general duty of the auditor to draw such warrants as the law prescribes, and while he would be protected in so doing, yet he may question *the legality of the claim, and the court will determine whether it be a valid claim or not. The defendant claimed that the work for which the bill was rendered and allowed did not come within the meaning of the words building or structure, as used in the lien law, and that being public property, it could not be sold under the lien law. These were not necessary nor proper questions for the court to entertain upon mandamus. The auditor had answered sufficiently. Mandamus could only be granted where there was no remedy at law. There was a remedy in this case by interpleader between the parties to determine their respective rights to the fund. Writ refused. 488

A. J. Cunningham, for the Relator.

C. W. Baker, Contra.

AGREED CASE.

[Hamilton District Court, 1880.]

CLARKE ET AL. v. TRUSTEES OF LANE SEMINARY.

Where there is no bill of exceptions filed in a case, and the agreed statement of facts is not made a part of the record, the case is not in a proper condition to be heard by the court.

ERROR to the Court of Common Pleas.

The case below was tried upon an agreed statement of facts. The action was brought by the plaintiffs, who were subcontractors under one Crofton, who had contracted to erect on the property of the defendants, on Walnut Hills, certain buildings.

Cox, J.

Judge Cox announced the opinion of the court, saying that there was no bill of exceptions filed in the case, and that the agreed statement of facts was not made a part of the record. Under these circumstances, the case was not in a proper condition to be heard in this court, and judgment for defendant would be affirmed.

EVIDENCE.

[Hamilton District Court, 1880.]

Burnet, Avery and Cox, JJ.

WM. ALBERTS v. BARNEY MOLLER.

In an action by a sub-contractor against the owner on an order on the latter, given by the contractor to the sub-contractor who claims that it was accepted verbally, but which acceptance is denied by the owner: *Held*, that the owner may introduce evidence to show that he did not owe the contractor the amount given in the alleged acceptance. Such evidence is competent, as tending to prove whether there was any consideration for the acceptance and also as to whether it is reasonable to infer that the owner did accept.

PETITION IN ERROR.

Moller brought suit against Alberts to recover $975 upon an order drawn in his favor upon Alberts.

Cox, J.

Judge Cox announced the opinion of this court. Shuttledreyer & Co. were erecting four buildings in this city for Alberts for the sum of about $14,000. About the time of the completion of the buildings they gave an order on Alberts to Moller for $975, for materials furnished toward their erection. Moller presented this order to Alberts for acceptance, and Moller and another witness testify that Alberts accepted it verbally, and promised to pay it on the next Saturday. Alberts and his wife
489 *and another witness testify that he refused to accept it, saying he only owed Shuttledreyer & Co. $500 in cash and a note, payable in one year, for $800; and that he offered to give to Moller, on account of the order, either that amount of money or the note, and that Moller declined both, but insisted on the whole order being cash. On the trial Alberts offered evidence tending to prove that, at the time the order was drawn and presented, he was only indebted to Shuttledreyer & Co. in $500 cash, and a note to be given, payable in a year, for $800. On motion of plaintiff, this, and all testimony tending to show the state of accounts at the date of the order between Shuttledreyer & Co. and Alberts, were ruled out. In this the court erred. The testimony was competent in two aspects: First, as tending to show whether there was any consideration for accepting the drafts; and, secondly, as tending to settle the disputed fact of acceptance by Alberts, by showing whether the amount owing by him to Shuttledreyer & Co. was such at that time as that, with the other evidence, the jury might reasonably infer that he did accept it. The judgment will be reversed, and the case remanded.

Cowan & Ferris, for Plaintiff.

O'Connor, Glidden & Burgoyne, Contra.

STREETS—INJUNCTION.

[Hamilton District Court, 1880.]

Burnet, Avery and Cox, JJ.

†TAPHORN V. CINCINNATI & MARIETTA R. R. CO.

When the fee of a street is in the abutting lot owner, he is entitled to an injunction against the laying of a steam railroad track in the street, although under legislative authority, until compensation is made him for the additional burden upon the soil; but it is otherwise where the fee is in the municipality in trust for public use.

APPEAL from Court of Common Pleas.

AVERY, J.

The suit is to enjoin the defendant from laying its track on Second street, between Park and Mill, under ordinance of city council. Plaintiffs are owners of improved lots upon the streets. The lots on the north side are in Yeatman & Anderson's subdivision of a tract described by conveyance from Culbertson Park, the original owner, on both sides of, and including the street, as running from a point near Front street north along an alley, thence along the south line of Columbia street 458 feet to a post, and thence south again. The lots on the north side are in a subdivision by the heirs of Richard Harrison *of a tract described, in a subsequent conveyance from Culbertson Park, as running south from Third street to 490
the north side of Yeatman's mill property, thence with that line west, and back again to Third street.

At the date of these conveyances, Columbia, or Second street, as it is now called, was used by the public as a street, but the only evidence of dedication, so far as shown, is the fact that it was so used, and was described as a boundary. The fee, therefore, was in Culbertson Park, and by the two conveyances passed entirely out of him, since the north line of the one was made the south line of the other, and thus included the street between the two. The court is not inclined to think that the call for Columbia street in the first conveyance was controlled by the measurement of the front along the south line of the street, and from this it would follow that the middle of the street became the common boundary. But whether so or not, is, for the purposes of the present question, immaterial. Yeatman & Anderson's subdivision was acknowledged and recorded under the town plat law of 1831, the effect of which was, if the fee of half the street was in them, to vest it in the city. Upon the other hand, if it was not in them, it is in the heirs of the grantee under the other conveyance; for while they had conveyed the lots on the north side of the street, it is by a description which makes the middle of the street the boundary. In neither event, then, would the lot owners on that side have more of the fee of the street than the north half.

Upon the south side, if the fee was in Yeatman & Anderson, it passed out of them by their plat, and the lot owners on that side, apart from access between their lots and the street, would have no interest against the public beyond a mere possibility of reverter. Under the town plat law the fee of the south half would be in the city in trust for the uses and purposes of a street; but to permit a railroad track to be laid in the middle at grade, with sufficient roadway along the sides, is not an abandonment for street purposes. How far the public uses of the street may allow of the enroachment is a question for the representatives of the public. The legislature has provided, in the exercise of the power of eminent domain, that when necessary, in the location of any part of a railroad, to occupy a street, it shall be competent for the council of the municipal corporation to agree upon the manner and terms and conditions of the occupation, 75 O. L., 358, section 1. Although the fee is in the city in trust for the uses and purposes of a street, occupation by the railroad track is not to be enjoined, since so long as the street is not practically extinguished, the extent to which it may be subjected to the additional use, is committed to the city council.

†This case was reversed by the Supreme Court Commission on authority of 38 O. S., 41. Feb. 5. 1884. See also 8 Rec. 420.

491 *Upon the north side of the street, however, the fee is in the lot owners. Yeatman & Anderson's plat is the only acknowledged and recorded plat of that part of the street, and their title, at the most, extended only over the south half. The north half was, therefore, unaffected by it. Not that one half was any less part of the street than the other, but that only the fee of the south half vested in the public. The proposition that only by plat acknowledged and recorded by the owner, according to the statute, the fee of a street vests in the public, is too well settled to require discussion. Fulton v. Mehrenfield, 8 O. S., 440 As to the fee in the north half passing to the present owners, under the conveyances by Richard Harrison's heirs, the authorities are collected in the notes to Dovaston v. Payne, 2 Smith Lead. Cas., 213; Hinchman v. Horse R. R., 17 W. J. Eq., 75, 82.

When the fee of a street is in abutting lot owners, the weight of authority, is they have rights of ownership which, as against the additional burden of a steam railroad upon the street, are within the guarantee of the constitution that private property shall not be taken for public uses without compensation. The public may still determine what the public uses of the street require, but for the additional burden upon the soil, the private owner may demand compensation. Reasons of local convenience may have induced a relaxation in favor of horse railroads. They are for the use of street passengers, and street cars, except in running on fixed tracks, are like other street vehicles. But as to steam railroads, the cases are nearly uniform.

In Kentucky the ruling is to the contrary. R. R. v. Esterle, 13 Bush., 667. In Pennsylvania also; 6 Whart., 25; 36 Penn. St., 99; but there, the prohibition of the constitution against taking private property is interpreted to mean taking it altogether. The same ruling is found in Porter v. R. R., 33 Mo., 128, but whether the fee was in the lot owner does not appear from the case. Upon the other hand, the fee being in the lot owner, his right to compensation is fully maintained in Imlay v. Union R. R., 26 Conn., 255; Williams v. Central R. R., 16 N. Y., 97; Starr v. Camden & Atlantic R. R., 4 Zab., 592; Pacific R. R. v. Reed, 41 Cal., 256; Cox v. Louisville R. R., 44 Ind., 178; I., B. & . R. R. v. Hartley, 67 Ill., 439; Kucheman v. C., C. & D. R. R., 46 Iowa, 366; Schurmein v. St. Paul R. R., 10 Minn., 82; Pomeroy v. P. C. & M. R. R., 16 Wis., 640; Grand Rapids & Ind. R. R. v. Heisel, Mich. Sup. Court, 7 Am. Law. Reg., 478.

In Hatch v. Cin. & Ind. R. R., 18 O. S., 92, where the bed of a canal, by agreement with the canal company, was taken for a railroad, the owner of the fee was held to have rights in the soil which the railroad company should first have
492 proceeded *to appropriate and pay for. And in Lawrence R. R v. Williams, to appear in 35 O. S., where a highway being occupied by a railroad, the owner of the fee sought to compel its appropriation under the statute, the court say: This new use to which the highway has been diverted, imposes burdens on the land that are entirely different from, and in addition to, those that were imposed by the highway. The right so to divert the use, and impose additional burden on the land, could only be acquired by the corporation by agreement with the owner, or by appropriating and making compensation therefor in the mode prescribed by law.

The result of the cases is summed up by Judge Dillon: "The weight of judicial authority at present, undoubtedly, is that where the public have only an easement in streets, and the fee is retained by the adjacent owners, the legislature cannot, under the constitutional guarantee of private property, authorize a steam railroad to be constructed thereon against the will of the adjoining owner, without compensation to him." Dillon Mun. Corp., Sec. 576. The majority of the court is of the same opinion.

From this, so far as concerns the lots on the north side of the street, the right to an injunction follows. Public convenience may require the track, but this does not dispense with the necessity of first making compensation for private property. Nor in such cases does equity require that the damages should be irreparable. Equity has jurisdiction where private rights of property are concerned, to keep corporate bodies within their chartered limits. Where a corporation has the power to appropriate property by condemning and paying for it, the owner has the right to insist that it shall not be taken without condemning and paying for it; and to give effect to this right equity will lend assistance by injunction. Kerr on Injunctions, 296; Bisphane Eq., Sec. 437; Street R. R. v. Cumminsville, 14 O. S., 523, 550.

Only one of the plaintiffs is a lot owner on the north side of the street. The others are on the south side. All join in the action, but the interest of each is set out severally. The code provides that judgment may be given for or against one or more of several plaintiffs. 75 O. L., 666, Sec. 2. The lot owners on the south side not owning the fee, their petition will be dismissed. The lot owners on the north

side being entitled to the relief prayed, the order will be that defendant stand enjoined from laying any part of its track without his consent, upon the north half of the street in his front, until the right to do so has been acquired by proceedings under the statute for appropriation.

Stallo & Kittredge, for Plaintiffs.

Hoadly, Johnson & Moulton, for Defendants.

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*LANDLORD AND TENANT—FIXTURES. 493

[Superior Court of Cincinnati, General Term, 1880.]

Force, Harmon and Foraker, JJ.

†COOK AND COOK v. SCHEID.

A tenant having a right to remove trade fixtures during his term, loses that right, if he fails to reserve it, when he continues in possession after the expiration of his term under a new letting or agreement.

FORAKER, J.

This case was tried at special term before the court and a jury. The petition stated two causes of action. The jury found for the defendant. Plaintiffs moved for a new trial on the ground that the verdict was against the law and the evidence. Upon that motion the court reserved the case to general term. The motion is insisted upon only as to the second cause of action.

The record shows that the defendant was a tenant of the plaintiff's, under a written lease for a term of six years, which expired July 1, 1872; and that during his term he put upon the premises an engine and boiler, which, it is admitted the evidence shows, were trade fixtures, that he had a right to remove at the expiration of his lease.

At the expiration of the lease, however, the parties verbally agreed that the defendant should have the premises for another year upon the same terms and conditions as those expressed in the written lease; and at the expiration of each succeeding year, for four years thereafter, the same agreement was verbally made by the parties, and at the end of the fourth year the same agreement was again verbally made, except that the amount of rent to be paid by the defendant was slightly reduced.

At the end of the fifth year the defendant surrendered the premises; first, however, before the end of the year, he removed *the engine 494
and boiler. The second cause of action was for their value—admitted to be $275.

At no time was anything said by either of the parties about the engine and boiler, or defendant's right to remove them; and it is admitted that the evidence does not show any agreement or understanding, expressed or implied, whereby the defendant reserved his right to remove them after the expiration of his written lease.

The court charged the jury that the defendant had a right to remove the fixtures at the expiration of his written lease, but that he lost that right when he ceased to hold under the written lease and commenced to hold under the verbal lettings that succeeded it, unless he reserved the right of removal when he entered upon the verbal lettings, and each of them; as to which the jury should find.

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†This case was dismissed, for want of preparation, by the Supreme Court Commission February 19, 1884.

It is admitted that under this charge of the court, the jury should have found, upon the evidence, as to the second cause of action for the plaintiff, but it is claimed for the defendant that this charge of the court was erroneous; and that the jury should have been told that the defendant's right of removal belonged to him as long as he lawfully occupied the premises as the tenant of the plaintiff's, without regard to whether or not he occupied under different lettings; and that, therefore, the motion should be overruled, since, although the verdict was against the law and the evidence according to the charge of the court, yet it was according to the law and the evidence as the court should have charged.

This presents for our determination a single question, whether or not a tenant in possession of premises under a lease with the right to remove his trade fixtures during his term, loses such right if he fails to reserve it, when he continues in possession after the expiration of his lease under a new agreement for another term.

The supreme court of Michigan in the case of Kerr v. Kingsbury, partially reported in the American Law Review for January, 1879, opinion by Judge Cooley, has decided in favor of the negative of this proposition. The case of Devine v. Dougherty, 27 Howard's Pr. Rep. p. 455, holds the same way. But Devine v. Dougherty is overruled by Laughran
495 v. Ross, 45 N. Y., *p. 292, and is in conflict with every other New York case reported.

There are a number of cases also, and likewise several passages in text-books, to which our attention has been called, in which general expressions are found to the effect that a tenant may remove his fixtures at any time during his term, or during such time thereafter as he may lawfully occupy the premises as tenant. Taylor on Landlord and Tenant, p. 486, 40 Ind., 49, and cases there cited, also note to Joslyn v. McCabe, p. 714, of American Law Register, for November, 1879, and cases there cited.

It is apparent, however, upon examination, that these expressions were not intended to apply to a case of a continued occupancy under a new letting or agreement, but that in making them reference was had merely to such further occupancy of the premises as might be deemed, in the language of one of the cases, "an excrescence on the original demise."

In short, the Michigan case stands alone, and so opposed by the weight of authority, that, much as we respect it, and anxious as we are to relieve the tenant from every hardship that has been suggested as arising from the opposite rule, we are, nevertheless, unable to follow it.

Without undertaking to review the cases, it is sufficient to say that a fair construction of them shows an unbroken line of authority from Fitzherbert v. Shaw, 1. Henry Blackstone, 258, down to the recent and well-considered case of Watress v. The First National Bank of Cambridge, 124 Mass., 576, to the effect, as expressed by Taylor on Landlord and Tenant, p. 486, see 552, that "If a tenant at the close of his term renews his lease or surrenders it, for the purpose of acquiring a fresh interest in the premises, he should take care to reserve his right to remove such fixtures as he had a right to sever under the old tenancy. For where his continuance in possession is under a new lease or agreement, his right to remove fixtures is determined and he is in the same situation as if the landlord, being seized of the land, together, with the

fixtures, had demised both to him." To same effect, Tyler on Fixtures, 439; Ewell on Fixtures, 175.

But while the tenant must protect himself in such case by reserving his rights, we do not mean to say he must do so by *express agreement. 496 Such an agreement, as any other, might be shown by any facts or circumstances that would prove such to have been the understanding of the parties.

It is admitted, however, that there is no evidence in this case to show such understanding. We hold, therefore, that the defendant, Scheid, lost his right to remove the fixtures in controversy when he took the premises under the verbal agreement that succeeded the written lease, and, not having again acquired that right, his removal of them from the premises was wrongful, and that in consequence the verdict as to the second cause of action was against the law and the evidence, and should, therefore, be set aside.

FORCE, J., concurred.

HARMON, J., did not sit, having been of counsel for defendant.

Wilby & Wald, Attorneys for Plaintiffs.

S. N. Maxwell, Attorney for Defendant.

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*FORFEITURE—PLEADING. 556

[Superior Court of Cincinnati, Special Term, 1880.]

Force, Harmon and Foraker, JJ.

BALDWIN V. HENRY I. REES ET AL.

1. A denial that the plaintiff "lawfully entered," or is in "lawful possession," or that the defendant "has committed any breach of covenant so as to work a forfeiture," is not a traverse of any allegation of fact, but only a denial of the legal effect of alleged facts.
2. Lessee after a perfected forfeiture cannot call for an account to inform him how much he has omitted to pay, in order to enable him to make a tender.
3. After forfeiture and re-entry for breach of covenant to pay taxes, equity will not relieve against such forfeiture.
4. If the lessor purchases a valid tax title to the leased land so as to be seised of a different estate, yet if he makes peaceable entry and becomes fully possessed of the premises, his possession is lawful and entitled to protection.

FORCE, J.

The petition avers that, in 1847, one Luther Rose leased to one Sidney Warner Pease, for ninety-nine years, renewable forever, certain described premises, in which lease it was covenanted that the lessee and his representatives would pay all taxes and assessments, and in case of failure, the lessor or his representatives could enter and forfeit the lease and be repossessed of his former estate; that by various mesne conveyances the plaintiff became the owner of the reversion and of all the right and interest of the reversioner in the lease; that the defendant, Rees, became by assignment the owner of the leasehold, and as such went into possession; that taxes were not paid, and the land was sold by the auditor for such unpaid taxes; that the purchaser paid taxes for several years subsequently, and then sold and assigned his right to the plaintiff,

who was then the owner of the reversion; that the auditor of the county, by tax deed, conveyed the premises to the plaintiff, that thereafter, the plaintiff, for breach of covenant, entered upon the premises, forfeited the lease, took possession of the entire premises, and has remained in quiet possession thereof ever since; that the various defendants deny his
557 right and set up *claims to interest in the premises; whereupon plaintiff prays to be quieted in his title and possession.

Defendant, John E. Rees, files an answer denying that the plaintiff lawfully entered or is in lawful possession; denying that the lessee or any of his assigns committed any breach of covenant so as to forfeit the lease, or did any act so as to forfeit the lease; averring that he does not know the amount of taxes unpaid, asking for an account so that he may tender the amount properly due, and to have relief against forfeiture, if any has accrued, and by way of cross-petition, claimed that he holds a mortgage upon the leasehold and praying for foreclosure. The other defendants claim liens of various sorts upon the leasehold and file cross-petitions to have the leasehold sold to satisfy them.

Plaintiff demurs to Rees' answer and to the various cross-petitions.

It is clear that the denials are only denials of the legal effect claimed by the plaintiff as growing out of alleged facts; they traverse no allegations of fact, but only deny conclusions of law. They constitute no defense and are bad on demurrer.

The defendant is not entitled to an account of the amount of unpaid taxes to enable him to make a tender. The wrong done by omitting to pay taxes in violation of the covenant does not give a right to call for an account. It is his business to know.

But if the amount due on account of unpaid taxes were perfectly ascertained, defendant could not relieve the forfeiture by making tender of it. Non-payment of taxes is not like non-payment of rent, it puts in jeopardy the estate of the lessor, and equity does not relieve against a forfeiture effected for such a breach.

The fact that the estate of the lessee is encumbered does not affect the right of the lessor. By re-entry upon forfeiture, the reversioner becomes siesed and possessed of his former estate. The leasehold perishes; and incumbrances upon it, its foliage and fruit, perish with it.

It is true that no one can forfeit the lease but him who is seized of the estate of the lessor; and ownership by tax-title obtained from the state after the state has forfeited for non-payment of taxes, is a different estate from that of the lessor. For the lien of the state for
558 taxes, rests not upon any estate, but, *penetrating through all estates, rests upon the land itself, and hence, the state, by a forfeiture, takes the land divested of all previouse states. The state, when it subsequently conveys, creates a new fee simple, and confers a title free from all claim but the contingency of the state's eminent domain.

But this does not effect the plaintiff's right to be quieted. If there was a valid forfeiture by the state and conveyance to the plaintiff, while he could not then forfeit under the lease, for the lease and the estate of lessor and reversioner had gone out of existence, yet he is in possession under a clear title against which the defendants have no claim. If the forfeiture for taxes and the tax title are invalid, then plaintiff purchased only a tax lien and was seised as lessor and is in possession seised of his original estate. In either case he is entitled to the relief he demands.

The demurrer to the answer and cross-petition of Rees is sustained. For the same reason, the demurrer to the cross-petitions of the other defendants are sustained.

Yaple, Moos and Pattison, for Plaintiff.

Tilden, Buchwalter & Campbell, & Jordan, Jordan & Williams, for Defendants.

ASSESSMENTS—CONSTITUTIONAL LAW.

[Hamilton Common Pleas Court,]

†BOWLES ET AL V. BIDDINGER FREE TURNPIKE CO., ET AL.

A legislative enactment which provides for an assessment to pay the costs of a local improvement, upon property in the vicinity of such improvement, but without regard to whether such property is specially benefited thereby, is unconstitutional and void.

The power to impose general taxation is based entirely upon necessity, and is commensurate with the necessity and limited by it.

Assessments are based solely upon a principle of justice. It is just that property, which is specially benefited, the value of *which is 559
enhanced by the improvement, shall pay of the costs an amount in proportion to the special benefits conferred. And the power to impose assessments can only be commensurate with the right it is designed to enforce; and can, therefore, "only be constitutional when imposed to pay for local improvements, clearly conferring special benefits on the properties assessed, and to the extent of those benefits." Constitution of Ohio, Art. XII., Sec. 2; Art I., Section 19. Hammet v. Philadelphia, 65 Penn. St., 146; Scoville v. Cleveland, 1 O. S., 126; Hill v. Higdon, 5 O. S., 243; Meissner v. Toledo, 31 O. S., 387; Thomas v. Gaines, 35 Mich., 156; Chamberlain v. Cleveland, 34 O. S., 551; Cooley on Taxation, 104; Burroughs on Taxation, 71.

LONGWORTH, J.

The petition recites that certain property owners in the northwestern part of this county petitioned the county commissioners to establish a free turnpike road from the Butler county line south, known as the Biddinger Free Turnpike; that all the property owners within the bounds of the road did not join in the application; that the county commissioners proceeded to act upon this application, appointing three free holders as commissioners, who proceeded to lay out this road and issue bonds under color of law, in the name of the county, for the payment of the costs. The proceedings were all had under color of the One-mile Assessment Act as it existed prior to the adoption of the Revised Statutes, which is retained with slight modifications immaterial to this case at page 1171, Vol. I., of Revised Statutes.

The court is asked to enjoin the auditor and treasurer from levying and collecting a special tax to pay the costs of this improvement.

It is insisted that this act is unconstitutional and void, and I am very clear that it is so. By its terms it provides that for the cost of constructing a free turnpike road, the property lying within one mile of

†See 6 Bull. 404 for District Court opinion. A *contra* decision is found in 37O. O. S. 35.

such road, shall be assessed. Not a word is said about benefits to the property.

In the act known as the Two-mile Assessment Act, it is provided that the property lying within two miles shall be assessed according to bene-
560 fits; but in the one-mile act, which is separate *and distinct from the two mile, it is simply provided that all property within one mile shall be assessed.

Now, the whole theory upon which the right to levy a special tax to pay for a public improvement is based, is, that the property benefited by the improvement shall pay for the cost of it. It is true that under the construction given the assessment laws by the courts it very often happens that property which in reality is not benefited, does not have to pay it; still it is always upon the theory that the property has been benefited.

In the case of a city assessment, the court say: "We will not allow you to show that your property has not been improved by this proceeding. The city council is the proper tribunal to determine that fact, and, having determined it, we will not allow you to show that it is not so." For instance the municipal code says that the city council may assess property in the neighborhood, in the vicinage, of the improvement according to the benefits to pay the costs of the improvement. If council assess a piece of property, the owner of that property cannot be heard to say that his property has not been benefited because the proper tribunal to determine that fact has decided the question. Still all through the decisions of the supreme court and the lower courts runs the principle that it is upon the theory that it benefits the property, that such an assessment can be levied and collected.

Now, here all the property within a mile is to be taxed—no property more than a mile off shall be taxed, and none within the mile shall escape. In my view of the law the only theory upon which that statute could be held constitutional, is by reading it so that it shall mean that all property within a mile shall pay in proportion to the benefit it has received. The statute does not say in terms that it shall pay according to its value—tax value or any other kind of value—but simply to pay. But, to give it such a construction, is to do violence to its terms, because it expressly says that all property shall be assessed, and if there is any property not benefited, it must pay something—What? If it pays one cent it is the same as if it pays one thousand dollars. It is not to be assessed on account of its improvement, or because of its improvement, but it is to be assessed solely because it lies within one mile of the road.
561 If the legislature *may pass a valid law, creating a special tax upon property within one mile, why may it not within two? or why may it not within ten miles? or as suggested by counsel, what objection is there to the legislature providing that the county commissioners may construct a free turnpike road in the northeast corner of the county and that all property lying in the southwest corner shall pay for it?

The cost of such an improvement can be assessed under the laws of Ohio as I read them, only in two ways, either by general tax or by a special tax, which special tax shall be in accordance with the direct effects of the improvement upon the property so to be taxed, and it is not within the power of the legislature of Ohio to provide for special taxes upon property without regard to any rule of benefits; otherwise, as I say, the legislature might provide that the road shall be built and that John Smith

shall pay for it, for I see no difference between that case and this one, where the legislature provides that the road shall be built and everybody within a mile shall pay for it.

The demurrer will be overruled and the plaintiffs may take their injunction.

Von Seggern. Phares & Dewald, for Plaintiffs.

I. J. Miller, for Turnpike Co.

C. W. Baker, County Solicitor, for Auditor and Treasurer.

WILLS—DOWER.

[Hamilton District Court, 1880.]

Burnet, Avery and Cox, JJ.,

GERTRUDE MCLAUGHLIN v. ELLEN GRAVES.

1. The transfer of a dower estate is a good consideration for a deed, and is a consideration which would be respected in a will.
2. Where a testator provides in his will for the payment of his debts and then gives to his widow the income of his entire estate in lieu of dower: *Held*, that the widow takes subject to the provisions of the will that all the debts are to be paid, and when they are paid the income can only be what arises on the remainder.

ERROR to the Court of Common Pleas.

This case was tried in the court below on an agreed statement of facts, having come up from the probate court on appeal. It appeared that in 1877 William McLaughlin died, devising to his wife the income from his entire real and personal estate for her use during her life, the same to be in lieu of her dower interest. This was the second item of the will. The first provided for the payment of debts. Upon the death of the widow the property was devised to a trustee for his children by a former wife. The real estate was sold to pay debts, which were about $1,500. The widow asked that her proportion should *be given her in money. The property sold for about $4,500. The probate court, on distribution, gave the widow her portion, after deducting the debts and the costs of administration. The court below sustained the judgment of the probate court, and to this latter judgment the petition in error was filed. The question in the case was whether the widow was entitled to her portion of the gross proceeds of the sale without deduction of costs and debts, she claiming that she is purchaser of the estate for value, and is entitled to be protected in the full value of the estate, having parted with her dower estate and taken provision made for her in the will, she stands in a better relation than any other legatee would. 562

Cox, J.

Judge Cox announced the opinion of this court.

The transfer of a dower estate is a good consideration for a deed, and is a consideration which would be respected in a will. The widow in this case had the right to accept the provisions in lieu of dower, but she accepted them subject to the terms and conditions of the will.

But this will must be construed like other wills. It made the debts of the testator a charge upon his entire estate, and after that he gives to his widow the income of his entire estate. If the debts must be first paid, the income would undoubtedly be that which would arise after the payment of the debts; but, whether this first provision were in the will or not, the debts must be first paid, because a testator's property is always sub ect to the payment of his debts. But this will very explicitly declares the debts must be first paid, and when they are paid the income can only be what arises on the remainder.

Judgment affirmed.

Gray & Tischbein, for Plaintiff.

C. W. Baker, Contra.

EMINENT DOMAIN—EVIDENCE

[Hamilton District Court, 1880.]

Burnet, Avery and Cox, JJ.,

CITY OF CINCINNATI V. SCARBOROUGH.

1. In the condemnation of that portion of a turnpike road, situated within the limits of a municipal corporation, it is competent for the company to prove the amount of tolls received at a gate on that portion of the road.
2. The net annual tolls for a number of years for that portion of the road to be condemned, having been shown by the company, as well as its surroundings as to parallel and intersecting roads, it is competent upon this data for the company to prove by the testimony of witnesses familiar with the value of money and its investment in stocks, bonds, and in loans upon real estate and other securities, their opinions as to the basis of capitalization of that portion of the road, and to give the reasons upon which their opinions are based

563 *This case came up by motion for leave to file petition in error. In 1877, W. W. Scarborough, for the use of the turnpike company, filed a petition in the common pleas, alleging that the company was the owner of a turnpike leading from this city through Madisonville to the Columbus and Wooster Pike, in this county, a distance of about seven miles, having toll gates thereon; that the city of Cincinnati, by the extension of its corporate limits, had embraced there in aportion of its road, something over a mile in length, having thereon a toll gate; that in accordance with the statute the company had applied to the city authorities to take steps to condemn that portion of the road within its limits; that the city having neglected to do so, a petition was filed by the turnpike company asking that the city should be required to condemn that portion of the turnpike within the corporate limits,and that a jury should be impaneled to assess the value thereof. It appeared from the record that an inquiry into the value of that portion of the road was had in accordance with the statute, and that the jury awarded to the company the sum of $17,000. Several exceptions were taken during the progress of the trial by the city, to the introduction of testimony on the part of the company. The statute not giving the municipal corporation the right to file a petition in error in this court, without obtaining leave for that purpose, the case came up now on motion for leave to file that petition.

JOHNSTON, J.

It appeared upon inspection of the record that the chief errors relied upon are that the court below erred in permitting evidence as to the amount of tolls that were collected at the toll gate within the city limits, claiming that the gate was there without authority of law, and under the statute a nuisance. Second, because expert testimony was permitted for the purpose of establishing the value of the franchise or road to be appropriated, whereon witnesses were allowed to give their opinion as to the rate of interest at which that portion of the road should be capitalized, based upon the receipts. Third, that the court erred in permitting the net revenue derived from that portion of the road to be given in evidence.

As to the first objection, the court found upon examination of the statute in force, at the time of this proceeding, that the company had the right to maintain its gate within the corporate limits, and take toll thereat, as well for that portion of the road lying within the city limits as for travel upon portions lying outside thereof. The act of April 4, 1878, provides in substance that where by extension of the limits of a municipal corporation a portion of a turnpike shall be embraced therein having thereon a toll gate, before the removal of the gate to a point eighty rods outside the corporation limits, compensation shall be made for the damages the company will sustain by such removal.

*This evidence, therefore, was competent to show the value of this portion of the road, for it tended to show the amount of travel 564
thereon, which is the essential element in determining the value of a franchise of this character. As to the objection made to the testimonyof experts, and as to the net revenues of the road being received, this question arises first upon the testimony of W. W. Scarborough. He testifies that he had actual knowledge of the receipts of this road at the gate in question, as well as at the gates throughout its entire length for a great many years; that he had been a stockholder for twenty years, and part of the time its president or treasurer; that the net revenues for that portion of the road within the city averaged about $1,200 per annum, and having testified that when this portion of the road should be taken the remainder would scarcely be self-supporting, he was asked the question, that such being the net revenue for this portion of the road, at what rate in his opinion it should be capitalized. Under the objection of the city, he answered that he thought at the rate of five or six per cent. Various other witnesses, having knowledge of the value of investments of money in bonds, stocks and other property of this character (some of them having the same knowledge as Mr. Scarborough in relation to this turnpike company), having this case put to them hypothetically, testified under the same objection, that a capitalization upon the basis of four, and some going as high as seven per cent., would be but fair.

This question has never been passed upon by our supreme court, and counsel as well as the court, admit, after a diligent search among the authorities, their inability to find a case where the exact question has been presented.

The court is of opinion, however, that as the value of the franchise was dependent upon the return for the money and labor expended in keeping the road in repair, whereby the company was enabled to realize this income, and inasmuch as it was developed in the evidence that the stock had no market value, not enough of it ever having been on the

market to give it a market value, that the questions put to persons having not only personal knowledge of the income of this portion of the road and its probable future, but having a large experience in the investment of money in stocks, bonds and property of this character, were the only means through which the jury could be properly informed in the premises; and having given their opinions as to the rate of capitalization, it was but fair that the jury should know upon what these opinions were based. (The court cited 34 Penn. and 15 Gray).

The annual income having been proven, and the value of money in investments having been shown, the capital sum to produce
565 this income becomes but an arithmetical calculation. *The surroundings of the road, whether there are any parallel or intersecting roads whereoy the tolls are likely to be diminished—all these are to be taken into consideration by the witness.

There was testimony by which if the jury had been governed, instead of a valuation of $17,000, the capital sum would have been fixed at from $25,000 to $30,000 for this portion of the road. The jury seemed, from their verdict, taking $1,200 as the net revenue for this part of the road, to have capitalized it at seven and one-half per cent. Although at first blush the verdict would seem to be large, taking the character of the evidence introduced, it would seem but fair.

The protection of the city against a recurrence of this kind, if it needs protection in this direction, rests with the citizens. Annexation of contiguous territory being dependent upon a vote of the people, they should not annex territory having portions of turnpikes therein, without the territory or corporation to be annexed having first made provision for the extinction of the franchise without expense to the city. The motion for leave to file a petition in error is, therefore, overruled.

The City Solicitors, for the Motion.

Hoadly, Johnston and Colston, and Clement Bates, Contra.

PAYMENT—BILLS AND NOTES.

[Hamilton District Court, 1881.]

Burnet, Avery and Cox, JJ.

JOHN HILPERT v. C. KINSINGER.

Where the endorsers of a note are in fact the debtors and the makers are only sureties, and the latter effected a renewal of the note with the wife of the creditor, the creditor not being present, such transaction would not constitute a payment of the note.

ERROR to the Superior Court of Cincinnati.

In that court a petition was filed against the two assignees to require them to allow certain claims. The claims consisted of two notes, one for $1,700, with 8 per cent. interest, on which George Klotter, Sen., was an endorser, and the other for the sum of $100. The judgment below directed the assignees to recognize these claims. The defendants claimed that the notes which were given by Klotter's sons and Klotter, Sen., to the plaintiff were afterward paid by a note given by Klotter's sons in full satisfaction of the claim, and also that George Klotter's sons were

the principle debtors, and George Klotter, Sen., was surety only, and that the court erred in refusing to direct the clerk to enter judgment against Klotter's Sons as principal and Klotter, Sen., as indorser. There was some dispute, also, in regard to the notes. It was claimed that they were not for the proper amounts due.

Cox, J.

Judge Cox announced the opinion of this court.

The notes were not in evidence, but the plaintiff claimed *that they were taken up by George Klotter, Jr., and another note for the sum of $1,900 was substituted without the knowledge of the plaintiff, and that, therefore, he was not in possession of the two notes which he claimed now to have allowed. The testimony showed that the sum of $1,500 or $1,600 was loaned by the plaintiff in 1874, which was handed to George Klotter, Sen., he at the same time telling the plaintiff that he and his sons would be responsible for it; that he did not want the money himself, but he would turn it over to his sons in the brewery. He had a note made by his sons, which he indorsed at the time. The plaintiff and Klotter himself testified in effect that he was the principal debtor and that they trusted him. As to the amount of the note the court was of opinion that it was fairly made out. It appeared, that when the note was to be renewed, the amount over $100 was received by the plaintiff in money, and the balance entered into the new note or formed a new note itself, and this accounted for the note of $100 and for the $1,700. 566

It was claimed that the note given for $1,900 by George Klotter's Sons was given in payment of the original note, and therefore George Klotter, Sen., was exonorated. It appeared that while this note was renewed every year, and George Klotter became indorser at each subsequent renewal, yet when it came to be renewed the last time, a short time before the assignments, George Klotter, Jr., took the note to the house of the plaintiff, in the absence of the plaintiff, and gave that as a substitute for the other note at maturity, and took up the notes upon which George Klotter, Sen., was indorser. This transaction was with the wife of the plaintiff. She could neither read nor write, and did not understand the transaction, and when it was ascertained that this note was not indorsed by George Klotter, Sen., complaint was made in regard to the matter, but it was some time after the note had been surrendered. This was not payment of the debt. It was not accepted by the plaintiff as payment of the original debt. In fact, he was not aware until he came to make the claim against the assignee that this note, unindorsed by George Klotter, Sen., had been given in exchange for the other notes. He made demand of George Klotter, Sen., to become indorser, but it was after the time of George Klotter, Sen.'s, assignment, and by direction of his assignee, he declined to make any indorsement, although he believed himself responsible on the note. The judgment of the court below should be affirmed.

567 *NEGOTIABLE BONDS—SCHOOLS.

[Hamilton District Court, 1880.]

Burnet, Avery and Cox, JJ.

†BOARD OF EDUCATION OF WESTWOOD v. SINTON.

Bonds payable to bearer, issued by a board of education for purchasing a site and building a school house under a special law, limiting the aggregate to $20,000, but leaving the amounts to be from $50 to $500, and the time to be not exceeding ten years, at the discretion of the board, and providing that for paying the same as they became due such tax might be levied annually as would be sufficient to pay the principal that should fall due each year, and also the interest on all the bonds were taken up and paid by the board of education and left for cancellation in the hands of the treasurer, who, instead of cancelling, negotiated them to an innocent purchaser: *Held*, The board of education was liable on the bonds in the hands of such purchaser.

ERROR to the Common Pleas Court.

The judgment was upon thirty coupon bonds of $100 each, made by the board of education of Westwood, September 1, 1869, as part of an issue to the amount of $20,000, under a special law (66 O. L., 402), for the purchase of a site and the erection of a school building, and payable to bearer ten years after date. The bonds had been taken by plaintiff below as collateral security for a loan made to Wm. E. Davis in November, 1876, he supposing at the time that Davis was the owner. The facts were that Davis was the treasurer of the board of education. On the 6th of April, 1874, the board ordered him to purchase fifteen of the outstanding bonds and appropriated the money for that purpose. In August, 1874, they appropriated the further sum of $1,500, and in February, 1875, $2,000 more to the same purpose. In June, 1875, Davis reported the numbers of the several bonds purchased under these three orders, among which were the bonds in question and was directed by order of the board to cancel them by punching them or defacing the signatures. It was not discovered until his death, in April, 1877, that he had not done this, but had negotiated the bonds.

AVERY, J.

Upon these facts it is contended that the case stands as if the bonds were never issued. This must be conceded, so far as the first issue is concerned.

The bonds bore upon their face, however, the appearance of authority. The special act, to which they referred, prescribed no conditions except that they should not exceed in the aggregate twenty thousand dollars. Whether the aggregate had
568 *been reached by once issuing them was a fact peculiarly within the knowledge of the Board of Education. The purpose of the issue was designated, but it would be no defense against a *bona fide* purchaser that the funds were misapplied, nor, for the same reason, that the consideration was not received. By the representations upon the face of the bonds themselves, the board of education would be estopped. Hackett v. Ottawa, 99 U. S., 86, 95; Daniels' Neg. Instr., Sec. 1550. The special act conveyed no notice of any power to take up the bonds before maturity; on the contrary, by conferring power to levy such amount annually as would pay the principal each year falling due, it was implied that they should be so graded as that a portion would mature every year, and none should be paid before due. The bonds were in fact taken up. But although taken up they were put into circulation again, and while this was not the voluntary act of the board of education, the question remains whether it was by their negligence.

A negotiable instrument is only the written evidence of a contract, and like other written evidence of contract, delivery is required for its completion. But where a negotiable instrument that passes by delivery comes into the hands of a *bona fide* holder for value before maturity, the presumption is that it was delivered, and if the maker seeks to escape liability, the burden of proof is upon him. Nor would it be sufficient to prove merely that there was no delivery in fact, if by his negligence the paper had been put in circulation. Ross v. Deland, 29 O. S., 473, 479.

†This case was reversed by the Supreme Court. See opinion 41 O. S. 504.

In Ingham v. Primrose, 7 C. B. N. S , 82, recovery was permitted on an acceptance, although not issued by the acceptor. He had given the paper to the drawer, and the drawer failing to have it discounted, returned it, whereon the acceptor, with the intention of cancelling, tore it in two and threw the pieces on the ground, whence they were afterward taken up by the drawer without knowledge of the acceptor and negotiated. The principle declared was that negotiable instruments having become part of the merchantile currency of the country, innocent holders have the right to enforce payment against those who, by making them, have caused them to be apparently part of such currency. The case of Ingham v. Primrose was recently considered in the Queen's Bench Division, and its authority questioned. Baxendale v. Bennett, 3 Q. B. D., 525. But this was upon the ground either that the acceptor had not been guilty of negligence, because he was under no duty to the public in respect to the paper, or, if negligent, that it was not the proximate cause of putting the paper into circulation.

The English cases appear to result in this: That if neglect of duty toward another or toward the public, of which he is a *part, be the proximate cause of leading him into the belief of the existence of a certain state of facts, and he 569
has acted on that belief to his prejudice, the person chargeable with the negligence cannot be heard afterward as against him to show that the state of fact did not exist. Whatever conflict there may be in the cases is to be attributed not to any difficulty as to the principle, but as to its application.

In the present case the board of education was the corporate body. The treasurer was its agent. The law does not require that he shall be one of the board, although it seems he was in the present case. It is required that he shall give security to the approval of the board. The bonds, although taken up by authority of the corporation, were left in his possession. No steps were taken to ascertain if he had complied with the order, the board trusting to his compliance. They confided even that the bonds were in his possession, although it seems that of those which he reported there were twelve that the board, after his death, were required to purchase. This is a pregnant circumstance to show the confidence reposed in him by the board. They took his word for it all.

It is a common principle that where, between two innocent persons, one must suffer in consequence of the fraud of a third, he shall suffer who reposes confidence rather than a stranger. In applying the principle, we must not overlook the fact that the confidence reposed must be the proximate cause of the loss. But leaving in the hands of the treasurer bonds, which were so drawn as to be negotiable merely by delivery, was the proximate cause of their getting again into circulation. There was a duty owing to the public so to concel or deface them as that they could not pass into currency. If this duty was left to be performed by their agent, they and not the innocent holder should suffer for his default.

Judgment affirmed.

King, Thompson & Maxwell, for Plaintiff in Error.

Taft & Lloyd, Contra.

ACCORD AND SATISFACTION.

[Hamilton District Court, 1880.

Burnet, Avery and Cox, JJ.

DUNN ET AL. V. LIFE ASSOCIATION OF AMERICA.

During the pendency of suit upon a life insurance policy, but before answer filed, a compromise was agreed upon, the money to be deposited, with enough to pay costs, in the hands of a third party, to be paid over to the assured, on his dismissing the suit and forwarding the *policy, properly endorsed, to the office of the 570
company in St. Louis The deposit was accordingly made, and still remains in the hands of the third party, but the assured did not dismiss the suit and forward the policy to the company; on the contrary, he assigned all his interest to another, by whom the action continued to be prosecuted, the company by original answer, setting up the compromise, and afterward by amended answer denying all the allegations of the petition except that the policy was issued. *Held*, The compromise agreed upon was no bar; it was simply an accord upon mutual promises, with no other consideration than the promises themselves, and without performance.

The action was on a policy of $1,000, on the life of C. Butler Williams, taken out for the benefit of William Dunn as a creditor. The answer was that by compromise with Dunn, the claim had been settled, and that he had received through his attorney in St. Louis $3,550 in satisfaction. Afterward an amended answer was filed, not referring in terms to the original answer, and denying all the allegations of the petition, except that the policy had issued. The jury found specially that the policy was valid and subsisting at the death of Williams, and that due proofs were made of the loss, but their verdict was, nevertheless, for the company.

As this was because of the alleged settlement, motion was made for a judgment for the plaintiff, notwithstanding the verdict on the ground that by filing the amended answer, that defense had been abandoned.

AVERY, J.

The general rule where pleadings are amended is that the second pleading shall be taken as an abandonment of the first. In applying this rule, however, the supreme court in Dunlap v. Robinson, 12 O. S., 530, indicates that the second pleading must be so inconsistent with the first as to require the inference of that intention. The denial of all liability upon a claim is not inconsistent with setting up the compromise of the claim, since compromise may stand on denial as well as admission of liability. The parties at the trial did not regard the first answer as abandoned. On the contrary, all the evidence for the company, and the evidence in rebuttal, was confined to that issue. The motion for a judgment, notwithstanding the verdict, was properly overruled.

A motion was also made to set aside the verdict, and for a new trial, on the ground that it was against the weight of the evidence, which was overruled, and judgment entered for the company.

This presents the principal question. The office of the company was in St. Louis, and after Dunn commenced his suit here, and attached the property of the company, he went to St. Louis. While there the
571 evidence was that through an attorney *named Knapp, employed by him, he accepted a proposition from the company to pay $3,500 and the costs of the pending suit, he to return to Cincinnati, dismiss the suit, and forward the policy to the company in St. Louis, with a proper indorsement. The terms of the first proposition were that the company's check for the amount should be drawn to the order of the attorney and be held by him until Dunn returned to Cincinnati, dismissed the suit and forwarded the policy, when it was to be paid over; but finally the agreement was that the check should be drawn to the order of the father of the attorney, a gentleman well known both to Dunn and the company. It was so drawn and the terms of the agreement reduced to writing in the form of a receipt given to the company, and signed by the attorney. Dunn returned to Cincinnati, but did not dismiss the suit, and assigned the policy to W. M. Cameron, for whom the suit was continued and in whose behalf this petition in error is prosecuted. The check, drawn to the order of the father of the attorney, was deposited by him on the next business day and was paid, and he still holds the money, to be turned over to whomsoever may be etitled to it, except fifty dollars, which, he says, under instructions from Dunn, he paid to his son as attorney's fees.

On this state of fact, the question arising is whether the liability under the policy was discharged. It is a general rule, that accord without satisfaction is no bar; the meaning of which is that to discharge a debt or demand by reason of an agreement to receive satisfaction in some other way, the satisfaction must be received. Where the intention of the parties is to receive the agreement itself in satisfaction, there are cases which maintain the distinction that an "accord with mutual promises to perform is good, although the thing is not performed at the time of action brought." 2 B. & Ad., 335; 24 N. H., 289; 23 Barb., 546. Taking this with the qualification that a consideration exists, it is reasonable, and the abandonment of the defense of a litigation and payment of costs would furnish a consideration. Cooper v. Parker, 15 C. B., 822; Mitchell v. Wheaton, 46 Conn.; Harper v. Graham, 20 O., 106. But where there is only an agreement to abandon the defense and pay costs on a condition which remains unperformed, and neither party has acted on the agreement, and the costs remain unpaid and the defense is persisted in, the case is different. In such case, certainly, the rule laid down in Frost v. Johnson, 8 Ohio, 393, should apply, that accord resting on mutual promises is not good without performance.

The court below recognized this by charging the jury that if the check was paid by the company to the elder Knapp, to be held for the company until Dunn performed the conditions *which were not performed by him nor waived by the company, the liability under the 572
policy would remain. But this charge was accompanied by explanations calculated to induce the jury to infer that the money must have been held exclusively as the agent of the company, and the jury were told that if the payment were for the benefit of Dunn, and the company had nothing more to do with the matter, the liability under the policy was discharged.

When by agreement between two persons one deposits money in the hands of a third person to be paid over to the other on condition, such third person is not exclusively the agent of either, but is acting for both. He to whom the money is to be paid has an interest in the deposit, and yet the money does not belong to him until he has performed the condition. On the other hand, he, depositing the money, is the owner, subject to the condition to be performed, and yet the deposit is not for his benefit, but for the benefit of him to whom, on such condition, the payment is to be made.

The question for the jury then was, not for whom the money was paid by the company, since in equal sense it was paid for the company as well as for Dunn, but it was whether the money when paid by check to the order of Knapp was the same as if paid to Dunn.

Although this question was not fairly submitted to the jury, their finding, it is true, must be taken to be an affirmation of the fact, that when paid to the order of Knapp it was in substance a payment to Dunn. But the finding was clearly against the weight of the evidence. The case stood simply as an accord resting on mutual promises, without other consideration than the promises themselves, no part of which had been performed. The condition on which the money was to be paid to Dunn had been imposed by the company. It was only in the event of performance on his part, that they were willing the payment should be made. They had not acted on the agreement except to place the money where it would remain subject to the condition that it should be

his on performance, and if not performed in a reasonable time the law required that it should be returned. So far from abandoning their defense, they had, by filing their amended answer, insisted upon it. As to the fifty dollars paid by the father of the attorney to his son, it was without authority from the company; indeed, the evidence indicates that even under the instructions of Dunn it was not to be paid until his authority over the money had, by his performance of the condition, become complete.

Judgment reversed and case remanded.

C. D. Robertson and Alfred Yaple, for Plaintiff in Error.

Stephen Coles, Contra.

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577 *VIRGINIA MILITARY LANDS—PARTITION—LIMITATIONS.

[Hardin Common Pleas Court, February Term, 1880.]

†ALFRED MORRISON ET AL. v. JOHN BALKINS ET AL.

1. Where lands in the Virginia Military District of Ohio have been entered and surveyed, but no patent issued, there can be no partition on the application of the parties not in possession, and who show no right at law to recover possession.
2. Parties claiming to be owners of such entry and survey, not patented, but who, not being under disability, have not asserted any claim for twenty-one years, will not be aided by a court of equity against persons in possession, and whose possession must be presumed lawful.
3. Lapse of time for a period equal to the bar of the statute of limitations, furnishes a rule of evidence raising a presumption in favor of occupants of land for such period, that the holders of prior equitable titles have granted their interest therein to such occupants.

The material facts are these: First Cause of Action—September 6, 1878. The plaintiffs filed a petition, amended November 9, 1879,
578 which avers in substance *that a portion of the plaintiffs named are seized of an equitable estate in fee, of one undivided eighteenth part of survey 10,532, in the Virginia Military District in Hardin county; that other plaintiffs named are seized of an equitable estate in undivided parts of said land; that their title is derived as follows:

Said lands were entered and afterward surveyed, June 8, 1822, for and in the name of John Slaughter and John Jones, on military warrants 5353 and 6305, to them respectively issued; Jones died intestate, December 10, 1824, leaving some of the plaintiffs named his heirs. On November 22, 1824, Slaughter, in writing, assigned his warrant, 6305 (after entry and survey thereon), on part of which said lands had been entered, to Wm. T. Galt, who died intestate August 20, 1825, leaving others of plaintiffs his heirs. On the 30th of January, 1871, de-

†The opinion in this case was written by Judge Dodge. The syllabus is prepared as the result of the opinion and authorities cited in argument. The case is vastly important in principle, since there are 120,000 acres of unpatented lands in the Ohio Virginia Military District, most of which has been occupied for twenty-one years or more by parties who cannot always trace a title to the original holder of the entry. This case goes far in quieting these titles. On the authorities cited the courts can quiet the title of occupants even as against newly issued patents and against suits to recover on such patents.

fendant, Samuel H. Ruggles, purchased by deed from a portion of the heirs of Galt one undivided sixth interest under said entry and survey, but Slaughter's heirs now claim the interest of Wm. T. Galt, notwithstanding the assignment of the warrant. Slaughter died intestate long after his assignment of said warrant, leaving heirs named.

On 21st of May, 1824, the surveyor of said Military District delivered to one David Collins, as agent of Slaughter, Jones and Galt, said warrants and the original survey of said land, with the certificate of the surveyor necessary to procure a patent from the General Land Office. Collins died more than twenty years since, and said papers are lost and no patent has issued.

Second cause of action—John Kearse and others are, and "have been for several years," in possession of the land and have received rents and profits.

Prayer: That the evidence of said warrants, survey, etc., may be perpetuated, the loss established, the equitable titles established, the rights as between Slaughter's heir and Ruggles' and Galt's heirs determined, the portions of the respective tenants in common determined; that plaintiffs have their proportion of said lands partitioned and set off to them, or if this cannot be done, that such other relief may be given as equity may require, and if the court shall be of opinion that the assignment of Slaughter did not in equity pass his estate in said survey to Galt, then that John Balkins, claiming under the assignment, *etc., be decreed to execute a conveyance to plaintiffs; that an account be taken of rents and profits, and that plaintiffs have judgment for the same against the occupants. 579

December 5, 1879, Ruggles answered that he purchased one-sixth interest in the land without notice of the alleged assignment of said warrant to Galt, and prays for partition, that one-third of the land be set off to him.

December 9, 1879, Kearse, Banning and Williams, parties in possession, file demurrer for misjoinder of causes of action, and that petition does not state sufficient facts.

L. M. & W. A. Strong, for Demurrer.

I. There is a misjoinder of causes of action, one for partition, as between plaintiffs and part of defendants, and another for quieting title as against other defendants, and another to recover rents from defendants in possession.

This is unauthorized: Rev. Stat., 1224, Sec. 5019, 5757; 75 Stat., 609, Sec. 5019, clause 6, refers to rents and partition of the same land sought to be recovered, with an action to recover possession in a proper case for recovery at law.

II. There can be no partition where there is an adverse possession, and where the plaintiffs have no right at law to recover possession. Fabler v. Wiseman, 2 Ohio St., 207; Nash Pl., 1347–1351; Williams v. Van Tule, 2 Ohio St., 336; Byers v. Wackman, 16 Ohio St., 440; Perry v. Richardson, 27 Ohio St., 110. In some of these cases there was partition on an equitable title, but only where there was a right of possession. 5 Ohio, 121; 17 Ohio St., 553.

III. The plaintiffs are asserting a state equity which the court will not aid.

IV. There can be no account for rents, because the plaintiffs never could have recovered possession. 21 Ohio St., 664; Taylor Landlord and Tenant, Sec. 636.

Jeremiah Hall, for Plaintiffs.

I. A partition proceeding is not adversary. 2 Estee's Pleadings, 325.

Therefore, there is no misjoinder. As to the rents, the demurrers are the only parties defendant, and if the claim for rents be a separate cause, it grows out of the case stated in the petition.

580 *II. Equity has jurisdiction to give the relief demanded. Story Eq., 646–648; 653–658; Ch. 14, Title Part.

Wm. Lawrence, for Gunn's heirs, occupants of land in two similar cases in this court involving the same questions. They were defendants in this case, but were, on motion, struck out.

I. There is misjoinder of causes: (1) partition, (2) determination of conflicting equities, (3) to establish lost papers and (4) rents. This case is not aided by 75 Vol. Stat., 609, Sec. 1; Rev. Stat., 5019, which only applies when plaintiff has a legal estate. Penn v. Cox, 16 Ohio, 33.

The occupants are improper parties. Pomeroy Remedies, Sec. 374; 2 Ohio St., 209; 15 Ohio St., 337; Swan v. Swan, 8 Price, 518. Mortgagee not proper party. White v. Tudor Lead. Cas. Eq., Vol. 2, Part 1, p. 886 [474.]

II. There can be no partition. In addition to authorities cited, see McBain v. McBain, 15 Ohio St., 345–351; 75 Stat., 760, Sec. 4; Rev. Stat. 5754, includes "tenants" only; Sec. 5757 shows that only "legal rights" can be partitioned; Davison v. Wolf, 9 Ohio, 73; 11 Ohio, 389; 27 Ohio St., 110.

Freeman on Partition, *passim*. Story says "where the title is decreed and has not been established at law," the court will not proceed. 1 Story Eq., Sec. 650, note; Wilkin v. Wilkin, 1 Johns. Ch. R., 117; Parker v. Gerrard, Ambler R., 236; Phelps v. Green, 3 Johns. Ch. 305; Cox v. Smith, 4 Johns. Ch., 276; Cartwright v. Pulteney, 2 Atk., 380, Miller v. Warmington, 1 Jac. & Walk., 473; Baring v. Nash, 1 Ves. & B., 555; 1 Story Eq., 653–656; 2 Estee's Pleadings, 171; Jenkins v. Van Shaak, 2 Paige, 242.

I venture to say that no case can be found where partition has been made before patent issued, and on application of claimants against parties in possession, under claim of title adverse to such claimants.

"The title of complainants must be indisputed, otherwise the title will be dismissed." Adams Eq. (230); Castleman v. Veetch, 3 Rand., 598; Straughan v. Wright, 4 Rand., 493; Smith v. Smith, 10 Paige, 470; Steedman v. Weeks, 2 Strob. Eq. R., 141; Pelt v. Ball, 1 Rich Eq. R., 361; Collins v. Dickinson, 1 Hay, 240; Davis v. Davis, 2 Ired. Ch. R., 607; Manners v. Manners, 1 Greene Ch., 384; Wiselay v. Findlay, 3 *Rand., 361; Stuart v. Coulter, 4 Rand., 74; Garrett v. White, 3 Ired. Ch., 131; Bruton v. Rutland, 3 Humph., 435; Horford v. Merriam, 5 Barb. S. C. R., 51; Burhaus v. Burhaus, 2 Barb. Ch., 398; Trayner v. Brooks, 4 Hey., 295; Maxwell v. Maxwell, 8 Ired. Eq., 25; Forest v. Moorman, 2 Carter, 17; Boone v. Boone, 3 Md. Ch., 497; Whellock v. Hale, 10 Humph., 64; Corbett v. Corbett, 1 Jones Eq., 114; Adams v. Ames, 24 Conn., 230.

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The Ohio cases show that partition settles no question of title; hence a vain thing to order partition.

To attempt to settle title or right of possession would deny the constitutional right to a jury trial. Rev. Stat., 5130; Const. Art. I., Sec. 5.

Cannot try title on partition. Slade v. Barlow, 7 Law & Eq., 296; 2 White and Tudor L. Cas. Eq., Pt. 1 (470), 882–902; Bruton v. Rutland, 3 Humph., 435–6; Niceley v. Bales, 4 Humph., 17; Rev. Stat. Ohio, 5783.

Can only quiet title for party in possession. Rev. Stat., 5779; Buchanan v. Roy, 2 Ohio Stat., 251; Thomas v. White, 2 Ohio Stat., 540; Douglass v. Scott, 5 Ohio, 194; Collins v. Collins, 19 Ohio St., 468; Rhea v. Dick, 34 Ohio St., 420.

Possession under tax title bars partition. Hoffman v. Beard, 22 Mich., 59; 2 White & Tudor L. Cas. Part 1, Eq., 902.

III. The court will not aid a state claim as this is. 10 Ohio, 24, 26, 524; 1 Ohio St., 478; 14 Ohio, 443.

Possession for twenty-one years bars partition. Adams v. Ames, 24 Conn., 230; 2 White & Tudor L. C. Eq., Part 1, 901. Lapse of time, as said in McCoy v. Grandy, 3 Ohio St., 464, is a "rule of evidence raising a presumption that the title [legal or equitable] has passed." 1 Story Eq., Sec. 87, holds the same rule. This whole subject is argued in 7 (Cincinnati) Law Record, 418, January, 1879. In these cases, the defendants, in fact, have been in possession for thirty years, and on an answer in the nature of a cross-bill in equity, the court would enjoin plaintiffs' action and quiet defendants' title.

IV. The court should leave the plaintiffs to perfect their title by procuring the patent. It is to be presumed the government will do its duty. A partition now would be a judicial cloud on the title of parties in possession, which the court *should not create when the government denies the rights of plaintiff's title by refusing a patent. 582

DODGE, J.

The plaintiff avers that his ancestor, Slaughter, received for services in the revolutionary war a land warrant, which he caused to be located upon the land in controversy; that a certificate of entry was duly made but never returned, and no patent was issued.

This, he claims, vested in his ancestor, Slaughter, a perfect equitable title, while the legal title remained in the United States in trust.

Plaintiff connects himself with his ancestor by proper averments, and demands judgment for an undivided one-twelfth of the land as one of the heirs of said Slaughter. He also prays for partition and an account of rents and profits.

To this petition the defendant demurs.

The Code permits a party to bring his action for the recovery of an interest in the land, and also for partition.

Two questions are, therefore, raised by the demurrer:

First—Whether the facts stated are sufficient to vest a complete equitable title in Slaughter; and,

Second—Whether an action for the recovery of land can be maintained upon a purely equitable title. Counsel for defendants have raised no issue upon the first question, and seem disposed to concede that the facts stated, if true, did, in fact, vest an equitable title in Slaughter. The court not having an opportunity to fully investigate

the laws applicable to land entries, will assume that such is the case.

It stands admitted, then, that plaintiff has a full and complete title in equity to one-twelfth of the land in controversy, and the inquiry now is, can he recover thereupon in this form of proceeding?

The Code seems to provide but for two forms of real actions.

A person may bring his action at law for the recovery of land. In this it is declared sufficient to allege that he has a legal estate in the land described in his petition. The use of the word sufficient in the Code seems fairly to imply that so much, at least, must be averred;
583 that a recovery *cannot be had upon less; that plaintiff must at least be able to aver that he has a legal estate in the land.

The other action allowed by the Code is by a party in possession of land, who is authorized to file his petition against any person holding or claiming an adverse interest therein. To maintain this action possession has always been held to be necessary.

A party in possession of land and holding a complete equitable title, can easily obtain a decree of this court by which his legal rights are forever established. But is there any provision of law by which a person, being out of possession, but being the full and absolute owner in equity of real estate, can enforce his rights in court? If not, there is certainly a *casus omissus* in the Code. A right exists which cannot be enforced; a wrong without a remedy confronts us.

I am strongly inclined to believe that the court would, in a proper case, in the same action, give a decree for a legal title and a judgment for the recovery of the land.

This, however, is not a case calling for the exercise of any such extraordinary jurisdiction on the part of the court. If the facts stated by the plaintiff really exist, the government will certainly give him a patent for the land upon application.

To hold otherwise would be to question the good faith of the nation, to throw an aspersion upon the honor and integrity of our government. There exists, then, no necessity for the plaintiff to call into exercise the utmost powers of a court of equity. He can easily have a full and complete remedy at law, by simply making his proof and taking out his patent. For this reason, therefore, and not because the court might not grant relief in a proper case, the demurrer will be sustained.

The plaintiff, however, still further insists that he is entitled, at least, to an order of partition in this action, even if he cannot recover at law upon his equity; that by joining a prayer for partition to his petition, the difficulty of the case is obviated.

There is, however, no privity of title between himself and the defendant now in possession of the land. None is claimed. He and the defendants claiming the same source of title as himself, claim the whole of the land, and none of them are in possession.

584 *Under these circumstances, I cannot see that the prayer for partition affects the conclusion which has been announced.

Demurrer sustained, and the plaintiffs not desiring to amend, final judgment for defendants.

*STREET RAILROADS. 612

[Hamilton Common Pleas Court, 1880.]

SOMMERS AND KILGOUR V. CINCINNATI ET AL.

1. Under the provisions of sections 2501 to 2505 inclusive, and sections 3437 to 3443 inclusive, of the Revised Statutes, providing for the extension of existing street railroad routes, the consent of a majority in number of the property owners upon the street or streets through which such extension is to pass, filed in writing, is a condition precedent to the power of the city council to grant permission for such extension; and the action of the council in granting such permission is not conclusive against the property owners of the fact that the requisite majority have given their assent to the construction of the extension proposed.
2. A written consent given by an unauthorized person, a stranger to the title, and not purporting to be the consent of the real owner, afterwards ratified by such owner and adopted as his own act, but not until after the passage of the ordinance granting permissison to construct the extension, cannot be counted as the "written consent" of the owner within the meaning of the statute.
3. In a suit brought by a tax-payer in his own name, in behalf of the corporation under section 1778 of the Revised Statutes, to restrain the railroad company from performing any act under or by virtue of such ordinance, for the reason that the same is invalid for want of the consents of property owners, the court will not, in the exercise of a sound discretion, award an injunction; it appearing that the plaintiff is not a property *owner along the line of the proposed extension, and that the injury sought to be restrained threatens only a private and not a public right. 613
4. When such grant of permission is for a period greater than twenty-five years, it will be valid to the extent of twenty-five years.
5. The advertisement of the application provided for in section 2502 is extended to apply only to proposed construction of new routes and not to extension of existing routes upon which no additional fare is to be charged.
6. When council designate two or more streets in which they declare it beneficial to the public to have such extension located, leaving to the railroad company the choice of the various routes so designated, the discretion conferred upon council by section 2505 has been completely exercised, and no part of this discretion can be said to have been delegated to the railroad company.
7. A prolongation of an existing street railroad track through any street or streets within the corporation in which council declare that the same will be beneficial to the public, no matter in what direction such prolongation may be made, is an extension of an existing track within the meaning of section 2505 of the Revised Statutes; the requisites of such extension being that it shall be constructed only in such streets as are so designated by council and that no additional fare shall be charged by reason of such construction.

LONGWORTH, J.

This case comes before the court upon a motion for a temporary injunction to restrain the city, its officers and agents, and the Storrs & Sedamsville Street Railroad Company from doing or performing any act under an ordinance passed by the city council, January 30, 1880, and to restrain the company from claiming or exercising any privileges under the said ordinance, or tendering any bond thereunder, and to restrain the city and its officers from accepting any such bond. This suit is instituted by the plaintiffs, as taxpayers of the city, upon the suggestion that the city solicitor had been requested to apply for an injunction and had refused to do so. The defendant railroad company is a corporation which, by various extensions of its route, has at last carried its line of railroad from a point outside and westward of the city limits to the corner of Fourth and Walnut (or Fourth and Main), in Cincinnati.

The ordinance in question grants it permission to extend its street railroad from its terminus (reciting that terminus to be at the corner of Fourth and Walnut streets) along Fourth street, westwardly over the track of the Consolidated Street Railroad Company to Vine street; thence north on Vine street over the track of the same company to Twelfth street; thence west on Twelfth street by double track to Central avenue; hence north on Central avenue by occupying the same track and by constructing an additional track to Clark street; thence west on Clark by double track to Baymiller street; thence continuing west on Clark street by single track to Freeman street, thence north on Freeman street
614 over the track of the Consolidated *Company to Hopkins street; thence west on Hopkins street by double track to Dalton avenue; thence south on Dalton avenue by double track to Gest street; thence west on Gest street by double track to McLean avenue; thence south on McLean avenue by double track to its own track on Eighth street; thence returning on said McLean avenue to Gest street, Dalton avenue and Hopkins street to Freeman; thence east on Hopkins street by single track to Baymiller; thence south on Baymiller to Clark, thence eastwardly on Clark to Vine; thence east on Twelfth to Walnut; thence south on Walnut to Court; thence continuing south on Walnut to Fifth; thence east on Fifth to Main, and thence south on Main to Fourth. The ordinance contains a further provision, that if the company so elect, it may run its cars on a single track instead of a double track on Clark street, from Central avenue to Baymiller; thence westwardly to Eighth street, returning to Baymiller over the tracks above provided for; thence continuing east on Hopkins street by single track to Central avenue; thence south on Central avenue over the track of the Consolidated Company. Permission is also given to the company to extend its railroad from the intersection of its tracks with the turntable on Eighth street to the Walker Mill Road; thence northwardly on the Walker Mill Road by double track to Liberty street. It is further provided that should the company fail from any cause to obtain the right, or otherwise be unable to run its cars west on Fourth street from Main to Vine, it shall then have authority to extend its track from Sixth and Main northwardly on Main to Seventh; thence west on Seventh to Walnut; thence north on Walnut to Court; thence continuing north on Walnut to Twelfth; thence west on Twelfth to Vine; thence to the tracks at the intersection of Eighth and McLean avenue, and back to the intersection of Vine and Twelfth; thence south on Vine to Fifth; thence east on Fifth to Walnut; thence south on Walnut to Fourth. The ordinance goes on to provide the conditions under which the grant shall be enjoyed, and the manner in which the work of laying the track shall be done, but further provides that before the construction of the track shall be commenced, the company shall obtain the consent of a majority in interest of the owners of the property abutting upon the improvement. It further provides that the fare for carrying passengers over the road, as extended, shall not be in any manner increased by reason of this additional grant. It is stipulated in the ordinance that the right granted therein shall cease and determine with the expiration of the grants heretofore made to said company, and a bond of $10,000 is required from the company, conditioned that it shall pay and save the city harmless from all damages for
615 which it may be *liable by an injury to persons or property on account of this grant or operation of cars thereby authorized.

It is claimed by the plaintiffs in this suit that this ordinance is illegal and void for several reasons, two of which, they say, appear upon the face of the ordinance itself. The first of these is that the route provided from Eighth street at the intersection of McLean avenue to the corner of Fourth and Main streets, and so on, is not an extension of the old route in the language of the law, but is the construction of a new route, and that the steps required to be taken to entitle the council to pass an ordinance to construct a new route have not been taken. In the second place, because it is not the exercise by the council of the discretion delegated to it to provide for the extension of railways and determine the streets in which they are most beneficial, if constructed, to the public, but that the ordinance attempts to delegate to the grantees that discretion, of determining the streets in which the so-called extension may be constructed by giving the election of four routes over which they are authorized to construct their road. The ordinance is said to be void for the reason that prior to and at the time of its passage the consents of a majority of the property holders owning land abutting upon the proposed route had not been filed in writing, as required by law. It is further claimed that the term of the grant is for a longer period than twenty-five years, the limit fixed by law for the duration of such a franchise. It is also claimed that there was an imperfect advertisement of the ordinance. The only issues of fact upon which evidence has been offered are as to whether these consents were obtained, and whether the ordinance was properly advertised. Without going into a recital of what the evidence is, suffice it to say that I find from an examination of it that the facts are as follows: Before the ordinance was passed, and at the time when it was passed, the consents of a majority of the property holders in writing had not been obtained, unless certain consents be counted as such which were given, not by the owners of the property, but by other persons strangers to the title. These persons signed their name to a memorandum which reads as follows:

"The undersigned, owners of property abutting on———street, hereby consent that the Storrs & Sedamsville Street Railroad or its assigns may construct and operate a (single or double track) street railroad in said street."

In some cases these persons had authority from the owners to give consent, and their act was subsequently ratified, although they did not sign the names of their principals, or even designate in giving consent that they were acting as agents for principals. In other cases these persons had no authority to give any consent, whatever, but their act was afterward ratified by *the person who in reality owned the property. 616
These ratifications, however, all took place after the ordinance had passed and gone into effect. I find it also to be the fact that at the present time the actual consent of a majority of the abutting property owners to this proposed extension has been given, and that if there be some who object to the construction of the road they have never signified an active objection, either by bringing suit or otherwise. The question arises whether the consents given in the manner described are a compliance with the provisions of the statute. Section 3437 of the Revised Statutes provides that street railways with single or double tracks may be constructed or extended within or without, or partly within and partly without any municipal corporation or unincorporated village. The section following provides that the right to construct or extend such railways

within or beyond the limits of a corporation can be granted only by ordinance of council, and the right to construct it within or beyond the limits of an unincorporated village only by the county commissioners. The next following section contains the restriction that no such grant shall be made until there is produced to the council or the commissioners, as the case may be, the written consent of the owners of more than one-half of the feet front of the lots and lands abutting on the street or public way along which it is proposed to construct such railway or extension thereof, and the provisions of sections 2501 and 2505, inclusive, as far as they are applicable, shall be observed in all respects, whether the railway proposed is an extension of an old, or the granting of a new route. These sections referred to are a portion of chapter II of title 2 of the Code, referring to the creation of corporations and the general provisions governing them, and in coming under the subdivisions entitled "Street Railways." Sections 2501 to 2505, inclusive, are found in what is known as the Municipal Code, and are intended to apply to street railroads, in so far as they have connection with the government and interests of cities, towns and villages. Section 2501 provides that no corporation or individual shall construct a street railroad until council shall by ordinance have granted provision therefor, prescribing the terms and condition upon and the manner in which the road shall be constructed and operated, and the streets and alleys which shall be used and occupied therefor, and that cities of the first and second grades of the first class may renew any such grant at its expiration upon such conditions as may be considered conducive to the public interest. Section 2502 provides that no ordinance for such purpose shall be passed until public notice thereof has been given by the clerk of the corporation by advertisement, and no grant shall be made except to the individual or corporation that will agree to carry passengers upon such proposed rail-

617 road at the lowest rates of fare, and shall have previously *obtained the consent of a majority of the property holders on the line of the proposed street railroad, represented by the feet front of lots abutting on a street along which such road is proposed to be constructed. This section also contains a provision that no grant, or renewal of any grant, shall be valid for a greater period than twenty-five years from the date of such grant or renewal. Section 2505 provides that the council of any city or village may grant permission by ordinance to any corporation, individual or company owning or having the right to construct any street railroad, to extend their track, subject to the provisions of sections 4 and 5 of the act of March 27, 1866, upon any street or streets where council may deem such extension beneficial to the public, and when any such extension is made, the charge for carrying passengers on any street railroad so extended, and its connection made with any other road or roads by consolidation under existing laws, shall not be increased by reason of such extension or consolidation. Sections 4 and 5 of the act of March 27, 1866, referred to, which are found on page 55, volume 66, of the Ohio Laws, provide that when any company or individual, or company of individuals, shall have obtained, or shall obtain a grant from, or the consent of the council of any city or incorporate village to use and occupy the streets and avenues of such city or incorporate village for a street railroad, and shall be unable to obtain the consent of a majority of the owners of any street or avenue to be so used or occupied, or having obtained the consent of such majority shall be unable to agree

with any of them who did not, in giving consent, expressly waive or release any claim for compensation, or with any other owner or owners as to such use or occupation. It shall and may be lawful for such company, individual, or company of individuals to appropriate or condemn the same according to law. It contains the further condition that not more than one track shall be laid in any street or avenue without the consent of a majority in interest of the owners of property abutting thereon being first had and obtained, reference being had to the assessed value of the whole property located upon such street or avenue. Section 5 provides for the manner of such appropriation or condemnation.

It seems to my mind that the intent of the legislature in the statutes which I have cited is very clearly expressed, and that no ambiguity is to be found in them. The first set of sections referred to applies to street railroad corporations or to individuals who run or operate street railroads in all places, whether in cities, in villages, hamlets or in the country. Sections 2501 to 2505 inclusive are intended to apply to that subdivision of the class of street railroads which happen to be in or connected with municipal corporations. The language in 3439, to wit: That "the *provisions of sections 2501 to 2505 inclusive, so far as they are applicable, shall be observed in all respects," cannot mean anything 618
else than that those sections of the municipal code shall apply to all street railroads which happen to be connected with municipal corporations, in addition to the general provisions fixed by sections 3437 to 3443 inclusive, which are intended to apply to every street railroad of every kind and in every place. No more comprehensive language than that found in section 3437 can be devised by the wit of man. It refers to railroads within municipal corporations, or without municipal corporations, or railroads which lie partly within municipal corporations and partly without their limits. No grant either to construct a new line of road or to extend an old line can be made until there is produced to the council, or the county commissioners, as the case may be, the written consent of the owners of more than one-half of the feet front of the lots and lands abutting on a street or public way along which it is proposed to construct such railroad or extension. From this provision of law it is evidently intended that for the purpose of protecting the individual rights of the property holders, not only shall their consent, or that of a majority of them, be in all cases first obtained, but it is expressly declared that such consent shall be evidenced and proved in one way, and in one way only, to-wit, by consent in writing filed before the ordinance shall be passed or the grant shall go into effect. In this respect the statute bears a strong resemblance to the statute of frauds, under which it has been often decided that where the signature or memorandum is made in writing by one agent, that the authority of such agent may be proved by parole. In this case, however, the consents were in many cases given by persons who were not at the time agents for anybody, and whose only relation as agents arose afterward by ratification of some kind, nor did the consents given by them purport to be the consents of their principals, or of any other person but themselves. In many instances these persons may have had or may have thought they had an interest of their own in the property, as in the case of one who, as an executor, gave consent which is now claimed to be the consent of the devisees under the will which he represented. As in another instance where a husband

signed his name, his wife being the sole owner of the property; and as in the still other instance of one who gave his consent, who was himself not an owner at all, but who contemplated purchasing a lot of land abutting upon the improvement. I cannot bring my mind to the conclusion that the facts shown constitute a compliance with the requisites of the statute, and in view of the fact that the legislature has seen fit to make such compliance a condition precedent to the exercise of the legislative power on the part of the council, I am forced to the conclusion that the
619 ordinance *is in this respect invalid. What then is the position of the plaintiffs upon this state of fact and law? To what relief, if any, are they entitled? They are before the court as two taxpayers of the city of Cincinnati, suing in behalf of themselves and all others of the same class, and on behalf of the corporation itself, against the city and the railroad company to prevent this ordinance from being carried into effect.

That portion of the Code which regulates the duties of the city solicitor provides, among other things, that he shall apply to a court of competent jurisdiction for an order to restrain a misapplication of the funds of the corporation or the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the corporation in contravention of the laws or ordinances governing the same, or which was procured by fraud or corruption (section 1777). Section 1778 of the same subdivision provides that in case he fails so to do it shall be lawful for any taxpayer to institute suit for such purpose in his own name on behalf of the corporation. The next section provides that the court shall upon the hearing of such case, if satisfied that such taxpayer had good cause to believe that his allegations were well founded, or if the same is sufficient in law, make such order as the equity and justice of the case demand. What order then do the equity and justice of this case demand? What injury has been done either to the corporation or the plaintiffs in this suit? There has been here no misapplication of the funds of the corporation or any abuse of its corporate power which can affect its corporate funds or the pecuniary interest of any of its citizens other than those who are property owners along the line of the proposed railroad extension, and who not only do not made any complaint, but a majority of whom actually consent at the present time to the laying of the tracks. Indeed, I think I am warranted in assuming that all consent from the fact that none are here today to complain, and none have up to this time been heard to make complaint. In what respect have the interest of these plaintiffs and the other taxpayers of Cincinnati, or of the corporation itself, been affected, or in what respect can they be affected by the ordinance in question? I might answer that every citizen is conclusively presumed to be injured and wronged by the passage of an ordinance in any respect illegal. This undoubtedly is true, and the statement cannot be gainsaid, but I am unable to find any provision of law by which a remedy for such an injury in the courts is given in the absence of fraud or corruption. It is *damnum absque injuria*. The statute does not provide that any citizen or elector of a city shall have the standing in court which these plaintiffs have, but confines the right to sue to that class only which pays taxes. Of these citizenship is not required to enable them to institute the proceeding
0 *provided for. I can well understand that an elector of the city, who pays no taxes at all, should have as much interest in the mainte-

nance and enforcement of the laws, and in confining the municipal legislature within its legal and constitutional limits, as he might have if he paid taxes. On the other hand, I can understand that one who is not a citizen of the city, who has never even seen it, who lives in a foreign country, and who has no interest in its prosperity and welfare, except as limited by the amount he has invested in property situated here, and upon which he pays taxes, may be careless concerning these matters, except in so far as they affect such investment. The legislature in its wisdom has seen fit to limit the right to sue to that class which pays taxes, and gives it to no other person. From this fact then, that it is because they are taxpayers that they may sue, it follows *exnecessitate*, that the relief to be granted described in section 1779 as "such order as the equity and justice of the case demand," is such relief as will properly protect such an interest and nothing more. The statute does not provide that wherever the court is convinced that the council have exceeded their authority in passing an ordinance it shall mechanically proceed to issue an injunction against its operation, but leaves to the court the most unbounded discretion by providing that in such case it shall make such order as is just. This discretion, like all discretion exercised by a chancellor, is governed by the known rules and usages of chancery jurisprudence. And surely it is sufficient objection to interference upon the part of the court in any case to show that the complaint has no manner of interest whatever in the premises. What business is it of the taxpayer if the city council permit a railroad company to do such a work as this without having first obtained the written consent of certain private owners who do not complain, provided the doing of such work does not increase the debt of the city, the liability of the taxpayer, or any interest which he may have or in the nature of things by any possibility can have from the doing of such act? It seems to me that the answer to this question is plain and that only one answer can be given. The provision requiring consents is made for the protection of the property holder and for his protection alone. (See Roberts v. Easton, 19th O. S., 78). Whether the consents be given or withheld is a question which, in the nature of things, cannot concern any persons other than the railroad company and the property owners whose consents they ask. I do not wish to decide, nor is it necessary that I should do so, that if the plaintiffs in this case were non-consenting property holders along the line of this so-called improvement that they could, upon this ground, obtain an injunction by asking the court for such an order as is equitable and just. I wish to decide only this point, to-wit, that nobody else can.

*The ordinance in question is claimed by the plaintiffs to be illegal for the further reason that it grants to the railroad a franchise 621
which shall endure for a longer period than twenty-five years. Section 2502, already read, contains the proviso that no grant or renewal of any grant for the construction or operation of any street railroad shall be valued for a greater period than twenty-five years from the date of such grant or renewal. Assuming that this restriction applies to the extensions of existing routes, as well as to the construction of new lines, and that in fact the grant in question is for a period greater than twenty-five years, I have no hesitation in coming to the conclusion that this illegal element of the ordinance is separable and distinct from the remain-

ing portions of it, and that to the extent of twenty-five years the ordinance is operative, provided it be unobjectionable in other respects.

The ordinance is said to be invalid for the reason that no advertisement and no public notice of the application therefore was given by the clerk of the corporation by advertisement for at least three consecutive weeks, in the manner pointed out by section 2502. That section provides that no grant shall be made except to a corporation, individual or individuals, that will carry passengers upon such proposed railroad at the lowest rates of fare, and this clause is a part of the sentence in which the advertisement is made necessary.

Inasmuch as one of the essential elements of an extension is declared to be that no additional fares shall be charged by reason of the constitution thereof, and inasmuch as it would be idle to provide for receiving bids for carrying passengers over such extension at the lowest rate of fare, when no fare of any kind is to be or can be charged thereon, I am of opinion that the provision for advertisement and reception of bids is intended to apply only to the construction of new and independent routes upon which a fare is to be charged, and that the only object of an advertisement is to obtain bids from competing corporations or individuals. The fact, therefore that the ordinance in question was advertised only for the period of two weeks instead of three, constitutes no objection to its validity if it provides only for the extension of an existing route, and not for the construction of a new one.

Again it is objected that this ordinance attempts to delegate to the grantees the discretion of determining the streets in which the so-called extension may be constructed, by giving to them the election of four routes over which they are authorized to construct their road. Unquestionably, where the legislature has delegated to a council the exercise of a discretion, such discretion must be exercised by the council only, and it has no power to delegate to another the right to exercise such
622 *discretion or any part thereof. The maxim, "*Delegata potestas non potest delegari*," applies strictly, and to its fullest extent, as recognized by the late decision of the district court, in the case of Snelbaker's mandamus suit. The only question here is, whether, as a matter of fact, any part of that discretion whatever has been delegated to the railroad company. Section 2505 gives the council power to grant permission to any existing company, owning a street railroad, the right to extend its track on any street or streets where council may deem such extension beneficial to the public. To determine upon what street or streets such extension will be beneficial to the public, requires the exercise of a discretion, and this discretion can be exercise by the council as a collective body only. This ordinance does not purport to give to the railroad company the right to determine where its location will be beneficial to the public, but gives to them simply an option of choosing in which street or streets it will lay its track, the council having fixed those streets as the ones in which it is beneficial for the public to have such extension located. Council have declared that any one of four routes proposed will be beneficial to the public interest, and have, therefore, left no part of its discretion to be exercised by any other person or corporation. They have completely exercised that discretion as a collective body, and have simply left the choice to the company as to the location of its track. I do not think that the statute will bear the construction placed upon it by plaintiffs, to-wit: That council is

bound to determine in which street or streets the location of a railroad will be most beneficial to the public; which construction excludes the possibility of determining that two or more separate routes may be equally beneficial, as was determined in this case. Such supposition not only may often be true, but it seems to me in most cases, would be true, and yet if plaintiffs be right in their proposition in every case in which it is true, council would, perhaps, be prevented from making any grant whatever, because it could not declare that it was more beneficial to locate the road in one street than in another.

I am well satisfied that the intent of the legislature, as expressed in this limitation, is to prevent council from permitting a road to be constructed in any street or streets where such construction would not be beneficial to the public interest, and to allow such roads to be constructed in such street or streets only as shall conduce to the welfare of the public at large. If I be right in this view of the law there can be no objection to the council giving to the company the right to elect in which street or streets its track shall be laid, having once determined that it is for the public weal that such road shall be placed in some one of several designated thoroughfares.

*The last objection is that the route provided from Eighth street, at the intersection of McLean avenue, to the corner of Fourth 623
and Main streets, and so on, is not an extension of an old route in the language of the law, but is the construction of a new route, and that the steps required to be taken to entitle council to pass an ordinance for the construction of a new route have not been taken in this proceeding. A number of cases have been cited for the purpose of showing how courts have defined the term "extension" of a railroad and distinguished it from the construction of a new line. The word "extension" is one of such broad significance and capable of such unlimited application that from the word alone its strict meaning could never be deduced. The true nature of the subject-matter to which the term is applied only can furnish the guide to its construction. A mathematical line can only be extended by prolongation; a tree can only be extended by ramification; a circle only by increasing its diameter, and the cube or sphere only by increase in two directions. All growth of every conceivable description is extension.

Now, the very idea of a line of steam railroad is that it shall connect one place with another. The very first requisite of such a road is that it shall have two termini, and the law authorizing it to exist provides that those termini shall be designated and described. The very idea of extending such a railroad seems to presuppose that one of its termini should be left behind, and the road prolonged to some other point. Although such road may do a local business, although it by no means follows that every passenger or bundle of freight that comes upon the cars at one end shall necessarily proceed to the other, nevertheless, the road is in contemplation of law as well as in common understanding a line of railroad connecting two points or termini. In the case of a street railroad there is a decided difference. Such road is intended in the nature of things to carry passengers from point to point, from place to place, and to proceed through devious and winding thoroughfares. It has no termini. It is not necessary that it should have actual termini.

The express word route is used most properly to describe such a network of railway. Instead of proceeding from one terminus to another terminus, we rather think of such a system as starting from a point and, after various meanderings, returning to the same point again, forming a network of travel for the accommodation of transient passengers who pass over the road for short distances, from point to point, and from place to place. It is a system of railway rather than a line of railroad, and the term "extension" when applied to it, means increase of the system rather than a prolongation of the line.

In providing for such extension the legislature is careful to
624 *avoid any such expression as the extension of the line or the extension of the road or even the word extension itself, but simply declared in section 2505 "that council may grant permission by ordinance to any corporation, individual or company owning or having the right to construct any street railroad to extend their track." I am, therefore, of opinion that a prolongation of an existing track in any direction whatever, through any streets whatever in which council declare that the same is beneficial is in contemplation of law an extension of an existing street railroad, the requisites being that council shall allow it to be made only in streets in which it shall be beneficial to the public, and that in no case shall any increase of fare be made by reason of the increase of the railroad system.

These views which I entertain of the motion before me make it unnecessary, if not improper, to pass upon many other interesting propositions which have been advanced and pressed by counsel.

I have been urged to view this case as one brought by two stockholders of a rival and competing company, who are suing for the purpose of protecting their individual interests and those of the company of which they are stockholders, and not for the sole reason that they are taxpayers of the city; and in support of this view I am furnished with evidence to prove that they are large stockholders and deeply interested in the success of a competing line. This fact does not, and cannot in any manner influence the relief which should be granted or refused by a court of equity. It is because they are taxpayers of the city of Cincinnati that they have any right to bring suit in this court at all. It is only as taxpayers of the city of Cincinnati, suing in behalf of the corporation or against the corporation, that they could be entitled to any manner of relief whatever, and it is only for the reason that they are such taxpayers, and suing in such right only, that the relief which they ask is denied.

The motion for temporary injunction will be overruled.

SALES—FRAUDULENT CONCEALMENT.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

†GOODALE v. JAMES G. HUNT.

Fraudulent concealment, on the ground of which equity will set aside a sale, may consist in the mere non-disclosure of a fact, known to the *seller and not equally open to the knowledge of the buyer, materially affecting the subject-matter of the sale; but this can only be where there is a duty of disclosure, or there have been partial representations, which for want of the disclosure would prove deceptive. The duty of disclosure may arise from the circumstances of the sale, but not from the mere relation of buyer and seller. 625

APPEAL from Court of Common Pleas.

Suit to set aside the transfer of title to a house and lot at Bond Hill made in consideration of $4,700 stock of the Monte Grande Gold Mining Company, on the ground of fraudulent concealment by defendant of claims of his own against the company affecting the value of the stock. One claim was of adverse title to a mine of the company, but this was not shown to have been a valid claim or to have affected the value of the stock. The other was a claim for money advanced, since reduced to a judgment and therefore established as a valid claim. The amount was $7,000; the entire stock issued was $85,000. The company was an Ohio corporation organized in 1866 for working mines in Nicaragua. Defendant was one of the originators and a director from the beginning. Plaintiff had taken stock under a new issue in the spring of 1876, and became also a director. In autumn of that year defendant desiring to move here with his family from Kentucky, inquired of plaintiff if he knew of a house. Plaintiff mentioned his house at Bond Hill, and the following day took defendant and defendant's wife out to see it. After their return he offered to sell the house for what it cost him and take stock for the amount at par, which offer was accepted. The evidence tended to show that at this time he did not know, nor have ready means of knowing, of defendant's claim and that defendant was aware of this. He also testified that on their way out to Bond Hill defendant said the stock was worth three hundred, but defendant denied this and his wife corroborated him.

AVERY, J.

Concealment of a material fact by one of the parties to a contract leaves the other free to avoid it. The concealment may be passive, that is by withholding the truth, as well as by asserting untruth. But there is this difference, that to make withholding the truth concealment, there must have been a duty of disclosure arising in some way from the circumstances of the sale itself, or the relations of the parties.

The relation of buyer and seller does not impose this duty. The civil law doctrine of implied warranty is not recognized at common law; the common law rule is *caveat emptor*. At the same time, where to take advantage of the rule would prove dishonest, a constant effort to escape from its operation is manifested. Hence a sale for a particular use is

†This case was affirmed by the Supreme Court, without report, Feb. 12, 1884. 11 Bull. 107.

held to imply the representation that the article is fit for the use, or if the sale is general that it is fit for the ordinary use, and if the seller have
626 knowledge of any fact of which the buyer is ignorant, rendering *it unfit, the duty of disclosure is imposed. But this is because of the implied representation gathered from the sale itself.

In Kerr on Fraud and Mistake, p. 101, it is laid down generally that defects which are latent, or circumstances affecting materially the subject-matter of the sale, of which the buyer has no means, or at least not equal means, of obtaining knowledge, must, if known to the seller, be disclosed. But reference to the cases cited as authority for the proposition indicates that this is only where the sale in itself amounts to a representation. Mellish v. Motteux, Peake 156, was the sale of a ship which, by reason of an injury to her lower timbers, was unfit for a ship, and would have been inevitably lost on going to sea. Smith v. Harrison, 26 L. J. Ch. 412, was the sale of the interest of a partner for £150, which interest, by reason of the insolvency of the firm and the state of the individual partner's account, known to the seller, but unknown to the buyer, was of no value whatever.

No case more acutely marks the distinction to be observed than Hadley v. Clinton County Importing Company, 13 O S., 502. That was the case of the sale of an imported cow, sold as a breeder, and for the purpose of improving the buyer's herd of cattle. A dead calf had been taken from the cow a month or two before by artficial means, and had the appearance of having been dead some weeks, which fact, although, in the opinion of some witnesses, it would not affect the breeding capacity of the cow, in the opinion of others would render her worth less as a breeder. The court held that the rule of *caveat emptor* did not apply, and that there was evidence of fraud to go to the jury. The reason is thus given, p. 507: "It is expressly stated in the bill of exceptions that the evidence tended to show that the cow, the subject of the contract, had been sold and purchased for a breeder, with a view to the improvement of the plaintiff's herd of cattle. The vendors cannot be said to have been merely silent, and the jury were entitled to inquire whether the whole truth as to the breeding qualities of the cow should have been disclosed."

All the cases cited in argument for plaintiff rest upon representations made; in some of the cases express, in the others implied. Of the former class, are Prentiss v. Russ, 16 Me., 30; New Brunswick R. R. v. Muggeridge, 1 Dr. & Sm., 363; Kisch v. Venezuela R. R. L. R., 2 Eng. and Ir. App., 99; Trigg v. Read, 5 Humph., 529. Of the latter class, are Cornelius v. Molloy, 7 Penn. St., 293; Lee v. Jones, 14 C. B. N. S. 386; Dinsmore v. Tidball, 34 O. S., 411. They illustrate what is laid down in Hadley v. Clinton County Importing Company, that non-disclosure in order to constitute fraud must be of facts, which
627 the seller was under obligation to disclose, and that the *obligation must arise from something in the acts or conduct of the vendor in connection with the sale; doing something or saying something that for want of the disclosure is false and deceptive, 13 O. S., 513.

In the present case no artifice was practiced on the plaintiff. No representations were made. He was a director in the company equally with defendant. He had come in as a stockholder upon suggestion of friends of his own, and must be presumed to have relied upon his own judgment or theirs, at least not upon the defendant. The claim of de-

fendant was not a charge upon the stock. It affected the value of the stock, only as a general consideration dependent on comparison of the resources and liabilities of the company. There were no representations as to resources and liabilities. The value of the stock might prove to be more than part as the mines should meet the anticipations of the company, or as the chance should happen the stock might prove worthless. But these were the ordinary contingencies in a trade of that kind. So far as defendant's claim was concerned it was not of a character to affect the value of the stock to a greater extent than the proportion between $7,000, the amount of the claim, and $85,000, the entire amount of the issue of stock. If the mere fact of the sale implied a representation that the stock was of some value, it was not that it was of a particular value. There was no duty, therefore, to disclose what would not at the most have made a greater difference than ten per cent. of the par value.

Petition dismissed at plaintiff's cost.

M. W. Oliver and Rankin Jones, for Plaintiff.

Matthews, Ramsey & Matthews, Contra.

CORPORATIONS.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

STATE EX REL. BECKER V. SOCIETY, ETC.

1. An inherent right exists in a corporation to expel a member when he does an act that tends to the injury or destruction of the corporation, and it is not necessary that that cause be specially set forth in the constitution and by-laws as a ground for expulsion.
2. The court will not order a peremptory writ to issue, restoring a relator to membership in a corporation, where it is plain from the testimony that the members thereof can at once expel him in the manner pointed out by the by-laws of the corporation.

*The application was a mandamus to compel the defendant, The Society for the Support of the Sick of the Evangelical Lutheran St. Paulus Church in Reading, Ohio, to restore the relator to his rights and privileges as a member of the society. The case came on to be heard upon the alternative writ and the answer of the respondent. The claim of the relator was that in 1870 he became a member of the association, and that he had always conducted himself properly and paid his dues faithfully, but that in 1879, without any just cause therefor, and without any notice or trial being had, he was, by the officers of the association, denied the right to exercise the privileges of a corporator; that he tendered his dues and they refused to receive them. He further alleged that the society had a large amount of property, and that by its charter, constitution and by-laws, among other benefits to be derived from a membership, was the receipt of three dollars per week in the event of his becoming sick, and, in case of his death, $25 toward his funeral expenses. The defendants answered that no person could become a member of the association without he held to the Lutheran faith and 628

communed with the St. Paulus Congregation at Reading. The answer was rather ambiguous: for while it stated that the relator never was a member of the St. Paulus Church, yet notwithstanding that fact, that in August, 1879, the congregation, finding that he had gone to another congregation in the town of Reading, struck his name from the list of that church, and that thereby he was not entitled to remain a member of the defendant association, nor entitled to participate in its benefits.

JOHNSTON, J.

The court find that while the respondent claimed that the relator had never been a member of the church in fact, and the relator sought to show that fact and the further fact that it was not a prerequisite that he should have been a member to entitle him to the benefits of the association; yet, it clearly appeared from the testimony that he was in fact a member of the congregation before his connection with this society, and had a right to belong to the society. The question arose, however, whether he had been guilty of any act whereby the society were entitled to expel him.

From a reading of the charter, constitution and by-laws, and the testimony in the case, the court was satisfied that a person, to be a member of the society, must not only hold to the Lutheran faith, but must be a communicant of the St. Paulus Congregation, inasmuch as the society was for the support of the sick of the Evangelical Lutheran St. Paulus Congregation of Reading. This relator, having ceased to be a member of that congregation, he could no longer be entitled to exercise the rights and privileges of a corporator of the association. As to the
629 claim *that the relator was not arraigned to answer to any charges, the constitution and by-laws did not provde that in the event that a member should withdraw from the congregation upon that account he might be arraigned and expelled. But an inherent right exists in a corporation in many instances to remove or expel a member for causes which are not set forth in the constitution and by-laws. One of these causes may be where the party has committed some act which tends to the injury or destruction of the corporation.

On becoming a member of this association there was a mutual covenant or agreement that the member should work for the best interests of the society, and that they would continue to remain members of the St. Paulus Church. By withdrawing from the congregation the relator weakened its membership, and also its revenues, and the society became injured, as a withdrawal from the congregation reduced likewise the membership of the society and its revenues, and threatened its existence; for when its membership should fall below ten, then the society was to become extinct. While it appeared that the relator was not notified, and that he was not formally tried, there being simply a refusal of the treasurer to receive his dues, the court would not be justified in holding that a peremptory writ should be granted simply to restore him to the society, to be at once turned out by formal proceedings in accordance with the by-laws. On the whole case the peremptory writ would not be allowed, and the petition will be dismissed at relator's costs.

Lane & Spangenburg, for Relator.

C. Von Seggern, for Respondent.

EVIDENCE—WITNESSES—LIFE INSURANCE.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

†MUTUAL LIFE INS. CO. v. SCHMIDT, GUARDIAN.

1. The evidence taken at a coroner's inquest, and the verdict of the jury therein, are not admissible in evidence to establish the cause of death of the deceased party in a case where the cause of death is a controverted question. The fact of death may be established by the inquest.
2. A witness cannot be impeached upon the ground of surprise by the party calling him, simply because the witness does not come up to his expectations—the witness not testifying adversely to him—while not doing him any good, doing him no harm.
3. While the proofs of death furnished by the beneficiary under a policy of life insurance may be introduced in evidence against the beneficiary by the company in the nature of admission against interest, they are competent only to the extent that they contain statements of facts within the personal knowledge of the persons making them. The affidavits of a physician, and of other persons called to examine the body after death, of the person whose life was insured, stating from hearsay, that the deceased had taken arsenic and that that was the cause of his death, is incompetent testimony as against the beneficiary, who furnished such proof of death to the company, in accordance with the provisions of the policy that proof of death and the cause thereof should be made before payment of the policy. 630

ERROR to the Superior Court of Cincinnati.

This was an action by George Schmidt, as guardian of an infant female, four years of age, to recover upon a policy of insurance upon the life of her father, William Aab, she being the beneficiary named in the policy.

JOHNSTON, J.

The death of the party and the issuing of the policy being admitted and the defense being that the person whose life was insured came to his death by his own hands, the burden of establishing that issue devolved upon the defendant. The plaintiff offered no testimony, and the defendant having offered its evidence, the plaintiff offering no testimony in rebuttal, the case, after argument and the charge of the court, was submitted to the jury, and there was a verdict for the plaintiff for the amount of the policy, $1,000. The main errors relied upon were that the court erred in ruling out the hearsay portion of the testimony appearing in the proofs of the death of the party; in refusing to admit in testimony on behalf of the insurance company the evidence taken before the coroner; in refusing the insurance company the right to read certain portions of the testimony before the coroner for the purpose of contradicting a witness called by the insurance company, and also in its charge to the jury, and that the verdict was contrary to the weight of the evidence.

Among the witnesses examined before the coroner were one Meyers and one Gerringer, who were called by the insurance company for the purpose of showing that the deceased committed suicide. The testimony before the coroner also contained the testimony of the physician who was called immediately after the death of the party. It appeared that none of these witnesses were present at the time it is claimed the deceased took the alleged poison. It was claimed by the company that he came to his death by arsenical poison taken in the fluid shape. None of these witnesses were present and saw him take the poison, but they proceeded to detail in their testimony what they had heard in relation to his having taken poison, all originating from a child four years of age, perhaps the ward in this *case. The plaintiff objected to the introduction of the record on the ground that it was not competent for the purpose of proving the means by which the party came to his death, and for the further reason that it was merely hearsay. 631

†This case was affirmed by the Supreme Court. See opinion 40 O. S., 112.

There was no error in the court refusing to permit the evidence taken before the coroner to be introduced. The inquest of a coroner may be used to prove the fact of death of a party or of his insanity, in another proceeding, but the means of death or the cause of insanity cannot be established by the testimony of the witnesses as embodied in the inquest. They must be called and give testimony as other witnesses where the right to a cross-examination may be exercised by the party to be affected thereby. It was sought by the insurance company to establish the fact circumstantially by proving by Meyers that, upon his entering the room immediately after the death of Aab, he saw his wife, then his widow, in the act of throwing the contents of a tumbler out of the window, the contents being of a whitish color. Meyers, when upon the stand, being interrogated by counsel for the insurance company, stated that he did not recollect then what he in fact saw the lady do on going into the room, and being asked whether or not he did not see her throw this whitish substance from the tumbler out of the window, he said he could not recollect; that he had forgotten what he did see at that time, or what he may have testified to before the coroner; and, after having been thus interrogated backward and forward for the purpose of bringing him up to the point, he still persisted in saying he did not know what he had testified to or what he had seen on that occasion, it having been so long ago that it had passed out of his recollection.

The insurance company then asked the court for leave to impeach the witness by showing that he had not only stated before the coroner, under oath, that he had seen this substance thrown from the window by the wife, but that he had also stated the same in substance to another party outside of court. Objection was made to this line of examination being pursued.

Meyers simply failed to come up to expectations of the party calling him, and therefore it was not competent for the insurance company to impeach or contradict the witness, because he had not testified adversely to it. To have permitted the party calling him to have introduced what the witnesses said upon another occassion, or what they may have testified to before the coroner's jury would have been giving the insurance company an undue advantage. It would have been giving it the opportunity of placing before that jury a statement or declaration having all the effect of independent, substantive testimony either not given under the sanction of an oath, or without any cross-examination and contradictory of nothing to which the
632 witness had testified. *It is only where a witness testifies adversely and takes the party calling him by surprise, that such party may destroy the witness by impeaching him by showing that he had stated differently out of court. The witnesses, while they did not do the company any good, did it no damage. We think, therefore, that the court properly refused to permit counsel to impeach this testimony.

A new trial was asked on the ground of newly discovered evidence. The testimony claimed to have been newly discovered was the testimony of the wife of the decedent. She was in court during the trial under the subpœna of the company, but was not called to the stand, hence the company was not entitle to a new trial on that ground. The verdict was not contrary to the weight of the evidence.

It was very singular that no post-mortem examination was made. When the attending physician arrived the man was dead. In his affidavit that was sent forward to the insurance company to prove the death of the party, he stated in substance what he had been told by the wife, and she in turn testified what she had heard the child say. The other two witnesses—Meyers and Gerringer—knew nothing of the causes of his death except by hearsay, and the guardian testified that he personally knew nothing of his death.

The court, in charging the jury, expressly cautioned them that anything that appeared in the proofs of death to have been received by the parties as hearsay evidence would not be considered by them, as the evidence was not competent. We think the court charged properly in that respect. When a party in interest, whose admission is sought to be introduced against him, details facts that come to his knowledge through hearsay, that does not make such evidence competent. It is hearsay, notwithstanding the fact that it was introduced in the nature of an admission against him. 2 Bos. & Pul., 548; 16 N. Y., 381; 1 Gr. on Ev., section 202.

Judgment affirmed.

Morrill & Struck, for Plaintiff.

Judge Yaple and Baldwin & Bruner, Contra.

ASSIGNMENT OF JUDGMENT.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

LEIGHTON and WIFE v. DURRELL.

A decree for the sale of mortgage premises having been assigned as collateral security for a loan to the defendants, to pay off the plaintiff, the loan being usurious, in an action to enjoin the assignee from enforcing that decree for a greater sum than the amount loaned with the legal *rate of interest, and to compel him to assign the decree; where it appears that the defendants have found a 633 party who will loan them the money to pay off such assignee, upon an agreement with him, that he shall hold said original decree as security, upon the payment of the money legally due the assignee, to him, or into court, a court of equity will adjudge such party entitled to hold said decree for his security, whether the assignee assign it to him or not, and the decree will be kept alive for his security.

APPEAL.

The plaintiff instituted this action to enjoin a decree for sale held by Durrell against their property. They allege that in 1875 one J. H. Varnholtz obtained a decree in foreclosure for the amount of $3,600, and that by mesne assignments it came into the possession of the defendant under an agreement between them and him that upon the payment by Durrell to Durrell's assignor of $2,592, Durrell should hold the decree as collateral security for the loan, Durrell to give them one year to pay the balance of the decree, which, by that time, had been reduced to $2,592. They allege that Durrell loaned them enough money to pay off his assignor, but made the loan on the basis of $2,700, and that they were to pay him interest upon that sum at the rate of twelve per cent. per annum, four per cent. being deducted from the amount, and eight per cent. to be paid on the $2,700. They further state that the time having expired for the payment of the money Durrell insisted upon issuing an execution upon the decree to sell the property; that they tendered him the amount due upon the decree at six per cent. interest, but that he refused to receive the same, whereupon they brought this suit for an injunction. They say in their petition that they were ready and willing to pay the amount with six per cent. interest, or any other sum which the court may find due to the defendant, and they ask that he be compelled to accept the same, and to assign the decree to John Lyford, who was ready to pay to him the amount due under it. Durrell claimed that he purchased the decree and became the absolute owner of it, and that $2,700 were to be paid to him with interest before he should be compelled to cancel or discharge it, and that the same not having been advanced to him he was under no obligation either to satisfy the decree or receive the money. He denied any agreement to assign the decree to any person.

JOHNSTON, J.

The contract between the parties was usurious, and for that reason the sale of property by Durrell for any greater sum than the amount actually loaned with the legal rate of interest must be enjoined. The testimony warranted the court in finding that the amount actually due, with interest, was tendered at the time suit was instituted in the court of

634 common pleas, and that *defendant had refused to receive it. While there was testimony tending to show that Durrell was to assign this decree to Lyford, yet it was immaterial whether that should have been proved to be the agreement or not, it appearing that, as between the plaintiffs and Lyford, Lyford had agreed to advance enough money to pay off Durrell and to hold the decree as his security.

If the money were in court, and the court would order Durrell to receive the money from Lyford, and that Lyford, by virtue of hs agreement with the plaintiffs, should hold this decree as security for the money advanced. It is quite immaterial to the creditor from what source the money comes, so that he gets all that is due him. It is no objection to the enforcement of such an agreement, that the creditor was not a party to it, as it would be executed when justice between others required it without reference as to whether the creditor assented or not. 15 Wis., 612, Dormer v. Miller *et al.* Taking the statements of the plaintiffs to be true, that they are now ready and willing to pay the money to Durrell, the court would go so far as to order that, if by virtue of the agreement with Lyford or with any other person upon a like agreement, plaintiffs should pay the money to Durrell before the close of court, today, the court would order that that person would be entitled to hold the decree as security for the loan, and that Durrell should receive the money to which he is legally entitled and that the decree should be kept alive for his security. If not paid, however, the order would simpy be that Durrell should be enjoined from proceeding to enforce the sale of the property for the payment of any greater sum than the amount loaned by him, with six per cent. thereon.

McDowell and Strafer, for Plaintiffs.

John A. Shank, for Defendant.

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650 ***RAILROADS.**

[Logan District Court, March Term, 1880.]

Beer, Dodge and McCauley, JJ.

†SKILLMAN v. C. S. & C. R. Co.

1. In Ohio a railroad company cannot discriminate between ticket and car rates for passenger fare.
2. A railroad company having adopted a ticket rate for passenger fare, this will be deemed a reasonable rate in those cases where such company may charge a reasonable rate.

June 17, 1875, Skillman filed his petition in the common pleas, averring that the railroad company in 1875 had established the price of railroad fare for passengers from Huntsville to Bellefontaine, 6¼ miles, at 20 cents on purchase of a ticket at the Huntsville office and 25 cents if no ticket was purchased. On 8th of June, 1875, Skillman entered the passenger car at Huntsville to go to Bellefontaine, without having prepurchased a ticket, when the conductor demanded 25 cents fare, which plaintiff refused to pay, and the conductor forcibly ejected him from the cars; not at a station, but about two miles therefrom, for which wrong he claimed damages. No regulation of the company required passengers to buy tickets, Smith v. P., Ft. W. & C. R. Co., 23 Ohio St. 16.

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†This case was reversed by the Supreme Court. See opinion 39 O. S., 444.

The railroad company claimed a right to demand 25 cents fare and averred that Skillman was ejected without any unreasonable force for refusal to pay.

In the common pleas, John L. Porter, Judge, charged the jury that the railroad company had a right to

(1) "Charge any rate not exceeding 25 cents for any distance less than eight miles and more than six miles.

(2) "And the railroad company had the right to prescribe rates for prepurchased tickets and car rates where tickets were not purchased, for distances less than eight miles and more than six miles, provided neither of such rates exceeded 25 cents."

And the Judge said to the jury:

"The construction of the statute of 1875, which authorized the defendant to charge as fare for the transportation of a passenger, for distances of eight miles and upward, that multiple of five nearest reached by multiplying the rate by the distance, requires the multiple which is equal or next above the product thus reached, shall govern and not the multiple short of or below such product. Thus the defendant is authorized to charge twenty-five cents for eight miles; thirty cents for nine miles; three times nine are twenty-seven, and thirty cents is the nearest multiple above twenty-seven, and thirty cents also for ten miles, because three times ten are thirty, being just equal to the product of the rate multiplied by the distance; thirty-five cents for eleven miles and so on."

There was a verdict and judgment for the defendant. Motion for new trial overruled and exception. 651

The case was taken on error to the district court.

William Lawrence, for Plaintiff in Error.

The court below said the railroad company "is authorized to charge 25 cents for 8 miles." This overlooks the fact that the statute fixes no rate for 8 miles but only distances "more than 8 miles"—that is for nine miles and more.

The statute of April 20, 1874, and of March 30, 1875 (4 Sayler Stat. 3288-3516, Laws of 1874, p. 147, and Laws of 1875, p. 143), provide that "any corporation operating a railroad, in whole or in part, in this state, may demand and receive for the transportation of passengers on said road, not exceeding three cents per mile for a distance of more than eight miles; provided the fare shall always be made that multiple of five nearest reached by multiplying the rate by the distance; and for the transportation of property not exceeeing five cents per ton per mile when the same is transported a distance of thirty miles or more; and in case the same is transported a less distance than thirty miles, such reasonable rate as may be from time to time fixed by said corporation or prescribed by law."

This statute controls in this case. State v. Sherman, 22 Ohio St., 411; 1 Ohio Railway Rep., 80, 165, 166 (1870); C., H. & D. R. R. Co. v. Cole, Law and Equity Reporter, April 4, 1877, page 412; P C. & St L. R. R. v. Moore, 33 O. St., 384; 29 Ohio St., 126; 23 Ohio St., 190; 1 S. & C. Stat., 281, 309.

The statute does not fix any rate under 8 miles. The effect is that the railroad company can charge only a reasonable rate.

What is a reasonable rate may be in some cases a question of fact and in some a question of law.

I. When a railroad company fixes a ticket rate there is no authority to charge a higher car rate and the court will, as a question of law, hold that the ticket rate is a reasonable rate.

1. On December 16, 1867, the attorney general of Ohio decided this question, which arose as to the Pittsburg, Ft. Wayne & Chicago R. R. Co., under General Corporation Statute of May 1, 1852, 50 Stat. 274, section 13; 1 Swan &. C. Stat., 278, section (30) xiii.; Act April 4, 1863, 60 Stat., 54, the only difference being that under that statute the rate for distances over 30 miles was 3 cents per mile and the company could fix reasonable rates for distances under that, while now the statute applies to distances over 30 miles with reasonable rates for less. The attorney general said the statute fixed the rate for distances over 30 miles at 3 cents per mile, and as to the power to charge more against passengers who did not prepurchase tickets, he said:

"Have railroad companies authority to exact rates greater than those prescribed by law, from passengers destined to stations *distant more than thirty miles? I think not. I understand this authority is assumed and in some instances exercised as to passengers who fail to purchase tickets. The claim rests on two grounds, one of personal convenience to the company's agents; the other and chief, of protection against their dishonesty. 652

"1. If the exaction of these greater rates be considered in the light of a penalty for the violation of a corporate regulation, it is wholly unauthorized, for the impo-

sition of penalties is not an incident of corporate powers. If it be considered in the light of a burden imposed on the traveling public to compensate for the crimes of the company's agents, it is equally unauthorized for the punishment of the innocent for the crimes of the guilty and faithless, is still less an incident of corporate power.

"On either ground it contravenes the positive and express terms of the statute, which is an answer sufficient and conclusive.

"2. It may be said that the exercise of this power is warranted and justified by public policy. But neither self-protection, public policy, or any pretext whatever can override a public statute. Reasons of public policy may be grounds for legislative interference and relief, but I have only to consider the powers of these corporations in the absence of such legislation.

"3. The limitations of the statute are dependent on no conditions, either of public policy, self-protection, prepurchase of a ticket, or otherwise, except distance alone.

"No corporate regulation can disregard this positive enactment. If it were otherwise, the creator of these corporate beings would be subject and subordinate to the creature.

"Hence, when a passenger enters the cars with the *bona fide* intention of being transported a continuous journey of thirty miles or more, the exaction from him of fare at a rate more than that prescribed by the statute, on any pretext whatever, is unauthorized.

"No breaking of the journey into fragments, and charging for shorter distances between intermediate points, can sanction or legalize excessive rates."

And he proceeded to say:

DISCRIMINATING RATES ILLEGAL.

Are discriminating rates for distances less than thirty miles authorized as against passengers failing to prepurchase tickets? The statute of 1852 (1. S. & C. p. 278, section 30) to the restriction of which the Pittsburg, Ft. Wayne & Chicago Railroad Company is subject, provides that for less distances than thirty miles, such "reasonable rates" may be charged "as may from time to time be fixed by the company or prescribed by law."

1. It is a sufficient answer to the proposition to say that no authority exists for fixing a multiplicity of rates between the same points. A reasonable rate may be fixed, and not many rates for the same class of passengers.

653 *2. The legislature having prescribed what is regarded as a "reasonable" compensation for thirty miles distance, it is not "reasonable" that the company shall be authorized to fix any rate for a less distance which will exact a greater gross sum.

If it be, in legislative contemplation, unreasonable to exact more than ninety cents for thirty miles, it would certainly seem unreasonable for the company to exact a greater sum for any less distance.

II.

The Statute of Implication limits the fare to twenty cents.

1. It is clear on reason and authority that the company could not charge as much fare for six miles as for nine.

Smith v. P., Ft. W. & C. R. R. Co., 23 Ohio St. 10, 16; Campbell v. R. R. Co., 23 Ohio St. 168, 190; State v. Sherman, 22 Ohio St. 411.

2. An important question arises on the construction of the statute of 1875 for distances over nine miles. The general rate is three cents per mile. But at this rate nine miles would be twenty-seven cents, eleven miles, thirty-three cents, and so on. These sums, if exacted, would make great incovenience in "making change" under our decimal and half-decimal system of money. To remedy this the statute says: "The fare shall always be made that multiple of five nearest reached by multiplying the rate by the distance." Thus, if the distance is nine miles, multiplying the rate, three cents, by the distance, nine miles, we have a result of twenty-seven cents. But as this is not a multiple of five, the statute says the fare shall be, in such case, "that multiple of five nearest reached," that is nearest to twenty-seven. What is the nearest multiple of five to twenty-seven? There are only two multiples to choose from—twenty-five and thirty—for these are both multiples of five. Now between twenty-seven and twenty-five there is only one num-

ber, while between twenty-seven and thirty there are two numbers; therefore, twenty-five is "that multiple of five nearest reached," and is the authorized fare for nine miles.

As a question of law it is manifestly unreasonable to charge as much for six miles, as for nine.

The construction of the statute made in the common pleas cannot be supported.

1. It assumes that thirty is as near to twenty-seven as it is to twenty-five. This is about as absurd as it would be to say that a point two miles distant from an object is nearer the object than a point only one mile distant.

2. This construction enlarges corporate authority by construction against the plain words of a statute, which is against every authority of every court.

*3. It is an unjust discrimination against the traveling public, by requiring every passenger (except dead heads) to lose three cents, rather than a railroad company shall lose two cents; that is assuming that twenty-seven cents are the exact but unattainable just compensation to be made for nine miles' travel. 654

4. The statute and usage under it show that no such strained construction is authorized. A railroad company cannot charge for fractions of a mile. For ten and three-fourths miles only ten miles fare can be taken. The statute recognizes no fractions, this is the usage under it. Hence, the legislature intended all questions as to fractions to be resolved in favor of the public.

III. The plaintiff could only be lawfully ejected at a station. Ill. Central R. R. v. Sutton, 42 Ill. 438, 23 Ohio St. 10, 15.

IV. No tender of fare is necessary where more than the legal rate is demanded, 23 Ohio St. 10, 16, 18, 19.

V. Damages. 23 Ohio St. R. 11, 17.

W. H. West, W. A. West and James Walker, for Defendant.

BEER, J.

The railroad company having fixed a ticket rate, this must be deemed a reasonable rate, and no higher rate could be demanded.

Judgment reversed.

Cause remanded for trial.

PARTITION—HOMESTEAD—INJUNCTION.

[Logan District Court, March Term, 1880.]

Beer, Dodge and McCauley, JJ.

RINEHART ET AL. V. RINEHART AND RINEHART.

1. When a decree is made in a partition proceeding for the sale of lands, one tenant, in common, in possession, cannot claim such lands as a homestead, exempt from sale under the Ohio homestead statute.

2. The minor children cannot in such a case claim a homestead.

*3. Whether minor children of a widower who occupies a homestead can make the claim of homestead exemption against an execution for debt. *Quaere.* 655

4. Whether injunction is a proper remedy against a sale of property exempt as a homestead, or motion to set aside sale. *Quaere.*

August 2, 1879. Christopher Rinehart and others, minors, by their next friend, filed a petition in the common pleas of Logan county against Margaret Rinehart and George Rinehart, in which the plaintiff alleged that they are unmarried minor children of George Rinehart and Wilhelma, formerly his wife; that in and prior to 1873, said George was the owner of a homestead in Bellefontaine, described, and of the value of $700, acquired by the joint earnings of said George and wife and out of her separate money; that while said George and wife resided in said homestead in 1873, she died. Said George being such widower resides

with plaintiff now in said homestead. In 1875 George married defendant, Margaret, and she at February term, 1879, of said court, obtained a decree for divorce and alimony against said George, in which the court adjudged to said Margaret the undivided half of said homestead in fee with the right of immediate possession, and money to be paid in installments fifty dollars in one year, fifty dollars in two years, to be liens on the undivided half of said homestead remaining in said George.

On April 30, 1879, said Margaret filed in said court a petition for partition against said George, on which on 6th of June, 1879, said court made an order to sell said homestead in pursuance of the statute (it not being divisible; Rev. Stat. 5762). The plaintiffs were not parties in said alimony or partition proceeding.

Said Margaret has caused an order of sale to issue to the sheriff, who has advertised and is about to sell the same. The plaintiffs demanded of the sheriff to set off a homestead, and he refused. Said George refuses to claim any homestead exemption. Prayer for injunction to prevent sale.

Injunction allowed by probate judge, August 2, 1879.

August 6, 1879, the injunction was dissolved on motion at chambers, before Porter, judge of common pleas. (Rev. Stat. 5584).

September 25, 1879, the plaintiff appealed to the district court, two judges—Porter and Beers—suspending the order to dissolve injunction. (Rev. Stat. 5226).

March 19, 1880, George Rinehart, on leave of district court, filed answer alleging that he was in 1873, and since, the owner in fee of the homestead and praying an injunction against sale.

William Lawrence, for Margaret Rinehart.

The injunction must be dissolved and the sheriff must be permitted to sell the property because it is not exempt from sale in a partition proceeding.

656 *I. There can be no homestead exempt from sale except where it sought to be appropriated to pay debts.

1. This is shown by the title of the original homestead statute "to exempt the homestead from forced sale on execution to pay debts." 2 Swan & C. Stat., 1145; 48 Stat. 29; 2 Curwen 1518.

The title can properly be considered. Burgett v. Burgett, 1 Ohio, 480.

2. The statutes all show this is the only exemption. 2 Swan & C. Stat., 1145; 2 Curwen, 1518; 75 Vol. (1878) p. 692, Secs. 54, 62, 65 and 66; Rev. Stat. of 1880, sections 5426, 5435 and 5438.

II. There can be no demand of homestead by or on behalf of the minor children when the widower, as in this case, refused. 75 Vol. Stat. (1878) p. 692, section 62; Rev. Stat. 5435.

This is not aided by the answer now filed by the widower, George. The rights of parties are to be determined as they stood when the suit was commenced.

III. The homestead statute is to be construed with reference to (1) its object and (2) the "effects and consequences" of holding it applicable in such case as this. If it applies to a partition sale of a homestead, one tenant in common could never secure any benefit by sale of the property, it being indivisible.

The result would operate as a restraint on alienation, which is discouraged by the law. 4 Kent 132; Perry on Trusts, section 386-802, note

5; Adams Eq., (43); Co. Lett., 206*b*-223*a*; Ware v. Crain, 10 B. & Cr., 433; 2 Redfield on Wills, 667; Rochford v. Haekman, 9 Hare, 475; Sperry v. Pond, 5 Ohio, 387; Walker Am. L., 297; Worm in v. Lagarden, 2 Ohio St., 380; Davison v. Wolf, 9 Ohio, 75.

The argument *ab inconvenienti*—principle—policy—good sense—injustice avoided. Neville v. Hambc, 1 Disney, 519; Brower v. Hunt, 18 Ohio St., 340; Lucky v. Brandon, 1 Ohio, 59; Hurd v. Robinson, 11 Ohio St., 237; Rezner v. Hatch, 2 Handy, 42-49.

IV. This is no case for injunction.

There is a remedy at law, by motion to set aside sale. Frevert v. Finfrock, 31 Ohio St., 621; Keys v. Williamson, 31 Ohio St., 561.

V. No authority is produced to sustain the injunction. Spencer v. Spencer, 24 Ohio St., 488, does not touch the questions now made.

Lock v. McMahon, an Illinois case, 8th Central Law J'l, No. 25, for June 20, 1879, page 492, is relied on by plaintiff. In that case minor children held a homestead exempt from a mortgage executed by the father to secure a debt. It is to be noticed (1) that was a case where it was sought to appropriate property to pay debt; and (2) the Illinois statute, unlike the Ohio statute, expressly authorizes the children to demand the *exemption which continues for their benefit "until the youngest child becomes twenty-one years of age." Hoskins v. Litchfield, 31 Illinois, 143. 657

James Kernan, Sr., and James Kernan, Jr., for Plaintiffs.

1. The homestead is exempt. 66 Ohio Laws, 49, sections 1, 2.

2. The application to set off homestead may be made at any time before sale.

3. Who entitled. 75 Ohio Laws, 692, section 64.

4. Plaintiffs entitled to injunction. 24 Ohio St., 488; 8 Cent. Law J'l, 492 (June 20, 1879, No. 25).

Plaintiffs are within the equity of the statute.

McCauley, J.

The demand in this case for a homestead seems to have been of the whole premises, and clearly, the plaintiffs had no right to it out of the undivided half of the real estate owned by Margaret Rinehart. The demand is based on a misconception of the homestead statute. It only applies when a homestead is sought to be taken to pay debts. It cannot apply in a case like this.

The order suspending the order dissolving the injunction is revoked; the order dissolving the injunction is sustained.

Injunction dissolved.

VENDOR AND PURCHASER—HOMESTEAD—SURETIES—INTEREST.

[Logan Common Pleas, March Term, 1880.]

SUTTON ET AL. v. KAUTSMAN.

DICKINSON v. KAUTZMAN ET AL.

1. When a purchaser of land is indebted for purchase money and the title to a portion fails, he is entitled to an abatement in the price, the *amount of which
658 is determined by the relative value of the land lost, unless the sale was intended by the parties to be at a stipulated price per acre.
2. The abatement may be made in an action by the indorsee of negotiable purchase money notes, who takes them as collateral security for a prior claim, without any new consideration.
3. The abatement will be made against all persons seeking to enforce a vendor's lien, as to which there can be no *bona fide* holder without notice entitled to protection.
4. A purchaser is entitled, as against such indorsees, or parties seeking to enforce a vendor's lien, to have his notes reformed to correct any mutual mistake between him and his vendor, in fixing the amount of the purchase money notes.
5. When an entire tract of land is sold for a price to be paid in several installments yearly, for several years, an abatement for failure of title of a part will be apportioned among the several payments, and not all be taken from those first falling due.
6. As against a vendor's lien there can be no claim for a homestead under the homestead statute, neither by the debtor nor his wife. She is a necessary party before the court can adjudge her barred. It is proper in making a decree to sell, to adjudge in advance of a claim for homestead, that none shall be allowed which will interfere with satisfaction of the vendor's lien.
7. When a vendor of land, holding notes for purchase money, indorses and delivers them to indemnify persons who are sureties for him, they are, in case of his insolvency, entitled to a decree that the notes be paid into court and the fund held for their protection. And they are entitled to enforce his vendor's lien in aid of the fund for their indemnity.
8. As between such sureties and a subsequent judgment creditor of the vendor of the land, who files a petition in the nature of a creditor's bill in chancery to reach the vendor's lien, the sureties have priority.
9. A promissory note agreeing to pay a sum "three years after date, with 5 per cent. from date," is a promise to pay 5 per cent. for three years, after which there is no contract rate, and the note will bear the statutory rate of 6 per cent. in the absence of a statute giving a different effect to the note.
10. Under the Ohio statute, as construed by the supreme court, such note and a judgment thereon will bear interest only at 5 *per centum* per annum.

At the November term, 1879, of the court of common pleas of Logan county, these two cases were referred to Wm. Lawrence, as special master commissioner in chancery, to hear and determine all questions of law and fact and make report.

His report is, in substance, as follows:

WM. LAWRENCE, SPECIAL MASTER—

1876, April 1st, Peter Kautzman owned 100 acres of land in survey 3314, and 50 acres in same survey in Logan county. He then made a verbal contract with his son, Thomas M. Kautzman, to sell and convey to him these two tracts of land for cash then paid, $1440, and 12 promissory notes of that date, payable by Thomas Kautzman to the order of Peter

Kautzman, for $592.96 each, payable respectively one each year for twelve years, "with 5 per cent. from date." Thomas then took possession of *the land and on the 19th of September Peter Kautzman made him 659
a deed of conveyance of general warranty in fee simple.

On the 8th of June, 1874, Fawcett and Roberts, insolvent debtors, made an assessment of their personal assets nominally $5,000, to Peter Kautzman, as assignee, in trust for the benefit of creditors, under the statute regulating assignments. W. W. Sutton, A. J. Fawcett and Thomas Bell became his sureties at that date in an undertaking for the faithful performance of his duties, duly approved by the probate court.

In March, 1877, the last eleven of these notes were, at the request of Sutton, Fawcett and Thomas Bell, indorsed in blank by Peter Kautzman to them as collateral security, to indemnify and save them against loss or damage by reason of their suretyship, for which purpose they were deposited with Cyrus Bell as custodian.

1877, December 3d, at November term of the court of common pleas of Logan county, for that year, Joshua M. Dickinson received judgment against Peter Kautzman and J. S. Ansley for $2,122.13, with interest at 8 per cent., and costs taxed $12.96.

An execution issued on the judgment, December 21, 1877, and was returned, no goods or lands of Peter Kautzman on which to levy, and both judgment debtors were then without property available for levy, and were then and since insolvent.

1878, January 2d, Sutton, Fawcett and Thomas Bell commenced their action against Thomas Kautzman, avering the assignment of Fawcett and Roberts, the suretyship of plaintiffs, the execution and indorsement of the 12 notes, the insolvency of Peter Kautzman, that Thomas M. Kautzman threatens to sell the land, and prays for injunction to restrain sale until he pays the notes, and for such other relief as equity may require.

Injunction was allowed.

1879, May 29th, supplemental petition alleges that two of the notes have become due, prays on account that they may have judgment on the notes due, and on others as they become due, and when collected they may be authorized to apply proceeds to pay the liability of Peter Kautzman, and for other equitable relief.

1879, April 3d, Dickinson was made a defendant.

1879, November 14th, Peter Kautzman was made defendant.

1878, January 12th, Dickinson commenced his action against Peter Kautzman, J. S. Ansley and Thomas M. Kautzman, averring the judgment in favor of Dickinson, that there is no property liable to execution, that the conveyance of Peter Kautzman to Thomas M. Kautzman was made to hinder and delay creditors, and prays that it be set aside and subjected to the payment of the judgment, or if that cannot be done, that the notes *on Thomas M. Kautzman be subjected to the pay- 660
ment thereof and that the vendor's lien of Peter Kautzman be enforced against said lands, and that they be sold to pay the judgment and for other equitable relief.

On a supplemental petition filed January 25, 1878, Cyrus Bell is made a party, and it is averred that he holds the notes but has no claim on them.

1878, April 12th, Sutton, Fawcett and Bell, the sureties, were made defendants.

There is no evidence that the sale was made by Peter Kautzman to hinder or delay creditors. Thomas M. Kautzman paid his note due April 1, 1877, for $592.96.

There was a mutual mistake between Thomas and Peter Kautzman in fixing the amount of the notes. The land was intended to be sold at $53 per acre, that is 150 acres for . . . . . $7,950.
The cash payment April 1, 1876 . . . . . 1,440.

Balance, ... $6,510.

The notes were intended to be, and should have been, 12 of $542.50 each.

The 50-acre tract of land was sold by proceedings in said court in 1879 to satisfy an outstanding mortgage on it, prior to, and on April 1, 1876, and as to this the title of Thomas M. Kautzman has failed. It is agreed that the 100-acre tract was worth more per acre than the 50-acre tract, and that in April, 1876, the values were of the said 50 acres $2,250, and of the 100-acre tract $5,700.

The indebtedness of Thomas to Peter Kautzman is, therefore, as follows:

The value of 100 acres April 1, 1876 . . . . . $5,700.
Cash then paid. . . . . 1,440.

Balance. . . . . $4,260.

This should have been in 12 notes of $355 each; the first note actually given being paid, $592.96, there was an overpayment of $237.96 to apply as a credit on the second note, due April 1, 1878.

Thomas M. Kautzman, therefore, owes a balance of $117.04 on his second note, due April 1, 1878, with five per cent. interest from April 1, 1876, and 10 notes which should be reformed to be of $355 each, with five per cent. interest from April 1, 1876, payable one each year, commencing April 1, 1878.

Thomas M. Kautzman has a wife and is the head of a family. He resided on the 100 acre tract with his family, in a dwelling house thereon, until in May, 1879, when he and his family removed into a village near it, and he asserts he has not decided whether he will return to re-
661 side on that land or not. He has *continued to control the land, leasing it out and taking the rents. At the delinquent tax sale of January 16, 1877, the 100-acre tract was sold by a defective tax sale, for $54.03, to Charley L. Stewart.

In March, 1877, when the notes were indorsed, Peter Kautzman's liabilities for undistributed assets of Fawcett and Roberts, was $3,550.16, which was subsequently reduced from time to time, until his liability is probably now about from $1,500 to $1,800, as found due from him by the probate court, and which he has been ordered to distribute.

Thomas M. Kautzman has no property liable to execution, except the 100 acres of land, and this is probably insufficient in value to pay the judgment in favor of Dickinson and the liability of Sutton, Fawcett and Bell as sureties, and insufficient to pay the indebtedness on the notes to Peter Kautzman.

The pleadings of Sutton, Fawcett and Bell claim they are *bona fide* purchasers of the notes on Thomas M. Kautzman, and that he cannot recoup from their amount any sum by reason of the failure of title of the 50 acres of land, part consideration for which they were given.

The notes were indorsed and delivered as collateral security to indemnify Sutton, Fawcett and Bell against loss by reason of their suretyship without any new consideration therefor. The law sustains such transfers just as it does a voluntary mortgage without new consideration to secure pre-existing debt, 1st Jones on Mortgages, Sec. 611; Wright v. Bundy, 11 Ind., 328; Cooley v. Hobart, 8 Iowa, 358.

But the law reserves all defenses the maker of the notes may have against their payment. Rosborough v. Messick, 6 Ohio State, 448.

When it is sought to enforce a vendor's lien a defense can be made, and there can be no protection in favor of the party claiming the benefit of the lien. Thomas M. Kautzman has a right to apply as payment on the purchase price of the 100 acres of land he bought, so much of the money he paid as part consideration for the 50 acres—the title of which failed. Revised Stat. 5070.

Code, Sec. 92, etc.; High on Injunctions, Sec. 291 and authorities. He also has the right to reform the notes, to correct the mutual mistakes between him and the payee, in the amount for which they were intended to be made payable.

Thomas M. Kautzman claims by his answers that the mutual mistake in the amount for which the notes were given should be corrected and the notes reformed.

This he is entitled to have done.

He also claims that his title to 50 acres of the land having failed, a ratable proportion of the purchase price, estimating all *the land as of equal value, should be deducted from his liability, and that 662 the money paid by him in the same proportion for the land so lost, should all be taken from the reformed notes first falling due, which to that extent should be cancelled.

There are, therefore, distinct questions to be considered.

As to the mode of estimating the value of the land which was lost.

The price as intended of the whole 150 acres, was $7,950. One-third, for 50 acres lost, would be $2,650.

It is true the purchase price was estimated on a basis of $53 an acre. It would be competent for parties to agree that land should be sold at a fixed price per acre, and even to agree that a portion of the more valuable land should be sold for a less price per acre than that fixed for less valuable land. In such case the contract should be respected.

But where, as in this case, it is evident that the agreed price of $53 an acre, was only a mode of arriving at a gross sum, regard should, upon every principle of justice, be had to the relative value of the different portions of the land. This should always be done for the purpose now under consideration, except in cases where the proof shows that the parties intended a fixed price per acre, agreed upon notwithstanding difference in actual value. In case of failure of title of a portion of lands sold in one entire contract, an abatement should be made by deducting from the gross purchase price, a ratable proportion of the value lost, unless the evidence shows that the parties to the sale, having their attention drawn to the value, stipulated regardless of that, for a price per acre.

In this case the 50 acres lots were less valuable per acre than the remaining 100 acres, and Thomas M. Kautzman is entitled to a deduction on value, herein above stated.

2. Thomas Kautzman is not entitled to a credit of the amount of his abatement in full, from the notes first maturing. He is entitled to have the value of the 50 acres fixed and deducted from the original gross sum with which he was chargeable at the time of his purchase. The cash payments he made should then be credited on his first maturing liabilities, and the residue be extended in payments according to the original terms of sale and credit. This gives effect to the terms of the contract so far as it is possible to pursue it.

More difficult questions are presented in the conflicting claims of Sutton, Fawcett and Bell, as sureties, on one side, and Dickinson on the other.

The sureties have a right on general equity principles, and by virtue of the Civil Code, to require Peter Kautzman to pay his liability as assignee, and as incident to this, to obtain indemnity by a fund to be brought into court to pay the dividends declared by the probate court.

663 *Code, section 500; 2d Story Equity, 729-850; Wright. v. Simpson, 6 Ves. 734; Hays v. Ward, 4 Johns. Ch., 129.

And the sureties may in a proper case in a proceeding for this purpose, reach assets not liable on execution at law, as on a creditor's bill, on the principle that "equity will avoid a multiplicity of suits" and proceed to give full relief when jurisdiction attaches for some equitable object.

Francis' Maxims, IX., 42; 1 Story's Eq. 64 k.

The sureties as indorsers of Peter Kautzman obtained possession of the notes on Thomas M. Kautzman prior to the date of the judgment in favor of Dickinson. As to all rights and remedies on the notes, they are prior in time to Dickinson, and their claim to indemnity must be first satisfied before Dickinson can assert a claim on their proceeds. This results from the maxim that in equity he who is prior in time, other things being equal, has the better equity, and from the other equity maxim *in aequali jure meloir est conditis panidentis.*

The sureties are, therefore, entitled to a judgment that Thomas Kautzman pay the notes due and others as they become due, with execution awarded and the proceeds be brought into court and applied to pay costs, taxes on the land, including the lien of purchaser at tax sale, the claims of creditors of Fawcett and Roberts as they are or may be adjudged to be on the accounts of Peter Kautzman in the probate court, or on appeal, if any, and the residue to apply on the judgment, interest and costs in favor of Dickinson.

On said judgment a sale of the 100 acres of land could be made as on judgment at law, and on that, Thomas M. Kautzman, or his wife, could, under the statute, demand that a homestead of $1,000 in value be set off, if they should at the time of the judgment or probably even afterwards, reside on the land.

Revised Statutes, 5438, 66 Stat. 48; Gibson v. Mundell, 29 Ohio State, 523.

On the authority of Wetz v. Beard, 12 Ohio St., 431, a temporary absence from and lease of the lands would not defeat the homestead claim.

Dickinson's petition asks that the vendor's lien of Peter Kautzman on the land, be enforced and subjected to the payment of his judgment.

As against a vendor's lien there can be no homestead.

Ex parte Pardee N. Digest, Ga. 2, West's Jurist, 279; Smyth on Homestead, section 202, 490; Thompson on Homestead; Chambers v. Phelps, 39 Ga., 386; Stone v. Darnell, 20 Texas, 12; Montgomery v. Trett, 11 Cal., 191; Farmer v. Simpson, 6 Texas, 303; Burnes v. Gray, 7 Iowa, 26; Dillon v. Byrne, 5 Cal., 455; Shepperd v. White, 11 Texas, 354; Phelps v. Conover, 25 Ill., 309; Sucassion of Fulks, 12 La. An., 537; McHendry v. Reilly, 13 Cal., 75.

*It is now settled in Ohio that "a judgment creditor who seeks by action to subject to the payment of his judgment a claim for purchase money due to the judgment debtor, as vendor, is entitled to the enforcement of the vendor's lien to the same extent it might have been enforced by the vendor against the vendee." 664

This language applies to a case where the vendor retains the notes or evidence of right of action, and is not authority for holding that when purchase money notes are transferred by the vendor, and held by other parties, that a judgment creditor of the vendor can in such case subject the vendor's lien to the payment of his judgment.

In such case he could not so subject the lien to the prejudice of parties holding the notes, because a debtor can only be required to pay his debts once, and the holders of the notes are the rightful claimants of the debt.

In such case also, the holders of the notes could not on a judgment thereon, as at law, have the benefit of the vendor's lien to exclude a homestead claim or otherwise, because the vendor's lien does not pass to the indorsees of the notes, and such lien is not assignable by express language.

Hecht v. Spears, 27 Ark., 229, S. C. 11 Am. Rep., 784.

It does not follow that the vendor's lien is absolutely annihilated.

If a note given to a vendor of land for purchase money be by him indorsed to a third person, and afterwards paid or taken up by him, his lien will revive and attach to it.

Perry on Trusts, section 238; 2 Leading Cases in Equity, 368.

On this principle Peter Kautzman has a contingent reversion in the purchase money notes, and a vendor's lien, which is at law suspended, but in equity is valuable property, and can be reached by his creditors. This must be so for several reasons. It is a maxim "that every right must have a remedy." The appropriation of this right to satisfy creditors, even to the exclusion of a homestead in Thomas M. Kautzman and his wife, does no injustice to anyone. A refusal to so appropriate it would be a denial of justice. It would be absurd to hold that the vendor's lien is *in nubibus*, and beyond the reach of courts. Courts can reach as far as valuable rights can go. The courts have already recognized the principle that a vendor's lien can be enforced by courts to secure the ends of justice. A surety on a vendee's note for purchase money of land, who is obliged to pay it, has been subrogated to the vendor's lien with a right to enforce it.

Perry on Trusts, section 238 and authorities.

If a vendor having a vendor's lien enforces his debt against the personal assets of a deceased vendee, and thereby deprives *creditors or legatees of the means of securing their claims, equity will subrogate them to the rights of the vendor's lien, or will marshal assets to secure justice to all. 665

2 Sugd. Vend. 873 (7 Amer. Ed.); Perry on Trusts, Sec. 238.

In this case the vendor's lien can be reached by creditors.

The necessity for any decree to exclude a homestead is not presented in the pleadings. It cannot be known that any such claim can be made. But as it is quite certain that the allowance of a homestead would defeat full satisfaction of the claims now made, justice requires that this question be now settled. The pleadings may properly be amended for this purpose, and when, unless new reasons be presented to the contrary, a decree should be made excluding a claim for homestead as against Peter Kautzman, Sutton and other sureties, and Dickinson, it will be necessary to make the wife of Thomas M. Kautzman a party, for she cannot be deprived of her right to demand a homestead without this. She must have her day in court. There must be "due process of law." 2 Jones on Mortgages, section 1423; Sargent v. Wilson, 5 Cal., 504; Revalk v. Kraemer, 8 Cal., 66; Moss v. Warner, 10 Cal., 296.

It remains to pass on the equities and priorities as between Dickinson and the sureties of Peter Kautzman.

It is claimed on behalf of Dickinson that the vendor's lien did not pass to Sutton and other sureties by the indorsement of the notes, and that in the event of a claim of homestead of the extent of $1,000, by Thomas Kautzman or his wife, there will be land of that value which the holders of the notes cannot reach, but that Dickinson is entitled to reach it, having specifically asked this remedy in his petition.

To give this remedy to Dickinson before the indorsees of the notes shall be fully indemnified, would extinguish $1,000 of their claims on the notes and take from them a property which they hold by the contract of indorsement as indemnity.

This cannot be done because it would divest a vested right without consideration to them.

They cannot hold more indemnity than is necessary for their protection.

Fassett v. Traber, 20 Ohio, 545; Brown v. Webb, 20 Ohio, 450.

If the homestead claims be asserted against them their security is probably insufficient. They have not taken indemnity which in amount is unreasonable, or a fraud on other creditors.

If it is said it is unequitable to permit them to hold a portion of the notes, which may be unavailable in their hands in case a homestead claim is asserted, the sufficient answer is, that Thomas M. Kautzman may
666 acquire other property subject to execution, *and it is not unreasonable for them to hold it for this purpose.

Dickinson is, therefore, in a position where he cannot assert a claim on the homestead which may interfere with the right of the sureties—the indorsees, because he has no right thereby to cancel any portion of the notes held by them.

And the indorsees have an equal right at least with him to demand that the vendor's lein of Peter Kautzman shall be appropriated in aid of their indemnity. If Dickinson has a right to satisfaction of his judgment out of Peter Kautzman's vendor's lien, when neither he nor Kautzman has possession of, or a right to the possession of the notes, for the payment of which the vendor's lien subsists, Sutton, Fawcett and Bell having the lawful possession of such notes, and an equitable right to indemnity equal in justice with Dickinson's

right to satisfaction of his judgment, must also have a right to appropriate the vendor's lien. Their priority over Dickinson rests on more than one ground.

They can annex the vendor's lien to the notes and do no injustice, while Dickinson cannot without impairing rights they hold by contract.

The vendor's lien is a mere incident of the debt evidenced by the notes, and in dealing with it, equity may properly recognize the doctrines that the incident follows the principal "*accessorium non ducit sed sequitur suum principale.*" The prior holders of the principal have the first claim to appropriate the incident to their benefit.

Dickinson is prior in making a specific claim in his pleading to appropriate the vendor's lein, but he cannot maintain his claim to the prejudice of the sureties for reasons stated.

The sureties, however, may properly amend their petition if necessary, or may claim the benefit of the principle of pleadings stated in Edwards v. Edwards, 24 O. S. R. 412, that "it is true they did not aver in so many words the existence of the vendor's lien, nor did they specifically pray for its enforcement. They did, however, aver all the facts essential to the existence of the lien, and prayed for general relief." And the court held that such petition would warrant a decree.

As a general rule a creditor's bill cannot be maintained until the creditor's claim is reduced to judgment. But the sureties here are not pursuing a creditor's bill against Peter Kautzman; they do not have judgment against him nor ask judgment to them, but they seek indemnity out of his assets, and equity jurisdiction must reach far enough to prevent a failure of justice, by appropriating the vendor's lien for their protection. 2 Story's Equity, Sec. 730-850, authorities; Adams' Equity, [270].

*The bill for indemnity in equity is one which seeks "to subject particular assets to their payment of the debt." 667

Adam's Equity [270] 578 note, (4th Am. Ed. notes) and authorities cited; Stump v. Rogers, 1 Ohio, 533.

And the sureties having a right to subject to their indemnity the notes which Peter Kautzman, as a creditor of Henry M. Kautzman, had against him, they will, as said by Chancellor Kent in Hayes v. Ward, "be entitled to every remedy which the creditor has against the principal debtor, to enforce every security and to stand in the place of the creditor."

4 Johns. Chan. Rep. 131.

Thomas M. Kautzman is liable to account for interest on the notes he owes at 6 per cent. after maturity. They are all in the same form except as to time of payment, and as a specimen I give a copy of one, as follows:

"$502.96. April 1, 1876.

"Three years after date I promise to pay Peter Kautzman or order five hundred and ninety-two and ninety-six one-hundredths dollars. Value received; with 5 per cent. from date.

"(Signed) Thomas M. Kautzman."

This, on general principles, would be a contract to pay 5 per cent. for three years, after which there would be no agreed rate, and it would be left to the operation of the statute fixing the rate at six per cent.

2 Parson on Notes and Bills, 371, cases collected; Bernhizel v. Furman, 22 Wallace, 170; Cromwell v. County of Sac, 94 U. S., 351; Brewster v. Wakefield, 22 Howard U. S. 118; reversing 1 Minn., 352, Doan v. Campbell; Burns v. Anderson, Sup. Court Indiana, January, 1880, reversing Kilgore v. Powers, 5 Blackfd. 22; Pittsburgh Legal Journal, Dec., 1863, per Lawrence, Judge, collects authorities; 25 Ohio State, 624, cases cited National Bank v. Bank, 94 U. S., 437; Brockway v. Clark, Wright R. 627; Tuffli v. Ohio Life Insurance Company, 2 Disney, 126; Holden v. Freedman's Savings Co., U. S. Sup. Court, Dec., 1879, 8 Cincinnati Law Record, 595. But this general rule is change by the statute as decided in Marietta Iron Works v. Lattimer, 25 Ohio St., 624, and Sawyer v. Phillips, 15 Ohio St., 222. Those cases proceed on the idea that the statutes known as the 8 and 10 per cent. laws, give to a contract for interest above six per cent. the effect of continuing the stipulated rate, after the contract period expires. As a general rule a statute fixing a contract rate higher than the general statutory rate should not be enlarged by construction for manifest reasons.

The two cases referred to possibly receive some countenance from a principle not alluded to in them, that contracts made under a statute are to be deemed as adopting its provisions. If it had not been for
668 these two cases, which are probably without *analogous decisions in any other state, I would have supposed that a debtor who agrees to pay 8 per cent. for a fixed period, does not thereby agree to pay it for a longer period, and that the statute was only intended to do justice, by requiring a judgment to bear the higher contract rate in cases where the contract rate was continuing, to avoid the rule that a note is merged in a judgment which will only bear the statutory, and not the prior contract rate.

And as to the notes now in controversy, the statute applies so as to change the general rule which prevails generally in other states. These notes and judgment thereon will only bear 5 per cent. interest. Rev. Stat., section 3179-3180; 66 Stat.. 91.

For the protection of Thomas M. Kautzman and Peter Kautzman against loss or transfer, these notes should be brought into court and filed.

Charles L. Stewart, the purchaser at tax sale, should be made a party.

The master recommends a decree in accordance with these principles.

The wife of Thomas M. Kautzman having been made a party, the case was heard at March term, 1880, in the common pleas on exceptions to the report of master.

James Kernan, for Thomas M. Kautzman:

The report of the master is erroneous in this:

1st. The vendor's lien did not pass to Sutton, Bell and Fawcett by the transfer of the notes to them.

2d. They, or any proceeding by them to indemnify themselves out of said notes, cannot assert such vendor's lien.

3d. And, therefore, could not resist the assertion of the homestead rights of Thomas M. Kautzman.

4th. The question of homestead does not properly arise in this case. The wife of Thomas M. Kautzman is not a proper or a necessary party in this case.

5th. The sureties having taken the notes for indemnity, they cannot pursue a petition to secure indemnity. Their petition only seeks to enforce the indemnity they have—not to add to it. The Civil Code authorizes a surety to "maintain an action against his principle to compel him to discharge the debt or liability." Rev. Stat. 5845. But there is no such petition here.

W. H. West, for Dickinson:

The report is wrong.

1st. The two cases cannot properly be consolidated.

2d. The sureties have no right to appropriate the homestead nor the vendor's lien, but Dickinson may.

The sureties, though holding more than $1,600 of notes by way of indemnity, are only entitled to that amount, and as to the residue, Dickinson has a right which in equity cannot be defeated *by the custody of the notes in the hands of the sureties to the extent of the value of the homestead or vendor's lien. 669

The sureties cannot appropriate the homestead, but Dickinson may. The sureties only hold the notes and such security as they afford, to the amount of $1,600.

3d. The petition of the sureties is an unauthorized proceeding in the nature of an attachment before a note is due. Rev. Stat. 5564.

John A. Price, for the Sureties:

The report should be confirmed.

1st. The cases must be consolidated because the rights of all parties cannot be determined without this.

2d. The right of the sureties to reach the vendor's lien and homestead is as good as Dickinson's, and better by reason of the possession of the notes.

If the sureties had bought the notes the vendor's lien would have been extinguished. But the right of a surety to indemnity is as valid as a judgment creditor's right to satisfaction.

3d. The petition of the sureties is a petition to obtain indemnity. It is authorized by the Code, section 5845, and by equity jurisdiction independent of the Code. The fact that they hold an ineffectual security by the notes cannot deprive them of the right to add to their indemnity. There is nothing in the nature of an attachment on a debt before due. There is money due on the notes. The sureties being now in danger can demand indemnity independently of the notes and can appropriate notes whether due or not just as a judgment creditor can.

PORTER, J.

The securities of Peter Kautzman are not pursuing a creditor's bill. They are seeking indemnity against their liability for Peter Kautzman. They are seeking in equity to subject certain assets of Peter Kautzman to the payment of his liability.

The notes were assigned by Peter Kautzman to the sureties, who hold them with full right to hold and control them until fully indemnified for their liability. Their equity is prior in time to Dickinson's judgment, and is, therefore, the better equity.

Dickinson's claim is based upon the same notes; he claiming the vendor's lien of Peter K., because he is a judgment creditor.

This right in Dickinson is disputed by the sureties. They say that Dickinson has not the better right to this vendor's lien, because neither

Peter Kautzman nor Dickinson owned or controlled the notes when Dickinson's judgment was obtained; but that they were then held by sureties as indorsees; and to allow Dickinson alone to enforce the vendor's lien would prejudice their rights as prior indorsees of the notes.

Again it is claimed that not only does the vendor's lien inure to the benefit of Dickinson alone, but as against the notes in the
670 *hands of the securities, that Thomas M. Kautzman would be entitled to a homestead in the land—and thereby scoop out and extinguish $1,000 from their security and Dickinson enforce a vendors lien for the balance. This would certainly prejudice the rights of the securities and set aside their contract of indemnity with Peter Kautzman, and would certainly not be equitable or just.

Peter Kautzman's vendor's lien is contingent, suspended, reversionary; and why? Because it passed from him on the assignment of the notes to the sureties.

How then does Dickinson obtain a better equity to Kautzman's vendor's lien? Simply on the ground that he afterwards obtained a judgment against Peter Kautzman.

I cannot understand how he can obtain a higher or better equity than the sureties, arising out of and based upon the notes legally indorsed to, and held by the sureties.

I cannot see how justice can be done to all the parties arising out of the conflicting claims to these notes without considering both these cases together as one claim.

As to the remaining grounds of exceptions, I see no reason to dissent from the opinion of the master.

The report of the master will, therefore, be confirmed, with leave to parties to amend their pleadings to correspond with the report and decree recommended by the master.

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705 ## *REPLEVIN.

[Logan District Court, March Term, 1880.]

Beer, Dodge and McCauley, JJ.

JOHN KELLY v. EDWARD PURCELL.

1. In an action of replevin, the defendant may make a defense invoking the exercise of equity jurisdiction.
2. When persons not parties to a replevin suit have an interest in the subject-matter, they may be made parties and have relief afforded by the exercise of equity jurisdiction.
3. Goods and chattels on which there is a chattel mortgage may, nevertheless, be sold on execution, on a judgment against the mortgagor, but the rights of the mortgagee will not be affected thereby, unless he has done something to estop him from asserting his rights.
4. When such sale is made on execution, the mortgagee may assert his right to the goods by replevin against the purchaser.
5. In such case the purchaser under execution cannot, by answer, demand that the assets shall be marshaled if the necessary parties are not before the court
706 *6. A reviewing court will not reverse a judgment in replevin in favor of the mortgagee, because the court rendering such judgment refused to permit the assets to be marshaled.

The material facts are these:

1878, February 5, Purcell filed a petition in the common pleas, alleging that on January 29, 1878, at Logan county, Kelly wrongfully

detained from him, and still does detain, goods and chattels (which are described) of the value of $500, of which the plaintiff is the owner by virtue of a chattel mortgage executed by John Nash and Ellen, his wife, September 1, 1877, to secure an indebtedness of said Ellen to plaintiff of $5,200, to the immediate possession of which plaintiff is entitled; said goods being the property sold on execution by the sheriff of Logan county, January 29, 1878, to satisfy a judgment of William Goodrich against John Nash to the damage of plaintiff of $600.

"This action is brought in replevin to recover the possession of said property."

The property was taken on an order of replevin and delivered to Purcell.

1878, May 29, Kelly filed answer.

First defense: Denies unlawful detention.

Second defense: On November 6, 1877, William Goodrich recovered judgment in the court against John Nash for $870, on which execution was issued, and said property and other goods of Nash's were levied on and sold January 29, 1878, part to Kelly, and part to Goodrich, who sold to Kelly.

On September 1, 1877, Nash and wife executed a mortgage to the plaintiff, Purcell, on 252 acres of land in Logan county, to secure said $5,200, the same debt secured by said chattel mortgage. The real estate mortgage was, and is, ample to satisfy said indebtedness of $5,200. Goodrich had no other means of satisfying his judgment except by sale of said goods. Nash, then, and since had no property subject to execution except said goods—the title of the real estate was, and is, in Ellen Nash, who, with her husband, made said mortgage.

Prayer that the plaintiff be required to look to his real estate mortgage security, and to exhaust it before asserting his claim under the chattel mortgage.

At November term, 1879, the court, on motion of plaintiff, *struck the second answer out as immaterial, and defendant excepted, when the case was tried to the court, a jury being waived. 707

Purcell produced in evidence the chattel mortgage duly recorded, by the terms of which the chattels are absolutely conveyed to him to secure the debt, without any clause reserving a right of possession in the mortgagor, until default in paying the debt of $5,200, due September 1, 1879.

The defendant offered the judgment execution and report of sale, under which he claimed title, and that John Nash had possession of the goods when seized in execution by the sheriff, to which the plaintiff objected, when the court ruled them out, and Kelly excepted.

The defendant offered to prove that all the allegations of the second answer were true, to all of which the plaintiff objected, the court sustained the objection, and defendant excepted by bill of exceptions.

The court rendered judgment for Purcell.

1880, March 8, Kelly filed a petition in error in the district court.

William Lawrence, John A. Price and James W. Steen, for Plaintiff in Error.

The chattel mortgage gave Purcell a right at law to replevy the goods, but in equity Goodrich had a right to "marshal the liens," and require Purcell, who had two funds as security for his claim of $5,200; (1) the real estate mortgage, and (2) the chattel mortgage—to secure

payment of his claim from one fund, the real estate mortgage, so as to leave the chattel property to satisfy the judgment of Goodrich, who only had one fund—the chattel property—out of which he could obtain satisfaction.

Having this right before a sale on execution, he can protect himself on the same principle after such sale. The common pleas erred in proceeding on the idea that this equitable defense could not be made by answer in a replevin suit.

The second answer makes two classes of questions, one as to pleadings, and one as to the legal and equitable rights of the parties. The ultimate merits of the case are not now to be considered, but only the question whether Kelly has a right to have them heard at all in this case.

*I.

708 Equitable relief may be given on an answer stating grounds for it in a civil action for replevin.

1. The Civil Code expressly authorizes the defendant to "set forth in his answer as many grounds of defense as he may have, whether they be such as have been heretofore denominated legal or equitable, or both."

Civil Code, section 93, 3 Curwen 1952; Rev. Stat. 5071; Code, section 371; Rev. Stat. 5311.

It applies in replevin as in other cases, these provisions to be liberally construed in favor of the remedy. Code, section 2, Rev. Stat. 4948.

2. The elementary authorities support this right. Bliss Code Pleadings, 347–351; 2 Estee's Pleadings, 396, and cases cited; Pomeroy Remedies, section 90–767.

3. The judicial decisions support it. Grinnell v. Brashears, 1 Handy, 510, approved 10 Ohio St. R., 461–468; Dobson v. Pearce, 12 New York, 156; Conger v. Parker, 29 Ind. 380.

See cases collected, Bliss Code Pl., 347-351; and see note 1 to section 350; Morgan & Co. v. Spangler, 20 Ohio St., 38-56.

4. It is essential to the administration of justice. If a plaintiff in replevin claims under a chattel mortgage, may not the mortgagor show a mutual mistake in its terms and reform it as in equity? He cannot do this on ordinary law issues.

If since the execution of the mortgage he has made an agreement for a release of part or all the chattels, and tendered pay, may he not have relief as for specific performance in equity?

The chattel may be a relic, or heirloom, or family picture, the loss of which no money could adequately compensate.

In Morgan & Co. v. Spangler, 20 Ohio St. 38, a bailie's lien was enforced on an answer for equitable relief.

II.

In Code actions of replevin a general denial, admits all equitable defenses as between the parties.

1. Elementary authorities. Pomeroy's Remedies and Remedial Rights, p. 707; sections 677, 678 and 679; Bliss Code Pl., section 328; Nash Pr. 402, 403 (3d ed.), and (4th ed.) vol. 2, p. 832.

709 *2. Judicial authorities. Timberlake v. McArthur, district court, Logan county, March, 1880, in [Cincinnati] American Law Record, June, 1880, p. 713 and cases there collected.

III.

All the requisite parties are before the court.

1. The second answer affects only the rights of the plaintiff and defendant.

No decree for relief is asked against third persons as in Cramer v. Benton, 60 Barb. 216, affirmed 56 New York, 638, and Hicks v. Sheppard, 4 Laus., 335—Bliss Code Pl., section 350.

2. No objection was made for want of any additional party, either by demurrer, motion or otherwise.

This is a waiver as to the parties now before the court. If objection had been made, then the proper persons could have been made parties, Mrs. Nash, Goodrich, etc. When the court struck out the answer that was a denial of the opportunities to make new parties. If it be said that Mrs. Nash had a right to require her husband's chattels to be applied in paying the debt before resorting to the mortgage on her land, we reply that is assuming that she would make such claim, when she might not. It is assuming that Kelly cannot defeat any such claim on her part. Kelly has a right to show that the debt was in fact hers, and that her land should be exhausted before resorting to her husband's chattels. The petition in replevin admits the debt is hers.

3. Kelly has a right to show that Nash and wife knew of the sale on execution, made no objection, and so are estopped from now asserting any claim.

4. No third person is asking any relief. The rights of any third person are not concluded or affected. Certainly the rights as between these parties may properly be decided. The Code, section 40 (Rev. Stat. 5013, expressly authorizes the court to "determine any controversy between parties before it."

5. Neither Ellen Nash nor Goodrich are necessary parties.

6. If they were they can yet be made parties. Code, section 137 *Rev. Stat., 5, 114, and it was error to strike the answer out. 710
Morgan v. Spangler, 20 Ohio St., 38–56.

Assuming that an equitable defense may be made, then the second answer makes a good defense as the propositions hereafter state.

IV.

Goodrich as judgment creditor of John Nash, having no remedy but as against the chattels in controversy, had a right to marshal the liens and assets, and require Purcell to pursue the real estate mortgage, and Kelly holding title in part under him, and in privity succeeds to all his rights.

1. So are the authorities: Fassett v. Traber, 20 Ohio, 540.

Bank Muskingum v. Carpenter, 7 Ohio Pl. 1 p. 71.

Miami Exporting Co. v. Bank U. S., Wright R., 249, 255, 256, syllabus 12.

Aldrich v. Cooper, 8 Ves. 382–395; Averall v. Wade, Temp. Sugd. 252, *u*; 1 Jones Mort., 728–875; 2 Jones Mortg., 1628–1631; 1 Story Eq., 559–560; 1 Waite's Actions and Defenses, 352.

2. Rights were acquired under the sale on execution. Goodrich had a right to levy on the goods (subject to the rights of Purcell under his mortgage), and by the levy secure a lien. Carty v. Fenstenacker, 14

Ohio St., 457; Morgan v. Spangler, 20 Ohio St., 38–55; Grinnell v. Brashears, 1 Handy 509.

V.

The same result follows the principle, that where different persons hold parts of the same mortgaged premises, some under judicial sale, and some by private sale, the mortgagee on foreclosure will be compelled to exhaust, first, the part last sold, and thus in the inverse order of sale till the mortgage be satisfied.

Cary v. Folsom, 14 Ohio 365; Commercial Bank v Western Reserve Bank, 11 Ohio 444–452.

*VI.

711 The form of Kelly's remedy.

Purcell by taking the goods in replevin vests the title in himself. 1 Handy, 512; 17 Ohio, 155; 2 Ohio St., 87; he chooses to take the goods and risk being chargeable with them.

1. Kelly may have a remedy by requiring Purcell in this action to account for the value of the goods.

It may well be said, as it was by Gholson, judge, in Grinnell v. Brashears, 1 Handy, "the plaintiff having and elected to take the property by a replevin cannot with any justice complain if he be made to account for the value."

2. Kelly having possession of the goods under a sale on execution, Purcell is chargeable with notice of his rights. 7 Ohio Pt. 2, p. 90; 13 Ohio, 408; 15 Ohio St., 162.

It is inequitable that Purcell, being amply secured, should now be permitted to hold the goods in controversy, the result of which will be that Kelly will lose his property, with no remedy for his loss. Kelly is entitled to relief to enjoin the replevin suit.

3. Kelly might be subrogated to the rights of Purcell in the real esate mortgage to the extent which Kelly's goods have gone to pay a portion of Purcell's debt secured by such mortgage.

It is said in Perry on Trusts, section 238, "If a vendor having a lien on real estate for his purchase money (and a mortgagee would stand in the same position) enforces his debt against the personal assets of a deceased vendee, and thereby deprives creditors or legatees of the deceased vendee of the chance of being paid their debts or legacies, equity will substitute them in the place of the vendor (mortgagee), or will marshal the assets to do justice to all." 2 Sugd. Vend. & Puch. 873-878 (7 Am. Ed.) cases collected.

4. The sale by the sheriff satisfied Goodrich's judgment, and Kelly must now lose his property unless he can have relief.

5. It was error, therefore, for the court below to strike out this second answer and thus cut off this form of relief.

712 *6. The second answer was sufficient in form to authorize the relief, for, as said in Miami Exporting Co. v. U. S. Bank, Wright R., 257: "Chancery will, in furtherance of justice, grant relief even more extensive and beneficial to the complainant than he has sought or prayed for in his bill." 1 Cox R. 58; 1 Bibb. R., 472; 2 Atk. R., 3-141; Edwards v. Edwards, 24 Ohio St., 412.

James Kernan, Jr., James Kernan, Sr., and W. H. West, for Purcell.

The chattel property under a chattel mortgage cannot be levied on.

Gwynne on Sheriffs, 225; 2 Hilliard on Mortgages, 230; Robinson v. Fitch, 26 Ohio St., 659; Herman Chattel Mortg. section 117; 1 Schouler on Personal Property, 547-548.

The proper parties were not before the court for the relief asked.

BEER, J.

This is a case in which the rule of *caveat emptor* applies, Kelly and Goodrich having actual notice of the chattel mortgage at the time of their purchase of the goods. Even if they had not had such notice we cannot see how their equity would be superior to that of Mrs. Nash. It may very well be that the chattel mortgage was taken with the understanding that her husband's chattel property should be exhausted before proceeding against her land.

The judgment of the common pleas is affirmed.†

*REPLEVIN--EVIDENCE 713

[Logan District Court, March Term, 1880.]

Beer, Dodge and McCauley, JJ.

TIMBERLAKE v. MCARTHUR.

1. In a civil action for the recovery of specific personal property (replevin) under an answer denying the plaintiff's right of possession, it is competent for the defendant to prove, that although the plaintiff had a right of possession, it was waived by a special agreement between the parties. It is not necessary to set up such special agreement by answer.
2. In the trial of a civil action to a jury in the court of common pleas, a refusal by the court to permit a competent question to be asked of a witness on behalf of a defendant on the statement of the facts proposed to be proved, is not such error as will authorize a reviewing court to reverse a judgment against such defendant, unless the record shows that it was proposed to give such additional evidence as would make a full defense.

The material facts are these:

1875, February 10, McArthur filed petition in the common pleas, averring:

First—That Timberlake wrongfully detains goods and chattels described, of which plaintiff was at the commencement of the action and still is entitled to the immediate possession (substantially as in the form in 2 Nash Ohio Code Pleading (4th ed.) 822), that by reason thereof the plaintiff has sustained fifty dollars damages.

Timberlake's answer "denies that plaintiff had a right at the commencement of this action to the possession of the property described."

1877, June 19, on trial to a jury in the common pleas, before John L. Porter, Judge, McArthur gave in evidence a chattel mortgage on the property in controversy, to her made by Timberlake, March 25, 1874, to secure the payment to her of Timberlake's note of that date for $238,

† The first four points in the syllabus of the foregoing case are well established by the authorities cited.

The 5th and 6th points seem to be in opposition to authorities and reasons of great force. The case is valuable in practice. The court did not in the opinion remark on the fact that the debt was the debt of Ellen Nash.

six months after date; also, in evidence proved the note unpaid, de-
714 mand of property before *suit was brought, and refusal by Timberlake to deliver. The mortgage, was in usual form conditioned that Timberlake should retain the property until the note became due, when, if not paid, McArthur should be entitled to have and take possession.

The bill of exceptions states:

"The plaintiff having rested, the defendant to maintain the issue on his part was himself called as a witness, and his counsel put to said witness the following question:

" 'What arrangement was made, if any, by which you would go before a justice of the peace and confess judgment on said note?'

"Plaintiff objected to said question. The court inquired of defendant's counsel 'whether this arrangement was made upon any new consideration,' to which defendant's counsel replied: 'That it was upon the consideration of having the note go into a judgment, and of bail for stay of execution being put in.'

"The defendant's counsel further stated, that 'defendant expected by said question to prove that it was agreed between the parties that defendant should go before a justice of the peace and confess judgment on said note, and put in bail for stay of execution to the satisfaction of the justice of the peace, and that plaintiff would not require the possession of said property until after the judgment was rendered.'

"Thereupon, the court sustained the objection made by said plaintiff to said question, and refused to permit the defendant to answer the same.

"The defendant excepted."

Verdict and judgment were rendered for plaintiff, McArthur, when defendant moved to set aside the same, which was overruled and exception taken.

1877, June 26, petition in error filed by Timberlake.

William Lawrence, for Plaintiff in Error.

The whole case may be briefly stated thus:

McArthur sued Timberlake in replevin, claiming a right of possession to goods described.

The defendant's answer denied the plaintiff's right of possession.

715 *Under this, can the defendant prove an agreement by which plaintiff waived an admitted previous right of possession? I say, yes.

I.

In action of replevin where the plaintiff alleges a right of possession of goods, and this is denied by answer, the issue is one under which the defendant may prove a special agreement by which the plaintiff waived the right of possession.

1. So are the judicial authorities.

In Kelley v. Blakely, 2 Western Law Monthly, 151, 550, it was held, that an answer in replevin which denies that the defendant does unlawfully detain the property demanded, puts in issue the entire averments in the petition; property in the plaintiff as well as his right to immediate possession; 2 Western Law Monthly, 603; 8 Ohio St., 293; Bliss Code Pl. 235*n*. This was after the case of Shurr v. Statler, 1 Western Law Monthly, 318; 4 Scammon, 440.

2. So are the elementary authorities.

In Pomeroy's "Remedies and Remedial Rights," pages 707, 708, sections 677, 678, it is said:

"In an action for the conversion of chattels the complaint, of course, averring property in the plaintiff, the general denial permits the defendant to show that the property is not in the plaintiff; (Robinson v. Frost, 14 Barb. 536); as for example, by proving that a third person is owner of the goods either by an absolute or qualified title."

In a note it is said:

"Davis v. Hoppock, 6 Duer, 254. He may show title in himself or a third person. Sparks v. Heritage; 45 Ind. 66; Kennedy v. Shaw, 38 Ind., 674; Farmer v. Calvert, 44 Ind. 209, 212; Thompson v. Sweetzer, 43 Ind., 312; Davis v. Warfield, 38 Ind., 461. See also Jones v. Rabilly, 16 Minn. 320, 325."

The text again says (Sec. 677.):

"Under a general denial in the same action, or a specific denial of the conversion, any facts may be proved in defense which go to show that there was no conversion; as, for example, that the goods were lost without fault of the defendant (Millard *v. Giles, 24 Wis. 319,324); or were taken under an execution against the plaintiff. McGrew v. Armstrong, 5 Kansas 284." 716

And in a note is added:

"Or that the goods were taken with the plaintiff's consent." Wallace v. Robb, 37 Iowa, 192, 195."

In the text (Sec. 677) a reference is made to "cases which hold that the defense of property in a third person, or in the defendant must be specially pleaded."

The note gives the reference, and adds as follows:

"Dyson v. Ream, 9 Iowa 51; Patterson v. Clark, 20 Iowa, 429. The doctrine of these cases is clearly opposed to the true theory of the general denial."

3. When a plaintiff is permitted to aver a conclusion of law by the rules of pleading, a general denial of such conclusion makes a broad issue under which every defense at law may be made.

Pomeroy says (Sec. 708):

"When the action is brought to recover possession of goods, the complaint alleging title, or right of possession in the plaintiff, the defendant may, under the general denial, introduce evidence to show that the plaintiff is not the owner, nor entitled to the possession of the chattels."

A note to this says:

"Caldwell v. Bruggerman, 4 Minn., 270; Woodworth v. Knowlton, 22 Cal. 164. In this case defendant proved that the goods were the property of a third person. See also Sparks v. Heritage, 45 Ind., 66; Kennedy v. Shaw, 38 Ind. 474; Farmer v. Calvert, 44 Ind. 209-212; Thompson v. Sweetzer, 43 Ind. 312. And see Bond v. Corbett, 2 Minn. 248; Caldwell v. Bruggerman, 4 Minn. 220; Wood v. Ostram, 29 Ind. 186; Northrup v. Miss. Val. Ins. Co., 47 Mo. 443."

Section 679 says:

"In an action to recover land * * * the general denial admits proof of anything [as defense at law?] that tends to defeat the title which the plaintiff attempts to establish on the trial." Lain v. Shepardson, 23 Wis. 224-228."

Bliss says:

"Upon the same principle in action for the recovery of personal
717 *property a denial puts in issue the plaintiff's ownership, and an averment by the defendant that the property belongs to a third person is not new matter within the meaning of the statute. It is but another form of denial of plaintiff's ownership."

Bliss Code Pl., section 328 ; Bruck v. Tucker, 42 Cal. 346; Marshall v. Shafter, 32 Cal. 176; Nelson v. Brodhack, 44 Mo. 596; Bledsoe v. Simms, 53 Mo. 305; Vose v. Woodford, 29 Ohio St., 245; Lain v. Shepardson, 23 Wis. 224; Mather v. Hutchinson, 25 Wis. 27; Lombard v. Cowham, 34 Wis. 486; Vail v. Halton, 14 Ind. 344; Maxwell v. Campbell, 45 Ind. 360; Rhodes v. Gunn, Ohio Supreme Court, 1880; Woodworth v. Knowlton, 22 Cal. 164; Kennedy v. Shaw, 38 Ind. 474; Sparks v. Heritage, 45 Ind. 66; Davis v. Warfield, 38 Ind. 461; Thompson v. Sweetzer, 43 Ind. 312; Wheeler v. Billings, 38 New York, 263.

In an action of replevin the plaintiff is permitted to aver his right of possession as a conclusion of law. In all such cases his answer may meet such conclusion by a general denial, under which all defenses at law may be made. Evans v. Cricket, 2 West. Law Monthly, 603; Trustees v. Odlin, 8 Ohio St. 293; Bliss Code Pl., 325 *n*.

In the third edition of Nash's Practice, 402, it is said:

"According to the decisions in Ohio *non detinet* in replevin is the general issue under which the defendant may prove any fact which shows that he does not unlawfully detain the property, as a levy on execution. Oaks v. Wyatt, 10 Ohio R. 344; Ferritt v. Humphreys, 12 Ohio R. 112. Unless these decisions shall be followed there must be great strictness in the pleadings in this action."

Again he says (page 403, same ed.):

"Our present code is substantially what the former statute was. Hence, the wrongful detention is the real issue, and on this issue all evidence tending to show which party had the right to the immediate possession is competent."

In the fourth edition of Nash the same doctrine is reaffirmed, vol. 2, p. 832, where Nash says:

"In these forms I assume that the plea is *non detinet*, as under the plea all defenses are admissible."

A denial of plaintiff's right of possession is as good as *non detinet*. This must be so, because the Code, section 92, says:

718 *"The answer shall contain a general or specific denial of each material allegation controverted by the defendant."

The defendant could not answer *non detinet*, for he did detain by virtue of an agreement which gave him the right to do so.

He could and did deny the plaintiff's right of possession, and the proof he offered, if allowed, would have defeated that right. He cannot plead the evidence which supports his answer.

I invite attention to section 183 of the Civil Code, now Rev. Stat., Sec. 5824. This shows that without any answer the defendant could give the evidence he proposed.

II.

The bill of exceptions sufficiently shows the materiality of the evidence offered, and that its rejection was prejudicial to the defendant below.

When a question is asked of a witness, which is competent, it can-

not be necessary then to state that the party asking it expects to prove all the facts which would combined make a complete defense. It is enough to state the expectation to prove one material fact.

A whole defense is rarely ever proved by one witness. When a party asks to prove one material fact it is error to refuse it.

1. This is so on judicial authority.

Thus, in Wilcox v. Stull, 2 Ohio St. 574, the court say, in substance, it is an error to refuse evidence of "some matter that was material to the issue." Gandolfo v. State, 11 Ohio St. 114; "something material;" Hollister v. Renor, 9 Ohio St. 9; "error prejudicial in some degree." Scovern v. State, 6 Ohio St. 204; Whidden v. Seelye, 40 Maine 256; Onondaga Ins. Co. v. Minard, 2 Comst. 98; Homes v. Gale, 1 Ala. 517; Duffee v. Pennington, 1 Ala. 508. These cases contain a reference to many others.

2. The convenience and necessity of practice requires it.

The court cannot properly require a party or his counsel, before allowing a proper question to be answered, to state that he expects to prove every fact that would make a complete defense. He may not know, but nevertheless has a right to ask witnesses to state in evidence what they may not be willing to state before.

Suppose the court had permitted the question which was *asked to be answered, and the proposed facts to be proved, they were competent. Could the court then rule out the evidence because counsel could not tell whether the other requisite facts could be proved to complete the defense? It would be very inconvenient practice to rule out or refuse to receive any evidence unless a party will state that he expects to prove all the facts which may go to make up a long and complicated defense. 719

No such practice has ever been adopted. To require it would work a denial of justice in cases where parties cannot know fully what can be proved.

It would offer a premium for unscrupulous lawyers, if any such could be found.

III.

The giving of bail for stay of execution was a sufficient consideration for waiving the right to the possession of the goods. McComb v. Kittridge, 14 Ohio, 348; 3 West. Law Monthly, 286; Blazer v. Bundy, 15 Ohio St. 57; Idem. 295.

W. W. Beatty and W. H. West, for McArthur.

BEER, J.

We are unanimously of the opinion that the question which was asked of the witness was competent under the issue made.

But it does not sufficiently appear that the plaintiff in error was prejudiced by the refusal of the court below to receive the evidence which was offered. It is not shown that it was proposed to prove that Timberlake offered to confess judgment and put in bail, nor that the time for so confessing and putting in bail had elapsed before this suit was commenced.

Judgment of the common pleas affirmed.†

† The district court reversed the common pleas on the only question really made in that court, but affirmed the judgment on other grounds. It may well be doubted if the ground of affirmance can be sustained, but the case is reported as one useful in practice.

723

*OFFICIAL BONDS.

[Clermont Common Pleas Court, 1880.]

† STATE OF OHIO v. ROBINSON ET AL.

1. A surety who signs an official bond upon an agreement with the principal obligor, that he is not to become liable until the bond is signed by others whose names are written in the obligatory part of the instrument, cannot be held, if the bond is delivered by the obligor to the obligee, in violation of such agreement.
2. In such case, the incomplete condition of the instrument appearing on its face is notice to the obligee of the conditional signing of the surety sufficient to put him on the inquiry, and bind him.

COWEN, J.

The petition alleges that A. N. Robinson, on the 31st day of August, 1876, with George F. Robinson, John Elliott, B. F. Buckingham, Jerry Fitzwater, Wilson Fitzwater, Robinson & Son, Artis Fitzwater, John F. Johnson, John Thompson, F. J. Montsinger, A. Oscamp and John Stump, as his sureties, executed his bond in the sum of four hundred thousand dollars, for the faithful performance of the duties of
724 treasurer *of Clermont county, for the term of two years, from the first Monday in September, 1876. The petition contains the further allegation that A. N. Robinson afterward entered on the duties of his office, and on the 10th day of December, 1877, resigned his office; that at the time of his resignation there was a deficit in the treasury of $29,404.72, with which sum of money he was charged, and which he neglected and failed to pay over to his successor in office, except the sum of $3,280.57; that the sum now due, and for which judgment is asked, is $26,124.15 with interest from December 10, 1877.

The answer of George F. Robinson, one of the sureties, sets up, as a second defense to this petition, the following: That the names of John H. Branch and N. Hutchinson were written together with the names of sureties in the body of the bond, and that he signed and sealed it on the condition that said Branch and Hutchinson would sign the same as obligors with him; that they were owners of real estate and other property of considerable value; that he delivered the bond to A. N. Robinson, the principal obligor, as an escrow, to be kept by him on special conditions, to-wit: That he, George F. Robinson, was not to become liable thereon, nor was it to be delivered to plaintiff until it had been signed and executed by each and every one of the proposed obligors, whose names were written in the body of the bond; and the answer further states that the plaintiff had due notice of this conditional delivery of the bond to A. N. Robinson; that John H. Branch and N. Hutchinson did not sign said bond, and that the bond was received and accepted by the plaintiff without their signatures, whereby he claims he is discharged from liability. The other sureties join in an answer containing a simliar defense.

To this defense the plaintiff has filed a general demurrer, and the legal question raised is, do the facts alleged in these answers, if true, constitute a good defense to the action?

† A case having the same title, in district court, was affirmed by the Supreme Court Commission, without report, 11 B. 228.

It is settled by the great weight of authority, that where the obligatory part of a bond contains the names of several sureties, and some of them sign the bond and deliver it to the principle obligor, upon the condition that it was not to be delivered to the obligee, until the other sureties named had signed it, and it is delivered to the obligee without their signatures, and accepted *in this incomplete condition, the 725
sureties who do sign are not liable. While the supreme court of Ohio has not, that I am aware, decided the question, yet it has been so held in numerous cases by the highest courts of other states. In support of this doctrine the following cases from the supreme court of the United States and state supreme courts are cited: Pawling v. United States, 4 Cranch, 219; State Bank v. Evans, 15 N. Y. L. Rep., 155; Fletcher v. Austin, 11 Vt., 447; Dair v. United States, 16 Wall. 1 in 1872; State v. Pepper, 31 Ind., 76; State v. Peck, 53 Maine, 284 in 1865; Haskins v. Lombard, 16 Me., 140.

In the notes to the case of Guild v. Thomas, 54 Ala., 414 in 25 Amer. 710, the reporter after citing numerous cases, says: "We think ourselves warranted in drawing from the foregoing cases the following conclusion: Where a bond is not executed by all the persons named in it as obligors, and it is proved to have been delivered by some of the persons executing it upon the condition that the others named as obligors, should also join in the execution, it is void as to those so executing it."

In the case of Hall v. Smith, decided by the court of appeals of Kentucky, March, 1879, reported in vol. 8, No. 20 of the Central Law Journal, which was a case in which the defendant signed his name as surety on a bond, in the body of which the names of two others were inserted as sureties, on condition that they should become jointly bound with him as sureties, and the bond, without his knowledge or consent, was delivered to the obligee, without the signatures of the other two, the court says: "The bond purported to be the bond of those who never executed it, and gave every evidence to the holder that it was an incomplete instrument. He saw the names of the parties signed to the instrument, and knew the character of the undertaking; and, as an ordinarily prudent man, should have made inquiry to know why it was that the names of these parties were in the bond as sureties, and not signed so as to make it their obligation. * * * The extent of their liability was plain—unmistakably—and was notice to the obligee of the condition upon which the appellant agreed to become bound."

In the case of Fletcher v. Austin, 11 Vermont, 447, above cited, it was held: "Where a bond contains in the obligatory *part the names 726
of several persons as sureties, if a part sign with the understanding and on the condition that it is not to be delivered to the obligee until signed by the others, it is not effectual as to those who do sign until the condition is complied with. The obligee must inquire whether those who have signed, consent to its being delivered without the signatures of the others." In the case of Sharp v. United States, 4 Watts 23, it is said: "His (the surety's) signature is conditional, and unless it be shown that the condition, viz.: the execution of the bond by William Laughlin, whose name appears in the body of it, has been dispensed with by him, he has a good defense to the suit." Also, Cutter v. Roberts, 4 Neb.; Duncan v. United States, 7 Peters, 435.

In this case, the surety, George F. Robinson, avers that the obligee had notice of his conditional signing of the bond. He also avers that the bond was delivered to the obligee with the names of the two sureties who did not sign, written in the body of the bond. This condition of the instrument alone was sufficient to put those whose duty it was to accept it upon the inquiry as to the manner of its execution. It was in law notice to them of any agreement existing between the principal obligor and the sureties who signed, as to the conditional liability of the latter.

The demurrers are overruled. The paintiff has leave to file a reply to the answers of the defendants, if it so wishes, on or before the first day of the next term of this court.

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739 *PETITION IN ERROR.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

GOING V. SCHNELL ET AL.

When a petition in error is pending in the district court, and a bond given to supersede a judgment of the common pleas, the court of common pleas would be the "court below" within the meaning of section 6722 Revised Statutes, which could give leave to proceed to enforce the judgment notwithstanding the bond; but if the case were a judgment of a district court superseded by a bond in prosecuting a petition in error in the supreme court, then the district court would be the "court below" which could grant the leave.

Cox, J.

This is a petition in error to reverse a judgment of the court of common pleas. In the court below the plaintiff brought an action against defendants on an undertaking to stay execution on a certain judgment rendered in the common pleas, against John C. Schnell, and to reverse which, a writ of error was prosecuted in the district court, the condition of the bond being that said John C. Schnell would abide the judgment of the district court and pay the amount of judgment and costs adjudged against him in case said judgment should be affirmed in whole or in part. The petition alleges that said judgment was affirmed in the district court at the January term, 1879, and that it is now unpaid, unsatisfied and unreversed. That John C. Schnell thereupon filed his petition in error in the supreme court, and caused an undertaking to be executed in the district court for a stay of execution upon said judgment rendered against him and affirmed as aforesaid; whereupon, plaintiff filed his motion for leave to proceed to enforce said judgment (the same being rendered upon a cause of action arising on a contract for the payment of money only), notwithstanding the said stay, and in that behalf executed to the satisfaction and approval of said court an undertaking of restitution to the defendant, John C. Schnell, in case said judgment should be reversed or modified; and, thereupon, said court duly granted said motion, and gave plaintiff leave to proceed to
740 *enforce said judgment in accordance with the statute in such cases made, and provided, and awarded execution thereupon, which was

issued, but returned wholly unsatisfied for want of property; and that said defendant is wholly insolvent. By reason whereof the said undertaking has become absolute, and plaintiff asks judgment for the amount of two thousand one hundred and fifty eight dollars and twenty-four cents with interest, and costs.

To the petition, defendants demurred, and the court below sustained the demurrers and entered judgment for them, to which plaintiff excepted, and now prosecutes this writ of error.

It was claimed by the court for the plaintiff, that there should have been a judgment below for her. That by virtue of section 6722 of the Rev. Stat., she had a right, on obtaining leave of court, and giving a bond of restitution, to prosecute an action against the sureties on the undertaking given to stay the execution of the judgment of the common pleas pending the action in the district court, notwithstanding, the defendant had, on the judgment being affirmed in the district court, filed his petition in error in the supreme court, to reverse it, and given a bond to stay the execution of the judgment of the district court, while the case was pending in the supreme court.

On the other hand, the defendants claim that in such case the statute gives a right only to enforce the original judgment by execution, but no right to proceed on the bond. That the first bond given to stay the execution in the common pleas, has, itself, been superseded by the second one given to stay the execution on the judgment of the district court. We have not found it necessary in deciding the case to consider this question. The amended petition in the case below is defective in not stating in what court the leave was obtained to prosecute the judgment, notwithstanding the superseded bond, or what court approved the bond given by plaintiff to so prosecute. This defect, if no other, would be fatal on demurrer, and would warrant us in affirming the judgment of the court below. We might stop here, but the question is an interesting one to the profession, as to which is the proper court from which to obtain leave to prosecute the judgment on giving a restitution bond. It was stated in argument that the leave had been obtained in the common *pleas. Section 6722 Rev. Stat. says "the court below may give leave." We have been able to find but two 741
cases where this question has been considered. One in Gardner v. Cline, 2d Western Law Monthly, 329, which was one where the judgment of the court of common pleas was superseded by bond, pending writ of error in the district court. The application was made to the court of common pleas for leave to prosecute the judgment on giving bond of restitution.

There were only two courts dealing with the case, and the court of common pleas, as the court below the district court, granted the leave.

The other case is that of the Valley Bank v. West & Co., 2 Handy Rep. 61. In this case a judgment of the superior court in special term was taken on error to the general term, and judgment rendered. Proceedings on general term judgment were stayed by a bond pending a petition in error in the supreme court. The superior court in general term there held—Judge Gholson delivering the opinion—that the "court below, the tribunal that decided the controversy in the first instance and rendered the judgment, is to grant or refuse leave to enforce the judgment. That tribunal being the one best acquainted with the merits of the case, and the demands of justice."

The court goes on to say that "the leave to be obtained and the judgment to be enforced apply as well to a stay of proceedings in a judgment of the district court resulting upon a petition in error in the supreme court, as upon a petition in error in the district court, to reverse a judgment of the court of common pleas; and the case now under consideration stands in the same condition as if there had been a judgment in the district court and a petition in error in the supreme court." And the superior court in general term, thereupon proceeded to give the leave to prosecute the judgment. If we are to follow the line thus indicated by these two cases, then it would lead us to hold that when a petition in error is pending in the district court and bond given to supersede the judgment of the common pleas, the court of common pleas would be the "court below" which could give leave to proceed to enforce judgment, notwithstanding the bond. But if the case were a judgment of the district court superseded by a bond in prosecuting a
742 petition *in error in the supreme court, then the district court would be the "court below," which would grant the leave.

In confirmation of this view it is to be observed that upon affirmation by the district court of a judgment of the court of common pleas, and a stay of execution upon petition in error, to the supreme court, the effect is to stay the mandate of the district court, by which action the court of common pleas would have jurisdiction to cause execution to be issued. Whereupon, it would follow that application to supersede the stay could not be entertained by the court of common pleas, but only by the district court.

Judgment common pleas affirmed.

Moulton, Johnson & Levy, for Plaintiff in Error.

Follet & Dawson, for Defendants in Error.

VENDOR'S LIEN—LIMITATIONS.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

†Wm. C. Smith v. James W. O'Connor.

O. having purchased real estate and had the legal title taken in the name of S., agrees with S. that for all advances of money made by him, and for services rendered, he shall have a lien on the property; and, that upon the conveyance of said title he will *then* be paid the amount of his advances and services: *Held*, That the conveyance of the legal title and the payment of the advances and services being made concurrent acts, if the legal title is conveyed under the agreement, but the amount of advances and services are not paid as agreed, and no security is taken therefor, there arises by operation of law an equitable lien or trust upon the property conveyed in favor of S., and his right to enforce such lien is not affected by the six year's statute of limitation.

Error to the Superior Court of Cincinnati.

Smith commenced this action to recover $1,507 with interest from 1871, alleging that in 1858 he and the defendant had mutual dealings,

†The judgment in this case was reversed by the Supreme Court. See opinion 40 O. S. 214.

and that the defendant having purchased certain real estate directed that the title should be taken in the name of the *plaintiff; that he advanced certain money to defendant and performed certain 743
services for him, and that it was agreed that he was to have a lien on the land conveyed to him therefor, and the plaintiff was to hold the title until the defendant should reimburse him; that in 1871 a statement of account was made out between the parties by which it appeared that the defendant was indebted to the plaintiff in the amount claimed; that Anthony Shonter, agent for the defendant, gave plaintiff a check for that amount; that the payment of the check was refused, and thereupon, Shonter, as such agent, representing that he would cause the money to be paid in a very short time, the plaintiff surrendered the check; that upon receiving the check, plaintiff gave a receipt in full for all demands, and executed and delivered a deed for the land in question. The amount of his claim never having been paid, plaintiff asked judgment for the amount of it that it might be held to be a lien on the land, and the land sold to pay the same. The defendant demurred, setting up the statute of limitations of six years, and claiming that the claim was barred.

JOHNSTON, J.

The averments of the petition are such as to characterize the transaction between Smith and O'Connor as one taking place between a vendor and vendee of real property. Whatever may be the decisions in some of the states, in the majority of them, and in the state of Ohio, it has long been the settled law, that on the conveyance of real property where the price is not paid, and independent or outside security has not been taken therefor, that a vendor's lien arises in favor of the vendor, and the vendee holds the title as trustee for him to the extent of the unpaid purchase money.

The lien rests on the ground that it would be inequitable and contrary to the intention of the parties to allow the purchaser to retain the estate without paying the purchase money.

The principle of the lien originates in the doctrine of equitable trusts. 1 Ohio, 320; 2 do., 385; 14 do., 23; 17 do., 520; 11 O. S. 68; 17 do., 19; 31 do., 504-5.

Smith, therefore, does not occupy the position of a simple contract creditor, unprotected by any equity. A trust or charge upon the property by the allegations of the petition, arose by *operation of law 744
in his favor, and it stands charged in the hands of O'Conner for the payment thereof, and his claim thus assuming the nature of a trust or charge upon the property, by the 4974th section of the Rev. Stat. of the state, it is protected against by the six years' limitation clause claimed by defendant. In the opinion of this court, the court below erred in sustaining the demurrer and entering judgment for defendant. Judgment reversed, and the cause was remanded for further proceedings.

S. T. Crawford, for Plantiff.

Judge O'Connor, for Defendant.

ATTACHMENT.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

†JEFFERSON NATIONAL BANK v. PURCELL ET AL.

An attachment upon the ground that the debtor has assigned his property with intent to defraud his creditors will be set aside where the sole evidence to support it is a conveyance, which if fraudulent at all is so only by construction of law under the provisions of the statute of frauds, and it is shown affirmatively that even if in its consequences as to creditors the conveyance be fraudulent such consequences were not in fact contemplated or intended.

PETITION IN ERROR.

AVERY, J.

This is a petition in error to the superior court of Cincinnati. The error alleged is that the superior court discharged an attachment against the property of John B. Purcell. The attachment was on the ground that he had assigned a portion of his property with the intent to defraud his creditors. The assignment in question was a conveyance to his brother, Edward Purcell, of the Cathedral residence; the Mount Saint Mary's
745 Seminary and land in that vicinity; the school property at the *corner of Elizabeth and Mound streets; the old hospital property at the corner of Plum and Third streets; a lot fronting on what was formerly the Whitewater canal, lying nineteen feet east of Park street; and a lot on Mount Harrison. The title to all this property was in John B. Purcell, but the financial transactions which had supplied the money for its purchase and which had extended over many years, had been conducted by his brother, Edward Purcell. Edward Purcell had no debts, other than such as were contracted on account of his brother; his brother had none, other than those contracted by him; and the object of the conveyance was to put the title in him with a view that he should make an assignment for the benefit of his creditors, who were, at the same time, the creditors of his brother.

The assignment was accordingly made by Edward Purcell for the benefit of his creditors. But now, the ingenious argument of counsel is that, as only those who were creditors of Edward Purcell could come in under the assignment by him, the effect was to exclude those, who, by contracting with Edward Purcell, as agent, were simply the creditors of his brother; while, as to those who had contracted with Edward Purcell in his own name, and who would have the right to elect to hold either, the effect was to compel them, by coming in under the assignment, to discharge his brother; and it is argued, therefore, that this conveyance by John B. Purcell was with the intent to defraud his creditors.

This conclusion is built upon a certain decision under our Statute of Frauds, that assignments, stipulating that creditors who come in shall release the assignor; and assignments reserving the surplus to the assignor after providing for a certain class of creditors, are void; and the proposition is that such assignments are with the intent to defraud creditors, since only assignments with the intent to defraud creditors

†This case was affirmed by the Supreme Court, without report, June 17, 1884, 41 B., 323.

are void. Atkinson v. Jordan, 5 Ohio, 293; Dickson v. Remson, 5 O. S., 218, 224.

There is a distinction, however, between a statute which merely avoids conveyance, and one which authorizes a seizure of property, or, since the language as to arrest and bail is the same with that as to attachment, the arrest of the person. A statute *may well set aside 746
a conveyance as in fraud of creditors, if that would be its consequence without regard to the intention in fact; but it is a different question whether the property of the debtor should be sequestered or his person imprisoned.

The decisions, it is true, are not uniform. In Whedbee v. Stewart, 40th Maryland, 414, it was held that the words "intent to defraud" in the attachment law, are to receive the same construction as similar words in the statute against fradulent conveyances, ordinarily known as the Statute of Elizabeth, under which the prevailing rule is that where the consequence of a conveyance is fraudulent, courts should pronounce it to have been made with such intent. But, in Spencer v. Deagle, 34th Missouri, 456, the opposite construction was adopted, and it was held that, for the purposes of attachment, "it is not enough that the consequences of the conveyance would be to hinder or delay creditors; that the conveyance must have been made with that intent and purpose." And, in the 6th Nebraska, 529, it is said that the intent required in a case attachment "is not such intent merely as may be inferred from the consequences of the act of the party."

Attention is called to the fact that the latter case was an attachment before debt due, and that the language of the statute in such cases requires that there should be the fraudulent intent to cheat or defraud creditors, or hinder or delay them. But if the principle is to be applied that, from the consequences of an act as fraudulent, courts must pronounce it to have been done with the intent to defraud, we can see little difference between "intent to defraud" and "fraudulent intent to defraud." The difference in phraseology may, perhaps, be accounted for by the fact that in the case of attachment before debt due, the words "hinder or delay creditors" are added, while in the case of attachment after debt due, the language is simply with the intent to defraud creditors. It may be that in one case the words "fraudulent intent" were used so that they would be applicable to the character of the intent where creditors were simply hindered or delayed. But be that as it may, the supreme court appears in Gans v. Thompson, 11th O. S., 579, to have recognized no difference between the two statutes in respect to the intent to defraud. In that case an attachment before debt due, the affidavit *was simply that the debtor was about to dispose of his 747
property with "intent to defraud his creditors." The court of common pleas set aside the attachment. Upon motion, the district court reversed the judgment, and the judgment of reversal was affirmed by the supreme court.

Actual fraud and constructive fraud are distinguishable and the distinction has been applied by the courts of this state, even under the statute of frauds. Thus, although constructive fraud, as it is termed, will be sufficient to set aside a conveyance against existing creditors, actual fraud is required against subsequent creditors. In other words, the court stops at the consequences of the act and does not extend the intent.

No case could be freer than this of actual fraud.

Each case must be determined by its own circumstances, and, certainly, the relations of Edward Purcell and his brother, and the peculiar character of this property, place this case by itself.

No argument could be more stringent than that which, taking a legal view of their relations, evolves the conclusion that the result of what has been done is to prefer creditors, and from that, the conclusion that such preference was intended.

The statutes of this state do not declare assignments in trust to prefer creditors fraudulent. They are merely made void under the Insolvent Law to the extent of the preference. Nor have decisions gone so far in this state as that a mere implied reservation of surplus to the assignor fixes upon the assignment the character of being fraudulent. In Dixon v. Rawson, 5 O. S., 218, the stipulation was express, and it was held simply that the parties having provided that there should be a surplus, were not permitted to show that there could not be a surplus.

Considering the magnitude of the debts the conveyance was to secure, it is hardly possible the thought could have occurred even if the conveyance was in result a preference of the creditors of Edward Purcell, who were not, at the same time, creditors of his brother, that there would have been, after the satisfaction of such debts, a surplus.

Comments such as these are not for the purpose of affecting the legal conclusions of the ingenious argument which has been addressed to the court, but simply to make it clear that in this case certainly there is no fraud in fact; distinguishing, as we feel *justified, from the 748 language of the books, between fraud which is actual and fraud which becomes so simply by operation of law.

The language, as has already been observed, of our statute in respect to arrest and bail is identical with the language in respect to attachment. In the one case the property of the debtor may be sequestered; in the other his person may be seized; but, in either case, all that is required is that he should have assigned or disposed of his property, conveyance or transfer "with intent to defraud his creditors."

Now, reasoning by analogy from the construction which the statute as to arrest and bail has received, it would follow, we think, that the intent required to support an attachment is not merely that which is to be inferred from the consequences of the act. Doubtless, at the outset, the mere fact of a conveyance which, in its consequences, would affect creditors and as to them, might be termed fraudulent, would make out the case; but the point contended for is that the question of intent is not open for explanation, and that, because, by the argument, the assignment, as such, would have been fraudulent, the court in determining whether the attachment should stand or not is shut out from the question whether there was actual intent to defraud.

In New York where an assignment was made for a certain class of creditors, without any mention of a surplus, which, in effect, as is argued, would be a reservation of the surplus to the assignor, the omission of a provision for the surplus was held to be not such evidence of intent to defraud creditors as was required to warrant arrest. Spies v. Joel, 1st Duer, 669, followed and approved in 8th Abbott, 53. Says Judge Duer: "I am clear in the opinion that proof of actual intent in all cases in which fraud is charged, ought to be required to justify or sustain an order of arrest." In this county hitherto like doctrine has been

held. In Chamberlin v. Strong, 3d Western Law Gazette, 281, a decision of Judge Storer is reported, in which he observes: "In this class of cases we require the proof of fraudulent intent on the part of the defendant to dispose of his property, before we can sustain an attachment. What is termed in legal parlance constructive fraud is not sufficient."

*The court, therefore, is of the opinion that there was no error in the discharge of the attachment by the superior court, and accordingly the judgment will be affirmed. 749

King, Thompson & Maxwell, for Plaintiff in Error.

Mannix & Cosgrove, Contra.

TAXES AND TAXATION.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

RIDDERMAN V. COMMISSIONERS OF HAMILTON CO.

Under the act (70 O. L. 10) county commissioners are not authorized to order the refunding of taxes charged and collected upon illegal additions purposely made by the county auditor to the assessed value of real estate.

ERROR to Court of Common Pleas.

AVERY, J.

The error alleged is that the court of common pleas sustained a demurrer to the petition and dismissed the action. The case came into that court by appeal from the board of county commissioners. The facts alleged were that the county auditor had, in 1875, without any action by the board of equalization or notice to plaintiff, and for the purpose of increasing the tax duplicate, added $250 to the assessed value of plaintiff's real estate, and that he had thus been taxed in excess during the intermediate time, $27.43 in all, for the refunding of which he had applied to the county commissioners.

By the statute in force (70 O. L., 10) it was provided: "The county auditor shall from time to time correct all errors which he shall discover in his duplicate either in the name of the person charged with taxes or assessments, the description of lands or other property, or in the amount of such tax or assessment; * * * and if at any time the county auditor shall discover that any erroneous taxes or assessments have been charged and collected in previous years, he shall call the attention of the county commissioners thereto, at any regular or special session of the board, and if the county commissioners shall find that taxes and assessments have been so erroneously charged and collected, *they shall order the county auditor to draw his warrant on the county treasurer in favor of the person." This was construed in State ex rel v. Commissioners, 31 O. S., 271, and it was held that the commissioners of a county were without authority to order the auditor to draw his warrant on the treasurer for the refunding of taxes erroneously charged and collected, except where the error was clerical merely, either in the name of the person, the description of the property, or the amount of the tax. 750

In the present case the error was not clerical. The petition alleges that the addition was made by the auditor for the very purpose that was accomplished. It was not an error in the name of the person, description of the property, or amount of the tax. It was not an error at all except that it was against the law. Humphreys v. Safe Deposit Co., 29 O. S., 608. In that sense it was a fundamental error.

The plaintiff had not been left wholly without a remedy. He might have enjoined the assessment and collection of the illegal tax. S. & C., 1151. The right of action was also given him to recover back against the officer making the collection if his action were brought within one year. S. & C., 1152. It may be he did not know of the illegal addition to the assessed value of his property and that his right to recover back is barred by the lapse of time. But this furnishes no authority for helping him to a remedy not given by law.

Judgment affirmed.

Swormstedt, for Plaintiff in Error.

Waters, Contra.

POOR AND POOR LAWS.

[Hamilton District Court, 1880]

Avery, Cox and Johnston, JJ.

STATE EX REL. WILSON ET AL. v. JOHN RITT ET AL.

A harmless pauper lunatic, an inmate of Longview Lunatic Asylum, in Hamilton county, Ohio, cannot be discharged therefrom and his protection *and maintenance cast upon the county infirmary therein, without the certificate provided for by section 742, Revised Statutes, relating to said asylum, whether he be a resident or nonresident of the county or state.

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The object of this proceeding is an application for a mandamus to compel the defendants to admit into the county infirmary the man Henry Bitter, whose case is familiar to the reading public. Bitter was found by the relators, a harmless pauper lunatic, in a suffering condition in a field in Millcreek township in April last. The relators aver that they applied to Ritt to take charge of him in the infirmary; that he refused; that thereupon, upon the suggestion of Ritt, the board of directors of the infirmary and the trustees of the township were convened together, the result of which was, after legal advice, the defendants continued to refuse to take charge of the man. Whereupon this application was made to compel the defendants to receive him

The respondents claim that the county infirmary was not the place intended in this county for the reception of the insane, whether harmless or otherwise; that the funds set apart for the maintenance of that institution are for the indigent poor of the county, and that in order possibly to entitle this man to admission into the infirmary, he having been an inmate of Longview, he should have received, or some one or him, from the superintendent of Longview a certificate setting forth certain facts required by statute, before he could be admitted, if at all.

JOHNSTON, J.

The status of this man is difficult of determination under the laws of the state. The statute provides that no person can be admitted into

Longview unless he has acquired a settlement in this county and become insane thereafter. Bitter had not acquired a settlement in the county when he was sent to the asylum, but he was committed there by the county commissioners in October, 1878, where he was confined until this spring, when he was turned out without the certificate entitling him to admission into the infirmary. He had become an inmate of that institution.

The provisions of the statute cited by the relators, sections 970 to 972, inclusive, do not have the application claimed for them. They do not aver that there are rooms in the infirmary *set apart for the safe keeping of lunatics, residents of this county, who cannot be received in the insane asylum or who have been discharged therefrom ; but, if the relators had so averred, it would have been met with the further objection that these apartments were for insane persons resident in this county. Section 974 of the statute simply provides for the indigent poor resident in the county and nonresidents, and not to indigent insane persons of that class. 752

Whether the superintendent of Longview had a right to discharge the man without the certificate referred to, may be a question for further consideration, and whether he may be compelled to resume control of him, or to issue the certificate provided for, to him, are questions the court do not decide ; but before the defendants can be compelled to receive him the certificate above referred to should be presented. The application failing to show that such a certificate was ever issued, the writ must be refused.

The course pursued by the trustees of Millcreek township was commendable. They had discharged their whole duty, but the case presented by their application could not afford the party relief.

Application dismissed at relators' cost.

John W. Caldwell, for Relators.

Sam'l F. Hunt, for Respondents.

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*TAXATION. I

[Adams Common Pleas Court, 1880.]

HARVEY CONNER v. JOHN T. WILSON.

1. Notes belonging to a resident citizen of Ohio, secured by mortgages on lands in Indiana, which have always remained in the hands of an agent in that state and are to so remain for collection and reinvestment and which have been taxed there each year, are embraced in the term "credits" as used in the tax laws of Ohio, and are subject to taxation at the residence of the owner in this state.
2. Such taxation violates no provision of the constitution of Ohio, nor of the federal constitution.
3. Sections 48 and 49, p. 456, vol. 75, O. L., authorizes the county auditor to go back four years prior to the date of the taking effect of the statute in his corrections of false returns of taxpayers, and to charge such persons on the duplicate with the proper amount of taxes for that period of time, and in this respect is retrospective.
4. This statute does not create new obligations, but is wholly remedial, providing only for the enforcement of existing liabilities, and hence is not a retroactive law in the sense in which that term is used in article II, section 28, of the constitution.

5. The county auditor has the right after the delivery of the duplicate to the county treasurer and before the latter's final settlement, to correct the return of the taxpayer or assessor, and to charge persons on the duplicate with the proper amount of taxes.
6. If the correction is made and the taxes placed on the duplicate by the county auditor after December 20th, they are due and payable at once, and if not paid, the treasurer may bring suit forwith for their collection under section 22, p. 485, Ohio Laws.
7. Where in such suit the answer of the taxpayer discloses all the facts which authorize the auditor to charge the taxes against him, the *auditor's neglect to
2 file away in his office a statement of the evidence upon which he made the correction of the duplicate is no defense to the action.

COWEN, J.

The plaintiff alleges that there stands charged upon the tax duplicate of Adams county against the defendant, as personal taxes, $7,134, and that this sum is due and unpaid, and asks for judgment.

The defendant has filed an answer containing six defenses. The first defense is merely an averment that the defendant is not indebted. This is a statement of a legal conclusion embodying no matter of fact, and as a pleading is not good. Though no motion or demurrer is filed to this defense, it should be stricken out. 29th Ohio State, p. 16; 18 Ohio State, p. 353.

The plaintiff has filed a motion to strike out the second, third, fourth and fifth defenses on the ground that they are irrelevant matter and surplusage.

To the sixth defense the plaintiff has filed a general demurrer.

The defendant in his sixth defense alleges that about twenty-three years ago, having furnished all the capital, he was in partnership with a resident of the state of Indiana, in the business of wares, goods and merchandise located in the state, selling only to persons residing in that state; that in the year 1860 he sold his interest in these goods, wares and merchandise to his partner, and authorized him to invest the proceeds, and his share of the notes and accounts in loans to resident citizens of Indiana secured by mortgage on real estate in that state; that this was done and the notes and mortgage reinvested from time to time, in the same way; that these notes and mortgages have always remained in that state under the control and management of said agent and to so remain, and that he has each and every year been taxed on them in Indiana and and has paid the taxes so assessed; that these notes and mortgages are the property of the defendant upon which the taxes sued for were levied, assessed and placed on the tax duplicate of Adams county, in March, 1879. During this time the defendant has resided in and still resides in Adams county, Ohio. The defendant also says that the county auditor did not at any time file in his office a statement of the facts or evidences, or any of the same, upon which he made the charge of taxes against the defendant in March, 1879.

*It is claimed on behalf of the defendant that the facts stated in
3 this defense show the actual *situs* of the property on which the tax complained of is assessed, was at the time in the state of Indiana, and that it is subject to the same rule as to taxation as tangible personal property which is taxed at and according to the law of the place where it is situated, irrespective of the residence of the owner.

The law in regard to the taxation of personal property makes a distinction between what is termed tangible and intangible property, chattels

being of the former class and choses in action of the latter. It is everywhere recognized as the law that chattels are subject to taxation at the place where situated, and not where the owner resides, if they are separated from him. But it is an equally well-established principle of law that debts, as property, have no locality separate from the place of residence of the persons to whom they are due. They follow the person of the owner and can have no *situs* apart from his domicile. A note and mortgage are merely evidences of a debt, not the debt itself. The right to the sum of money therein named, not the pieces of paper upon which the evidence of its existence is written, constitutes the property. The *situs*, or locality, of this kind of personal property, so far as it can have a *situs*, does not therefore depend upon the actual location or place of deposit of these pieces of paper-evidences—but upon the residence of the person to whom the right to sue and recover the debt which they evidence belongs.

Hence the rule is that debts cannot be taxed in the jurisdiction of the debtor, but are subject to taxation at the domicile of the owner where they are property. Cooley on Taxation, page 65, says: "Contracts for the payment of money or which have a money value can only be considered as the property of the owner where he has his domicile, and, consequently, are only taxable there." "To tax in one state contracts owned in another, is held to impair their obligation, and, consequently, to be inadmissible, even though they are made payable in the state imposing the tax, and are secured by mortgage in that state."

And again, on page 15: "The mere right of a foreign creditor to receive from his debtor payment of his demand, cannot be subjected to taxation within the state. Debts owing to foreign creditors by either corporations or individuals are not the subject *of taxation. The 4
creditor cannot be taxed, because he is not within the jurisdiction, and the debts cannot be taxed in the debtor's hands through any fiction of the law which is to treat them as being for this purpose the property of the debtors. They are not the property of the debtors in any sense; they are the obligations of the debtors, and only possess value in the hands of the creditors." See also state tax on foreign held bonds 15 Wallace, 300.

This rule has been expressly held as the law of Ohio. In the case of Worthington and Wife v. Sebastian, Treasurer, 25 O. S. 9, the court says: "The argument of counsel is, 1st, That property must be taxed by the law of the *situs;* and 2d, That the *situs* of credits, bonds, etc., is the place of the debtor, obligor, or maker. This latter proposition we deny without expressing any opinion as to the former. Intangible property has no *situs*. If for purposes of taxation, we assign it a legal *situs*, surely that *situs* should be the place where it is owned, and not the place where it is owed. It is incapable of a separate *situs*, and must follow the *situs* either of the creditor or debtor. To make it follow the residence of the latter, is to tax the debtor and not the creditor, to tax poverty instead of wealth." And the court quoted in support of this rule from the opinion of the supreme court of the United States in the above-cited case in 15 Wallace, 300, as follows:

"But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. * * *

Debts can have no locality separate from the parties to whom they are due."

But it is further claimed by defendant's counsel that notes and mortgages like those upon which this tax is assessed were not intended by the legislature of this state to be embraced in the subjects of taxation specified in the act in force when the liability to this tax is alleged to have accrued; and that if the tax law, fairly construed, does include them, it is unconstitutional and void, both by the constitution of the state and the constitution of the United States.

The construction of the statute, as well as the constitutional ques-
5 tion, I regard as settled by judicial decisions. In the case *of Worthington and Wife v. Sebastian, Treasurer, 25 O. S., 8, the court had under review the tax laws of 1846, 1852 and 1859. The provisions of these statutes and the present Revised Statute in relation to the taxation of "credits," are substantially the same. The liability for the tax sought to be recovered here accrued under the statute of 1859 as amended and revised. The court in deciding that case say:

"Our system of *ad valorem* taxation has uniformly proceeded upon the theory, that tangible property is to be taxed according to the law of the place where it is situated, irrespective of the residence of the owner; while, with equal uniformity, it has proceeded upon the theory that 'credits,' 'investment in bonds,' 'stocks,' etc., are taxable according to the laws of the place where their owners or holders reside. Our *ad valorem* system of taxation was first established by the act of 1846 (vol. 44, p. 85). That act was in force at the time the present constitution was adopted, and was fully and favorably known to the people of Ohio. By that law tangible property was not subjected to taxation unless situated 'within the state;' and 'credits' of persons residing in the state, including 'every claim or demand for money, labor, or other valuable things, due, or to become due,' were subject to taxation. So far as questions in this case are concerned, the section of the constitution in question is a substantial embodiment of the provisions of that act, the only material difference being, that the law of 1846 limits the right to tax tangible property to cases where it is located within the state, while the constitution contains no limitation. Both agree, however, in taxing resident owners of intangible property, irrespective of its real or constructive *situs*. The statute of 1852 (vol. 50, p. 138), enacted at the first session of the general assembly after the adoption of the present constitution, is substantially similar in this respect to that of 1846, and likewise to that of 1859, under which these taxes were assessed; in other words, for nearly a third of a century, and ever since we have had an *ad valorem* system of taxation, the people of the state have acquiesced in the policy of taxing resident owners of credits, notes, bonds, stocks and the like, without any regard to the residence of the debtor, or the place where the securities are issued or made payable. Under such circumstances it is very plain to us that it
6 could not have been the intention by section 2, *article XII., of the present constitution, to prohibit the imposition of such a tax."

The question also whether the power of a state to tax, in the hands of one of its resident citizens, a debt held by that citizen upon a resident of another state is prohibited or limited by the constitution of the United States has been recenty decided by the supreme court of the United States in the case of Kirtland v. Hotchkiss, at the October term, 1879. In this case, the plaintiff in error, a citizen of Connecticut, instituted

the action for the purpose of restraining the enforcement of certain tax warrants levied upon his real estate in the town in which he resided, in satisfaction of certain state taxes, assessed against him for the years 1869 and 1870. The assessment was by reason of his ownership during those years, of certain bonds executed in Chicago, and made payable to him, his executors, administrators or assigns in that city, at such place as he or they should by writing appoint, and, in default of such appointment, at the Manufacturers' National Bank at Chicago. Each bond declared that: "It is made under, and is, in all respects, to be construed by the laws of Illinois, and is given for an actual loan of money, made at the city of Chicago, by the said Charles W. Kirtland to the said Edmund A. Cummings, on the day of the date here." They were all secured by deeds of trust executed by the obligor to one Perkins, of that city, upon real estate there situated, the trustees having power, by the terms of the deed, to sell and convey the property and apply the proceeds in payment of the loan, in case of default on the part of the obligor to perform the stipulations of the bond. All the essential facts of this case are similar to those of the case under consideration.

The court addressing itself to the question whether the federal constitution prohibits a state from taxing such a debt owned by one of its resident citizens, says: "The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the state imposing the tax. The debt which he holds against the resident of Illinois is property in his hands. 15 Wallace, 320. It constitutes a portion of his wealth, and from that wealth he is under the very highest obligation, in common with his fellow citizens of the same state, to contribute for the support *of the government whose protection he enjoys. The debt in question, 7
although a species of intangible property, may, for purposes of taxation, if not for all purposes, be regarded as situated at the home of the domicile of the creditor. It is none the less property there because its amount and maturity are set forth in a bond. That bond, whether actually held or deposited, is at best only evidence of the debt, not the debt itself. The bond may be destroyed, but the debt—the right to demand the repayment of the money loaned with the stipulated interest—remains. Nor is the locality of the debt, for the purposes of taxation, affected by the fact that it is secured by mortgage upon real estate situated in Illinois. The mortgage is but a security for the debt, and, as held by the court in 15 Wallace, 323, already cited, the right of the creditor "to proceed against the property mortgaged, upon a given contingency, to enforce by its sale the payment of his demand, * * * has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the state when held by a resident therein," etc. The debt in question, then, having its *situs* at the creditor's residence and constituting a portion of his estate there, both he and the debt are, for purposes of taxation, within the jurisdiction of the state. It is consequently, for the state to determine, consistently with its own fundamental law, whether such property owned by one of its residents shall contribute, by way of taxation, to maintain its government. Its discretion in that regard is beyond the power of the federal government in any of its departments to supervise or control, for the reason, too obvious to require argument in its support, that such taxation violates no provision of the federal constitution."

This decision authoritatively settles in favor of the state of Ohio the question of her right under the federal constitution to impose a tax on the property of the defendant described in his answer. The fact that his property has been taxed in the state of Indiana cannot affect in anywise this right.

The defendant claims that the statute, section 48, p. 456, vol. 75, Ohio Laws, by virtue of which the correction of the tax duplicate was made and the amount in controversy added to his taxes, was designed to be prospective in its operation; and if by its terms, it is retrospective, it is unconstitutional and void. The present section provides that inquiries
8 and corrections may go *back four years. The section before revision provided for going back only one year. While the general rule is that statutes should be construed as prospective, yet this rule is not applied with the same strictness to statutes of a remedial character. Judge Cooley says in his work on Taxation, page 232: "A remedial provision may well be presumed to have been intended to reach back for the purpose of justice." 30 Iowa, 234 and 274. The statute in force at the time the liability for these taxes accrued permitted the auditor to go back one year to correct the duplicate; the present statute simply extends the time to four years. In other words it contains an additional element in the matter of time as to the remedy which by its language may be fairly construed to be retrospective as to delinquencies. It is not subject to the objection that it is a retrospective law as that term is used in article II., section 28, of the constitution. In Rairden & Burnett v. Holden, Administrator, 15 Ohio State, 207, the supreme court say: "A statute purely remedial in its operation on pre-existing rights, obligations, duties and interests, is not within the mischiefs against which that clause of the constitution was intended to guard, and is not, therefore, within the just construction of its terms. In defining a retroactive or retrospective law, which terms they treat as synonymous, they say: 'Every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions already past, must be deemed retrospective.'"

The correction of the duplicate by placing thereon the true amount of taxes due from the defendant was not the creation of a new liability, or the imposition of a new duty. These taxes were ascertained and fixed according to laws then in force and by a rate then fixed. The liability and duty of paying these taxes existed before, and would have been enforced had the property been returned by him for taxation as required by law. His neglect or failure to perform this duty at the proper time did not release him from his liability, and the law passed in 1878 only provides for enforcing this old liability, not for creating a new one. The law is purely remedial in its character.

This statute comes within the rule laid down in Lawrence Railroad Company v. Commissioners of Mahoning county, 35 Ohio State, 1, in
9 which the court say: "The legislature cannot *create a liability for acts as to which there was no liability when they were committed; but where a remedy exists, the legislature may change it, as well as to acts theretofore as thereafter done." And, "It is perfectly clear that if a liability exists, the form of the remedy may be changed, or the existing provisions supplemented by other legislative enactments."

It is also claimed that the statute of 1878 contains no saving clause, but this objection, I think, is met by the decision in 1st Ohio State, 603, in which the court say: "Where a statutory remedy, for a right, created by statute, is repealed but the repealing statute provides a substantially similar remedy, the right may be prosecuted under the repealing statute."

Section 49, p. 457, O. L., clearly gives the right to the county auditor "at any time before final settlement with the treasurer to correct the return of the assessor, and to charge such persons on the duplicate with the proper amount of taxes." This is substantially the same provisions in force for many years, and was passed upon in Champaign County, Bank v. Smith, 7 Ohio State, 42. The revised section is retrospective and m-e braces the duplicate of 1878.

The liability to pay these taxes existed and they were in contemplation of law due in December, 1878, and no part having been paid then, the whole became due, and the treasurer had the right to collect them as soon as they were placed upon the duplicate.

Section 49 provides that the auditor shall, in all cases, file in his office a statement of the facts or evidence upon which he makes corrections. The answer of the defendant avers that no such statement or evidence was filed by the auditor. This objection would be good were it not for the fact that the answer admits the ownership of the property and all the facts which authorized the county auditor to place these taxes on the duplicate. The failure of the auditor to perform his duty in this respect has been no injury to the defendant. He does not dispute the facts. The objec ions of the defendant's counsel presented in a very able and elaborate argument have been adverted to so far as deemed necessary. The demurrer to the sixth defense is sustained. The motion to the second, third, fourth and fifth defenses is overruled, but as these defenses are substantially the same as the sixth, and all the questions raised by each of them *have been fully argued on this demurrer, a demurrer to each of them will be sustained, if filed. If the defendant does not desire to amend his answer, judgment will be given for the plaintiff for the amount claimed in the petition. 10

Collins & Thomas, for Plaintiff.

J. M. Wells & William Lawrence, for Defendant.

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*STOCKHOLDER'S LIABILITY. 28

[Logan Common Pleas Court, February Term, 1880.]

†SAMUEL TAYLOR ET AL. V. WEST LIBERTY WHEEL CO. ET AL.

1. A court of equity in setting up the business of an insolvent corporation, and paying creditors whose claims were subsisting at different dates between which transfers of stock were made, should apply corporate property existing at the date of any transfer to pay claims then existing in cases where stockholders having made *bona fide* transfers of stock are, nevertheless, held personally liable for debts then existing.

† This case was approved by the Supreme Court, 51 O. S., 236, 239.

29 *2. When the assets of an insolvent corporation are in a condition to require time to convert into money, creditors may assert their claim against the individual liability of stockholders without awaiting the distribution of corporate assets which are not subject to execution, but which, when reduced to money, should be applied to reimburse payments on individual liability.

3. When by statute, stockholders are individually liable to creditors of a corporation "in an amount equal to the stock by them subscribed" with a right of transfer of stock, the general rule is that they are not individually liable for debts created or assumed after they made a *bona fide* transfer of stock.

4. It is a general rule that when a corporate debt is evidenced by note, and this is subsequently renewed, those stockholders who were such when the first note was given, but whose stock was transferred before the date of the renewal note, are not individually liable to contribute to its payment.

But this rule does not apply:

(1) When the corporation makes a new note to trustees covering several claims, merely as a means of fixing the amount of indebtedness and with a view to close up the business of the corporation, such new note is only collateral to the prior subsisting claims.

(2) A judgment on such consolidated note does not affect the question. It is not a merger of the prior claims to such extent as to preclude equity courts from protecting prior rights.

(3) When creditors assert their claim of individual liability against stockholders on such judgment, they will be remitted to their rights as they existed on their original claims, as against persons then stockholders.

(4) Hence, if the original claims were on interest only at the statutory rate of six per cent., that rate only can be enforced as against the individual liability, and not the contract rate of eight per cent. carried into the judgment.

(5) If parties borrow money and advance it in paying debts of a corporation, they thereby then become its creditors. But, if some of these with new parties additional, subsequently pay the money so borrowed by giving a new note therefor upon the understanding that they are to be reimbursed by the corporation, they become corporate creditors from that date. And only those who are stockholders at the latter date can be charged on individual liability for indebtedness.

5. When creditors of a corporation assert their claim of individual liability against stockholders, the individual liability is an amount equal to the stock subscribed, and interest thereon from the time of suit brought to enforce it.

6. An extension by a creditor of the time of paying a corporate debt does not release the individual liability of stockholders. Stockholders do not stand in the relation of sureties for the corporation.

30 *7. The stockholders of an insolvent corporation when subject to individual liability should be assessed *pro rata* for the payment of claims of creditors to whom they are liable. When some stockholders by reason of transfers of stock are liable to assessments for some claims on which others are not so liable, the assessments are made on the aggregate amount of individual liability of each stockholder, and not on the residue of such aggregate after deducting prior assessments.

8. If a transfer of stock be made, the total assessments against the several holders of such stock cannot exceed in the aggregate "an amount equal to the stock," even though the former and subsequent holders may be both liable to assessments for different debts existing at different periods.

This case was referred to William Lawrence to prepare a decree on such facts as he found at February Term, 1879, reported to the court as follows: The preparation of a decree requires a consideration of the facts and the law of the case arising thereon. The facts as they appear in the pleadings, reports of WILLIAM D. DEAN, master, and evidence, are as follows:

The West Liberty Wheel Company was duly organized as a manufacturing corporation under the statute, January 17, 1871, soon after commenced business with a paid-up capital of $30,000 in shares of $100 each, and continued to June, 1876. It became insolvent on the 1st of January, 1874. Transfers of stock were made each year from October 23, 1871, to July 10, 1875, after which no transfer was made, so that while some of the stockholders continued unchanged, there are lists shown in the report at six several periods having reference to the dates of differ-

ent liabilities of the corporation, August 5, 1871, January 18, 1873, February 9, 1874, December 26, 1874, February 22, 1875, July 10, 1875. As to the transfers, the master, W. D. DEAN, reports: "The master is unable to find that any transfers of such stock were merely colorable, or without consideration or made with intent and for the purpose of evading liability thereon."

On the 21st of June, 1876, the plaintiff took a judgment in this court for $10,879.85 and costs on a promissory note and warrant of attorney executed by the corporation June 16, 1876, bearing interest at eight per cent. per annum. The payees in the note (creditors in the judgment), though not therein named as such, were in fact trustees for themselves and other prior creditors of the corporation as hereafter stated, and the note and *judgment were procured for the purpose of obtaining satisfaction from the corporation and its stockholders. 31

September 5, 1876, the plaintiffs, on behalf of themselves and other creditors of the corporation, filed the petition in this case against the stockholders of the corporation, alleging the insolvency of the corporation and for the payment of its debts, seeking to dispose of corporate assets on hand, and to charge the stockholders upon their statutory individual liability, as the statute says, "in an amount equal to the stock by them subscribed," the original subscriptions having been paid. Revised Statutes, section 3258. A receiver was appointed, who holds assets of the corporation estimated at $5,823.13, and the liabilities to August 10, 1878, are estimated at $19,879.49. And a portion of the assets are clearly existing or traceable as corporate property to February 19, 1874, which date is material, as it is the first period when any person, now a creditor of the corporation, has a right to pursue the individual liability of stockholders. In order to ascertain who of the stockholders are liable for different corporate debts, it is necessary to ascertain when they were contracted.

The judgment of the plaintiffs, though in the names of the plaintiffs, is held in fact as stated for themselves in part, and in different proportions, and in part for others, and includes claims arising as follows:

1. In 1874, the Logan County Bank advanced to the wheel company $4,000, for which, on December 28, 1874, the company made its three notes to the bank respectively, of $1,000, $1,500 and $1,500 at three, six and twelve months. In payment of the note for $1,000, and $742.41 of additional advances by the bank, on August 31, 1875, John Ordway, William Fisher, William Woodward, B. B. Leonard and Job Salkeld gave to the bank their note for $1,821.43. Amount now due $2,227.28.

2. For the said note for $1,500 due at six months, the same persons gave their note to the bank, August 1, 1875, for $1,557.91. Amount now due $1,905.

3. The note for $1,500 due at twelve months remaining unpaid, and the bank having advanced to the company $210.74 in 1875, said Ordway, Fisher, J. W. Woodward and Robert Aspinwall, on January 1, 1876, paid said sums by giving their note to the bank for $1,844. Amount now due $2,254.90.

*4. August 5, 1871, R. E. Runkle, John Ordway and F. N. Draper, borrowed of the Bellefontaine National Bank $2,000 on their note, 32
and advanced this to the wheel company, and $500 having been paid, W. R. Fisher, John Ordway and J. W. Woodward borrowed, about April, 1874, $1,500 on their note of the Champaign County Bank, with which they paid the balance due said Bellefontaine Bank, and on June 16, 1876,

$900 remained due on the Champaign County Bank note. Amount now due $1,099.80.

5. On January 18, 1873, J. W. Woodward, Fisher, George F. Bailey and J. H. Deck borrowed of the Logan County Bank and advanced to the wheel company, money on their note to the bank for $4,000. On this was paid by the wheel company, April 23, 1873, $1,000; July 23, 1873, $1,000; February 9, 1874, $1,300, thus leaving $700 of the original loan unpaid. February 4, 1824, the makers renewed this note for the balance due and included in it additional money advanced to the company, giving a new note to the bank for $3,500, on which the wheel company paid September 7, 1874, $1,500 when on December 1, 1875, J. W. Woodward, Fisher and Ordway paid off this last note with money borrowed on their note.

As the original note was all paid and the last note was executed in part by new parties, the wheel company is indebted to them only. They might have paid the prior note under circumstances showing that they looked to such prior makers for repayment, and leaving said prior makers as creditors of the wheel company, but the circumstances show that all parties expected the wheel company to pay all notes, and so the makers of the last note became its creditors. Amount now due $2,440.

6. On January 31, 1874, said J. W. Woodward, Ordway, Bailey, Salkeld, W. Woodward, Fisher and Deck on their note borrowed of the trustees of West Liberty Lodge, No. 96, I. O. O. F., $3,245.72, and advanced to the wheel company, and on June 16, 1876, there remained due $2,800.48.

These notes of the corporation paid by these parties bore on their face interest at eight per cent., and the notes they gave in borrowing money to pay corporate debts bore the same rate, but they took no note from the corporation for any of the several advances made, and had no
33 contract as to the rate of interest *the corporation should pay them. The wheel company did not execute any of the notes, balances on which entered into the judgment, and the notes on the persons who gave them are still held by the payees— the Logan County Bank, the Champaign County Bank, and the trustees of the West Liberty Lodge. Amount now due $3,256.50.

The six enumerated claims above make corporate creditors to date respectively from (1) August 31, 1875; (2) August 1, 1875; (3) January 1, 1876; (4) April, 1874; (5) December 4, 1875; (6) January 31, 1874.

As to the fourth enumerated claim, Runkle, Ordway and Draper were creditors of the corporation, August 5, 1871, but their claim was paid by Fisher, Ordway and Woodward in April, 1874, new parties (except Ordway) who became creditors of the corporation only at the latter date.

If the original creditors had assigned their claim against the corporation to those who paid the debt, or if the original creditors had continued such, no matter by how many renewals of the note on which they originally obtained money, they would have continued creditors as of the original date, with a right to remedy on individual liability of stockholders as of such date. The six foregoing claims were respectively carried into the judgment in favor of the plaintiffs for (1) $1,821.43, (2) $1,557.91, (3) $1,844, (4) $900, (5) $2,000, (6) $2,800.48. Five several other debts of the corporation originally contracted in November and December, 1873, May and July, 1874, amount now to $1,268.83. One

claim accrued and due December 26, 1874, for $110, on which is now due $144.12. There are twenty-three other claims which accrued after July 10, 1875, on which is now due $6,453.20.

John D. Van Deman, for one of stockholders.

In case a corporation renews a pre-existing note for a corporate debt, the persons who are individually liable as stockholders are fixed by the date of the renewed note, and not by the date of the inception of the debt. Millikin v. Whitehouse, 49 Maine, 527; 4 J. J. Marsh 1; Howard v. Pilgrim Society, 21 Peck, 270; Collard v. Bailey, 20 Wallace, 520; Boyd v. Hall, 56 Geo., 563.

The remedy is by petition in the nature of equity. Addler v. Milwaukee, 13 Wis., 57; Wright v. McCormick, 17 O. St. 86; *Umsted v. Buskerk, 17 O. St. 113; Sawyer v. Upton, 91 U. S. 45–56; Clark v. Thomas, 34 Ohio St. 63. 34

The assets on hand at the time a transfer of stock is made, should be applied to pay debts then existing.

E. J. Howenstine, Attorney for Stockholders.

I.

As a matter of practice, on the face of the pleadings the stockholders are entitled to a judgment of dismissal.

1. The second defense is that the plaintiffs had no legal capacity to sue as joint plaintiffs in their action of June, 1876. There was no community of interest. Code, section 34; Revised Statutes, section 5005; Q. [2] O. R. 156; 10 O. R. 235; *Ib.* 456; 17 O. St. R. 323; 29 O. St. R. 500, 508.

2. The third defense is that the assets or the company were not exhausted before suit brought against the stockholders. This is admitted in the reply, and must abate the action. Statute 1 S. & C. 310, section 78; Wright *et al.* v. McCormick *et al.* 17 O. St. R. 86; Titus v. Lewis, 33 O. St. R. 304.

3. The fourth defense charges that the judgment set out in the petition was entered on an admission of liability and confession of judgment, given by an officer of the company without any authority. This is admitted in the reply. Without authority for that purpose, an officer of a corporation cannot make such admissions or confessions. Stillwater T. Co. v. Coover, 25 O. St. R. 561–566; Sebastian v. Covington & C. B. Co., 21 O. St. 451–464; Loomis, Campbell & Co. v. Eagle Bank, 1 Disney, 285.

4. The sixth defense is that the extension of time on the several items of debt making up the amount of the judgment set out in the petition, operated as a release of the stockholders.

Plaintiffs' pleading show that their judgment of June, 1876, was based on indebtedness, all contracted prior to December, 1874, and represented by notes, which were repeatedly renewed, and time thereon extended upon payment of interest and agreement to pay interest; and, finally, all their claims were, on June 16, 1876, consolidated into the one note of that date and made payable one day after date.

These renewals and extensions of time were made without the knowledge or consent of the stockholders, and they are thereby released.

35 *The relation of a stockholder to the creditors of a corporation is that of a surety.

The liability is secondary, not primary. Statutes of Ohio, 1 S. & C. 310, Sec. 78; Wright *et al.* v. McCormick *et al.*, 17 O. St. O. R. 86-95; Hauser v. Donkersley, 37 Mich. 184; Dauchy v. Brown, 24 Vt. 197; Middletown Bank v. Magill, 5 Conn. R. 28; Patterson v. Wyoming Co., 40 Pa. St. 117.

The effect of the reasoning is the same in Moss v. Averell, 10 N. Y. Rep. 450; Harger v. McCullough, 2 Denio 119; Mokelumm Hill Canal Co. v. Woodbury, 14 Cal. 265; Davidson v. Rankin, 34 Cal. 503; Marcy v. Clark, 17 Mass. 330; Todhunter v. Walters, 29 Ind. 105.

As to release to surety by extension of time, see 2d Daniels Neg. Instruments, 290–291; 1st Daniels Neg. Instruments, 145, 147; Bank v. Carrol, 5 O. R. 214; Smith v. Worman, 19 O. St. R. 145–150; Blazer v. Bundy, 15 O. St. 57; Wood v. Newkirk, 15 O. St. 295.

II.

In Ohio, in manufacturing corporations organized under the act of May 1, 1852, a stockholder has the right to make an actual sale or gift and transfer of his shares to any person capable in law of taking and holding the same.

This is an incident to the right of property. And if such transfer is made while the corporation is carrying on its business, and such transfer is entered on the books of the company, the transferrer ceases thereby to be a stockholder, and he is freed from all liability in respect to such stock.

As to right to transfer, see 1st O. St. R. 292–306 and cases cited; 6 Cin., Law Record, [Law Jour.] No. 7, pp. 127, 128–131; Angell & Ames on Corp., sections 454, 564–567.

As to relief from liability, see Johnson, Receiver v. Saflin, 6 Cin. Law Jour., No. 7, pp. 124, 131; Gilmore's Ex. v. Bank of Cin., 8 O. R. 62, 71–2; Thompson on Stockholders, see p. 210, and numerous authorities there cited.

The case of Kerney v. Buttles, 1st O. St., 362, does not controvert this doctrine.

That was a case of partnership resulting from *ultra vires*, and the organization was under the act of 1816, and not under the act of 1852.

*III.

36 No person can be held liable for debts of a corporation contracted after he ceased to be a stockholder therein.

A renewal of a debt by a corporation and extension of time thereon by the creditor, after the date of complete transfer of stock, is such novation of debt as will relieve the person from liability who transferred his stock prior to such renewal.

Curtis v. Harlon, 12 Metc. 3; Castleman v. Holmes, 4 J. J. Marsh 1; Millikin v. Whitehouse, 49th Maine, 527; Wehrman v. Reakert, 1 Cin. Sup. Court Rep., 231, per Taft, judge; Thompson on Liability of Stockholders, section 101.

W. H. West for Plaintiff.

LAWRENCE, SPECIAL MASTER.

William Lawrence as special master reported on the law of the case as follows: Under the statute making stockholders in corporations individually liable for corporate debts, the general rule undoubtedly is that personal property shares of stock to a corporation, may be transferred and that " a *bona fide* transfer terminates the liability of the transferrer" both to the corporation and to creditors. The authorities which support this view are numerous. Thompson on Stockholders, section 210–215; Angell Corp. (9 ed.) section 612; 17 Mass. 64–335; U. S. Trust Co. v. U. S. Ins. Co. 18 New York, 199; Gilmore v. Bank of Cin. 8 Ohio, 71; 2 Abbott's Dig. Law Corp. 298, Upton v. Burnham, 3 Biss. 520. A transfer of stock in a failing corporation made to an irresponsible person for the purpose of escaping individual liability will not relieve the transferrer from individual liability, as to debts then existing. Thompson, 215. In Wehrman v. Reakert and others, 1 Cin. Superior Court R. 230, it is said "nor can any transfer relieve the stockholder from his individual liability for debts of the corporation incurred while he was a stockholder."

In the case now under consideration the court in which it is pending has given instruction for preparing the decree among others as follows:

"The stockholders are liable for all debts incurred while stockholders, although they afterward transferred their stock. But they are not liable for debts incurred after transfer if the transfer was in good faith, and I believe the master has not found that any stock was transferred in bad faith."

When corporation notes were outstanding for a liability, and were renewed after a transfer of stock, by a new corporate *note, this is a new debt, for the satisfaction of which only those stockholders can be charged who were such at or after such renewal. 37

Thompson's Liability of Stockholders, section 101.

Six several liabilities of the corporation were paid as already stated by different persons, who thereby then made themselves creditors of the corporation, but took from it no note or written evidence of indebtedness. These creditors subsequently aggregated their claims and took the note of the corporation of June 16, 1876, on which the plaintiff's judgment was taken.

It is important to ascertain whether these claims are to be deemed subsisting debts, (1) at the date of the co porate note taken up, or (2) at the date when taken up, or (3) at the date of the consolidated corporate note, or (4) at the date of the judgment.

Neither the consolidated note, nor a judgment thereon, can be deemed a novation or merger of the indebtedness so as to release the individual liability of prior stockholders. The note and judgment were to parties who became trustees for sundry persons including themselves, and these forms of indebtedness were adopted to pursue the rights of creditors thus represented against the corporation and stockholders. 2 Abb. Dig. Law Corp. 306; Young v. Rosenbaum, 39 Cal. 646; Dodge v. Minnesota Co., 16 Minn. 368; Jones v. Barlow, 38 N. Y. Superior Court 142; Byers v. Franklin Co., 106 Mass. 131.

Legal analogies support this view. Hollister v. Dillon, 4 Ohio St. 137; Choteau v. Thompson, 3 Ohio St. 424; McNacten v. Partridge, 11 Ohio 232; Krumbaugh v. Hugler, 3 Ohio St. 544; 16 Ohio St. 453; 17 Ohio 500; 16 Ohio St. 289.

The debts which entered into the judgment are to be deemed as existing from the time parties paid and took up the corporate notes. From that time they became corporate creditors, and a subsequent note made by the corporation for the purpose indicated is merely collateral to the original claims of creditors, which continue to exist and must continue to be expected.

If each creditor had taken a new note for his claim the result might have been different. Or, if no transfers of stock had been made, perhaps a different question might be presented.

But as to stockholders who made transfers of stock, the debts they
38 were individually liable to pay were under the instruction *of the court only those existing at the date of the transfer. These, the corporation could not afterward enlarge to their prejudice.

In asserting the individual liability of stockholders the parties interested in the judgment of the plaintiff, of June 21, 1870, can only assert their claims as of the original dates, when they became creditors of the corporation.

This will protect them from any increased rate of interest carried into the judgment and from the compounding of interest as a result of the judgment. Witherhead v. Allen, 4 Abb. App. 1867; Larrabee v. Baldwin, 35 Cal. 155; Abb. Dig. Law Corp. For this purpose the creditors cannot claim the date of the judgment, to fix the amount of their claim, and the prior date when they became creditors of the corporation to fix the stockholders chargeable with individual liability, as to those who were not stockholders at the date of the note on which judgment was taken.

The persons who borrowed money and made advances for the corporation paid to the banks from which they borrowed a rate of interest higher than the six per cent. statute rate. Their advances paid debts of the corporation bearing a contract rate of eight per cent. But having advanced this money to the corporation with no written contract rate, they can only now recover six per cent., which will reduce their several claims below the amounts included for them in the judgment which covered more than six per cent. on dues. 35 Cal. 155; 4 Abb. App. Dec. 628. Any higher rate carried into the judgment cannot be enforced against the personal liability of those who were not stockholders when the note of June 16, 1876, was given, on which judgment was taken. Any interest paid by the corporation to persons making such advances should not be disturbed. There is no pleading making any question as to it.

Interest can only be computed against stockholders on their individual liability from the commencement of this suit. Wehrman v. Reakert, 1 Cincinnati Superior Ct. R. 240; Burr v. Wilcox, 22 New York 551.

The pleadings do not seek to charge married women or their husbands for them.

The stockholders are not sureties for the corporation in corporate
39 debts, and an extension of time of payment given by a *creditor to the corporation does not release the individual liability of stockholders. Thompson, sections 34, 35, 38, 39, 358, 359.

This would limit general corporate rights entitled to protection, and seriously interfere with ordinary corporate business.

In making assessments to charge the individual liability of stockholders at different periods, when transfers of stock have been made in the meantime, each stockholder is to be assessed on the whole amount of stock, and a second or subsequent assessment is not to be on a balance after deducting a previous assessment. Thus, if one stockholder is chargeable for two debts existing at different periods, and another stockholder is only chargeable for one debt, both will be assessed *pro rata* on the whole amount of stock held by each.

As there is no property of the corporation subject to execution, and no case is made in equity by the stockholders, showing that creditors can be paid in any reasonable time by appropriating corporate assets, their individual liability may properly be now resorted to, reserving to them a right of reimbursement from such friends [funds] as may be made from corporate assets. Delay might work injustice to stockholders by prospective insolvency and death. Kennedy v. Gibson, 8 Wallace, 505; Wright v. McCormick, 17 Ohio St. 95; Wehrman v. Reakert, 1 [Cincinnati] Superior Court R. 230; Cowley v. Bartlett, 3 West. Law Monthly 4; 16 Ohio St. 318; Angell on Corp. (9th ed.) section 614; 4 J. J. Marsh 1; 18 Maine 35; Umsted v. Buskirk, 17 Ohio St. 133.

The most difficult question perhaps in this case, is to determine what shall be done with the assets on hand. As there are different classes of stockholders chargeable with different classes of debts and at different dates, it becomes important to decide to whose benefit, or for whose relief they shall be applied.

Upon the principles above stated, and under the decision of the court charging stockholders with corporate debts existing while they were such, notwithstanding a subsequent *bona fide* transfer of stock, it makes a material difference as to how the assets shall be applied.

The debts chargeable on the personal liability of those who were stockholders February 9, 1874, are $5,625.13; those who were stockholders December 26, 1874, are chargeable with $144.12, and those who were stockholders July 10, 1875, with $8,831.18, included *in the judgment of plaintiffs and $6,453.20 of debts contracted after July 10, 1875, not in judgment; the aggregate of the last two sums being $15,284.38. 40

If there were some stockholders not chargeable with any debts, they certainly could not claim any portion of the assets, because the American doctrine, as said by Thompson is, " that the capital stock of a corporation is a trust fund for the security and benefit of creditors."

And as the wheel company is insolvent, its assets less in value than the original capital invested is a trust fund for creditors.

This fund might be applied (1) *pro rata* for all the debts, or to reimburse stockholders who advanced or are compelled to pay money to liquidate them; or (2) to the benefit and relief of those who were stockholders chargeable for debts July 10, 1875, and who continued unchanged until the corporation ceased business in June, 1876; or (3) to pay first the claims against the corporation existing when transfers of stock were made, before applying any to pay debts originating after transfers were made.

In this case this rule would give the stockholders of February 9, 1874, the benefit of assets to the exclusion of those of December 26, 1874, and July 10, 1875. If stockholders are to be chargeable with corporate debts existing at the time of the transfer of stock, it would seem equitable

that they should have the benefit of property then existing. To say they shall be chargeable with debts then existing, and have no benefit of assets then existing and yet on hand, would seem unjust. Those who buy stock take it expecting existing debts to be paid from existing assets. To give such assets to those who afterward became stockholders exempt from liability to pay existing debts, would give them a decided advantage.

In this case the stockholders of February 9, 1874, are not, but might have been chargeable with a heavier liability than those of February 22, 1875. With what show of justice then could the latter and less burdened class have claimed the benefit of all the assets? There might be a strong equity in making a *pro rata* distribution of assets for the benefit of all who are chargeable with individual liability. "Equity delights in equality." 2 Abb. Dig. Law Corps. 230; Briggs v. Penniman, 8 Cow. 387; Jones *v. Woodruff, 10 Paige 541; Krebs v. Carlisle Bank 2 Wall. Cir. Ct. 33; *Re*-Accidental Ins. Co., L. R. 5, Ch. App. 428.

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Those stockholders who made transfers of stock *bona fide* (as found by the master, W. D. Dean) may claim with much force that if the corporation had been closed up at the time of transfer, they would have shared the benefit of assets on hand for debts then existing.

If the corporation continued in business making new debts there is much force in insisting that those who created them should bear the burden.

I will hold then with some doubt as to what is the proper rule, that so far as assets exist in specie or can be traced as assets, existing when stockholders made transfers of stock, they should be reduced to money and applied to the satisfaction of claims existing against the corporation at the time of such transfer, dating priorities in the order of time.

This view seems to receive some support in analogy to settled principles, though no direct authority has been cited in argument in this case.

Angel Corp. (9th ed.) 600–611: "It is a favorite doctrine of the American courts that the capital stock and other property of a corporation is to be deemed a trust fund for the payment of the debts of the corporation; so that the creditors have a lien or right of priority of payment on it, in preference to any of the stockholders of the corporation."

Thompson, sec. 10, cites numerous cases:

"He who is prior in time is prior in equity."

Wood v. Dummer, 3 Mason, 308; Middleton Bank v. Magill, 15 Conn. 78; Clark v. Terry, 30 Maine, 148; 6 Ohio, 227; 8 Ohio, 250; 11 Ohio, 444; 14 Ohio, 365; 16 Ohio, 228; 18 Ohio St. 169; Abb. Dig. Law Corp. 299; 2 Abb. 299. Bacon v. Robertson, 18 How. 480; Cramer v. Bird, L. R. 6 Eq. 143 (Rolls Ct. 1868); Eyster v. Cent. Bd. 94 U. S. 500.

As to bills, receivable accounts and similar property of the corporation, it does not appear when they originated. They must be presumed to have originated with the corporation at the time when the last stockholders chargeable became so, and hence, should be applied for their benefit—the stockholders of July 10, 1875.

Applying the law to the evidence, I find that all corporate *debts accruing prior to February 9, 1874, which were not paid were so novated that the first individual liability accrues on those who were stockholders at that date and that they are chargeable as follows:

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1. With $1,099.80 in favor of Fisher, Ordway and J. W. Woodward, for $900, they advanced "about April, 1874, with which they paid

balance owing by said wheel company to the Bellefontaine National Bank," and for which $900 was carried into plaintiffs' judgment, being No. 4 of the first six enumerated claims.

2. With $3,256.50 in favor of J. W. Woodward, Ordway, Bailey, Salkeld, W. Woodward, Fisher and Deck, for money they advanced to the wheel company January 31, 1874, procured from Liberty Lodge, I. O. O. F., and for which $2,800.48 were carried into plaintiffs' judgment, being No. 6 of the first six enumerated claims.

3. With five several claims not included in the judgment, but in favor of sundry parties, amounting to $1,268.83.

Total amount of all these $5,625.13.

This requires an assessment of 21.902 per cent. on the aggregate individual liability of solvent stockholders, including interest on their liability in the aggregate.

Those who were stockholders December 26, 1874, are chargeable with $144.12 for $110 accruing and due from the corporation at that date.

This requires an assessment on solvent stockholders of .5611 per cent.

Those who were stockholders July 10, 1875, are chargeable with claims numbered 1, 2, 3, and 5, of the six enumerated claims which entered into the judgment of plaintiffs, severally being for $2,227.28, $1,905, $2,254.90 and $2,444; in all, $8,831.18, representing sums severally entering into the judgment $1,821.43, $1,557.91, $1,844 and $2,000, or in all $7,223.34. These claims and the mode and date when originated, has been shown above. To this is to be added debts not in judgment, contracted after July 10, 1875, amounting now to $6,453.20, making a total of $15,284.38.

It would require an assessment of 79.4447 per cent. on solvent stockholders to pay this, which would make the aggregate of assessments 101.9078 per cent., being 1.9078 in excess of the *limit of individual liability. The assessment can only be 77.5369. The deficiency must fall on creditors entitled to charge this class of stockholders. 43

When a stockholder who has transferred his stock, is chargeable with an assessment less than his stock, the person to whom stock has been transferred, cannot be charged with an amount equal to the stock. A share of stock cannot be charged with more than a sum equal to its amount, though held by different stockholders at different times.

I have prepared and submit a decree in accordance with these principles.

[NOTE—At the May term, 1880, of said court, the case came on for hearing, John L. Porter, Judge. The court affirmed the findings of William Lawrence, Master, except as to the application and distribution of the proceeds of sale of real estate owned by the wheel company, and ordered that out of the entire proceeds of all the assets, the entire costs be first paid, and the residue be applied to reduce the aggregate of all debts, so that all stockholders should receive a *pro rata* benefit therefrom.—ED. AMERICAN LAW RECORD.]

TRADE-MARKS—PLEADING.

[Superior Court of Cincinnati, Special Term, July, 1880.]

†SINGER MANUFACTURING CO. v. ANDREW J. BRILL.

1. Where a manufacturer has, by advertisement and otherwise, identified his name with the articles which he manufactures, so that they come to be known and called by that name, and such name indicates him as the manufacturer and not any particular system or principle of construction, it becomes his exclusive trade name.
2. The word "Singer" has, in this manner, become the trade name of the Singer Manufacturing Company, and its use by other manufacturers, either alone or combined with other words, as a designation for their sewing machines, will be enjoined.
3. The appropriation of another's trade name cannot be justified by accompanying it with explanations which such appropriation makes necessary in order to prevent deception; therefore, an advertisement of "English Singers," accompanied by statements that the plaintiff is not *the manufacturer of the machines,
44 is an infringement of plaintiff's trade name, "Singer."
4. It is an infringement of a trade name to use it in advertisement, although the infringer does not affix it to the articles sold by him.
5. It is immaterial that the owner of a trade name also has a separate trade-mark, which the infringer does not appropriate.
6. A person's property in a trade name is not affected by the expiration of the patents on the articles to which it has been applied.
7. Laches, to deprive a person of ownership in a trade name, must be such as show an intention on his part to abandon it.
8. Where a manufacturer has adopted a peculiar and distinctive mode of encasing, finishing and ornamenting his machines, an exact or colorable imitation of these features, if not essential to the utility of the machine, will be enjoined.
9. An allegation in an answer, which is, in effect, merely an argumentative denial of an allegation contained in a petition, requires no reply.

FORAKER, J.

The plaintiff sets forth in its petition that it is a corporation organized and existing under the laws of the state of New Jersey, and is the successor of the Singer Manufacturing Company, a corporation under the laws of New York, and that the Singer Manufacturing Company of New York was the successor of I. M. Singer & Co.; that plaintiff is engaged in the business of manufacturing and selling sewing machines in all parts of the United States and Great Britain, and in other countries. That this was the business of its predecessors, established in 1850 by I. M. Singer, & Co.; that it has succeeded to and is possessed of all the trade names, trade-marks and other property rights belonging or pertaining to said business; that during the time it and its predecessors have so carried on business they have manufactured and sold sewing machines of many different kinds and varieties, and from the first have called and advertised and sold them as "Singer Sewing Machines," and that they have spent hundreds of thousands of dollars in advertising them by that name, and that by that name their machines have acquired a world-wide reputation for the excellence of their workmanship and their other merits; that in violation of its rights the defendant is selling sewing machines not manufactured by plaintiff, but having the form, shape, outline, ornamentation and appearance of its machines, which he calls and advertises as "English Singer Sewing Machines;" and that he advertises his *machines by prints, cuts, etc., in such a way as to hold out to
45 the public that he deals in the machines of the plaintiff.

Wherefore, the plaintiff prays for an injunction, enjoining defendant from advertising his machines as "Singers" or "English Singers," or in any other way that will be an infringement of its rights, and also that he may be enjoined from selling or advertising for sale any machine having the form, shape, outline, ornamentation or appearance of the sewing machines manufactured by the plaintiff, and for an account of profits.

†Decision in this case was reversed by Supreme Court. See opinion 41 O. S., 127.

The defendant by his answer denies that the plaintiff has any property right in the name "Singer," and denies that the word is a trade name, or mark of the plaintiff, and further answering avers that the word was, and is used, and understood to denote sewing machines of "certain particular combinations, and the princip es or device used in their construction," and that "it designates and did designate not alone machines manufactured by the plaintiff, but machines constructed after and upon the principle of machines originally invented by one I. M. Singer and his and other improvements thereon, upon which said invention and improvements letters patent were granted to I. M. Singer and others, by the United States, which said letters patent have long since expired, and further, that said name did not and does not in the estimate of the trade or of the public designate a machine made by plaintiff or by its predecessors." He further denies that plaintiff and its predecessors always used the word "Singer," and avers that they manufactured some machines with respect to which they did not use it, and that others have also used the word.

He also denies that he has ever in any way represented that the machines in which he deals were manufactured by the plaintiff, but avers that he has represented that his machines were made upon the Singer principle, and avers that plaintiff stamps its corporate name on its machines, but that no such name is stamped upon or attached to the machine in which he deals. And that he does not so use the word Singer in any way, either alone or in combination with other words. And he further avers that the plaintiff has a trade-mark consisting of a brass oval plate, on which it has certain letters and devices, and that it attaches this trade-mark to all of its machines to designate the manufacturer of them, and that he does not use the same, *but instead has a trade-mark of his own attached to all the machines sold by him, which indicates that his machines are not made by the plaintiff but by another, viz., Williams & Co., of Montreal, Canada. 46

Upon this state of the pleadings the case has been tried and is submitted upon the evidence.

Before passing to a consideration of the questions arising upon the merits of the case, it is neeessary, in order that we may know exactly what issue is presented, to dispose of a question that has been raised as to the pleadings.

It is claimed by the defendant that inasmuch as he sets up in his answer that the machines of the plaintiff and its predecessors were made according to a certain system or principle of construction defined in letters patent, in the absence of a reply denying that, his allegation stands admitted, and hence, that it is an admitted fact of the case that there is such a thing as a Singer system or principle. It became necessary to rule upon this question during the progress of the trial when evidence was offered upon this point of the case, and the ruling then made I am confirmed in upon consideration.

There can be but two kinds of answers under the Code, one a denial and the other new matter.

The defense of new matter means confession and avoidance. Hence, it is a rule that no new matter can be set up in answer that is inconsistent with the truth of the facts set forth in the petition. In other words such an anwer confesses and then avoids by setting up what may be sufficient to avoid what otherwise would be a liability. Hence, it is inconsistent with the nature of such an answer that it should put anything in issue.

It is alleged in the petition that plaintiff and its predecessors did not make their machines alike, but of various kinds, styles, etc., and that the word Singer meant simply that they were the makers of them.

The defendant could not have intended to admit this, and hence we must conclude that his answer was intended only as a denial; as such it is obnoxious to the objection that it is argumentative, but that objection has been passed over, and the answer performs its office as though unobjectionable; but its effect cannot be extended thereby. The issue is the same, *therefore, as though the answer in this respect were a simple denial of the allegations of the petition on that point. 47

But even if it were competent to consider this as setting up new matter, still no reply was necessary to put it in issue, since it is already denied by the allegations of the petition, and it would be idle as well as awkward to require it to be again denied by a reply.

Coming now to the merits of the case it may be said that there are but three general questions presented. The first is whether or not the word "Singer," as it has been used by the plaintiff and its predecessors, denotes the manufacturer, or is a word of description only.

The second question is, as to whether or not, assuming that the plaintiff has trade-mark or trade name rights in the use of the name Singer, the defendant has infringed them.

The third is as to the right of the plaintiff to enjoin the defendant from dealing in machines made in imitation, as to the form, appearance, ornamentation, etc., of the plaintiff's machines.

The first of these questions is a question of fact to be determined from the evidence.

The others, as the evidence has turned out, are only questions of law.

I.

A great number of witnesses have testified that the word "Singer," as it has been used by the plaintiff in connection with its machines, has been understood by them, and by the trade generally, to mean that the machines were manufactured by the plaintiff, or its predecessors; and that the plaintiff and its predecessors have manufactured and sold as "Singer Machines" a great many different kinds, sizes, styles and varieties of sewing machines, and that there is no such thing as a particular system or principle running through or found in all machines of the plaintiff.

On the other hand, a great number of witnesses have testified that the word Singer does not denote the manufacturer, but that it indicates that the machines to which it refers are built upon a Singer principle or system of mechanism.

If I were to count these witnesses, I do not know upon which side there would be the greater number. They are probably nearly evenly divided. I have not
48 counted them for the reason *that the preponderance of evidence is not to be determined in that way. I have endeavored, however, to weigh them; that is, I have considered who the witnesses are shown by the evidence to be, the interest or non-interest each appears to have in the result of this litigation, their intelligence and general character as shown by the evidence, and more especially the testimony itself as it has been detailed upon the stand; and from such a consideration of the evidence, I am brought without hesitation to the conclusion that the weight of the evidence on this question is decidedly in favor of the plaintiff.

Entirely ignoring the evidence offered by the plaintiff, and looking only to that offered by the defendant, it seems to me that this conclusion would be inevitable. For while it is true that the defendant's witnesses, at least almost all of them, testified that there was a Singer system or principle of mechanism present in all of the machines of the plaintiff, and its predecessors, yet there were no two of them who could agree upon its definition; and no definition was given by anyone, not excepting even the defendant himself, that would stand the test of a comparison of the different machines of the plaintiff with each other, or a comparison of the machines of the plaintiff with the machines of other manufacturers.

I mean by this to say, that, whatever it was that might be testified to by any witness as the Singer system or principle, it would be found upon examination to be either present in other machines of other manufacturers, or not present in all the machines of the plaintiff's make; thus showing by its presence in the machines of others that it was not peculiar to the Singer, and in the fact that it was found in some Singers and not in others, that it was not common to the Singers; thus proving in the one case that the word could not refer to what had been pointed out by the witness as the Singer principle, since, were that its meaning, all machines would be Singers in which the principle could be found; and, in the same way, proving the same thing in the other case, since all machines of the plaintiff are called and accepted by the trade as Singers, whether the particular principle indicated be found in them or not.

In another respect the defendant's evidence is to the same effect.

49 Almost without exception his witnesses speak of the machines *manufactured by the plaintiff and its predecessors, as "genuine Singers," and of those manufactured in imitation thereof, by other parties, as are those dealt in by the defendant, as "bogus" or "counterfeit" Singers, or they use some other adjective, instead of those named, to indicate the same thing.

They testify in the same connection that the bogus machines, and that is an especial claim made in this case by the defendant as to his machines, are made exactly like the machines of plaintiff, and that the material and workmanship of their manufacture are quite as good, if not better, than that of plaintiff's machines. From this fact it is manifest that by the terms bogus, counterfeit, etc., cannot be

meant that such machines are spurious in any other sense than that they are not manufactured by the plaintiff, and thus is proved by the defendant's own evidence what he is contending against, viz.: that to be a genuine Singer the plaintiff must be its maker. Since, if only a certain system or principle were meant by the word, a genuine Singer would be found in every machine that embodied such system, regardless of who made it.

If deemed necessary, still other matters of this same character might be pointed out to the same effect.

But it is claimed by the defendant, that no matter what may be the oral testimony adduced, the machines themselves, that the plaintiff has in great number exhibited to the court, and put in evidence, show that there is a definite and certain system or principle running through all of them, and that it consists of the combination of certain parts and principles.

The combination thus contended for by him, is, as I understand his claim, "the needle-bar driven by a heart cam and roller from a horizontal shaft, which is connected with an upright shaft by beveled gears, and the shuttle driven automatically by a crank and pitman attached to the upright shaft. The machine also having a spring take-up and balance wheel.

This combination is found in the new family machine of the plaintiff, but an examination of the other machines in evidence discloses the fact that it is not common to the plaintiff's machines.

For instance, in the family machine of the plaintiff, as it is called, the needle is not attached to a bar, but to a moving arm, operated by an eccentric cam situated at the opposite end of the *arm from the needle, and so working as to raise the entire arm. It has no crank or pitman or gear, and but a single shaft. It has still other differences that have been pointed out, but which I need not mention here. Suffice it to say that these differences are sufficient to make it appear to be, as Mr. Sackstetter, one of the defendant's witnesses, says, constructed on an entirely different principle from that of the new family. The new No. 1 wheel feed is entirely different from either the family or the new family. Instead of having an upright and a horizontal shaft, it has two horizontal shafts, and the motion is communicated by means of a crank and pitman, and the crank and pitman that drive the shuttle are attached to a horizontal rock shaft, instead of to an upright shaft as in the combination claimed by the defendant. Still other differences might be pointed out here, but I am only aiming to show enough, to show that there is a distinctive difference. 50

In the new No. 1 drop feed, as it is called, the shuttle, instead of being driven by a crank and pitman attached to an upright shaft, is driven transversely by a horizontal pitman working from a transverse rock shaft-crank, which is connected with a horizontal shaft with a crank and pitman with ball and socket joints; and in the new machine that has been designated as the oscillating shuttle machine, it is admitted by defendant that his combination is not even approximated.

And then there are the button-hole machine, and the carpet machine, in which it is not claimed that any such combination is to be found.

I have not called attention to all the machines, by any means, of the plaintiff, in which the combination contended for is not to be found, nor, as I have said, have I pointed out anything like all the differences that exist in those I have referred to from the combination referred to, but I have indicated enough for the purpose in view of showing that the combination that the defendant relies upon to show that there is a Singer principle of construction or mechanism is not common to all the machines manufactured and sold by the plaintiff and its predecessors. But all these machines, those in which no such combination is even approximated, as well as all the others, have been put upon the market, and have been accepted by the trade as Singer machines. This shows clearly that it was not the combination *that defendant relies upon, that was meant by the word Singer. For, had it been, those machines that did not have it could not have been recognized as Singers. 51

But it is said by defendant that most of these machines in which the combination contended for by him is not found, are old machines that have gone out of use, some of them, because they proved to be failures, and others as the family, etc., because they have been improved upon, and thus superseded, while as to others, particularly the new oscillating shuttle machine, they have been but recently put upon the trade.

That is true, but it seems to me to be a fact against the defendant rather than for him, since it shows that no matter what it is that the plaintiff has manufactured, whether something that succeeded or something that failed—whether they made it

years ago or are making it now—whether they made it upon one plan or another—with the combination claimed by the defendant as their principle or without, they to all alike gave the name of Singer machines. And this would seem to make it unnecessary that I should call attention to the fact that while many of the machines that have been put in evidence, are not any longer made by plaintiff, yet the evidence shows that while they were manufacturing and selling them, thousands of them passed into and yet remain in use, and that all such are yet recognized by the plaintiff, by those using them and by the trade generally, as Singer machines.

From these considerations, united with the direct evidence offered by the plaintiff in support of its claim that its machines are not manufactured according to any one system, pattern or principle; and that the word Singer was always used by it and its predecessors to designate that they were the manufacturers, I come, as I have said without hesitation, to the conclusion that the decided weight of the evidence is with the plaintiff on this question.

In this review of the evidence I have omitted to make mention of many things confirmatory of this conclusion, because it is a matter of great tediousness to refer to all, and I deem it sufficient to name only enough to show the ground upon which my conclusion rests.

If I were to refer to any other, however, it would be to the fact established by
52 all the witnesses in the case, those for the *defendant as well as those for the plaintiff, that if an order were to be received simply calling for a Singer machine, it could not be filled until there had been an explanation specifying what kind of a machine was wanted. This seems to have been regarded as a vital point on this branch of the English cases that have been referred to. And justly so, since it shows that by the word Singer cannot be meant any particular machine or kind of machine.

II.

It appearing from the conclusion reached as to the first question, that the word Singer, as it has been used by the plaintiff and its predecessors, denotes the manufacturer of their machines, there cannot be any question but that it is susceptible of becoming by use a trade-mark or name. The evidence shows that it has been used continuously from the establishment of plaintiff's business by I. M. Singer in 1850. That they have always in some manner attached the name either to their machines or their stands. They have also always used the name in all the advertising they have done.

There can be no question but that such a use, of such a word, for such a purpose, is sufficient to make it a trade name, and give to the plaintiff the property rights capable of being so acquired. And this result cannot be prevented by the fact that during al' or a part of this time the plaintiff used upon its machines a separate and independent trade-mark; since it is competent for one engaged in business to protect that business and the reputation he may acquire by more ways than one, and the law will not allow a man when called to account for an infringement of an adopted means of protection to defend by answering that the complainant has still other marks or names whereby to protect himself that he has not interfered with. And accordingly it has been held that "It will make no difference that the plaintiff has also a trade-mark which has not been taken by the defendant." Braham v. Bustard, 1 Hem & Miller, 447.

Nor can it make any difference that the plaintiff and its predecessors were protected in the manufacture and sale of their machines until their expiration in 1878 by letters patent, since the letters patent had to do only with the principles covered
53 by them that entered into the construction of the machines. They *had no reference to the manufacture so far as quality of material, skill in workmanship, etc., were concerned. When the letters patent expired every one was at liberty to make machines according to the systems or principles described in them, and is so yet; but that gave no right to anyone to appropriate to himself the reputation that the plaintiff had in the meanwhile acquired as a manufacturer. That was its property fairly earned and fully entitled to protection, and it is not a good argument to say that the plaintiff should not be allowed this, since that would be to extend to it a monopoly that it has been already enjoying under its patents.

It is not a good argument because it is not true. The monopoly that it has had under the letters patent was an exclusive right to manufacture according to the letters patent.

The monopoly the plaintiff now asks to have protected is quite a different thing. It is only a monopoly in the sense that it wants to exclusively enjoy its own property, *i. e.*, its reputation. It is simply a common law right that has ever been recognized and protected by the courts.

Let us inquire then whether or not the defendant has infringed the rights of the plaintiff.

The evidence shows that the machines sold by the defendant are manufactured by Williams & Co., at Montreal, Canada. That they are made in exact similitude to the new family machine of the plaintiff. This is the only style or kind of machine dealt in by defendant. They are so much like the plaintiff's machines that all the different parts are interchangeable. They are painted and ornamented like them. Their general appearance is so close a resemblance to the machines of the plaintiff that an ordinary observer would not notice any distinction.

At the base of the arm of the plaintiff's machine a trade-mark is attached, consisting of an oval brass plate, on which are a shuttle, two needles crossed, and a thread of cotton in the form of an S, with the words, "Singer M'f'g. Co." circling over the top, and "Trade-Mark" at the bottom.

At the same place on the machines sold by the defendant is attached a trade-mark, consisting of an oval brass plate of the same size, shape, color and appearance as that used by the plaintiff, but on it is a lion's head, and circling over that are the *words: "C. W. Williams M'f'g. Co.," words "Trade-Mark" and 54
"Montreal" below.

The general appearances of these trade marks are so much alike that unless the attention should be called to them it would hardly be discovered that they were different.

The word "Singer" nowhere appears upon the machines sold by the defendant, but in all his cards, circulars and newspaper advertisements he represents them to be "English Singer sewing machines, manufactured by the Williams Manufacturing Company, at Montreal, Canada."

The first question presented in this connection is whether or not there can be infringment of a trade name by merely advertising an article by the name in question without selling or offering it with the name attached.

However it may be in the case of a trade-mark, as distinguished from a trade name, I am satisfied both upon reason and authority that there may be infringement in that way of a trade name.

I don't know how I can better show this authority and the reason of it than by quoting from the opinion of the Lord Chancellor in the case against Wilson, 3 App. Cases, L. R., 389, where he says, speaking upon this point:

"My Lords, I am unable to see that this makes any difference in point of principle. It may well be that if an imitated trade-mark is attached to the article manufactured, there will, from that circumstance, be the certainty that it will pass into every hand into which the article passes, and be thus a continuing and ever present representation with regard to it; but a representation made by advertisements that the articles sold at a particular shop are articles manufactured by A. B. (if that is the legitimate effect of the advertisements, which is a separate question) must, in my opinion, be as imperious in principle, and may possibly be quite as injurious in operation, as the same representation made upon the articles themselves."

The next question here presented is that suggested by the parenthetical sentence of the Lord Chancellor, as above quoted, viz.: What is the effect of the advertisements made by the defendant?

It is earnestly insisted by him that his advertisements and representations are of such a character as to preclude all possibility *of deception; that everyone 55
reading them is thereby apprised distinctly and plainly that the machines dealt in by him are not the machines made by plaintiff; and it is claimed that this was especially intended to be made to appear in order that defendant might have the benefit of the superiority which he claims for his machines.

There is no question but that it does appear from defendant's advertisements that the plaintiff is not the maker of them, and that his machines are called "English Singers," and there is no question either but that, to one informed, these statements would be sufficient to impart all that is claimed.

But we must remember the fact, common to the knowledge of all, that the great mass of people likely to buy and use these machines are not so informed. The most that such persons know is that the machines called Singer machines are what they want, and consequently when they find the word Singer they are not apt to stop and read what accompanies it; but whether they are or not, the fact that

they must do so to avoid being mislead is sufficient. The defendant has no right to put them to that trouble or the plaintiff to that risk.

But again, if such advertisements do not deceive, if they are not intended to deceive, as defendant claims, why should they be made? If defendant wants to distinguish his machines from the plaintiff's why use a word that can have no other effect than to make an explanation necessary? It would seem easier for the defendant to guard and protect the reputation of his machine against what he claims to be the inferior machine of the plaintiff if he avoided the use of the word altogether. But, however this may be, the authorities are, without exception, that such use of the word Singer by the defendant, as he is shown to be making, is an infringement upon the rights of the plaintiff in its use as a trade name, assuming, as I have found, that the plaintiff has such rights.

And this conclusion is not altered by the fact that there is the trade-mark of the makers of the machines of defendant on each machine sold by him. I might give a number of reasons why this is so, but shall content myself with only this, that it is apparent that the effect of this trade-mark from its close resemblance to
56 that of plaintiff's in form, size, place of attachment, *material and appearance, is rather to deceive than to prevent deception.

And I may add that the fact that this servile imitation is wholly unnecessary, forces me to the conclusion that it is not only calculated to deceive but that it is so intended.

But again it is claimed that the plaintiff if it ever had a right to the use of the word Singer as a trade name has lost the same.

With respect to this question the evidence is that prior to 1877 it may be said that the plaintiff and its predecessors exclusively used the word. Since then the evidence is that at different times and places, and by different persons, the name has been largely used.

The Stewart Singer, the New York Singer, the Crescent Singer, the Kayser Singer, are but a very few of the very many combinations in which the word has been used to represent and sell sewing machines. The word has undoubtedly been largely used.

But the evidence also shows that while the plaintiff has not sued every one who has so used its name, it has nevertheless been diligent in its efforts to protect itself.

In England, Scotland, Germany, New York and Chicago, it has been prosecuting suits for this purpose.

From this it would appear that it has done enough to show no intention of abandonment. There has been no standing by, without objection, while the invasion of its rights has been going on, but just the reverse; and this is sufficient to cause me to hold that there has not been any abandonment by the plaintiff; and much more than sufficient, since it must be borne in mind that a trade-mark right is unlike a patent right, in thi , that one is a common law right, and, therefore to be always favorably considered by the courts, while the other is a statutory right, in derogation of the common rights of the public, and hence to be strictly construed. For this reason the owner of a trade-mark may stand by and see it infringed without losing his rights to it, until or unless he does something that shows an intention to abandon it, while it is just the reverse in the case of a patent right.

III.

The third question is as to the right of the defendant to sell machines not
57 manufactured by the plaintiff, that are made in *exact imitation of the plaintiff's machines. The machine sold by the defendant is in evidenee. It appears therefrom that in every feature it is a close imitation of the plaintiff's. I am not speaking of its general construction or principles of mechanism, but only of its finish, ornamentation, etc. As, to illustrate, the bed plate of the plaintiff's machine is of what has been called a "fiddle shape." This is not necessary, a square shape would answer every purpose as well.

The shafts or arms are incased in a particular way. It is not essential that they be encased in that particular manner. The trade-mark of the plaintiff is of a particular size, form, metal and appearance, and attached at a certain point. This is not necessary. The ornamentation of the plaintiff's machines is of a certain kind. It is not essential to the utility of the machine that any of these things should be exactly as they are. They could all be sufficiently deviated from to make the machines so dissimilar in appearance as to prevent them being mistaken for each other, and that, too, without any additional cost or trouble in their production.

There can be no question as to the purpose of this imitation. The object in this imitation as well as in the use of the name Singer is doubtless to appropriate as far as possible the reputation of the plaintiff's machines.

However the law may have been originally, it has now come to be well established that a court of equity will not only protect the use of a trade-mark proper, but along with it also all other insignia by which a trader may see fit to mark his goods. If a merchant sells goods under a particular trade name, and at the same time, always dresses them in a particular way, as to wrappers, ornamentation, etc., so that they always present the same general appearance, this dressing or wrapping whereby they are given this appearance come to be as much a property-right for which he is entitled to protection, as is the mark or name itself, under which the goods are sold; and, accordingly, we find the authorities all holding as it is stated in Ludlow and Jenkins on Trade-Marks, p. 49, that:

"A trader who has adopted a peculiar and distinctive mode of making up or packing his goods, is entitled to restrain an exact or colorable imitation of it."

To the same effect is the case of Sawyer v. Horn, reported *in No. 19, Vol. 58
IX, of the Reporter, page 603, the syllabus of which reads as follows: "Equity will restrain the imitation of a package and label adopted by a manufacturer for the sale of his merchandise, where these do not technically constitute a trade mark, if the public are misled by reason of the imitation."

The features of the machine of the plaintiff, to which I have referred, are clearly nothing more than the clothes in which it has seen fit to dress it for presentation to the public. And it is equally entitled to protection against an imitation thereof as much as though this were a case of the sale of a particular kind of soap in a certain colored wrapper.

The decree of the court will, therefore, find that the word Singer is the trade name of the plaintiff; that the defendant is infringing its rights in the use he is making of the word, and that he is also infringing upon the rights of the plaintiff in selling machines in imitation, in the particulars specified, of the machines of the plaintiff, and he will be enjoined accordingly. An order may also be taken for an account of profits.

King, Thomson & Maxwell, Attorneys for Plaintiff.

Tilden, Buchwalter & Campbell, Attorneys for Defendant.

SURETIES—COSTS.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

STANDARD PUBLISHING CO. v. SIMON S. BARTLETT ET AL.

1. Liability of surety for costs of nonresident plaintiff, begins with the undertaking and ends with the termination of the action.
2. There is no mode of release provided by the statute (75 O. L., 671); and without consent of the defendant the surety can be saved from future liability only by dismissal of the action.
*3. An order of court made upon *ex parte* application, if erroneous, need not be excepted to at the time to entitle one, without notice, and not present at the hearing, to judgment of reversal. 59
4. Moving for new security for costs not a waiver of right to object to discharge of surety, unless new security is given.

ERROR to the Superior Court of Cincinnati.

AVERY, J.

Simon S. Bartlett, a nonresident of this county, brought suit against the Standard Publishing Company of this city, and Goodman & Storer became security for costs. After the case had progressed for about a year, the court, upon their application, made an order discharging them

from liability as security for costs. The defendant then filed a motion that the plaintiff should be required immediately to give security for costs, and the court granted the motion, requiring the security to be given in fifteen days. Meanwhile the plaintiff moved into this county, and the court, upon his motion, set aside the order requiring him to give security, and also overruled the defendant's motion to dismiss the action for want of security, and their further motion to set aside the order discharging Goodman & Storer. To that the defendant excepted. The case then proceeded to final determination and was dismissed at the plaintiff's cost. Upon motion of the defendant, under the provisions of the Code, judgment was entered against Goodman & Storer for the costs up to the time of their discharge. The court refusing to enter judgment against them for the costs that had subsequently accrued, the defendant excepted and files his petition in error.

The liability of a surety for costs is fixed by law. The liability begins from the moment the surety indorses or signs the petition as security, and is a liability for all the costs that may be adjudged on final judgment against the plaintiff and for the costs of the plaintiff's witnesses whether there be judgment or not. The law makes no provision for the discharge of a surety when he has once undertaken the obligation. Additional security may be required under the provisions of the statute, but this still leaves the original surety liable. A resident plaintiff who becomes nonresident, may be required to give security, but the law does not provide that a nonresident, moving into the county after the suit is begun, shall be relieved from the duty of giving security.

60 *The jurisdiction of the court over the cause itself might, perhaps, in a proper case, upon the surety desiring to withdraw, justify the dismissal of the action. But, without dismissing the action we find no mode under the statute by which an end can be put to the liability of the surety.

In this case the action was not dismissed. Upon the contrary, the court overruled the defendant's motion for a dismissal and allowed the action to proceed. In its further course additional costs were accumulated, for which, if the order discharging the original surety was valid, the defendant was without security.

We think that, under the circumstances, it was error in the court to make the order.

But it is said that the petition in error does not allege that the court erred in discharging the surety; that the error alleged was simply in not entering up judgment against the sureties for the costs that had subsequently accrued. It is true the petition in error does not specially point out this particular error, but it alleges that there are other errors apparent upon the record, and the general allegation includes this particular one.

It is said again that the order discharging Goodman & Storer was not excepted to at the time. This is true also, but the order was made upon application *ex parte*, without notice to the defendant, and, indeed, without notice or evidence at all, except to the clerk, who was informed that the sureties declined to consider themselves further bound. The defendant, therefore, did not lose his right to except to this order by not taking it at the time. The defendant had an opportunity to take it at the time.

It is said again that, if there was error in discharging the sureties, it was waived by the fact that the defendant subsequently moved for new security, but while the motion for new security might be deemed a waiver, it would be so only upon condition that the motion were granted.

Now, it is true that the court granted the motion, but almost immediately afterward set aside the entry. The defendant then took his exception after his motion to dismiss the action as well as the motion to set aside the entry discharging the original sureties had been overruled. We think exception was taken in time; that, however, it might have been, had new security been given as asked by the defendant it was not given, and therefore, *asking for new security was no waiver of the right 61
to object to the discharge of those who were originally bound. The judgment, therefore, must be reversed, and proceedings to render such judgment as the court below should have rendered, judgment will be entered for the costs of the defendant chargeable against the plaintiff up to the final determination of the suit.

Milton Sater, Attorney for Plaintiff in Error.

James H. Perkins, Wulsin & Worthington, for Defendants in Error.

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*JUSTICE OF THE PEACE. 303

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

T. E. BLACKBURN v. HARRIET M. SEWELL.

An action for damages for breach of contract to sell real estate is not within the jurisdiction of a justice of the peace.

ERROR to the Common Pleas Court.

Cox, J.

The case was begun before a magistrate. Judgment was there rendered against Harriet M. Sewell. The case was appealed by defendant to the court of common pleas. The petition filed by the plaintiff set forth that the transaction arose on a sale of Hamilton county property by Blackburn to Mrs. Sewell, for $225. It was agreed that twenty-five dollars should be paid in cash, which was done, and the remaining $200 should be made up by the transfer of some property in Kentucky. The transfer was never made. Petition asks for $200 in damages for the breach of that contract. In the common pleas court a motion was made to dismiss the petition on appeal, on the ground that *the case was 304
not within the jurisdiction of the magistrate, because the statute provides that no suit shall be brought in the "magistrate's court on a contract for the conveyance of real estate, or involving the title to real estate, except trespass."

This motion was granted and the action dismissed.

A petition in error is prosecuted to this ruling of the court. The plaintiff in error, Blackburn, claimed that the district court had already decided a case like the present to be within the jurisdiction of the magistrate's court. The case referred to by the plaintiffs in error was a case where land had been sold and the title passed, and a suit brought for

part of the purchase money. In that case it had been held that the suit, being brought for money only, was within the jurisdiction of the magistrate's court. But in the case at bar the action was brought to recover damages for the nonconveyance of real estate under a contract of conveyance. The title had not passed, as in the former case. The case was, therefore, under the statute clearly without the jurisdiction of the magistrate. The motion to dismiss was rightly granted by the court below, and the judgment will therefore be affirmed.

N. McLean, for Plaintiff in Error.

Morton & Cooper, for Defendants.

APPEAL BONDS.

[Hamilton Common Pleas Court, 1880.]

Avery, Cox and Johnston, JJ.

ELMA ORR v. ALFRED ORR ET AL.

In appeal cases where the judgment is personal and for the payment of money only, the sureties on the bond must be worth double the amount in the aggregate, of the sum to be secured, beyond the amount of their debts. The sum to be secured is not the judgment but the full amount or penalty of the bond.

APPEAL from the Court of Common Pleas.

This case came before the court on a motion by defendant in error, to require Alfred Orr to furnish additional security. The *action was
305 one by Elma Orr against Alfred Orr for equitable relief. She alleged that property in Kentucky had been conveyed to Alfred Orr in trust to convey to her. That instead of conveying to her he had sold the property for $1,900 and invested the proceeds in some property lying near Madisonville, in this county. She asked that the amount owed her be made an equitable charge upon the Madisonville property. The equitable relief was not granted, but a personal judgment against Alfred Orr in her favor was rendered for $2,170. It is from this judgment that Orr took this appeal.

JOHNSTON, J.

The statute requires that in personal judgments the penalty of the bond should be double the amount of the judgment. Section 5230 Revised Statutes. Section 4953 provides that sureties upon bonds must be in residents of the state and should have property in double the amount of the sum to be secured, beyond the amount of their debts. The testimony before the court showed that the real estate of one of the sureties was valued at $10,000, upon which was a mortgage of $3,000, and that the real estate of the other was valued at $1,200, on which was an incumbrance of $1,000. The construction of the statue by the court was that the aggregate value of the property of the sureties should be double the amount of the penalty of the bond, which in the present case would be over $10,000. The sureties are not to be in the aggregate, worth simply the amount of the bond or double the amount of the judgment, but must be worth double the amount of the bond itself. That is the sum secured to the appel-

†See also 6 Bull. 390.

lee. In some cases the judgment may amount in the appellate court to the full amount of the bond. Hence, if their property amounted only to the penalty of the bond, and the judgment should be for that sum, the appellee would not be secured as the statute provided he should be.

Motion granted.

Crapsey, for Motion.

J. F. Baldwin, Contra.

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*ASSIGNMENT FOR CREDITORS. 306

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

†CINCINNATI ICE CO. v. JACOB PFAU ET AL., ASSIGNEES OF JOHN WEBER.

1. Where an assignment has been made for the benefit of creditors, under the laws of this state, and an order is made by the probate court authorizing the assignee to continue the business, a creditor who thereafter sells stock to the assignee, to be used, and that is used in the prosecution of the business under said order, is entitled to be paid out of the fund in the hands of the assignee in full.
2. Such an order has the effect of embarking the trust property in trade or business, and the creditor dealing with him has the right to look to the property for security.
3. Upon the refusal of the assignee to pay such creditor, he may proceed against the fund or trust property, in any court having equitable jurisdiction.

ERROR to the Superior Court of Cincinnati.

George Weber, some time ago, being engaged in the brewing business, in contemplation of insolvency, assigned his property for the benefit of creditors to Jacob Pfau and Alexander Starbuck. There being much stock on hand and in process of manufacture which needed to be preserved on ice, and the probate court, having ordered that Pfau and Starbuck might employ necessary help and continue the business, Pfau and Starbuck entered into a contract with the plaintiff for the delivery of a large quantity of ice at a certain price. A large amount of ice was delivered from time to time, and was used by the assignees in carrying on the business of the brewery, and different amounts were paid by Starbuck and Pfau; but a controversy having arisen as to whether Starbuck and Pfau were rightfully exercising the office of assignees, they refused to pay a balance due for ice delivered to the amount of $4,498.92, and include it in their account as assignees. Starbuck and Pfau went out of possession while the ice was being delivered, and Leo Brigel and John Bobe taking their places, some of this identical ice was used by Brigal and Bobe in the manufacture of beer, and, as alleged in the petition, much of the manufactured stock *on hand at the time they took possession was stock into which this 307
ice entered. The plaintiff averred that Pfau and Starbuck, having refused to pay this balance, they applied to their successors, Brigel and Bobe, and they also refused to pay it or allow it as a valid claim against the estate. Thereupon the ice company instituted this suit in the superior court, asking that that court might order the assignees of Starbuck

†This case was dismissed by the Supreme Court Commission, for want of preparation. See 11 B. 240.

and Pfau to allow this claim as a valid claim against the estate and pay it out of the assets of the estate in full. To this petition demurrers were interposed by the defendants. These demurrers were sustained and judgment entered for the defendants, and the plaintiffs prosecute this petition in error to reverse that judgment.

It was claimed that Pfau and Starbuck had no authority to make the contract sued on, their duty under the assignment being simply to proceed forthwith to wind up the trust and pay the claims of creditors of their assignor; but, even if they could contract, they could only bind themselves personally, and further they claimed that the plaintiff had not sought the proper forum, but must go into the probate court and ask that court to compel the assignees to allow the claim.

JOHNSTON, J.

While it would seem the duty of the assignees, by reason of the statute, was to wind up the business of the trust as rapidly as possible, it was not the duty of this court in this case to determine whether or not the probate court might make a valid order continuing the business of the assignor. It was sufficient to say that such an order had been made by the probate court, and that that order was unreversed at the time this petition was filed. The court was bound to presume that order valid. That being so, the question arose whether the contract with the plaintiff was such a contract as that the plaintiff, who was not a creditor of the assignor, might proceed against the assignees in their representative capacity. A large number of respectable authorities have been cited, wherein it has been held that parties acting in a representative character as executor or administrator, have no authority to bind the estate, but themselves only, in their individual capacity. The court, however, upon
308 a full *examination of the authorities, have met with a class of cases in which the courts have held that under certain circumstances, such parties may be sued also, in their representative character. The reasoning of our supreme court in 28 O. S., 238, Lucht, Administrator, v. Behrens, is strongly in favor of the doctrine that the creditor may sue the executor or administrator for a debt contracted by him for the benefit of the business of the estate, carried on under the will, for the benefit of the estate, or he may sue him individually. The creditor may look to the fund or property embarked in the trade, if he so chooses. But he cannot look to the general estate. The case of *ex parte* Garland, 10 Vesey, Jr., 109, is quite in point, and cited by our supreme court. Besides in same volume (28 O. S.) case of Cowper, Administrator, v. Atwood, 134, our supreme court have gone almost, if not quite, to the extent of holding that the debt of the administrator may be enforced against him in his representative capacity, and paid out of the general estate of the intestate, where it appears that the money received by him went toward the payment of the debts of the estate. The order of the probate court had all the effect of embarking the trust property in trade or business, and as long as the order remained in force, creditors had the right to look to it for payment.

In the language of Lord Eldon in 10 Vesey, cited "the creditors may determine if they will be creditors; next, it is admitted that they have the whole fund that is embarked in the trade; and in addition they have the personal responsibility of the individual with whom they deal. * * * They have something very like a lien upon the estate embarked

in the trade. They have not a lien upon anything else." This last expression draws the distinction between the general estate not embarked in the trade, and that embarked in it as when the testator in his will has directed that a portion of his estate, consisting of a business, shall be continued after his death.

The other claim made—that the plaintiff should have gone into the probate court to obtain redress, we think cannot be sustained. The creditor of such a business stands upon the footing of any other creditor. He may select any forum having legal and equitable jurisdiction. Had the balance been paid, *and included in the account of the assignees 309
in the probate court, that court might have confirmed that account. But this was not done. We are of opinion that he very properly sought the court below as his forum. The probate court while having jurisdiction in the settlement of the estate of insolvents, is only authorized directly to allow claims against the assignor. This claim is against the assignees, and did not exist when the assignment was made. Upon the whole case we think the court below erred in sustaining the demurrer to the petition, and entering judgment for defendants. Judgment reversed and cause remanded for further proceedings.

Paxton & Warrington and H. A. Morrill, for Plaintiff in Error.

Matthews, Ramsey & Matthews, Long, Kramer & Kramer, and I. M. Jordan, for Defendants in Error.

PARTNERS AND PARTNERSHIPS—JUDGMENTS.

[Hamilton District Court.]

Avery, Cox and Johnston, JJ.

FRITCHE V. LIDDELL & CO.

1. The individual property of a partner cannot be levied on to satisfy a judgment against the firm sued in the firm's name.
2. In order to reach the property of a member he must be made a party to the action.

Paul and Herman Fritche, partners as Fritche & Bro., brought suit, in a magistrate's court, against Chas. Liddell & Co., a partnership formed for doing business in Ohio, on the 26th of January, 1880. Service was accepted and judgment for $295 rendered on the 27th. A transcript for lien and execution was filed the next day in the common pleas court. An affidavit was made stating that plaintiff had a judgment against Liddell, that it was unsatisfied, and asked that an order be made by the *court for proceedings in aid of execution. The matter was referred 310
to a commissioner to take testimony. Liddell claimed a homestead exemption. He admitted having $523.50. The court thereupon ordered that he pay over $23.50, the amount which he had over and above the exemption. This petition in error was prosecuted to reverse that order, on the ground that the court had no jurisdiction in this case to make an order concerning Charles Liddell, when the judgment was against Charles Liddell & Co., a firm doing business in Ohio.

Cox, J.

Judge Cox delivered the opinion of the court:

"Revised Statutes, section 5011, provides that a partnership formed for the purpose of doing business, etc., in the state, may be sued by the name it has assumed, etc. Upon a judgment thus obtained by section 5381, an execution shall operate only on the firm property. In order to reach the individual members of the firm so as to levy an execution on his property it is necessary under section 5370 that he be made a party in his individual name to the judgment by action. So far as the record in the present case showed, there was no such action to charge Liddell individually.

The order of the common pleas court was therefore reversed.

R. S. Fulton, for Defendants.

Wilby & Wald, for Plaintiffs.

APPROPRIATION OF PROPERTY.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

CITY OF CINCINNATI v. CLEMENT L. ENGLISH.

Interest is not allowed in condemnation proceedings unless possession be taken.

ERROR to the Common Pleas Court of Hamilton county.

This proceeding was originally begun by the city in the probate court to condemn the property of Clement English lying west of McLean avenue in this city, in order that a sewer to run into the Ohio river, might be constructed across those premises. The case was tried in the
311 probate court and a value *assessed, from which determination the defendant, English, appealed to the common pleas.

From the testimony, it seems that the city, in September, 1875, without license from the owner or condemnation proceedings begun, entered on the premises and partially constructed a sewer. A completion of the work was prevented by an injunction obtained by English against the city until condemnation was made, and damages paid. During the pendency of this injunction, condemnation proceedings were begun and carried through. The case on appeal was tried in the common pleas, in the January term, 1880. On that trial, it was agreed between the parties that the witnesses should testify to the value of the property as of September, 1875. They did so. Compensation was to be assessed as to the value at that time. When the court came to charge the jury, following the agreement of counsel as to the testimony, he charged that they were to assess the value as of September, 1875, and to add to that value interest since September, 1875. This petition in error was prosecuted on the ground that the charge of the court was erroneous in ordering interest to be calculated on the value of 1875. It was argued as against this position by defendants in error, that as the value was fixed as of the date of September, 1875, interest should be calculated.

Cox, J.

In the large number of cases reported where compensation for condemnation was to be determined there was only one case which we have found where interest was allowed on the value of the property. In this one case, on the trial, the judge charged the jury to assess the value at a certain time, and then charge interest on that value up to the time of the verdict, and when the case was carried to the supreme court the charge was affirmed. The case is reported in 21 O. S. 334 and 338. On examination of this case, however, it is found that the Atlantic and Great Western Railway Company, who were the plaintiffs, had taken possession of the property immediately after the trial in probate court, having paid the amount of the verdict in that court. The case was then appealed to the common pleas court, and a verdict rendered there including, under the charge *of the court, the interest from the time the company had taken possession. In that case, then, by payment of money into court and taking possession, the title had already passed, and the only question was one of increase in compensation. It was eminently proper that interest should be charged from time of possession. In the case at bar, however, there was no possession by the city until after verdict in the common pleas. It was prevented by injunction. It is true that ordinarily the assessment is to be made as of the time of taking, but it was not so here, by agreement. 312

The charge was therefore erroneous in so far as interest was allowed. It is said by the city council that they are willing to allow the verdict to stand if the interest be deducted. We have no means at hand to determine what that would be, as the verdict was general only. Possibly the parties can agree on what it would be, and the judgment will be modified accordingly, otherwise the judgment of the court below will be reversed and the cause remanded for further proceedings.

Kumler, Crossley & Ampt, for Plaintiff.

H. B. Huston and John Conner, for Defendant.

NOTE.—The amount of interest included in the verdict, was afterward agreed on by the parties, and the balance of the judgment paid by the city.

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*HOMESTEAD. 364

[Coshocton Common Pleas.]

JOHN G. STEWART v. JAMES BOYD.

A debtor removing from his homestead after it is assigned to him under the statute, and settling in another state, with no intention to return, forfeits his homestead, and a creditor may subject it to the payment of his claim by petition to have the forfeiture declared.

VOORHES, J.

The plaintiff sets forth in his petition, that on the 11th day of May, 1877, the defendant made an assignment of all of his property, real and personal, not exempt from execution, to Daniel L. Triplett, for the benefit of his creditors. That he was at the time of making the assignment a resident of this county and the head of a family. On the 2d day

of August, 1877, Boyd, having demanded of said assignee an assignment of a homestead, the necessary proceedings were had in the probate court, and homestead, consisting of the premises described in the petition, was duly set off and assigned. Boyd and his family were at the time in possession of the premises so assigned, and continued to occupy the same from that time until the 1st day of April, 1879. At that time they
365 removed to the state of Indiana, where they *still remain, with no intention of returning to this county or to said homestead.

The assignee proceeded to, and did sell all the rest of the estate assigned to him.

The plaintiff, on the 23d day of May, 1877, recovered a judgment in this court against Boyd for the sum of $2,403.46, on which there remains due and unpaid the sum of $847.08, with interest at eight per cent. per annum, from July 18, 1878. On the 29th day of March, 1880, the plaintiff caused a writ of execution to be issued upon his judgment against Boyd, which was duly levied by the sheriff upon said homestead premises, and the same was duly returned with the proceedings of the sheriff indorsed thereon.

The plaintiff says his judgment still remains in full force for the unpaid balance thereon, and by virtue of his judgment and levy, the same is a valid lien upon the homestead premises; and, that there is no other property of Boyd's out of which he can have satisfaction of the same. Wherefore he prays for an order to sell the premises and apply the proceeds to the satisfaction of his judgment.

To the petition Boyd files a demurrer, stating four causes therefor:

1. That the court has no jurisdiction of the subject of the action.
2. That there is a defect of parties plaintiff.
3. That there is a defect of parties defendant.
4. That the petition does not state facts sufficient to constitute a cause of action against the defendant.

The first question presented by the demurrer is: That this court has no jurisdiction of the action.

We think this question presents no difficulty when viewed in the light of the case of Wetz v. Beard *et al.*, 12 O. S. R., 431. In that case, a homestead was duly set off to the debtor, after which a creditor caused the same to be levied upon, and proceeded to advertise the same to be sold by the sheriff. The debtor obtained an injunction against the creditor and sheriff, restraining them from further proceedings against the homestead. This injunction was made perpetual on appeal to the district
366 *court, and reserved for decision in the supreme court. It was held: That the homestead having been set off to the debtor under the statute, no further proceedings could be had against it while the right to the homestead continued. And whether it subsequently became subject to further proceedings of the creditors, should first be presented to and determined by the court under whose process such proceedings were sought. In the case just cited, the homestead having been assigned, a creditor seeking to subject it to the payment of the debts of the debtor, could not do so until he relieved it from the right of the debtor to hold it under such claim; which he must do in the court where the question of the validity of the assignment could be heard and decided. So, in this case, the homestead having been assigned to Boyd, no further proceedings can be had against it until a court of competent jurisdiction decides that the right to the homestead is terminated. If such right be not vested in

this court, then the right to further proceedings against a homestead after it is assigned, does not exist in the law; which we do not think is a sound proposition.

The second proposition presented by the demurrer is: That there is a defect of parties plaintiff. When a petition discloses upon its face that there is a defect of parties plaintiff, it may be met by a demurrer. But it is only so when the defect is manifest upon the face of the petition. The petition avers that the plaintiff is a creditor of the defendant, who has no property out of which he can obtain a satisfaction of his judgment except the premises heretofore assigned to the defendant as a homestead. The right to the homestead having terminated, the same is now subject, in law, to the payment of his judgment. From any statement made in the petition, we are not able to see that any person's rights are affected by the decision to be made in the case except those of the plaintiff and defendant.

The third proposition of the demurrer is: That there is a defect of parties defendant.

It is not apparent from the statements of the petition that any person has any rights in the property sought to be applied to the payment of the plaintiff's judgment, except the defendant; and he, it is averred, is foreclosed by his having abandoned the homestead.

*The fourth cause of the demurrer is; That the petition does not state facts sufficient to constitute a cause of action. 367

This presents the question, admitting all the facts stated in the petition to be true: Is the plaintiff entitled to the relief prayed for in his petition?

It is conceded that the homestead was set off to the defendant, and afterward abandoned by his removing with his family to Indiana, of which state he has become a citizen. That he there purchased another homestead, taking the title thereto in his wife's name, and that they do not intend to return to the possession of the premises described in the petition.

The plaintiff, having a judgment against the defendant, has a right to have it satisfied out of any property belonging to the defendant in this state, which is not shielded by the law from the orders, judgment and process of this court. If the property sought to be applied to the payment of the plaintiff's judgment is still the defendant's statutory homestead, then the demurrer should be sustained. If it has ceased to be his homestead, and has become liable for the payment of his debts, then the demurrer should be overruled.

Section 5438 of the Revised Statutes, which was in force at the time the homestead was set off to Boyd, provides, that upon application being made by a husband, his wife, agent or attorney, there shall be set off to the debtor, by metes and bounds, a homestead not exceeding $1,000 in value; provided the assignment so made is the home of the family. When the homestead is so assigned, and property returned and recorded, no further proceedings can be had against it. The assignment is made to the husband if he be living, although it may be made upon the application of his wife, agent or attorney. If the application be not made during the lifetime of the debtor, it may be made by his widow at any time before a sale of the property.

As no liens can be created against the homestead in favor of creditors by operation of law, or by the husband without the concurrence of his

wife, an assigned homestead is by the law fully shielded and guarded against all efforts of the creditors to appropriate it to the satisfaction of their claims, so long as it retains the character and statutory requirements of a homestead, *certain requisites or conditions must necessarily exist to entitle a debtor to a homestead. If he has voluntarily abandoned it before claiming it as exempt, his right to claim it is gone. He cannot have two homesteads. If he leaves his homestead and moves elsewhere, making the latter residence his home, his right to the former is gone.

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What the homestead is, is a question of fact. If the debtor be living upon the premises at the time exemption is claimed, his right cannot be disputed; or, if he be absent from the property, *animo revertendi* his right to the exemption is not impaired. But if his removal from the homestead be voluntary, actual and with no intention to return, then his right to claim the exemption is forfeited, and his creditors are entitled to appropriate his property to the payment of his debts. 31 O. S. R. 437; 32 O. S. R. 443.

The question now recurs: Can a homestead, after it is set off, be forfeited by abandonment?

There can be no doubt about the right of a debtor to sell his homestead, and make a good title; and he may reinvest the proceeds in another home, and hold it exempt from the claims of his creditors. But can he abandon the assigned homestead and have it shielded from the claims of his creditors?

The constitution and statutes of Kansas provide: That every family, occupying and holding as a residence, may exempt as a homestead, 160 acres of farming land, or one acre within the limits of an incorporated town or city. In the case of Morris v. Ward, 5 Kansas Reports, 239, it is held that a debtor occupying with his family 160 acres of land, is in possession of a homestead against which no liens can arise in favor of his creditors, by operation of law, or by the act of the husband without the concurrence of his wife.

The Revised Statutes of Iowa, section 2277, provide: "When there are no special declarations of the statutes to the contrary, the homestead of every head of a family is exempt from judicial sale." To entitle a party to the homestead exemption in Iowa, he must actually occupy, and be in possession of the premises as a homestead. His right, however, is not lost by a merely temporary absence. Davis, Wood & Co. v. Kelley *et al.*, 14 Iowa Reports, 523.

*"A judgment does not attach as a lien upon the premises used and occupied as a homestead by the judgment debtor. When a judgment debtor ceases to use and occupy premises which he owns as a home for his family, existing judgments attach as liens thereon, in the same manner that judgments attach as liens upon after-acquired property." 14 Iowa Reports, 567.

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The statute of Illinois regulating homesteads, provides: That a householder, having a family, may hold exempt from levy, forced sale, etc., a home, owned and occupied by the debtor, to the value of $1,000. In the case of Bliss v. Clark, 39 Ill. Rep. 590, the court held: That a judgment lien does not attach to a homestead, while the premises remain exempt from levy and sale, under the homestead law. But, if from any cause, the homestead exemption cease to exist, the premises become

liable to levy and sale, and the first levy thereafter will bind the property, whether issued upon a senior or junior judgment.

From the foregoing authorities, we see that homesteads, whether provided for by the constitution or statute of a state, have one principle in common, viz.: That, when a certain state of facts exist, the debtor is invested with the absolute title to a homestead which is not liable to process for the payment of his debts. In Kansas, if he be the head of a family, the owner of, and in possession of 160 acres of farming land, it is exempted to him as a homestead.

In Iowa, by statute, the debtor must be the owner of, and actually occupy and be in possession of, the premises, to constitute it his homestead.

In Illinois, the statute provides, that the homestead, to the value of $1,000, owned and occupied as a residence by the head of a family, shall be exempt from levy and forced judicial sale.

In Ohio, it is provided by statute: That when any lands or tenements are about to be levied on or sold under due process of law, if they, or any part of them, constitute the family home, there shall be assigned to the debtor, on demand of himself, his wife, agent or attorney, by metes and bounds, a homestead, not exceeding $1,000 in value; after which no further proceedings shall be had against it.

So we find the debtors of these states in a like condition with *reference to the property in a homestead. The right has been 370
secured and consummated to them by different processes of law, but in the end all are alike vested with the title to a homestead, and alike shielded from the claims of their creditors. The right of each is secured and fully consummated by the law and the act of the party.

In Kansas, Iowa and Illinois the right and property vouchsafed in the law to the debtor may be forfeited and made subject to the payment of the claims of the creditor by his abandonment of the homestead. If after he has had and enjoyed his homestead, he actually, voluntarily and with no intention to return to it, abandon it, it is then subject to the payment of his debts, and may be so appropriated in the mode provided in the law. 12 O. S. 431.

Under the homestead law of Ohio, we are not able to see that a debtor has any greater estate, when fully invested by the proceedings for its attainment, than has a debtor under the constitutions and laws of the states whose decisions we have consulted, as above stated; and, if they can forfeit the homestead by abandonment after it was fully and absolutely secured to and invested in them, we are unable to see, in principle, why the defendant, who has removed to the state of Indiana, become a citizen thereof, acquired another homestead and abandoned all intention to return to this one, should not be declared to have forfeited his homestead here, and his creditor have it subjected to the payment of his judgment.

The demurrer is therefore overruled.

Campbell & Voorhes, for Plaintiff.

James Boyd, in Person.

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*INSANE ASYLUMS.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

BUNKER V. FICKE ET AL., COMMISSIONERS.

1. Insane persons are the wards of the state, and by article VII, section 1, of the constitution, it is the duty of the state to foster and support institutions for their benefit.
2. The commissioners of Hamilton county are not liable for the payment of the salary of the superintendent of Longview Asylum.

PETITION IN ERROR.

Cox, J.

This is a petition in error to reverse a judgment of the court of common pleas. The action grew out of a claim filed before the county commissioners by Dr. Bunker for a balance of salary alleged to be due him as superintendent of Longview Asylum. He claims that he was appointed superintendent July 10, 1874, for the term of six years; that he filled the office from that time on until April 17, 1878; that at the time he was elected, his salary was fixed by the board of directors of the asylum at $3,500 per year, and that the salary was approved by the board of county commissioners. He claims further, that on the first of November, 1877, the board of directors of the asylum undertook, without any legal authority, to reduce his salary to $2,500 per year, and adopted a resolution to that effect, and that he received that part of the salary for the remainder of the time he acted as superintendent. He claims now to recover the balance of the $3,500, amounting to $470, due for the remainder of the time.

The commissioners rejected the claim and he appealed to the court of common pleas. In that court a demurrer was filed to his petition, and on hearing was sustained and judgment rendered for defendants. To reverse that decision this petition in error is filed.

It is claimed upon the part of Bunker that he was an officer of the state—an officer of a state institution; that his salary could not be changed during his term of office, and at any rate, it was not changed in accordance with law; that the change sought to be made by the board of directors of the asylum was without any concurrence upon the part of the
372 county commissioners, *and even if they did concur, his salary could not be changed during his term of office, and, therefore, he was entitled to recover the amount claimed.

On the part of the commissioners it is claimed that the superintendent of Lonview asylum is not an officer within the meaning of the term office, but the person holding that position is merely an employee, with his salary subject to be changed at any time during the term of that employment.

In order to determine this question we must look at the status of Longview asylum. It has for a long time held an anomalous position, not exactly defined, and the laws, governing its organization, have been subjected to frequent changes. They have been changed repeatedly to suit the altered circumstances of parties, conditions and persons. But, we think, from an examination of all the laws, its true status is apparent.

It was first erected by the county for the protection and care of insane persons therein, for whom the state had failed to provide and was largely under state control. Subsequently by a change which seems to have been designed to bring it under the general constitutional provision governing all insane asylums, it is, we think, a state institution. The first section of the seventh article of the constitution provides that "institutions for the benefit of the insane, blind, and deaf and dumb shall always be fostered and supported by the state, and shall be subject to such regulations as may be prescribed by the general assembly." Under this provision of the constitution laws have been passed from time to time for the support of Longview asylum. It is "fostered by the state," "supported" largely by the state, and "subject" entirely to such regulations as may be prescribed by the "general assembly." Formerly it was supported almost entirely by Hamilton county. The buildings were erected by Hamilton county from taxes raised therein, but although owned by the county, the state has taken away from it all control and management. Subsequently the commissioners were authorized to levy a certain amount upon the general duplicate for its support, and the state has, for a number of years, made annual appropriations for its support out of "the general asylum fund," the stereotyped amount being "a sum to be ascertained by the auditor of state, which shall bear the same proportion to the appropriations for the other asylums of the state for the insane as the population of Hamilton county bears to the population of the state, exclusive of Hamilton county, as appears by the last federal census," etc. So that, as appears, it is now supported by three different funds; one from the state, another from taxes levied by the county commissioners of this county upon the taxable property of the county and, the third, from insane persons whose keeping is paid for by their friends. 373

But the general management of the asylum is under the legislature, where is placed, and we think properly, the management of all institutions for the insane. The obvious intention of the framers of the constitution being to regard insane persons as the wards of the state, to be under the fostering and protecting charge of the state, and not under any particular local or private authority. Two of the directors of the asylum are appointed by the governor of the state, one by the court of common pleas of this county, one by the commissioners of Hamilton county, and one by the probate court. The directors are required to report their entire proceedings to the governor annually, and a copy of the report is to be furnished to the board of public works of the city of Cincinnati and to the county commissioners, thus subordinating the county and putting it on no higher plane than the city.

The law requires the superintendent of the asylum to keep a seal, the title of which shall be, "Longview Asylum, State of Ohio," and his acts are to be verified by the application of that seal to all written evidences of them. The superintendent is also required to report the receipt and expenditures of the institution to the governor. So that his acts, his seal, his position come within the definition of an office as described by the supreme court in the case of the State *ex rel.* v. Wilson in the 29th O. S., 347, where the superintendent of the Athens asylum was declared to be an officer and required to be an elector of the state.

The law requires that the superintendent shall be appointed by the directors of the institution. It requires that his salary shall be fixed by

the board of directors and be approved by the board of county commissioners. On the one hand it is claimed that the law in regard to the salary of the superintendent is governed by article two, section twenty of the constitution, "that the general assembly, in cases not provided for in the constitution, shall fix the term of office and compensation of all officers, but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

It is claimed that, the superintendent being an officer of the state, or under the control of the state, no change can affect his salary during his existing term of office, unless the office be abolished. On the other hand it is claimed that even if he be a state officer, his salary is at all times under the control of the legislature by virtue of the section 1, article VII, of the constitution, which provides that the institution shall be subject
374 to such regulations as may be prescribed by the legislature. *In our view of the case, it is not necessary now to decide this point.

The amount of salary is not fixed by the constitution, but the mode of providing for it has been left with the legislature. Practically, the legislature has left it to be fixed by the board of directors, with the approval of the county commissioners. The legislature, which in 1878 undertook to reorganize the asylum, volume 75, p. 95, provided that the salaries should remain as they then were until changed in the same manner, to-wit: by the board of directors of the asylum, with the approval of the board of county commissioners.

It is claimed in this case that there was no approval by the board of county commissioners. It is not alleged in so many words in the petition, but it is alleged that the directors themselves undertook to make the change illegally, and granting that this implies that they did so, without the approval of the county commissioners, the question arises, whether plaintiff, having brought his suit against the county commissioners, is entitled to recover against them, which question depends, we think, upon the question what control the commissioners have over the asylum.

Generally the law gives them no control over the funds of the asylum that we can observe, except in one or two cases. They may approve the act of the board of directors of the asylum in fixing or changing the salary of the superintendent and other officers, and they are authorized to pay the directors the amount fixed by law, not exceeding $250, for their actual loss of time and expenses in attending meetings of the board. But the county commissioners have no further control of the fund; they do not hold them; they do not disburse them. The fund is annually paid into the county treasury by virtue of law, and is a trust fund under the care and direction of the directors of Longview asylum for the purpose of maintaining it, and is subject to be appropriated by the directors as the law specifies.

There is some ambiguity in the law, however, in reference to the manner in which the fund shall be disbursed. For instance, it provides that the steward of the asylum shall, from time to time, upon the authority and vote of a majority of the directors, draw from the auditor of the county the sum of $2,000, to be paid out by him for current expenses of of the institution; that he shall make a report of his receipts and expenses; and the report shall be examined by the superintendent and directors. They are to supervise all his payments, and he must make a report to the auditor and fully account for the $2,000 before he can draw again, even by the authority of the directors; so that the current ex-

penses of the institution are paid by the auditor on a certificate *from the directors to the steward in sums of $2,000, as they may draw 375 them, when the steward fully accounts for each $2,000 which he receives.

As to how the salary is paid to the superintendent there is no clear specification in the law. The old law provided, and it throws some light upon the new one, that the steward shall make all purchases. He has now to supervise the farm, to pay the current expenses, and to pay the persons employed about the asylum. This seems to imply that the fund which the steward receives from the auditor is simply to be used in defraying the current expenses of the institution, and not to be appropriated to pay the superintendent.

We come to the conclusion, from a general examination of the law, that the superintendent is not to be paid out of this $2,000 paid to the steward, although, as we understand, it has been the custom. We think it would not be proper that the superintendent should be paid from this fund, because it is to be disbursed by the steward under the direction of the superintendent and the directors. He reports to them. They are to supervise and examine his accounts, and we do not think the law contemplated that the superintendent was to audit the payment of his own account. Following the analogy of the law as to state officers, we hold that he is only entitled to receive his salary by certificate of the directors to the county auditor for a warrant upon the county treasury. When his salary has been fixed by the directors, with the approval of the county commissioners, then it is a fixed sum, for which he can obtain from the county auditor a warrant upon the treasurer, and receive payment therefor.

We think the county commissioners are in no way responsible for the payment of this sum. The section of the statute which gives the commissioners authority to adjust claims against the county excludes any idea of this kind. It provides that no claims against the county shall be paid otherwise than upon the allowance of the county commissioners, upon the warrant of the county auditor, except in those cases in which the amount due is fixed by law, or is authorized to be fixed by some other person or tribunal, in which cases the same shall be paid upon the warrant of the county auditor, upon the proper certificate of the person or tribunal allowing the same.

Now, in this case, if the salary of the superintendent is fixed by the directors and approved by the county commissioners, it is subject to be paid by a warrant upon the county auditor upon a certificate of the directors allowing the same.

This demurrer was therefore properly sustained. The commissioners are not liable for the payment of the amount, *but if the plaintiff 376 has any remedy at all, a question we do not now decide, it lies in mandamus against the auditor, or against the board authorized by law to make the allowance and pay the claim.

The judgment will, therefore, be affirmed.

J. H. Bates and Stimmel & Davis, for Plaintiff.

Asa W. Waters, for Defendants.

PARTNERSHIP.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

CROWLEY V. CHAMBERLAIN & CO.

When a note against a partnership is with knowledge of the changed condition of the firm surrendered to the recent firm on one partner retiring, and a new note taken, and afterward when a new member comes in, the latter note surrendered and a note of the new firm taken and the rate of interest increased, and this note again several times renewed, and afterward presented to the assignee in bankruptcy of the late firm and dividend received thereon, and it is afterward sought to charge the original firm in an action on the first note, it is not error of the court to charge the jury that such fact discharged the member of said firm who first went out.

ERROR to the Superior Court of Cincinnati.

The action in the court below was on two promissory notes made by defendants, as Chamberlain & Company, one for $2,000, dated the 10th of March, 1872, and the other for $1,500, dated April 10, 1872. Both Chamberlains were in default, and the case proceeded to trial before a jury as against Walker. On the testimony it was in evidence that the plaintiff, Crowley, had been in the employ of Chamberlain & Company, as foreman of their stove and kettle factory, for a great many years, and that, while in their employ, he had lent them money, and that they were otherwise indebted to him. In 1871, Samuel N. Walker came into the firm, and brought money with which to help the firm along. In August, 1862, Walker left the firm and Sargent came in as a partner. In September, 1873, Crowley surrendered the notes
377 *given in 1872 and took three other notes of the firm, which were again surrended after Sargent went out, for other notes in which the interest was raised from 8 to 10 per cent. at the suggestion of Chamberlain. Chamberlain & Co. soon after went into bankruptcy, and the last notes given were presented to the assignee and dividends paid on them. On the trial the original notes did not appear in evidence, the reason being given that they had been surrendered, and Mr. Chamberlain had been unable to find them among his papers.

On the conclusion of the plaintiff's testimony, the defendant made a motion to overrule the testimony of the plaintiff and to direct the jury to return a verdict for the defendant. This the court did, but in order to give the plaintiff time to get more testimony the case was continued until the next day, when the plaintiff, not producing any more testimony, the court charged the jury that where the evidence of the plaintiff alone disclosed facts upon which the plaintiff could not recover, the law made it the duty of the court to so instruct the jury. In the present case the plaintiff on his own testimony, by his surrender of the notes on which the defendant was liable had released him, and the plaintiff could not recover a judgment against him therefor. The jury returned a verdict for the defendant, Walker. Judgment was rendered January 30, 1879, and bill of exceptions filed and signed May, 1880.

Cox, J.

No bill of exceptions having been signed in the time limited by law the only question on the record is, was substantial justice done? Walker

was in the firm when the notes were given, and in 1873, after Crowley knew that Walker had gone out, he surrendered the notes and received notes of the new firm. Indeed, the notes were exchanged a number of times, Crowley was not sure how often, and the rate of interest changed, and at last the notes were presented to the bankrupt's assignee and a dividend accepted. Under all these facts it seemed to the court that Samuel Walker had been discharged. The court thought that the conduct of the plaintiff showed no intention on his part to hold Walker, and the jury were warranted in finding the verdict for Walker.

"Inasmuch as a payment by A of B's debt on behalf of B, inures to the benefit of B if the creditor accepts the money, and B does not repudiate the payment, it follows that if a firm is indebted, and by the retirement of the original partner and the introduction of other parties, a wholly new firm is called into existence, a payment by the new firm expressly or impliedly on behalf of the old firm of the debts contracted by the old firm, *will extinguish its debt as between that firm and the creditor. 1 Lindley on Partnership, 419." 378

In Gardner v. Conn., 34 Ohio St. 193, the supreme court quote, with approbation, the doctrines laid down in Davis v. Desague, 5 Whart. 529: "When the separate note of one partner is taken by a creditor holding the note of the firm, it is a question of intention whether this amounts to an extinguishment of the joint debt. Perin v. Kane, 19 Maine, 355; Mason v. Nickerston, 4 Watts and Sergt., 100; 1 Lindley on Partnership, 443.

It is claimed that the court below erred in refusing to allow the plaintiff to dismiss his action on the day to which the continuation of the trial of the case was postponed in order to give him time to get more testimony, under that clause of the Code which provides that at any time before the case is submitted to the court or jury the plaintiff shall have a right to dismiss his case without prejudice. In the opinion of the court, the case had already been finally submitted to the court on the first day, and laid over on a condition, but plaintiff did not comply, and that, therefore, there was no error in the action of the court in refusing to allow the plaintiff to dismiss.

Judgment affirmed.

Paxton & Warrington, for Crowley.

Matthews, Ramsey & Matthews, for Walker.

FIRE INSURANCE.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

MIAMI VALLEY INS. CO. v. STANHOPE.

Policy of insurance, on household goods and furniture of a married woman in Kentucky, contained clause that policy should "cease from time the property should be levied on or taken into possession or custody under any proceeding in law or equity." An attachment against the husband was levied on the property, but was discharged before occurrence of the loss. There was no proof that the law of Kentucky differed from that of Ohio under which, since 1861, property of a married woman, acquired by gift, cannot be taken for the debts of the husband. *Held*, that the attachment did not avoid the policy.

983

ERROR to the Court of Common Pleas.

379 *Action upon policy of insurance on household furniture and personal apparel, as property of Ida B. Stanhope, in residence, Kenton county, Kentucky, to amount of $3,500. Clause in policy that insurance should cease from time property was levied on or taken into possession or custody under any proceeding in law or equity. Defense, that it had been levied on by sheriff of Kenton county under an attachment against the husband of insured for rent. Reply, that the attachment was of no validity, and had been discharged before the fire; further, that, with knowledge of the facts, $200 on account of the loss had been paid by the company. Charge of court to the effect that the attachment avoided the policy, but that partial payment with knowledge was a waiver. Verdict and judgment for $2,073; the jury finding specially that plaintiff was owner of the property.

AVERY, J.

That the payment was a waiver may be doubted. The only reason for so considering it would be on grounds of estoppel. But there was nothing to raise an estoppel, since it did not appear that plaintiff had been induced to forego any advantage, or to change her position. The only effect was to indicate an intention to waive, which, until acted upon, might be abandoned at the option of the company. Murphy v. Insurance Company, 7 Allen 239; Colonius v. Insurance Company, 3 Mo. App. 56.

The point was not material, however, except in the view that the attachment avoided the policy. This depended upon the clause that the policy should cease from the time the property was levied on or taken into possession or custody under any proceeding in law or equity. A reasonable construction must be given to this language To take the property of one person under a writ against another, would not be a levy in fact, but a trespass. It would not be a taking under any proceeding in law or equity, since it would be without the authority of any proceeding. Upon a precisely similar clause the law has been so determined, and a policy on goods claimed, but not proven, to have been fraudulently transferred from father to son, held not to be avoided by levy of an execution against the father. Insurance Company v. Mills, 44 Penn. St. 241.

Counsel contend that under the law of Kentucky the attachment was valid. But so far as the bill of exceptions shows there was no evidence of such law. The jury found specially that the property was owned by the wife. Under our law it was not subject to attachment for the debts of the husband. S. & S. 389; Pratt v. State, 35 O. S. 514.

380 The law of another *state must be proved as a fact. Ingraham v. Hart, 11 O. 255; Smith v. Bartram, 11 O. S. 690. In the absence of proof to the contrary it will be presumed to be same as our own. Legg v. Legg, 8 Mass. 99, 101; Allen v. Watson, 2 Hill, (S. C.) 319, 322. And we cannot assume for the purpose of finding error in the record that contrary proof was offered. Whelan v. Kinsley, 26 O. S., 131, 137.

Affirmed.

Matthews, Ramsey & Matthews, for Plaintiff in Error.

H. M. Cist, Contra.

LANDLORD AND TENANT.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

†SAMUEL ALTHOF v. JACOB FOX.

1. While under a covenant in a lease, to pay an annual rental in monthly installments, an action may be commenced by the lessor for each installment as it falls due, and remains unpaid; yet, if two or more installments have become due, the claim is *in solido*, and cannot be split and separate actions maintained thereon.
2. Where an indivisible claim is thus split, a judgment on one portion merges the entire claim for rent then due, and may be pleaded in bar of an action on any other portion of said entire claim.

ERROR to the Common Pleas Court.

Fox was the owner of a business house on Main street. Althof became his tenant under a lease in which the tenant covenanted to pay a yearly rent of $1,200, payable monthly. In March, 1878, there was due the rent for seven months. Four suits were then brought by Fox, three for two installments of rent, each for $200, and one for one installment of $100. The actions were begun the same day before a magistrate, and judgment entered in one of them for eighty dollars after a trial. A defense of partial eviction was set up by the tenant. Judgment was thereupon entered in the three other cases for the plaintiff, Fox, for same amount. Althof paid the first judgment, and took an appeal in the three other cases. In all these cases in the common pleas, Althof filed an answer setting out these facts and claiming that the judgment in one case was an extinguishment or a merger for all the other claims for rent.

The reply of Fox admitted the facts as to the jugments and payment, but denied another matter of defense—eviction—which was not involved in the decision of the reviewing court.

Judgment was rendered for plaintiff for the full amount in this action in the court below.

* The principal question which came up before the district court was whether the judgment in one of these suits could be used to defeat recovery in all the others. This was the chief ground of error urged by Althof's attorneys. 381

JOHNSTON, J.

The case at first blush seemed not to involve any difficult questions of law, but on a closer examination of the authorities it would be found to involve questions difficult of solution. In the state of Ohio the question whether or not an entire or indivisible cause of action could be split up and recovery had on each part had not been settled by the courts. As far back as 1670, in England, it had been decided that a judgment in one of the courts on the part of an entire claim could be pleaded successfully in bar of recovery on the remainder. 2d Keeble, 717, Girling v. Aldas. That case had been reviewed and appeared in the 19th Wendell, 207, Bendernagle v. Cocks. The code of practice does not require that a party should embrace his separate and independent claims against another in one suit, although the court might order it done in a proper case by consolidating them. Where parties have a running account, and it is their custom to make up that account and strike a balance every quarter, then it has been held that a quarter's balance is an entire and indivisible claim, though made up of several items and the recovery on one item is a bar to all the rest. It is difficult at all times to determine what an entire and indivisible demand is. In the case at bar the covenant for rent is primarily to pay a gross sum, $1,200. It is true that it is followed by the clause "payable monthly." We have found from the authorities, however, that while a party has the right to institute an action on each installment when it falls due, yet when several have fallen due they become a claim *in solido*. This is the rule laid down in cases where the covenant

†This case has been reversed by the Supreme Court. See opinion 40 O. S., 322.

was similar to that under examination. And, if after several installments have fallen due, a recovery be had on one, it can be pleaded to defeat recovery on all others due at the time. That is held to be an extinguishment of the original claim. It becomes merged in the judgment. No claim is left upon which to base any further action. This is the law as laid down in Illinois and New York. In the latter state, in the case of Gex v. Jacobs, 452, decided last February, reported in 7th Abbott's New Cases, a recovery of $200 was successfully pleaded in bar of a claim of $6,600, which was a harder case than the present. The judgment of the court in favor of the plaintiff seemed to the court erroneous, and the judgment of the court below for Fox is reversed, and the record warranting it, judgment will be rendered
382 here, as it should have been below, for Althof. *Although the district court was unanimous in this decision, they arrived at it with considerable hesitation, and the plaintiff in error, Fox, would no doubt think sufficient involved to take the case up to the supreme court and have the law on this question definitely settled in this state.

Fulton & Schroder, for Althof.

Wulsin & Worthington and James Perkins, for Fox.

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401 *FIRE INSURANCE.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

UNTERSINGER v. NIAGARA INS. CO.

When a loss occurs by fire, and the amount has been adjusted between the insurance company and the insured in accordance with the terms of the policy, and the loss paid, such settlement cannot afterward, in the absence of fraud in the insurance company or its agent, be opened up, and the company held further liable, if the insured after such payment discover that he, by his own mistake, omitted from his proof of loss other articles which were lost or destroyed.

PETITION IN ERROR to reverse a judgment of the Court of Common Pleas.

Cox, J.

In the court below an action was prosecuted by the plaintiff to recover from the defendant the sum of $1,115 for balance due him for loss by fire, on a policy for $2,000 issued to him on the stock and fixtures of a drug store in Cincinnati. The case was tried by the court to a jury. The facts as presented to the court and jury on the papers and by evidence, were substantially as follows: The policy issued by the defendant contained this stipulation: "Persons sustaining loss or damage by fire shall forthwith give notice of said loss to the company, and as soon as possible after render a particular account of such loss, signed and sworn," etc., "and also the cash value of the property." "When personal property is damaged the assured shall furthur cause it to be put in order, assorting and arranging the various articles according to their kind, separating the damaged from the undamaged, and furnish an inventory to the company and naming the quantity, quality and cost of each article." "The amount of sound value and of damage shall be determined by mutual agreement of the company and the assured, or failing to thus agree the same shall then be determined by appraisal of each article by competent persons not interested," etc. On the 9th day of August, 1877, a fire occurred in plaintiff's premises so insured, by which a large amount of

it was damaged. Notice *of the fire was given to the insurance company, who on the next day examined the premises and notified him to put the property in a place for adjustment, and next day after sent an adjusting agent to ascertain the loss. He took with him a druggist to assist in examining the loss and fixing prices of articles, lost or damaged. The first day he took a list of the articles of household furniture destroyed, and on the second day began with reference to the drugstore. The building having been totally destroyed, the goods were all in the street, but were subsequently put in a building. A list of the loss and damage was made up by the assured going through the store and giving the items, which were put down by the adjusting agent, and the prices assessed by the druggist, Mr. Clare. The insured says he gave all the items he could remember, and that they were properly put down by the adjuster, and no complaint is made as to the value fixed by Mr. Clare, the druggist. The loss so given, on furniture and drug-store amounted to $390, for which proofs were filed with the company, as required by the policy, and on the 17th of August, 1877, the company paid the amount, and the policies were surrendered to the company and cancelled. No fraud is claimed on either side. 402

In about two weeks after the payment the assured, on again going over his whole stock remaining and bills, ascertained that his loss was about $1,500, instead of $390. On the 2d day of October, and within sixty days after the fire, he notified the insurance company of this furthur loss, asked for the return of the first proofs of loss, and offered to repay the amount received from the company and to file a corrected statement of the loss. This the company refused, claiming that the entire loss had been adjusted according to the terms of the policy and paid, and denied all liability.

At the close of plaintiff's case, defendant moved to arrest the case from the jury and for a judgment for defendant, which was granted, to which plaintiff excepted and made a motion for a new trial which was overruled, and judgment entered for defendant, all which was excepted to by plaintiff. To reverse this judgment this petition is now filed.

The sole question presented to the court below and to this court is, whether, when loss by a fire occurs and the amount has been adjusted by the parties in accordance with the terms of the policy, and the loss paid, such settlement can afterwards, in the absence of fraud in the insurance company or its agents, be opened up and the insurance company be held further liable, if the insured, after such settlement and payment, discover that he, by his own mistake, omitted from his proof of loss other articles which were lost or destroyed.

*By the terms of the policy the parties had agreed that all loss sustained should be settled by mutual agreement, and in the absence of such agreement special arbitration should be called in. The loss was adjusted by the parties agreeing that the insured should name the articles lost, the adjuster should take them down, and a third party fix a valuation. 403

It is not claimed but that this was all fairly and honestly done at the time, and the company, without hesitation, acquiesced in the amount and paid it.

"The general rule is that the adjustment of a claim against an insurance company is binding upon all the parties in interest. The exceptions to the rule are the same as those applied to all contracts. They

may be avoided by a party defrauded, if they were made fraudulently. Nor are they enforced if founded on a material misrepresentation or concealment, or a material mistake of fact or on that of law. But the distinction of the common law between these two mistakes is still so far applied. that if money be actually paid under an adjustment, it may be recovered back if paid through a mistake of fact, but not if paid through a mistake of law." 2 Parsons on Contracts, 416, and cases there cited.

But the material mistake of fact upon which it can be recovered back is when the payment is made under a mistake of facts as to liability, as where the directors caused payment to be made, not knowing that the policy had been forfeited (1 Caines 32), or where the insured had been fully indemnified for the loss by other parties primarily liable to him. Darrell v. Tibbetts, English court of appeals, May, 1880; cited in 2 Central Law Journal 169.

If payment of a loss be refused after adjustment and demand, the insured is not limited to his first proof of loss, but may present and sue in a new adjustment and may show that the first presented was erroneous. Wood on Insurance, 427, 48 Illinois Rep. 31; 52 Illinois Rep. 466.

But when the loss has been adjusted and paid, it then becomes an accord with satisfaction, and when no fraud is claimed is a bar to another action on the same claim.

This case has, we think, been clearly decided by the supreme court of Illinois (52 Ill. 466 and also in 89 Ill. 62), where the court says, "A settlement by one insured against loss by fire with the agent of the insurance company, if fairly and honestly made, is conclusive, although nothing be paid for a portion of the property destroyed; but if it was the result of falsehood and fraud on the part of the adjusting agent, then it is not binding or conclusive on anyone, and this is a fact for the jury."

In the case at bar no falsehood or fraud was claimed against
404 *the adjusting agent, and the settlement admitted. There was, therefore, nothing for the jury to pass on, and the court did not err in arresting the case from the jury and entering judgment for defendant.

Judgment affirmed.

Moulton, Johnston & Levy, for Plaintiff in Error.

Matthews, Ramsey & Matthews, for Defendant.

EXEMPTION FROM EXECUTION.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

MALACHI KELLY v. MARY MCCUNE HINES.

The provision of the homestead act, that the exemption provided for shall not extend to claims for work and labor less than one hundred dollars, is to be strictly construed, and where there is a judgment for a greater amount, the homestead cannot be subjected, even to so much of the judgment as is less than one hundred dollars.

ERROR to the Court of Common Pleas.

AVERY, J.

The action in the court of common pleas was brought to subject the family homestead of plaintiff in error, admitted to be less than one thousand dollars in value, to a judgment against him of one hundred and seventy-eight dollars for the services of a housekeeper. The error complained of is that sale was ordered to satisfy one hundred dollars of the judgment. The question involved is the construction of the provision of the statute, that the exemption of a homestead shall not extend to a claim for work and labor less than one hundred dollars.

The provision is contained in section 5434, Revised Statutes. The words are: "The subsequent sections of this subdivision shall not extend to * * * a claim for work and labor less than one hundred dollars." Then follows section 5435, for the exemption from sale, on judgment or order, of a family homestead not exceeding one thousand dollars in value.

The question is, whether the limitation of one hundred dollars describes the character of the claim, or merely the extent to which as against the exemption it shall be permitted to prevail.

The policy of the homestead act has been held to require the most favorable construction for the debtor. Sears v. Hanks, 14 O. S. 298, 301. The exception of claims for work and labor must, therefore, be strictly construed. The exception is not of an amount, less than one hundred dollars, of a claim; but of a claim less than one hundred dollars.

*The only reason for an exception of the sort is that some special privilege was regarded by the legislature as attaching to particular claims. 405 But unless the limitation of one hundred dollars was intended to describe the character of the claim, the exception would extend to all claims for work and labor. In that view of the case the homestead would be subject to execution and sale up to the amount of one hundred dollars of each claim.

Obviously the result of this would be largely to impair the beneficial objects of the homestead act. Work and labor are words very comprehensive, and to privilege all claims, to the extent of one hundred dollars, might, in many cases, exhaust the amount, which it is the object of the statute to secure to the family of the debtor for a home.

In view, therefore, of the favorable construction required by the act, we are of the opinion that the privilege against exemption extends only to a claim for work and labor less than one hundred dollars. In this we follow the exact language of the statute. The purpose was evidently to protect a class of creditors whose means of support for themselves and families would be likely to depend upon punctual payment of their wages, thus making their claim more urgent than the claim of exemption by the debtor. Weymouth v. Sanborn, 43 N. H. 171, 173. Any claim for a larger amount would indicate the possession of means of support enabling the extension of the credit, and thus make it proper to exclude the creditor from the favored class.

The claim of the plaintiff below was on a judgment of $178. It was for services as a housekeeper, whether for weekly wages or an entire sum is not shown by the record. But if for weekly wages, the judgment was an entirety, and could not be apportioned.

The judgment is reversed, and, proceeding to render the judgment that should have been rendered on the pleadings, the petition is dismissed.

Paxton & Warrington, for Plaintiff in Error.

Joseph Cox, JR., Contra.

PRESENTATION OF A CHECK.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

ISRAEL BRAUN v. JACOB KIMBERLIN.

A check drawn in Cincinnati, upon a banking-house there, Sunday, but post dated as of the next day, was delivered on the day it was drawn, in payment for cattle
406 purchased, with the *understanding that the seller of the cattle was to take it the same night to Danville, Ky., where he resided; and it was accordingly taken and put in bank at Danville, Monday. The mail left Danville daily about noon, and was distributed in Cincinnati by nine the next morning, but the check was not mailed until Wednesday, and was not received by the bank in Cincinnati, to which it was sent for collection, until Thursday morning, when it was presented for payment and refused, the house upon which it was drawn having suspended at the close of business hours Wednesday: *Held*, that the presentment was in time, and the drawer not discharged.

ERROR to the Superior Court of Cincinnati.

AVERY, J.

The action was brought against Israel Braun as drawer of a check on the bank of C. F. Adae & Co., of this city, which was not presented until after failure of that bank. The defense was, unreasonable delay in the presentment of the check.

The check was given here in the purchase of cattle sold for Jacob Kimberlin, plaintiff in the action, by one Harris. Kimberlin and Harris lived in Danville, Ky., but were both in the city at the time, and present at the sale.

The sale was on Sunday and the check was given then, but dated as of Monday. The evidence was that Harris said they wanted the check so that they could go home that night to Danville, and Braun drew it and handed it to him with the remark, "Are you not afraid to take the check home with you?" Being taken the same night to Danville, it was put in bank there Monday, too late for the mail that day, but was mailed the next day, Tuesday, as the bank officers testified, to the First National Bank of this city. It appears, however, not to have been received until Thursday, when it was presented, but as the mail left Danville daily and was distributed here at nine next morning, the question was raised whether the mailing had not in fact been delayed until Wednesday. The bank of C. F. Adae & Co. paid out up to the close of business hours Wednesday, but did not open Thursday morning or ever afterward.

The court charged that if the check was given with the understanding that it was to be taken that night to Danville, and first became operative there as a check on Monday, it would be the same as if delivered there on that day; in which case presentment on Thursday would be in time, since the holder would have had until the next day to send it here

for presentment, and the bank here receiving it until, the next day after received, to present it for payment.

The error alleged is that this disregarded the fact of delivery here, and even if to be taken as delivered in Danville, that the check must at all events have been mailed from there *the next day, the contention 407 being that when a check is received at the place of payment, it must be presented the next day, or if received at a distant place, must be forwarded for presentment by the next mail after the day. Moule v. Brown, 4 Bing, N. C. 266; Smith v. Janes, 20 Wend. 192; Byles on Bills 19, 20.

The duty of the holder of a check is to present it in a reasonable time, and there are rules fixing the time. But the time may be extended by assent, express or implied, and so far as any rules may prescribe what shall be done by the holder, the only object is to determine the time.

In Woodruff v. Plant, 41 Conn. 344, a check on New Haven, drawn at a place twenty-two miles distant, was sent by the holder to another county for the purpose of making a remittance, and was not presented for payment until the third day after it had first been received, the bank having failed upon the second day. But on the ground that the drawer knew it was wanted, for the purpose of making the remittance, when he gave it, he was held to have assented to the delay.

In Prideaux v. Criddle, L. R. 4 Q. B. 455, there were two daily mails, requiring from two to three hours for delivery, between the place where a check was received and the place of payment. The check was not mailed to the place of payment, but to London, and from there presented for payment the second day after it had been received. This was held good, for the reason that if it had been sent directly to an agent at the place of payment, he would have had it until that time. Lush, J. "The plaintiffs received it on the 5th, they might have sent it on the 6th to an agent at Falmouth, and the agent might have presented it on the next day to the drawee, which presentment would have been in time. According to the authorities, it is immaterial through whose hands the check is sent, provided it reaches the drawees in due time."

In First National Bank of North Bennington v. Wood, 9 Reporter 191, where notice to an indorser, mailed on the day of demand, was misdirected, but on the next day was forwarded from the post town to which it had been directed, and reached the proper address, the same principle was applied by the supreme court of Vermont. "The plaintiff," say the court, "had until the day following the day on which the note matured to mail notice. The defendant having received the notice as early as he would, had the plaintiff so mailed it properly addressed, has not been prejudiced."

In Cox v. Boone, 8 W. Va. 500, a check upon Wheeling was received in the country some fifteen miles distant, on Wednesday night, too late, without unreasonable exertion, to reach the nearest post-office for mailing Thursday morning. The next mail left Saturday morning, and in usual course would have *arrived at Wheeling before twelve. The check was 408 not sent Saturday, and the bank closed its doors about noon that day. The court, after remarking that in reasonable probability, if sent on Saturday, the check would not have been received before twelve, went on to say: "But if received before twelve by plaintiff's banker or agent, he would not have been required to present it until the next secular day. To find plaintiff guilty of negligence, the whole time allowed by law,

to have sent the check by post and procured its presentment, must have expired before the bank broke and closed. He was not bound to send by mail, and if he did not, the law allowed him the same time for presentment that it allowed if the check had been sent by mail."

In the present case it was left to the jury whether the understanding was that the check should be taken to Danville Sunday night, and first become operative there Monday. It could not become operative anywhere until Monday, because only dated that day, and if to be taken to Danville Sunday night, must necessarily have been intended first to become operative there.

If drawn upon request that it was wanted for the purpose of being taken to Danville, the drawer may be presumed to have assented to the employment of the usual means of making presentment as between that place and this. The necessary delay would be included by the assent. Alexander v. Burchfield, 7 M. and G. 1061, 1064. The usual means of presentment for payment at a distant place consist in sending the check to a bank or agent there. That is usually done by mail, and unless there is evidence of a different understanding the parties may be held to have contemplated that course. But when the mail is employed, the holder has until the next day after receiving the check to send it, and the person to whom sent, until the next day, after it reaches him, to present it. Werk & Co. v. Mad River Valley Bank, 8 O. S. 301, 304.

The delay comtemplated, if it was understood the check was to be taken to Danville, must, therefore, have been that which would occur, in procuring presentment from Danville according to the usual course. This would have been until Thursday, and since presentment was of no avail then, the question is not affected by the fact that the holder did not adopt the usual course. As was said, in Werk & Co. v. Mad River Valley Bank, "the drawer has no right to complain of a delay in presentment for payment which was contemplated by the parties, and either expressly or impliedly assented to by himself at the time of drawing the check."

Affirmed.

Paxton & Warrington, for Plaintiff in Error.

King, Thompson & Maxwell, Contra.

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409 ***CONVEYANCE OF LAND.**

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

DENNIS SULLIVAN v. JOHN MANNIX, ASSIGNEE.

One taking the title to property in his own name, giving a note therefor, and afterward going into possession, making extensive improvements without the consent of the person for whom it is alleged he purchased it, and to whom he gave the note as payment, not accounting for rent, but treating the property as his own, cannot set up in defense of payment of the note, that he was a mere trustee.

PETITION IN ERROR to reverse the Superior Court of Cincinnati.

This suit was brought by Bussing & Co., originally, on a note for $10,500, payable in one year without interest, made by Dennis Sullivan,

payable to Edward Purcell, and by the latter indorsed to Bussing & Co. Edward Purcell's assignee, J. B. Mannix, was afterward substituted as plaintiff. To the petition Sullivan filed two answers. In the first answer he said that on the 6th of December, 1870, Purcell, having some pecuniary interest in a lot on Ninth street, between John and Mound, the title of which was in Dr. Muscroft, and desiring the property to be held by some safe man, requested Sullivan to go to Muscroft and have him deed the property to him (Sullivan.) This was done, and on Purcell's request, not as the purchase money, but a security, Sullivan gave the note sued on. He claimed that there were about $4,500 credits on the note. In his second or amended answer, he alleged that the transfer was made from Muscroft to Sullivan at Purcell's request, without any consideration passing between them; that the note for $10,500 was made at Purcell's request, and only as a memorandum; that Sullivan did not want to give the note, because he never could pay it, and only did it on the promise of Purcell not to press the payment of it. Meanwhile Sullivan tried to sell the property, and with the consent of Purcell he advertised it several times in order to sell it for the amount of the note. When that was unsuccessful he offered to convey it to Purcell, for whom he considered himself to be holding the property merely as a trustee. The credits on the note he alleged were put on the note and applied to it without his knowledge or consent whenever he made a deposit with Purcell as his banker. He said he was willing to reconvey at any time, and asked that he be declared as trustee of the property for Purcell, and the note be surrendered. In the court below judgment was rendered against Sullivan for the amount of the note less the credits, with interest from the day when the note fell due. A second *ground of error Sullivan urged 410
in the calculation of the interest from the time that it became due, claiming that the testimony showed that the note was made on an agreement that it should be renewed for the same time without interest.

Cox, J.

The transaction in the case seemed to have been a simple one. How Muscroft came into possession of the property did not appear from the record. But Edward Purcell wanted Sullivan to buy the property, and said to him: "You see Cresap and buy it." Muscroft seemed to understand and deeded it without a word. But before the deed was made Sullivan had the property surveyed and found that Dr. Muscroft's office stood a foot over the right line of the lot. He persuaded Muscroft to buy that one foot, which, with the rest, was then deeded to him. He went into possession, spent quite a sum of money in improving it, and occupied it, from the time of purchase to the present, never accounting to Purcell for the proceeds, and in every way treated it as his own. This testimony shows that he could not have been a mere trustee, but that he really purchased the property and gave his note in payment therefor. Without these facts the theory of the trust might have been supported.

As to the claim that too much interest had been charged because of the agreement for renewal, the court did not think that there was any evidence to sustain the claim.

Judgment of court below against Sullivan affirmed.

Mannix & Cosgrave, for the Assignee of Edward Purcell.

Fulton & Schroder and Fox & Bird, for Sullivan.

A LUNATIC'S CONTRACT.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

HENRY BECKROEGE v. F. W. SCHMIDT.

The principles of equity as to the validity of contracts with a person in a state of mental insanity, are in general the same as at law; and the mere fact of one of the parties to the contract being insane, is no ground in equity for setting aside the contract or for refusing the ordinary equitable remedies; the other party having had no notice of the insanity, and deriving no imaginable advantage from it.

ERROR to the Court of Common Pleas.

Schmidt brought suit to recover $600, balance due him for the sale of the coffee house to Beckroege in 1876. Defendant sets up that he was insane when the contract was made, and incapable of making a contract; that the price of the property was exorbitant; that during his insanity his wife paid $800 on the purchase money, and asked to have the contract set aside and the $800 returned to him. At the trial it was undertaken to be proved that the defendant was insane, and also that the real
411 *value of the coffee house was less than the contract price. The defendant's counsel asked the court to charge the jury that if it were found that the defendant was insane at the time of the contract, in any case that contract would be void; instead of which the court charged, that to sustain the defense completely, the jury must find the defendant to have been of unsound mind, and incapable of making a contract at the time of the contract, and also that the plaintiff knew of this state of defendant's mind, or that by or under misrepresentation he had profited by it. Verdict and judgment for plaintiff.

Cox, J.

The argument urged by plaintiff in error, who was the defendant below, was that the court erred in not charging that a contract was void if one party was insane, because his mind never could have met the mind of the other party in a contract. Most of the authorities hold that it would interfere too much with the general course of business to add such a new element of risk as the avoiding of a contract because of the insanity of one party when the other party did not know of such insanity or was not guilty of fraud. The law is thus laid down in Leake's Law of Contracts, p. 576, etc. A person may be afflicted with mental insanity to such a degree as to be incapable of understanding an agreement, and consequently incapable of binding himself by contract; and if a person enter into an agreement with another knowing at the time that he is in such a condition, the agreement is defective in the essential element of consent, and therefore void of legal operation. It was formerly held as a maxim of the common law, that a person could not stultify himself by alleging his own insanity, although his acts and contracts might be avoided by his representatives after his death. Bentley's case 4 Co., 123 b. But modern cases have qualified the doctrine to the extent above stated. The principles of equity as to the validity of contracts with a person in a state of mental insanity, are in general the same as at law;

and the mere fact of one of the parties to the contract being insane, is no ground in equity for setting aside the contract or for refusing the ordinary equitable remedies; the other party having had no notice of the insanity, and deriving no imaginable advantage from it. 9 Vt., 478–605; 6 Bear, 192; 3 Sm. & Gif., 135; 24 L. I. C., 644. The court thought the weight of the testimony was that the plaintiff had not known of the insanity of the defendant, and that therefore the verdict was sustained by the weight of the evidence.

Judgment affirmed.

McDowell & Strafer, for Defendant.

T. Horstman, for Plaintiff.

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*APPEAL BONDS. 412

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

†JAMES FARRELL v. HENRY H. FINCH.

An appeal bond from the judgment of a magistrate, in which the surety says, "I" will satisfy the judgment which may be rendered in appellate court, instead of "he" will satisfy, is good, and binds the surety.

Cox, J.

This is a petition in error to reverse a judgment of the court of common pleas. In that court the case was tried on an agreed statement of facts, which was substantially as follows:

In August, 1873, one Clarkson purchased cattle of John Ruan. In December, Clarkson filed his petition in bankruptcy and was adjudged a bankrupt.

In August, 1874, Ruan brought suit in attachment against Clarkson for the value of the cattle, before a magistrate. Clarkson plead the pendency of bankrupt proceedings and asked that proceedings be stayed, which motion the magistrate overruled and gave judgment for plaintiff. From that judgment Clarkson appealed to the court of common pleas, Farrell becoming his security on the appeal bond, which was as follows:

"I, James Farrell, resident of Hamilton county, as bail for appeal in the cause of John Ruan against George Clarkson, principal, and William B. Gall and Thomas Johnson, garnishees, hereby undertake to said John Ruan in the sum of $300, that said appellant shall duly prosecute his appeal to effect without unnecessary delay, and if judgment be awarded against said appellant, I will satisfy said judgment and costs that may accrue.

"(Signed) JAMES FARRELL."

While this case was pending in the common pleas, Clarkson obtained his discharge in bankruptcy and pleaded that, as a defense, the plaintiff replied, setting up a new promise to pay, made after the discharge.

On the trial of the issue so made, judgment was rendered against Clarkson, from which he prosecuted a petition in error to the district court, where judgment was affirmed.

Two points are raised in this case upon which it is claimed Farrell is not liable as surety in the appeal bond.

First, That the bond is invalid, because it provides "that if judgment be awarded against the appellant, I will satisfy," etc., instead of the word he will sat-

†This case was affirmed by the Supreme Court. See opinion 40 O. S., 337.

isfy, required by the statute. That it is an absolute agreement by the surety
413 to pay any judgment *which may be rendered against the appellant, instead of a collateral agreement, that the appellant will pay.

We do not think this point well taken. It has been repeatedly held by the supreme court, that an appeal bond is sufficient, when, although not literally complying with the statute, it does so substantially.

Although the literal reading of the statute be, that the surety contracts that the "appellant shall pay," we see no substantial difference when the surety in the bond says, "I" will myself, pay any judgment which may be rendered against the appellant. In the one case he obligates that the appellant will pay, in the other that he will pay; and this in nowise changes his liability to the plaintiff. It may be for some reason existing between himself and Clarkson, he was ultimately to pay the judgment and not to look to Clarkson to indemnify him.

But the relation of the surety is clearly stated in the supreme court commission in Lang v. Pike, 27 Ohio St., p. 503. The court there says the undertaking means that the surety will pay any judgment rendered in the appellate court against the party for whom he undertakes.

The second point is that the surety is not liable because the judgment in the original cause of action was rendered against Clarkson on an issue which set up a promise by him to pay, made after his discharge in bankruptcy, and that it was thus on an obligation incurred long after the appeal bond was signed. We cannot in this collateral action inquire into that question. A judgment was in that case rendered against the appellant, and the liability of the surety became fixed unless the judgment was reversed. But by the agreed statement of facts, it was on petition in error, affirmed by the district court, and is now in full force. The judgment of common pleas will be affirmed.

Archer & Merrill, for Plaintiff in Error.

Mallon & Coffey, for Defendant.

MARRIED WOMEN.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

GEORGE W. PLUMB v. JAMES DEE.

Making a married woman's separate property liable.

This case came before the district court on a petition in error from the superior court. In that court a petition had been filed by James Dee against Mary Plumb, wife of George W. Plumb, alleging that she was his wife previous to 1878, the time when the facts alleged in the
414 petition occurred. The petition *alleged that she was the owner of choses in action and personal property and real estate, describing it in her own right, and that with the consent of her husband she had been carrying on as a *feme sole* a millinery business, in the conduct of which business she rented from the plaintiff a store on the west side of Elm street, north of Fourth, for which she agreed to pay the plaintiff a certain rent, and which plaintiff rented to her on the faith of her separate property, for which rent he now asks judgment and a decree against her separate property. To this petition Mrs. Plumb filed a demurrer, which demurrer was overruled. An application for leave to file an answer was not made and judgment was accordingly rendered on the petition for the plaintiff.

A petition in error to that judgment is now prosecuted.

Cox, J.

Judge Cox delivered the opinion of the court:

He said that the facts stated in the petition conformed to the principle laid down by the supreme court, in which a married woman's separate property could be made liable for her debts.

Judgment affirmed.

SUITS AGAINST A BANKRUPT.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

JUSTINA GARDNER, ADMX., v. FRED. G. HENGEHOLD.

1. A suit in the state court may be maintained against a debtor in bankruptcy, upon a claim provable against his estate, and a valid judgment recovered thereon.
2. If the debtor would avoid such action, he should promptly apply to the state court and obtain a stay thereof as pointed out by the bankrupt act, until the question of his discharge is determined.
3. This is a privilege which he may waive, the same as he may waive the pleading of his discharge in bar of an action on a debt covered by his discharge. Neither the proceedings in bankruptcy nor the discharge extinguishes the debt.
4. An execution, on a judgment recovered before the discharge, but pending the bankrupt proceedings, will not, where there has been such waiver, be stayed upon motion in the action.

ERROR to the Superior Court of Cincinnati.

In April, 1878, proceedings in bankruptcy were commenced against Hengehold. About a year after this, the plaintiff, Mrs. *Gardner, as 415
administratrix of Jacob Gardner, holding certain notes of Hengehold, amounting in all to about $3,000, brought suit in the superior court to recover on them, while the proceedings in bankruptcy against Hengehold were still pending in the United States court. Hengehold filed an answer, and judgment was rendered against him in November, 1879. In December, 1879, he obtained his discharge in bankruptcy. In May, 1880, Mrs. Gardner sued out execution on her judgment against Hengehold, which was about to be levied when he filed a motion in the superior court, setting forth the above facts, and that the claims upon which the judgment was recovered were in existence when his petition in bankruptcy was filed, and asked that the execution be recalled, and that the plaintiff be perpetually restrained against issuing execution on this judgment, against which his discharge in bankruptcy was a perpetual bar. Affidavits and other testimony being offered by the plaintiff, the court below granted the motion, and perpetually enjoined Mrs. Gardner from issuing on her judgment. A bill of exception was taken embodying the motion, testimony and ruling of the court on it, and this petition in error is prosecuted to reverse the ruling of the superior court in enjoining execution on the judgment.

JOHNSTON, J.

Hengehold's counsel in supporting the ruling of the court below, relied on section 5106 of the late bankruptcy act, which provided that no creditor whose debt was provable, should be allowed to prosecute to final judgment any suit thereon against the bankrupt until the question of the

debtor's discharge in bankruptcy should be determined, and any such suit should, upon application of the bankrupt, be stayed to await such determination. But this portion of the bankruptcy act, in the opinion of the court, did not execute itself. The pendency of bankrupt proceedings did not prevent the creditor from bringing his suit or destroy or extinguish his claim. Under the provision, it was the privilege of the debtor to take some step, as provided by the statute, to bring home notice to the state court of the bankruptcy proceedings, either by motion or answer, and have the suit in the state court stayed. The assignee of the bankrupt had the same right to appear and ask a stay of proceedings. It appeared that the privilege of the debtor and his assignee had not been exercised in the case at bar, and that after bankruptcy proceedings were begun, the suit was carried to judgment in the state court which had jurisdiction of the person and the subject-matter. Although the claims did exist when the petition in bankruptcy was filed, they were merged in the judgment before the discharge.

416 *The discharge in bankruptcy could be pleaded in bar of all claims in existence at the time of filing the petition in bankruptcy. The fact of the discharge does not extinguish the claim, but only the right to recover on it, provided the discharge be pleaded in bar. But in the case at bar the claims were merged in a judgment after the filing of the petition and before the discharge, and as the judgment was a new debt, not in existence when the petition in bankruptcy was filed, the discharge could not be pleaded in bar of it. This we find to be the law in a number of well adjudicated cases. 2 Nat. Bankrupt Reg. 229; *in re* Williams, 5 Nat. Bankrupt Reg. 353; *in re* Gallison, and numerous cases cited. 3 Mo. Appeals, 342; 115 Mass. 27; 102 Mass. 472; 61 Georgia, 58.

If the question was one raised between Mrs. Gardner as one creditor of Hengehold, and the other creditors as to the equitable distribution of the assets of the debtor, the decision might be different. But here the question was one between Mrs. Gardner and Hengehold alone. Hengehold had the right to prevent judgment in the superior court by motion or answer, but he had failed to do so, and judgment was obtained. He had the same right to waive this that he would have to waive pleading his discharge in bar of an action on a claim clearly within the discharge. Hengehold having thus waived his right, the court below was wrong in enjoining execution on the judgment. The ruling of the superior court on the motion to enjoin is, therefore, reversed.

Moulton, Johnson & Levy and M. Kary, for Hengehold.

Jordan & Bettman, for Mrs. Gardner.

PROMISSORY NOTES.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

F. H. ROWEKAMP, ADMR., v. HOLTERS.

A promissory note given by a purchaser at a sale among heirs in partition, and payable to the order of "W., Sheriff of Hamilton county, Ohio," was indorsed by the sheriff to one of the parties, and by him indorsed over for value, and before

maturity, to a third person, with notice that the transfer had been made by the sheriff in the partition proceedings. In confirming the sale the court ordered that the sheriff should retain the note, and subsequently ordered that it should be paid to the administrator of the deceased. **Held*, That the indorsee was charged with notice, and that as against him the administrator was 417 entitled to payment.

ERROR to the Court of Common Pleas.

The action was begun by a purchaser who at a sale in partition among the heirs of Diedrich Richter, deceased, had given his note at two years after date, for a deferred payment, to the order of William P. Wallace, sheriff of Hamilton county, Ohio." The object of the action was to compel F. H. Rowekamp, administrator of Richter, and George Holters, the holder of the note, to interplead touching its ownership. Holters answered that he was the owner and holder of the note and had purchased it for valuable consideration, and without notice, from J. H. Richter, " to whom it had been transferred in partition proceedings by W. P. Wallace, sheriff." Rowekamp answered that it was part of the deferred payments in the partition proceedings that would have fallen to J. H. Richter as one of the heirs, but that the court in confirming the sale made an entry that the notes for the deferred payments should be held until further order, and that afterward, the administrator being a party and filing a certificate from the probate court, that $3,655 would be required for the payment of debts, it was ordered that the sheriff pay over the notes then in his hands not exceeding said sum. The answer further alleged that by some means J. H. Richter had obtained possession of the note, but that the court had ordered him to return it, which he refused, and that it was needed for the payment of the indebtedness of the estate. Upon demurrer to this answer judgment was rendered in favor of Holters.

AVERY, J.

It may be assumed that the note was indorsed by the payee. The answer of Holters does not say so in direct terms, but says that he is the holder and owner, which, as against the maker, has been held to be a sufficient averment of title. Genet v. Sayre, 12 Abb., 347; Holstein v. Rice, 15 How. Pr., 1; Mechanics Bank v. Straiton, 5 Abb. N. S., 11. It alleges transfer by the payee, and so differs from Tisen v. Hanford, 31 O. S., 193.

The indorsee of negotiable paper, for value, before due, takes it, discharged of original equities, but if the indorsement is by an agent, he will be bound to inquire as to the agent's authority. Edwards on Bills and Notes, 252. This requires, of course, knowledge of the fact of the agency, and in practical operation, will be somewhat affected by the principle, that words of addition to a name on negotiable paper, which may designate agency, or be descriptive of the person, will be taken as merely descriptive of the person. Collins v. Buckeye State Insurance Co., 17 O. S., 215, 224; Titus v. Kyle, 10 O. S., 445.

*This principle has been applied to a draft drawn upon a person as administrator, and accepted by him with the same word of addition; 418
Tassey v. Church, 4 W. & S., 346; to a promissory note signed by the maker as guardian; Forster v. Fuller, 6 Mass., 58; to a note payable to "J. S. Trustee of Sullivan Railroad," and indorsed "J. S. Trustee;"

Fiske v. Eldridge, 12 Gray, 474; to a note indorsed "L. R., Receiver;" Towne v. Rice, 122 Mass., 67.

In Powell v. Morrison, 35 Mo., 244, it was held, with some hesitation, that in a note payable to the order of "J. C., Sheriff of St. Louis county," and indorsed "J. C., Sheriff," the words were merely descriptive of the person of the payee and indorser, and did not charge the indorsee, for value, with notice of a trust. In Fletcher v. Schaumberg, 41 Mo., 501, there was a similar ruling upon a note to the order of "J. C., Sheriff," and indorsed "J. C., Sheriff." Both cases arose under sales in partition by the sheriff, the notes being given by the purchaser, and the statute making it the duty of the sheriff to collect and pay the notes over according to the order of the court.

Whether these last cases do not extend the principle too far, may be doubted. The reason sometimes given is that the addition of agent, trustee or treasurer, merely indicates that the signer has in his possession funds in a trust capacity, and therefore is willing to become personally bound on behalf of the trust. Sturdivant v. Hull, 59 Me., 172, 178. In other words the descriptive addition indicates the uses to which the money is to be put. Packard v. Nye, 2 Metc., 47, 51. But this would have little application to the case of a sheriff who is under no obligation or necessity to incur personal liability on account of trusts committed to him, and has no authority to divert trust funds for the purpose of indemnifying himself. Besides, the mere fact that he is a public officer, should, it seems, except the case 1 Parsons Notes and Bills, 98; 3 Dall., 384; 17 Mo., 486; 8 Cow., 191; 9 Mass., 490; 8 Allen, 463.

The question, however, is not essential. The answer of Holters alleged that the note had been transferred by the sheriff in partition proceedings. The statute governing such proceedings prescribes that the money and securities arising from a sale shall be distributed and paid by the sheriff under order of court. The funds are in his hands as trustee. Welsh v. Freeman, 21 O. S., 402; Preston v. Compton, 30 O. S., 299. Knowledge that the transfer was in partition proceedings charged the indorsee with notice of the character in which the paper was held by the sheriff, and imposed the duty of inquiring whether the court had made an order for the transfer. So far from any such order having been made, the distribution was withheld and ultimately *an order made 419
for transfer to the administrator. With this element of notice in the case, it is brought within even the Missouri cases. Ranney v. Brooks, 20 Mo., 105; Renshaw v. Wills, 38 Mo., 201.

Reversed.

C. W. Cowan, for Plaintiff in Error.

H. Tilden and A. Von Martels, Contra.

SUBSCRIPTIONS TO CHURCH PROPERTY.

[Coshocton Common Pleas Court, 1881.]

MILLER ET AL. v. MILLIGAN ET AL.

1. Where a deed is made to the trustees of a church to erect a church on the land described in such deed, edifice, and money was raised to build the house, by subscription, of persons who understood that the house would be free to all de-

nominations of Christians, such understanding will not interfere with the right of the church to exclude from the house all meetings of other churches or parties who subscribed.

2. The court will not reform the deed made by the grantor to trustees of a church, so as to declare them trustees for parties other than those named in the deed, unless it is apparent that fraud or mistake intervened affecting the parties to the conveyance.
3. The understanding of a public meeting will not control an act done by the trustees of a church in the management of property invested in them, when neither fraud nor mistake intervened in the obtaining of the title.

Saul Miller, George A. Turner and Abraham Funk file their petition against the defendants, in which they allege that they are the trustees of the German Baptist church, a religious body known as "The Coshocton Branch of the German Baptist church." That on the 3d day of April, 1878, Thomas Oglevie and his wife executed and delivered to them, as such trustees, a deed for sixty-one one-hundredths of an acre of land, for a consideration of one dollar; the same was to be held by them and their successors in office in trust for the said Baptist church, so long as the same should be occupied as a place of worship. *They say 420
they erected thereon a meeting house, in which to hold religious worship. That John C. Milligan, Wm. Mulford and Henry H. Milligan claim to be acting trustees of the Methodist Protestant church and have and claim a right to occupy said meeting house for meetings other than religious and not held under the direction of said Baptist church. That they and the said Thomas and Frank Oglevie, Thomas H. Scott and Howard Hook, and each of them, have wrongfully taken possession of said house and threaten to continue to do so, under some pretended right, to the annoyance of the plaintiffs in their rights, etc. They pray for a temporary injunction, and for a final hearing, when the same may be made perpetual.

The defendants file an answer, in the nature of a cross petition, in which they set forth the facts, which they claim entitle them to a joint use of the property, with the German Baptist church. They say that at and before the time of making the deed by Oglevie to the plaintiffs, there were in the vicinity members of the Methodist Protestant church, members of the Presbyterian church, and members of other churches, and persons who were not members of any church. That none of said various bodies were alone able to build a church, nor was the said German Baptist church. Whereupon, the whole community "made common cause of building a meeting house; the same to be a place for all Christian people of the neighborhood to meet and worship, none to be interdicted except Catholics." That in pursuace to this common design, many public meetings were held to consult and mature plans for its accomplishment; at which meetings, members of the German Baptist and Methodist Protestant churches, and others, who were not members of any church, were present and finally it was decided to raise funds and build the church on the grounds so conveyed by Oglevie to plaintiffs. Subscription papers were prepared and circulated to raise funds from all persons who were willing to aid in the enterprise. It was proposed, in the subscription papers, to build a Union church, to which the German Baptist church should hold the title and a preference in its use, except that the other Christian people should use it for meetings when it would not interfere with the use thereof by said German

421 *Baptist church. They aver, that it was upon such understanding that Oglevie executed, to plaintiffs, the deed, and that the defendants and many others signed and paid their subscriptions toward erecting the house. They say that in pursuance to such understanding they have taken possession of, and held meetings in, the house and that they still have the right to hold meetings therein. And they say that to deprive them of the right of holding their meetings therein would be to them a surprise; that the deed so made by Oglevie to the plaintiffs gives to them such right, or if it does not, they ask the court, on a final hearing, to correct said deed, by inserting therein a *habendum* clause, viz.: That the plaintiffs hold said premises and appurtenances to and for the use of said German Baptist church and the Methodist Protestant and other religious sects and denominations (Catholics excepted) in the community where located, with a preference only to said German Baptist church.

To the cross petition, the plaintiffs file a demurrer. That it does not state facts sufficient to constitute a defense to the action set forth in their petition. It is claimed in the cross petition—

1. That the funds raised to pay for the erection of the house were in part contributed by persons who understood that when the house should be built, that its use was to be common to all religious denominations represented by members in the community, excepting only the Catholics, and subject only to a preference to the German Baptist church; and that the title to the land was conveyed upon a like understanding of Oglevie.

2. That by the terms of the deed itself, this understanding is manifest and that the defendants are, therefore, invested with a common interest in the land and the building, and their right to have and hold meetings therein cannot be disputed by the plaintiffs, so long as they select such times and occasions as will not interfere with the religious services of the Baptist church.

3. They ask the court, if it shall be of opinion that their rights are not manifest in the deed, that it be so reformed as to carry into effect the understanding of the defendants, by declaring that the plaintiffs shall hold the premises in trust for the Baptist church, the Methodist Protestant church and the other religious sects and denominations in the community, excepting only the Catholics.

422 *A copy of the deed being attached to the cross petition, we will first consider the 2d proposition, viz.: Does it upon its face secure to the defendants the rights claimed by them? The deed bears date, April 3, 1878, and was executed by Thomas Oglevie and wife, who in consideration of one dollar therein named convey the premises therein described to Saul Miller, George A. Turner and Abraham Funk, as trustees of the German Baptist church to be erected thereon, which church should be known and designated as the Walhonding Union church; the same to be held by said trustees and their successors in office so long as said premises should be occupied as a place of religious worship for said church. The plaintiffs being designated as the "trustees of the German Baptist church to be erected on the premises so conveyed," the intention of the parties to the deed evidently was that the word church as therein used referred to the house; for it was something that the body or congregation expected and intended to erect upon the land. This is made more manifest when we take the declaration that

the erection when made should be known and designated by the name of "The Walhonding Union church." So the German Baptist church located upon the premises conveyed was to be known and designated as the Walhonding Union church, which name was for the purpose of distinguishing it from other church properties and congregations of the same religious body of which the plaintiffs were the trustees.

We think the deed contains no apt or proper words to justify the conclusion that the parties intended a union of persons of different religious beliefs.

If such had been the intention it would appear strange that the conveyance should be to the plaintiffs as trustees of the German Baptist church, when it would have been just as easy to have made them trustees of a union of religious bodies, organized and intending to have their place of worship upon the premises conveyed. Both grantors and grantees, by the deed, have agreed that the conveyance should be to the trustees of the German Baptist church; and that when their house should be erected upon the premises, and a religious body therein organized, it should be a German Baptist church, designated as the *"Walhonding Union German Baptist church." The designation 423
of the house is one thing, while the body of Christians, who assemble there to worship, is quite a different thing. This house and the isolated body of Christians to whom and for whom this conveyance was made, are to be known and designated as the "Walhonding Union church;" but the doctrines, tenets and beliefs of the religious body are to be sought for in the accredited policy and doctrines of the German Baptist church.

The first proposition made by the cross petition is, the understanding in the community and the mode by which funds were raised to erect the building, created either an express or resulting trust in the property, to all fragments of religious bodies (excepting Catholics) who lived in the community when the building was erected.

The principle is not new, that there must be two parties to a contract, both competent to contract and be contracted with. It is well established and understood that before a religious body can take the position of a contracting party they must organize, assume a name and choose from their number, trustees. When this is done the body stands in the law as one artificial person with the general rights and powers, and subject to the obligations and duties of a natural person, having power to exist, notwithstanding there be a complete change in its membership. When so organized by the legislature of Ohio, it is authorized and empowered to purchase, take, hold and convey real or personal property; to make contracts, execute deeds, employ agents, sue and be sued, and to be liable on its contracts and for its torts.

When Oglevie executed his deed to the plaintiffs, it is manifest that he labored under no impediment to make it, either as a gift or a sale, which latter it purports on its face to be. It is equally manifest, that the plaintiffs, at the time, were clothed with ample power to contract for and receive the title for the use of and in trust for the church of which they were the trustees. The terms of the contract imposed upon the Baptist church, that they would erect a house thereon for public worship; that they would use and occupy it for that purpose, and a failure to do either, forfeited the title, when it must return to *the grantor. Who at the 424
time of the making of this deed were present to represent the

Methodist Protestant church, or the fragments of other religious sects and those having predilections for other churches than the Baptist, and were clothed with power to take title to the body to which they belonged, and to impose upon such body any obligation, in harmony with the obligations imposed by the deed?

It is claimed that the Milligans and Mulford were at the time trustess of the Methodist Protestant church, but there is no averment that they were present, contracting jointly with the plaintiffs and Oglevie for an interest in the property in favor of the body which they claim to represent officially; nor is it claimed that they and the plaintiffs, officially, on behalf of the bodies which they represented, had any agreement or understanding by which they were to be jointly clothed with title or jointly bound, in any way, for the preservation of the title, by continuing the house to be a place of religious worship.

It is claimed that the fragments of religious bodies, though numerous, were weak, and no one able to erect a church edifice; that they called and held many public meetings, with a view to raise money and mature plans for building a house of worship; that members of all the various sects in the vicinity were present and participated in these counsels, including members of the Baptist church; that it was agreed at these meetings to raise money and erect the house, where all manner of sects (excluding only the Catholics) should be free to hold their meetings at any and all times, having regard only to not interfere with the times when the Baptists were using it for purposes of worship.

But if a religious body can only act through trustees or directors to bind the body, how could these township meetings, composed of every shade of sects, none of which were represented by a head able to bind the body he represented, be made effectual to bind the Baptist church?

There can be no doubt of the power of the trustees of any organized religious body to bind the body upon all contracts within the scope of its corporate powers or its necessities; but it is no less certain, that no one member, nor all the members of the body together, have power to create
425 any legal obligation *against the body. The acts of the body, to be legal and binding, must emanate from chosen trustees. When attempted to be done by the members, it is merely an individual act, binding, if at all, only upon the member acting in his individual capacity.

The demurrer admits that the various meetings were held as a means of planning and completing the erection of this house; that large contributions were made by members of other churches, all of which were with an understanding that when built its use would be free to them for religious meetings.

These statements speak well for the Christian sentiment and the liberality of the parties who participated therein; but as a whole they fall far short of securing to them an interest in the property, which they consented should be invested in the trustees of the Baptist church. For this act, they had a party competent to receive the title and competent to contract for and on behalf of the body which they were chosen to represent; while their understanding of their right to use it was powerless as against the church and also as against the individuals who made the promises. The trustees of a township may make an agreement or contract that will bind every citizen thereof when made within the purview of the law; but all the citizens of the township, in a meeting assembled, could not create a like obligation; and the reason, is, that the trustees make the obliga-

tion in pursuance to law, while the meeting of citizens would be an attempt to make it contrary to law; and the result would be that the act of the one is valid and that of the other is void. So the acts of the trustees of the Baptist church being sanctioned in the law would bind, while the various meetings spoken of in the cross petition, however meritorious and commendable, failed to impose any legal or binding obligation upon the Baptist church. When the deed was made Oglevie and the trustees of the Baptist church were present, the one competent to convey and the other to receive the title, which must remain the controlling act of the parties, unless fraud or mistake intervened to the injury of one or both of the contracting parties. Their understanding is all that was material to make their act as effectual to bind them as the obligation of the law; and it is not within the power of outsiders to say "we expected something which we did not get."

*If these terms are not consonant with their understanding when they made their subscription, it would have furnished a defense against its collection, but having paid it when the conveyance secured to them no rights in the property, they are left as are all persons who aid any enterprise by subscription. Their reward is in having contributed to a worthy public enterprise. 426

The third proposition in the cross petition is, that if the deed of Oglevie does not secure to the defendants the rights by them claimed, the court shall so reform the deed as to make the plaintiffs hold the title in trust, not only for the Baptist church, but also for the Methodist Protestant church and all other religious sects and denominations in said community excepting only Catholics.

It is not to be questioned but that a court, exercising equity jurisdiction, may conform written instruments to the original intention of the parties thereto; but such a power is not to be exercised by the court, until it is made manifest that the instrument, by reason of fraud or the mutual mistake of the parties, is not the instrument which the parties intended it to be when executed. It is not averred in the cross petition that the deed is not the exact transcript of the minds of Oglevie and the plaintiffs, at the time it was executed.

It is not claimed by Oglevie that either fraud or mistake intervened to his prejudice in making the conveyance. He asserts no distinct right that he was to have, and which he supposed was secured to him in the deed that is not there. It is true, he and the other defendants aver that it was understood among the persons who attended the meetings, called to encourage the people generally to contribute to the erection of the house, that all religious persons and sects should have free use and access to the house for their meetings. But they failed to say that the plaintiffs by any authority from the society, whose interest was by law confided to their care, made any agreement with the defendants whereby they were to have any interest in the church property. The defense has failed to present anyone, on behalf of the defendants or the various sects of the community, who was clothed with power on their behalf to contract for an interest in the church or its use. They having no power *to make a contract for any religious society, this is *ultra vires*, and it would appear to be in conflict with every principle of the law of trusts to permit them to have a trust declared in their favor, which must perish with them, as in the law they could furnish no successors. Oglevie was competent to dispose of the land and he had a right to im- 427

pose upon it such terms and conditions as would not contravene a sound public policy. This he did in his deed by requiring the plaintiffs to pay him the sum of one dollar; that they should erect thereon a church edifice, and would continue to use it as a place of public worship, for the church represented by the plaintiffs. These are the terms and conditions on which he agreed to and did part with his title to the plaintiffs; and by the defense he makes no complaint for himself, that he was either the victim of fraud or mistake, but he feels somewhat disappointed that the other defendants and others who have an interest in religious matters, are not permitted to enjoy a common use in the house, which he omitted to exact at the time of making the conveyance.

In looking at the whole defense made in the answer we think that as a cross petition, asking affirmative relief, it fails to present a case calling for the aid of the court, and the demurrer is, therefore, sustained.

G. H. Barger and Campbell & Voorhes, for Plaintiff.

Nicholas & James, for Defendants.

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479 *STREET ASSESSMENTS.

[Hamilton District Court, 1881.]

Avery, Cox and Johnston, JJ.

JOSEPHINE LAIRD ET AL v. CITY OF CINCINNATI.

1. The term "owner," as used in section 543 of the Municipal Code, as amended March, 1875, signifies a person who is the owner of a freehold estate in the property to be assessed. A lessee, under a perpetual lease with privilege of purchase, is an owner within the meaning of said section.
2. Where to secure a loan of money, the owner conveys the fee to the lender, and receives back a lease, with privilege of purchase from him, such security is in equity, a mortgage, and the borrower is the owner within the meaning of said section 543, and the proper person to sign a petition for street improvements provided for therein.
3. The guardian of the estate of an imbecile is the proper person to sign a petition for street improvements, provided for in said section where the property of his ward is to be effected thereby.
4. Where the owners of three-fourths of the front-feet of the abutting property petition for the improvement of a street in front thereof, as provided for in said section, the corporation may assess and enforce payment to an amount equal to the value of the property, after the improvement has been made. Any excess, however, must be paid by the corporation out of the general fund. Its payment cannot be enforced against the owner.

ERROR to the Superior Court of Cincinnati.

The action was brought to enjoin the collection of an assessment levied for the improvement of Lincoln avenue. It is alleged in the peti-
480 tion that in 1874, the city established a grade *for said avenue, and in 1876 entered into a contract for the improvement of the same, in accordance with the grade originally established, as they supposed, but in fact according to another grade, as they alleged; that the assessment was framed upon the five-year plan, one-fifth of the assessment being payable annually. They further alleged that the owners representing three-fourths of the number of feet front, did not petition for the im-

provement; that the assessment embraced certain items that ought not to have been included therein, namely, claims for services of the city civil engineer and of the superintendent of the work, and other items. The first annual installment having been placed upon the tax duplicate for collection, they asked that an injunction be granted restraining the collection of the same on the ground that it was illegal. A temporary restraining order was granted in the case, and, upon hearing, the court below made a separate finding of the facts and of the law. The court below found that the assessment was irregular to the extent that it included the services of the superintendent for a period beyond the time necessary for the completion of the work, and the services of the civil engineer and the difference between cement and lime in the stone work, and directed that those items be eliminated. A correct assessment having been made out, it was to be placed upon the tax duplicate and collected. Error is alleged to these proceedings.

JOHNSTON, J.

It was claimed that the city had not acquired jurisdiction to make the improvement in question for the reason that the owners representing three-fourths of the front feet of the property had not petitioned therefor in writing. It was claimed that some of the signers of the petition were not in fact the owners of the property of which they represented themselves to be the owners. The improvement was petitioned for, and done under the proviso contained in section 543 of the Municipal Code as amended March 20, 1875, to-wit: "Provided, further, that in any municipal corporation, where three-fourths in interest represented by the feet front of the owners of property abutting upon any street or highway of any description, petition for any improvement of such street or highway, none of the foregoing limitations of this section shall be operative or binding, but the assessment for such improvement shall be collected in equal annual installments," etc. As to William B. Dodds, who signed for three hundred feet, it appeared that at the time he signed the petition, he had borrowed money thereon of Ozro J. Dodds, trustee of H. C. Bates, for the security of which William B. Dodds had conveyed the property to Ozro J. Dodds as trustee, *and he had given back a lease to William B. Dodds for fifteen 481
years with the privilege of purchase. That security was nothing more than a mortgage. 36 O. S., Patrick v. Littell *et al.* The equitable title was in William B. Dodds, and, therefore, he had a right to sign the petition. As to Dodds & Rhodes, who had signed for 562½ feet, they were the owners of a perpetual lease of that property, and had a right to sign for the improvement. They had a right of purchase by the terms of the lease. In 11 Ohio, 355, Long v. Melindy *et al.*, it was held that a permanent leasehold estate is not a chattel real, but is realty, subject to all the laws and rules which attach to lands; and quite recently, in the case of Davis v. City of Cincinnati to be reported in 36 O. S., the supreme court in construing the word "owner" under the provisions of the Municipal Code relating to a personal liability for an assessment, held, that such owner must be one who has a freehold estate in the premises.

"The term owner, does not, as a general rule, include the holders of chattels real. The assessment is on land, and it is an owner of land who is liable. We are clear that the term "owner" does not include one having no other interest than as lessee for a term of ten years." As to David

Snyder who signed for fifty feet, it was claimed that he, having conveyed away the property after he had signed the petition, and before council had taken action on the petition, his signature was not good. The jurisdiction of the city in this case was acquired upon the presentation of the petition to the board of public works when the fee was still in Snyder, and it aided him in inducing the public authorities to take action in the premises, and the fact that he afterward conveyed the property did not take away the jurisdiction of the city theretofore acquired. The signature of David M. Snyder as guardian of C. M. Snyder was also a valid signature. His ward was an imbecile, but like the guardian of an infant, it was his duty to list the property of his ward, pay the taxes for the ward, collect the rents and manage the ward's estate, and, hence, it was his legal duty and right when it appeared for the best interest of his ward to sign for such an improvement or resist it if illegal. 22 O. S., 561, Campbell v. Park. This gave more than the required three-fourths of the property, and it was immaterial to consider other objections of that nature.

In 1876, at the time this improvement was petitioned for, the legislature had amended section 543 of the statute, giving the right to the city to collect assessments to the full value of the lot after the improvement is made, as shown by the provision quoted above. Therefore, the objection that the assessment was more than twenty-five per cent. of the
482 lot, after improvement *was made, fell to the ground. Neither was the act unconstitutional as being in violation of section 19 of the Bill of Rights, which prohibits the taking of a man's property for public uses without compensation, for the reason that the owner was not deprived of the possession of his property, and the law presumes that he receives compensation for the payment of the assessment, however heavy it may be, in the increase of the value of the property by reason of the improvement. The power being vested in the legislature to restrict municipal corporations in the abuse of their right to levy assessments, and the legislature not having exercised that power in cases where the owners of three-fourths of the feet front have petitioned for the improvement, the right of the city to levy and collect assessments in such cases is unlimited, and it may go to the full extent of the value of the property after the improvement has been made, as was done in this case. But the city could not, if the property did not yield enough to pay for the assessment, go over upon the property owners, and collect the balance in the way of a personal judgment. An assessment for a street improvement is local in its character and applies to property immediately benefited by it. If the owner is to be held personally liable for the whole assessment, in any event it is not only a local assessment, but also a general one as against the owner, and his other property is to be taken to pay for an improvement that is of no greater benefit to it than to the property of all other members of the community who pay no part of it. We cannot approve the interpretation of section 543, claimed by counsel for defendant in error. 52 Mo., 525, Neenan v. Smith.

Judgment affirmed.

C. W. Cowan and Jacob H. Clemmer, for Plaintiff.

City Solicitors, for Defendant.

BILL OF EXCEPTIONS.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

† JACOB BROCK v. AUGUST BECKER.

A bill of exceptions taken at a term of court subsequent to the trial, or thirty days' thereafter, will not avail to bring on the record errors of the court at the trial in its rejection of testimony. It must be saved by a bill of exceptions taken at the trial term, or thirty days thereafter.

ERROR to the Superior Court of Cincinnati.

In the superior court Becker brought suit for the amount due upon a promissory note for $5,000, being part consideration for *the conveyance of Becker's confectionery, on Mound and Barr streets, to 483
the plaintiff in error in this case. Brock set up as a partial defense to the note that when the conveyance was being negotiated Becker agreed that he would not go into the same business again in Cincinnati, and that he would turn over all his business to the plaintiff, and the plaintiff averred that this agreement had been broken by reason of Becker having gone into the business on Fourth and Broadway.

During the progress of the case it was sought to introduce such a proposition referred to above, said to have been made by the defendant. In the contract of sale nothing was said about this proposition. The court below excluded testimony tending to prove this proposition from the jury, and the defendant having offered the note in evidence, the jury were directed to return a verdict in his favor, which was done. This was on the 26th of November, 1879. The case was continued for the hearing of a motion for a new trial until the 2d of January, 1880, when the motion was overruled and time given to the plaintiff to prepare a bill of exceptions. Exceptions were taken at that time to the overruling of the motion as well as the charge of the court to the jury.

Cox, J.

Cox, J., announced the opinion of this court.

A bill of exceptions taken at a term of court subsequent to the trial, or thirty days thereafter, will not avail to bring on the record errors of the court at the trial in its rejection of testimony. It must be saved by a bill of exceptions taken at the trial term or thirty days thereafter. If all the testimony in the case was before this court and the bill of exceptions only taken at the subsequent term on the overruling of a motion for a new trial, the court would, nevertheless, examine into the whole testimony to ascertain whether the verdict was sustained by the law and the evidence. But the court ruled out the testimony at the previous term. No bill of exceptions was then taken in regard to such ruling. The error occurring at the trial was in the ruling out of this testimony, and therefore the court could not consider the testimony that was ruled out, because no bill of exceptions had been taken. The court must take such of this evidence, if at all, as the court below admitted, (and that was simply the production of the note, which made a clear case for the plaintiff below to recover),

† See Brock v. Becher, 6 Rec. 380 (Vol. 1 reprint, 519).

and the charge of the court upon that point. For these reasons the judgment of the court below must be sustained.

This ruling also governed the case between the same parties in which suit was instituted on a mortgage given to secure the payment of this note.

Jordan & Gibbons, for Plaintiff in Error.

Wm. Disney, Contra.

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484 *EJECTMENT.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

MADDUX, HOBART & CO. v. WEST AND BURSON.

In ejectment, the plaintiff, if he recover, must do so on the strength of his own title. It is for him to show his title up to the boundaries which he claims, and and he can recover no further than he proves his line to run.

ERROR to the Common Pleas Court.

Cox, J.

In the court below the defendants in error, West *et al.*, the plaintiffs below, brought their action to recover possession of a tract of land in Millcreek bottom, upon which now stand the cattle pens used by Maddux, Hobart & Co., and which they describe as a tract in the shape of a rectangle, two hundred and twenty feet east and west and one hundred and thirty feet north and south. The southern boundary plaintiffs allege to be the center line of the present channel of Millcreek. The defendants below deny that plaintiffs had any legal estate in the premises or any right to possession. They deny that by the metes and bounds given in the petition the southern boundary of plaintiffs' property is the present channel of Millcreek. No question is raised as to the respective titles of the parties, but only a question of boundary. It is admitted that Jacob and George Burnet were, until 1803, seized in fee of both tracts as tenants in common; that a partition was had in 1803, Jacob Burnet taking a portion north of Millcreek and the heirs of George Burnet a portion south of Millcreek, their common boundary being "the middle of the bed of said creek and the meanders thereof;" that the defendants in error, West *et al.*, derive title from Jacob Burnet and the plaintiffs in error under the heirs of George Burnet, by conveyances respectively calling for the center of Millcreek as the boundary, made about 1830 to 1846; that till 1846 Millcreek was the legal boundary between the parties; and that the lands sued for are north of the present channel of Millcreek. The defendants in error claim that Millcreek is still the boundary; the plaintiffs in error claim that it is not—that it has lost that character by sudden and violent changes of its course.

On the trial evidence was given by defendants tending to show that sudden changes had taken place in the channel of Millcreek since 1846 from freshets. Plaintiffs, in rebuttal, gave testimony tending to show that the changes which had taken place were insensible, and from attrition in high water on one bank, and gradual accretion on the other, and

from undermining in low water, and that the location of the channel before 1865 cannot *now be ascertained or marked by any outward or visible sign now existing upon the surface of the ground. 485

The court charged the jury that, if they found the channel had not changed, then their verdict must be for the plaintiffs; that, if they found it had changed, then they must consider how it had changed; that if by insensible changes by deposit and attrition, then the boundary line would still be the channel, but if by sudden changes sensibly and constantly made, or if the channel bed was entirely forsaken for another, then the ownership remains according to the former bounds, and the channel ceases to be the boundary. The court further charged that *prima facie*, the Millcreek channel is the present boundary, and that the verdict must be for the plaintiffs unless the defendants satisfied the jury by a preponderance of evidence that the channel had changed, either by making a new channel or by sudden changes, and that the boundary line, after such changes, could be made and located. In response to a question by plaintiffs' counsel, what would be law if the boundary could not be ascertained and marked, the court charged "then, if there is not such a change in the channel, the boundary follows the course of the creek."

To the latter charge counsel for defendant excepted, and in the latter charge lies the whole point of the case.

In ejectment, the plaintiff, if he recover, must do so on the strength of his own title. It is for him to show his title up to the boundaries which he claims, and he can recover no further than he proves his line to run. If that be a stream, as Millcreek, than he has made his case by proving that fact by a preponderance of evidence. But, when the defendant proves that the creek has changed, not by a slow and gradual accretion or attrition, but by a sudden and sensible change it has forsaken its channel, then the creek as it exists ceases to be the boundary, and the burden of proof is shifted to the plaintiffs to prove where the old bed was. It is for him to find the old landmark.

But the charge of the court was in effect, that after such a sudden sensible change, the stream would still be the boundary unless it could be ascertained from the evidence where the old boundary was, that is, the defendants must not only show the change, but also where the old bed of the stream was, and in the absence of any such showing, the stream as at present, marks the boundary.

This charge we think was erroneous and calculated to mislead the jury. The judgment will therefore be reversed.

Sage & Hinkle, for Plaintiffs.

Wulsin & Worthington, for Defendants.

486 *BUILDING ASSOCIATIONS—MORTGAGES.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

† CENTRAL BUILDING ASSOCIATION NO. 2 v. O'CONNOR ET AL.

Distribution under a building association mortgage.

APPEAL from a decree for distribution on confirmation of sale of property under a mortgage held by the association.

O'Connor was the owner of three shares in the association of $500 each, and bid them off at a premium of $316.50. The association not thinking his security worth the amount of the shares, gave him the amount of money less the premium at which he bid it off, and back dues which he was required to pay, not having joined the association at its inception. He took another share at a premium. On foreclosure the association claimed that the amount which he really owed it was $1,866. He claimed that he only owed $900, that being the amount advanced by the association to him.

Cox, J.

Under the authority of the 25th Ohio State, he held that the association could only recover interest upon the actual amount advanced to O'Connor. The money actually owed by O'Connor to the association instead of being $1,866, was only $1,500, which amount consisted of the actual money received by him from the association, the premium he agreed to pay and the back dues which, by the constitution of the association, he was bound to pay. When the decree was rendered in the court below it was rendered for dues and fines and interest, and the interest was taken upon the claim of the association that he owed them $1,866. The court could not now interfere with that judgment because this was not an appeal from the original judgment. It was simply an appeal from the distribution upon the confirmation of the sale; but in distributing the amount an order would be made as follows: The amount found by the decree of sale must remain, and to this amount added the balance of the premium on the one share, if any remaining unpaid, together with the dues and interest on the entire four shares, down to the date of confirmation, without fine; but, in computing the interest on the three shares the premium advanced on such shares, and taken out at the time, must be deducted, and the interest only calculated on the sum actually received at the rate of sixty cents per week on $500 per share. In addition, the dues and interest at the same rate must be calculated for the estimated future duration of the association on such sum found as at six per cent. interest, for the mean or average time between the first of said
487 *future installments and the last should produce the amount. The rule laid down in the case of Windisch *et al.* v. The Mutual Building Association, decided in this court recently, and reported in the Law Bulletin, will be followed. The estimated future duration will be upon the basis of 399 weeks for the entire life of the association.

Decree accordingly.

Warren Higley, for Plaintiff.

General Cist and J. H. Morton, Contra.

† See also 8 Rec., 99. (Vol. 2, reprint, 781.)

COLLATERAL SECURITY.

[Hamilton District Court, 1881.]

Avery, Cox and Johnston, JJ.

LUCY M. BOAKE v. JOHN BONTE & SONS.

Promissory notes given as collateral to secure payment of a judgment must be held till due and then collected. But if sold to a *bona fide* purchaser before due, their full value must be credited on the judgment.

ERROR to the Court of Common Pleas.

This is a petition in error filed to reverse a judgment of the court of common pleas in a case wherein five actions were consolidated. The action thus consolidated was to recover on nine promissory notes. It appeared that Robert Boake, the husband of the plaintiff, held a judgment for $2,474 against Hinman as principal and A. P. C. Bonte as security; that to secure the payment of that judgment, Bonte & Sons gave their nine promissory notes as collaterals, indorsed by A. P. C. Bonte. At the time of the execution of these notes as collateral security a memorandum was given by Robert Boake that in case the notes should not be paid as they fell due execution was to issue upon the judgment. The notes were not paid as they fell due, but no execution was issued upon the judgment. Boake assigned the judgment to his wife in consideration of money and property he had received from her out of her separate estate, and then shortly afterward made an assignment under the insolvent act.

Cox, J.

Judge Cox announced the opinion of this court, holding that the true interpretation of the memorandum given by Boake was that it was simply an accommodation to Bonte. It suspended the right of Boake to issue execution upon the judgment until the *notes became due, but did not compel him to do it upon the failure to pay the notes. He had a right to do it or not as he saw proper. It is true that the plaintiff took the notes charged with notice of the relation between Bonte & Sons and her husband. There was no actual manual transfer of the notes to her in May, 1886. They were held by him as her agent. The knowledge of the husband as agent of the wife was the knowledge of the wife, but it was simply that the notes were collateral, and subject to all the laws of collaterals in the hands of creditors. The notice which he had was not inconsistent with the ownership in her of these notes, subject to the rules of the law governing collateral paper. A party who holds negotiable promissory notes for payment of a principal debt, cannot sell them before due, but must hold them as trustee for the maker, until due, and then collect them and apply the proceeds to the payment of the debt. But as Boake in violation of his duty, sold the collaterals, he is to be charged with their full value. That being the rule of law, and inasmuch as the notes in this case covered the face of the judgment, it was a payment of the judgment, and his assignees had no interest at all in the judgment, they having acquired merely such rights as Boake had in it before the assignment, and he having before that time assigned the notes to his

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wife which satisfied the judgment. These principles are sustained by the following authorities: 16 New York, 395–6. The judgment of the court was, therefore, reversed.

Kary & Morton and General Ward, for Plaintiff.

Paxton & Warrington, Contra.

PROBATE COURT.

[Hamilton District Court, 1881.]

Avery, Cox and Johnston, JJ.

†SMITH v. HARKER.

The probate court alone has original jurisdiction to order the payment of a legacy.

ERROR to the Superior Court of Cincinnati.

In the superior court an action was brought by the defendant in error against
489 the plaintiff in error, to recover for services rendered *under the thirteenth item of the will of John Bates, which provided that he desired Harker, who had attended to his business during his lifetime, to take charge of and keep the accounts of the estate and assist in its settlement, and for such services allowed him $1,500 a year. The plaintiff alleged that he acted for some time in the capacity designated by the will, and was finally prevented from performing further services under it by the executor refusing to permit him to have access to the office, books or safe. A supplemental petition was filed, and to the petition there was a demurrer, which was overruled by the court. An answer was then filed by the defendant setting up that the incompetency of Harker to attend to his duties, his neglect of them and his appropriation of the money of the estate, and that it became necessary for the preservation of the estate that he should cease to act in that capacity. The case was tried by a jury, and a great many exceptions taken during the progress of the case, which resulted in a verdict of some $7,000 for the plaintiff. After the verdict the defendant moved to have judgment entered in his favor notwithstanding the verdict, which was overruled. A motion for a new trial was also overruled, and judgment entered upon the verdict. This petition in error is brought to reverse that judgment.

COX, J.

There are eleven distinct grounds of error. The court below charged that the devise in the will was in the nature of a legacy to Harker, in which this court concur.

The eleventh ground was that the court erred in taking jurisdiction of the case. This court had occasion during the last term to examine this question and held that a legacy was to be worked out through the order in the probate court, and that no other court had original jurisdiction of it. We still adhere to that opinion.

Judgment reversed.

Jordan, Jordan & Williams, for Plaintiff in Error.

Hoadly, Johnston & Coulston, and Cowan, for Defendant in Error.

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†For opinion of Superior Court see 6 Rec. 564. The above judgment of the district court was affirmed by the Supreme Court. See opinion 41 O. S. 236.

*TAXES AND TAXATION. 543

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

STATE OF OHIO, EX REL. MARKS v. W. S. CAPPELLER, AUDITOR.

A firm of clothing manufacturers having returned for taxation during a series of years upon blanks furnished by the county auditor, and in accordance with printed instructions on the back of such blanks, the average yearly value of material manufactured into clothing and not held over the year, in addition to the value manufactured, and having paid taxes on the entire amount applied to the county auditor to certify the overpayment to the board of county commissioners to the end that they might order him to draw his warrant for refunding the assessment under section 1038, Revised Statutes. Upon refusal of the auditor, mandamus was prayed. *Held*, That the error in including in the returns more than the law required was their own error; or, even if to be ascribed to the auditor it was not clerical error, or within the provision for correction of errors by the auditor, "when property exempt from taxation has been charged with tax."

AVERY, J.

The relators were manufacturers of clothing in the city of Cincinnati, in the years 1875–6–7–8, and allege that they made and returned for taxation during those years, upon blanks left with them by the ward assessor, and in accordance with the instructions on such blanks, first, the average value of material manufactured into clothing during the year; second, in addition to that, the average value unmanufactured; whereas, they allege they were required by law only to return the latter. In this way they *allege that they returned and paid taxes upon an aggregate of $60,420, when the true amount should have been only 544
$26,700; and they pray a mandamus against the auditor, that he certify the amount of overpayment, to the board of county commissioners, to the end that they may order him to draw a warrant upon the treasury in accordance with the provision of section 1038, of the Revised Statutes.

The auditor demurs.

Section 1038 is as follows: "The auditor shall from time to time correct all errors which he discovers in the tax-list and duplicate, either in the name of the person charged with taxes or assessments, the description of lands or other property, or when property exempt from taxation has been charged with tax, or in the amount of such taxes or assessments; and if at any time the auditor discovers that any erroneous taxes or assessments have been charged and collected in previous years, he shall call the attention of the county commissioners thereto, at any regular or special session of the board, and if the commissioners find that taxes or assessments have been so erroneously charged and collected, they shall order the auditor to draw his warrant on the county treasurer, in favor of the person or persons paying the same for the full amount of the taxes or assessments so erroneously charged and collected.

In State *ex rel.* Sisters of Notre Dame v. Commissioners of Montgomery County, 31 O. S., 271, similar provisions of the law as existing then, were construed, and it was held that the erroneous charges to be refunded were such as the auditor would have been required to correct

himself, if discovered before the payment of taxes; being clerical errors merely, and not extending to assessments for taxation of property exempt from tax.

The present statute in enumerating the errors which the auditor is required to correct, adds the words, "or when property exempt from taxation has been charged with tax." Presumably this was to meet a case like that of State *ex rel.* v. Commissioners of Montgomery County; but in other respects the law remains now as then.

The errors complained of by the relators were their own errors. The law prescribed a rule for the return of property for taxation, and they chose to be governed by the rule prescribed by the auditor. This was a voluntary choice. The cases cited of payments under duress have no application. It is permitted sometimes to yield to an illegal demand to save property or person from seizure, or to secure the performance of a public duty, to which one is entitled, and which it would be taking advantage of his situation to refuse. But nothing of this kind is involved in the return of property for taxation.

545 *The most that could be done, if there was refusal to make a return, would be for the assessor to make it himself. The power of the assessor to make it illegally would not be such an advantage of situations, as that if made according to his demands, it would cease to be a voluntary act. The law provides ample means and time before the collection of taxes for protection against any illegal demands of the assessor.

The duty of the auditor is to furnish the necessary blanks to the assessors for use in discharge of their duties, and to instruct them in their duties, but the construction of the tax laws has not been committed by the legislature to him. If he determines the meaning for himself or subordinates, it is upon his own responsibility. If others yield to the construction he adopts, and the proper construction turn out differently, the error is theirs. The relators allege they were not familiar with the law; they may not have been, but it was still their error in making a return that was not required of them.

If, however, their error in making the returns is to be ascribed to the auditor and called his error, it was not clerical error. The change which has been made in the statute by including the case of property exempt from taxation that has been charged with taxes, however it affects the result of the decision in State *ex rel.* v. Commissioners of Montgomery County, does not change the class of errors which the auditor may correct, but constitutes an exception to the class. The present case does not fall within the exception. "Property exempt from taxation" is property within the meaning of the tax law; that is property which is the subject of taxation, but which, when held for particular purposes, or in particular ownership, is made exempt.

That this is the natural construction appears from what is decided in State *ex rel.* v. Commissioners of Montgomery County, to provide against which the change in the statute seems to have been made. It appears, also, from the very term itself, "exempt from taxation," as referring to the statutes, which declare that property shall be exempt.

In the present case the property was not exempt from taxation, but was not property at all, that is to say not taxable property. The material on hand, or the average, was taxable; the material which had gone into manufacture was not taxable unless the product was held over a year. This has been ruled upon in Sebastian v. The Ohio Candle

Works, 27 O. S., 459. The policy or impolicy of the average system of arriving at the amount and value of any particular class of property for purposes of taxation, the supreme court do not undertake to discuss, but simply declare the law.

The result is that property of this character is no more to be called property exempt from taxation than real estate not within *the state, 546
and therefore not a subject of taxation or personal property such as stocks in incorporated companies, which in certain cases are not taxable, because the company itself is already taxed. Therefore, even if the error of which relators complain was an error of the auditor, it was not an error, which, under this section of the statute he was authorized to correct. It was an error, it is true, but not clerical error; not an error in respect to property by law exempt from taxation; but an error in taxing property not taxable at all. In that respect it was not a clerical error, but a fundamental one; that is to say error against the law.

The demurrer is sustained, and petition dismissed.

Chas. S. Spritz, for Relator.

Asa W. Waters, for Auditor.

SALES.

[Hamilton District Court, 1880.]

Avery, Cox and Longworth, JJ.

ANTONIUS ZEVERINK v. H. L. LAPPERT ET AL.

Where one purchases stock in a corporation from its foreman who knows of the insolvency of the corporation, but who assures the purchaser that he will become its foreman and make his fortune, such sale is fraudulent and will be set aside.

LONGWORTH, J.

The plaintiff asked to have a sale set aside, and for judgment upon the note which he had given at the time of the purchase. He alleges that he purchased the defendant's share of stock in the Western Furniture Company, which had a capital stock of $20,000, divided into ten shares of $2,000 each; the plaintiff had been a stockholder, owning one share, but sold out before this transaction. The company had been doing a prosperous business, but owing partly to the erection of extravagant buildings, had ceased to be prosperous, and was forced to make an assignment. The plaintiff states that the defendant told him that if he would purchase his stock he would become foreman and make his fortune. The value of the share of stock was seven hundred dollars, but in May, 1878, it was worth considerable less than nothing. The evidence shows that these facts were proven by Lappert, who had been foreman and knew all the affairs of the corporation, and he stated, before and after the sale, that the company had to make the assignment; that he regarded it as a swindle and was anxious to get out of it. The court held that the sale was fraudulent on the part of Lappert and should be set aside and allowed a decree for five hundred dollars and interest on the amount due on the note held by the plaintiff.

Hildebrant & Hildebrant, for Plaintiff.

S. N. Maxwell and Sayler & Sayler, Contra.

547 *MUNICIPAL CORPORATIONS.

[Hamilton District Court, 1881.]

Avery, Cox and Longworth, JJ.

†PHILIP KUMLER, CITY SOLICITOR, v. THE CITY OF CINCINNATI ET AL.

The powers of a city sustained to grant the right to lay pipes through the streets to supply steam for heating and to supply power to machinery.

APPEAL from Common Pleas.

In that court a petition was filed to enjoin the city from completing a contract made with Silsbee under an ordinance passed January 9, 1880, authorizing Silsbee to lay pipes through the streets of the city for conducting steam for heating and motive purposes.

Cox, J.

The ordinance provided that Silsbee should lay these pipes at his own expense, guarantee the city against damages from tearing up the streets, and give a bond in $50,000 to protect the city; supply heated steam to steam fire engines and to public buildings at a fixed price, and a great many other provisions calculated to guard this; and at the end of twenty-five years he shall convey to the city the property and surrender the franchise upon terms provided in the ordinance. In the answer it was claimed that this project, known as the Holly system of heating, was designed not only to furnish steam, but distilled water to the inhabitants, by reason of the condensation of steam in passing long distances through the pipes; that it will furnish steam to public buildings; that it will be a safegaurd against fire by insuring a smaller number of engines throughout the city; that it will enable the city to cleanse the streets from snow and to cleanse the sewers and do an immense amount of public benefit by preventing nuisances in the city and protecting health and regulating the business of the city, so far as manufacturing is concerned, at less expense and great convenience, and benefit to the citizens generally. It was claimed by the city solicitor that the granting of this ordinance and making the contract was beyond the power of the city council; that it conferred a franchise upon Silsbee, for the exercise of which they had no legitimate authority to grant, and that, therefore, the ordinance was void. A supplemental petition was also filed, setting forth that the legislature, on the 17th of March last, passed an act, approving the ordinance of the city council, but claimed that this act
548 was retroactive, conferring a new power upon the *council which it had not had before, and, therefore, was unconstitutional and void.

The first question to be considered was whether the city council had authority to pass an ordinance of this kind. The constitution grants to the legislature power to confer upon municipal corporations such authority as is necessary for the government of a municipality and for the convenience and benefit of the people within the municipality. In accordance with that provision of the constitution the legislature has, from time to time, created municipalities of different grades, investing them with different powers. Among others it has created a city of the first class, as Cincinnati is, and it has invested this city with a great many powers, some of which are enumerated specifically and others of which come under the general head. Among others, the city is given general control of the streets, lanes and alleys. That control is only restricted by the provision that they are bound to keep them open, and in repair and free from all nuisance, it is a general power to control the streets and alleys of the city in every way for the benefit of the people, so that the public easement in traveling over them is not interfered with. And this power is thus defined in the State *ex rel.* against the Cincinnati Gaslight and Coke Company, 18th O. S., 292. The question was really whether the city could grant the exclusive right, and the supreme court decided that the city could grant the right to lay the pipes and use the streets for the benefit of the inhabi-

†This case was affirmed by the Supreme Court. See opinion 38 O. S., 445.

tants for general purposes, but they could not grant the exclusive right to any individual.

It is not claimed in this case that this was an exclusive right, nor does the ordinance pretend to give such a right, nor would it be constitutional if it did.

The statute, in addition to the powers specifically granted, provides for a great many general powers, which are enumerated, within which the city may well act in giving this grant to the company—it might come within a number of them—to guard against injuries by fire; and in this respect the city council, having the legislative control over establishments which would be likely to cause extensive fires in the city, would have the right of providing against these injuries, and we can conceive no better exercise of the right than to regulate the number and places of steams engines to be used in buildings in the city. Suppose the city, in its legislative capacity, should say that an engine should not be used in any public building where injury from explosion or dangers of fire would be likely to happen. They may provide that an engine should be used at a certain distance fron that building, placed in a fire-proof or bomb-proof building, and if they deemed it proper to do so, they *might provide some way that the power from that engine should be conveyed 549
through the streets so as not to interfere with the public easement, to the buildings in which the power was to be used, as the manufacturer might desire, and thus might lessen the injury likely to result from fire by the extensive use of steam engines. They may provide that in populous parts of the city in order to lessen the smoke or danger of fire or explosion, these engines should be confined to certain parts of the city, and at the same time giving the power to the extent of laying pipes through the city to the engine of carrying the power to the place in which it was to be used. Again, the city has power to erect buildings for public schools and halls. It is necessary that these should be heated. The city may provide any reasonable method of heating them, either by steam or by fire. If they deem it necessary to provide for heating by steam, they may very properly say that the engines and boilers should not be located in the buildings, but in a place where there would be no danger of fire or explosion. They might put them off at a safe distance and lay through the streets these pipes thus heated. We think a legitimate object of this grant with reference to the fire department would be to enable the engines, instead of carrying fire with them to heat the water, to supply power by attaching the pipes to the engines at the place where used. Many other instances of this kind could be enumerated. Council has the power to build sewers under the streets, and, as one of the objects of this grant is to clean the sewers, this may be included in the power of the city council in making this grant. And, looking over all the facts as alleged in the petition and answer, it seems to us that the granting of this franchise was not an abuse of the power of council, but one legitmately within their control and power and necessary to carry out the general powers given them.

In regard to the act passed by the legislature approving the ordinance of council, it may be said that retroactive acts are not favored by the courts, and when they are clearly so, when they take away or impair vested rights acquired under existing laws, or create new obligations or new duties, or attach new disabilities in respect to transactions the consideration of which has already passed, they come within the meaning of retroactive acts which courts have declared unconstitutional. But we do not think this act comes within that class. It is an approval by the legislature of the act of council, an approval which was not required to make the act legal and constitutional. We are called upon to say that this act of the legislature is unconstitutional. Courts are always unwilling to declare an act unconstitutional unless it be clearly so in their opinion. We think the act was an approval given by the legislature of the ordinance *of council which approval they had the right 550
to make, which comes in no sense within the meaning of a retroactive and unconstitutional law.

Petition dismissed.

J. H. Perkins and D. H. Holmes, for Plaintiff.

Logan and Randell, Contra.

APPEALS.

[Hamilton District Court, 1881.]

Avery, Cox and Longworth, JJ.

HENRY DANBY v. ADMR. OF H. S. VAIL.

Where a suit is brought for a balance due on a settlement of partnership accounts and the parties by agreement referred the matter to a master to take a full account of all the partnership affairs, and the same was taken, and on a motion of defendant, the report was confirmed, from which plaintiff appealed. *Held*, on motion in district court by defendant to dismiss the appeal, that by the answer of defendant and the agreement to refer the whole partnership accounts to a master, the case was changed to one in equity and was appealable.

APPEAL from the Court of Common Pleas.

Cox, J.

The question to be determined in this court was upon a motion to dismiss the appeal, the defendant claiming that the case is one which was triable by jury, and, therefore, not a proper subject of appeal. In the court below the petition was filed by Danby, alleging an indebtedness of $2,111 from the defendant to the plaintiff, and asking judgment, that being the balance due, as alleged, from Vail & Danby to Henry Danby & Co. from a settlement and sale of partnership property. The defendant denied that Vail agreed to pay the debts of Baily & Danby; denied that Baily & Danby were indebted to Danby & Co. in any amount, and denied all the statements in the petition. He also filed a supplemental answer, in which he said that Charles Danby was a member of the firm of Danby & Co.; and was a necessary party to the determination of the issue. Charles Danby files his answer, and says he was not indebted to Danby & Co., that he sold his interest to H. S. Vail, who took all the assets and agreed to pay all the debts of the firm.

The case, as made, was a suit brought against the administrator of H. S. Vail for an amount due to Danby, as one of the *members
551 of the firm, upon a settlement of partnership, and a denial upon the part of Charles Danby of all the claims. He denied that he agreed to pay the debts of the firm, denied that there was a settlement, and denied that he owed the amount set forth. It was simply a case at law in which either party had a right to trial by jury. If the case had remained in that condition, and been tried by either court or jury, it would not have been the subject of an appeal. But after the pleadings had made an issue between the parties, the defendant had the case sent to a referee to state an account between the parties. The master reported that the plaintiff had no claim, and the petition ought to be dismissed. On motion of the defendant the report was confirmed and the petition dismissed. To that dismissal the plaintiff appealed to this court, and the defendant moved to dismiss the appeal, because he claimed the case was not the subject of appeal, but a suit at law. The case was one purely at law, but the defendant having taken it out of the ordinary course and asked for a reference, he thereby waived all question as to the jurisdic-

tion of the court in matters of equity, and it was, therefore, subject to appeal, 26 O. S. R., 567.

Motion overruled.

Boyce & Boyd, for Plaintiff.

S. E. Coles, Contra.

HUSBAND AND WIFE.

[Hamilton District Court, 1881.]

Avery, Cox and Longworth, JJ.

CHARLOTTE SIELMEIER v. PAULINA SIELMEIER.

A postnuptial agreement between husband and wife, whereby the wife sold her property to pay off the husband's indebtedness and improve his real estate, for which the husband agreed to give her a lien on all his estate, and further that they, with their respective children—each having children by a prior marriage—should live upon the land and that the survivor should have the property of both for life and that after the death of the survivor the two sets of children should receive the proceeds of the land: *Held*, That the wife having survived her husband, the agreement would be specifically enforced, and she would be decreed possession of the property during her life, and that after her death the property should be sold and divided among the children of both parties, share and share alike, *per capita* and not *per stirpes*.

APPEAL from the Court of Common Pleas.

Cox, J.

The plaintiff filed her petition below against the heirs-at-law of Christian Sielmeier, her deceased husband. She alleged that in 1873 she was the owner of certain real estate, being then married to her husband, Sielmeier; that to induce her to sell that property and give him the proceeds to pay off certain indebtedness of his, and to improve certain real estate of his own, he agreed to give her a lien on the property he then had, and such other property as he might purchase; that her part of the agreement was carried out, but that her husband refused from *time to time to secure her as agreed until some time in May, 1874, when 552
he took her before 'Squire Hill to draw up a paper securing her in accordance with the agreement, as she understood it, but which, in fact, was a paper imposing different obligations upon her than she had agreed to assume. She therefore, asked that the court decree a specific lien upon the property in question securing her for the payment of $1,800, the amount for which her property was sold, and the proceeds given to her husband, and that the agreement be held for naught. The plaintiff before her marriage with Sielmeier was a widow with two children.

Taking all the testimony before the court in regard to these parties in connection with the agreement made between them, which was offered in evidence, the agreement was a highly equitable one. The husband owned previous to the making of the agreement about forty-eight acres of land. From that parcels had been sold, leaving at the time of his death about thirty-two acres of land, situated near Pleasant Ridge. The wife sold her property for $1,800, which she gave to her husband. With that sum he paid off his debts and purchased other property.

When he died, however, he had only thirty-two acres. The agreement was that the parties, with their children, should live upon the land, which was in the name of the husband, as long as they saw proper; that, at the death of either husband or wife, the chattel property and enough real estate, and no more, should be sold to pay the actual debts of such party, and then that the survivor should live on the balance during his or her lifetime, and that on the death of the survivor the children of the parties should share in the proceeds of it, share and share alike, he having four children and she two. The parties seemed to have put their property together. It was nearly equal in value and they regarded it as a common fund, giving the survivor a homestead for life in the property, and their children an equal benefit in all of it. It was a very equitable provision, and provided very well for the wife. It was a considerable amount of money she invested, and the agreement ought to be enforced. The decree would be that the agreement produced was the agreement of the parties; that the plaintiff was entitled to the property during her life, and, at her death, the property should be sold and divided among the children of both parties, share and share alike, *per capita* and not *per stirpes*.

Cowan, for Plaintiff.

Hicks & Ferrell, for Defendant.

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553 *ESTOPPEL.

[Hamilton District Court, 1881.]

Avery, Cox and Longworth, JJ.

†JOSEPH RAWSON & SONS v. GEORGE BOGEN ET AL.

Where a wife through no improper motives and for a particular purpose transfers the title of her property to her husband and allows it to remain that way for several years, it does not create an estoppel in favor of the husband's creditors where credit was not given him on the strength of his apparent ownership of this property.

LONGWORTH, J.

It appeared that Mrs. Bogen was the owner, from her father, Mr. Hatmaker, of certain real estate which is now known as lot No. 3 in Bogen and Story's subdivision in this city. In 1868 her husband and Story, who owned property in the neighborhood, desiring to make the subdivision in question, had their wives convey the property to them through a trustee. Thereupon the subdivision was made. So matters remained for some time. The plaintiffs purchased in the market a note of Bogen's. The note fell due, and Bogen asked and secured, after some negotiation, an extension from plaintiffs for twenty days. Bogen, however, became unable to pay the note, and thereupon plaintiff brought suit in 1874 and obtained a judgment against him, which judgment became a lien from the 5th of January in that year. In December, 1873, Bogen made an assignment for the benefit of his creditors, assigning all of his property except this, which then stood in his own name, of which, how-

†This case was affirmed by the Supreme Court Commission, without report. 11 B. 136.

ever, he was not the owner. He conveyed this property through a trustee to his wife, although no record was made of the reconveyance until May, within the six months, however, prescribed by law. Bogen not actually owning this property, and having actually reconveyed it to his wife before the judgment obtained by plaintiffs, no lien attached to it in favor of plaintiffs by the rendition of the judgment. But the plaintiff claimed that Mrs. Bogen was estopped from setting up ownership by reason of the fact that she had transferred the property to her husband, with the special understanding that it should be forthwith retransferred to her; but that instead of being immediately retransferred, she allowed it to remain in his name from 1868 to 1873, thereby holding him as the owner of the property, upon the faith of which he contracted the debt, and it was now too late to claim that she was the owner of it and he was not.

But if an estoppel apply against a married woman under these circumstances, there is no evidence to show such a state of facts. Rawson testified that he knew nothing about the property being in Bogen's name; that he gave Bogen the extension because he had known him thirty-four or thirty-five years, had done business with him and knew him to be a man of commercial standing, and reputed to be owner of a great deal of property, and when asked what property Bogen owned, Rawson excluded this piece from the list. There was not a particle of evidence to *show that the extension was granted on the ground 554
that Bogen was the owner of this property, and Bogen's ownership was utterly and entirely disconnected from any of his transactions with the plaintiffs. There is no reason why an estoppel should be invoked against Mrs. Bogen, and there is no question but that from first to last that she was the owner in equity of the property, the conveyance having been made to her husband for a particular purpose by advice of counsel, and wholly without any intention to defraud.

Petition dismissed.

STREET ASSESSMENTS—INJUNCTION.

[Hamilton District Court, 1881.]

Avery, Cox and Longworth, JJ.

SAMUEL DANKS v. ABRAHAM PHARES ET AL.

Where an assessment for the improvement of a road was not properly petitioned for by all the property owners, yet some of the abutting owners acquiesced in the improvement and paid the first installment of the assessment and afterwards sold the property and the vendee failed to discover that such assessment, although a matter of record, was a lien on the property. Such vendee will not be entitled to an injunction to restrain the collection of such assessments. He has his remedy on the covenants of warranty in his deed from his grantors.

LONGWORTH, J.

In this case the action was brought by the plaintiff to obtain an injunction against the collection of an assessment for the improvement of the North Bend Road on the ground that the same is illegal and void. Prior to March, 1867, John Phares was the owner of lands abutting upon

the road as now improved. He died intestate in that month, and his property descended to his five children, subject to the dower estate of his widow. On the 3d of May, 1867, two of his heirs and his widow joined others in signing a petition for the improvement of the road. The petition, however, was not signed by a majority of the property owners whose lands would be assessed for the improvement, but only one property holder—a person not connected with this suit—took legal steps to dispute the assessment. The improvement was made. Subsequently the heirs of Phares conveyed this property to plaintiff, who in examining the title, overlooked the fact that this assessment existed as lien against the property. Having discovered the assessment when he went to pay his taxes, and the treasurer refusing to accept the taxes unless the assessment was paid, he filed this suit.

One of the grounds alleged for the illegality of the assessment was that a majority of the property owners to be assessed had not signed the petition for the original improvement, a condition precedent to the jurisdiction of the county commissioners to order the improvement.

The defendants claim that the plaintiff, by the act of his grantors, the heirs of Phares, was estopped in equity to deny the legality of the
555 assessment, for the reason that two of the heirs, *together with the dowress had signed the petition; that the first installment of the assessment had been paid, and that no proceedings had been instituted by any of these heirs to dispute the legality of the proceedings until the work was completed and the assessment ordered.

Whatever doubts may exist concerning the doctrine of equitable estoppel in cases of this character, are set at rest by the decision of the supreme court in 29 Ohio St. R., 500.

In the case at bar, there was no evidence that the heirs of Phares, the owners of the land when the improvement was made, had actual knowledge that the work was going on further than was to be derived from the fact that two out of the five heirs signed the petition for the improvement, and that the first installment of the assessment had been paid, but they did not allege nor claim that they were ignorant of it. They had clearly, therefore, not brought themselves within the rule that a court of equity will not grant relief unless it appears there has been no laches on the part of the party seeking it. No complaint had been made of the assessment until years after the improvement, the bonds of the county issued to pay for it and the debt which the contractors created. And then the complaint came, not from the parties who might have objected, but who never did object, but from the purchaser who bought from them without notice of the alleged lien of the assessment. That purchaser took, as a matter of course, the same rights which his grantors had. He bought the property subject to the lien, which was a matter of record. It was true that he had no actual knowledge of it, but that was neither here nor there. He has his remedy on the covenants of warranty in his deed from his grantors.

Petition dismissed and injunction refused.

*FRAUDULENT CONVEYANCES—EVIDENCE. 623

[Hamilton District Court, 1881.]

Avery, Cox and Johnston, JJ.

BERNARD GROTE v. FRANK MEYER AND WIFE ET AL.

1. A debtor, in failing circumstances, may in good faith prefer one creditor over another; and in an action to set aside a conveyance upon the ground of fraud parol evidence may be introduced to show other and additional considerations to those named in the deed, that the wife was the creditor of the husband, that she had theretofore released her inchoate rights of dower in his property in the execution of mortgages, and secured nothing therefor.
2. In order that a wife may claim compensation for such releases, it is not necessary that an agreement should be made expressly therefor at the time of the execution of such releases; she may, thereafter, demand it.

APPEAL from the Common Pleas Court.

Bernard Grote v. Frank Meyer et al. Appeal from common pleas, where a creditor's bill was prosecuted by the plaintiff, to set aside an alleged fraudulent conveyance of real estate on Laurel street, worth $6,000, and a leasehold on Hopkins street worth $500, by Frank Meyer to Morril Snyder, who for a nominal consideration transferred the property to the wife of Meyer. Grote was a creditor of Meyer, having, while treasurer of a certain association, loaned $750 of its money to Meyer. The petition charged, that in 1879 these conveyances were made to hinder and delay creditors. Meyer and his wife denied that the transfer was made to defraud creditors, and allege that when the husband purchased the property his wife made the first cash payment of a thousand dollars, and that the improvements were made in part with her money. Besides the wife claims at different times to have released her inchoate right of down [dower] in these premises with her husband in mortgages to building associations.

JOHNSTON, J.

The testimony shows that at the time of the transfer Meyer was probably insolvent. The decisions, however, of this state are uniform, that a debtor who is insolvent even may in good faith transfer his property to a creditor in payment of his indebtedness to him. He must not do anything more than that. He cannot bargain for a return to himself of a part of the consideration by the creditor, nor to hold it in part for the benefit *of some other creditor; for in such cases the courts will hold such creditor as a trustee for all the creditors; the court will 624
not view with the greatest nicety the value of the property transferred. If it be no more than a fair and reasonable equivalent of the debt, and is in discharge of the debt, the sale will be sustained. The creditor cannot, under such circumstances, give his property away, or upon an inadequate consideration. He must be just before he is generous.

Now the evidence in this case discloses that when in 1879 the transfer was made of this property to the wife, that other considerations moved between the parties than the nominal amount named in the deeds. It is well settled that parol testimony will be received to show these additional considerations. At least Meyer caused to be transferred to his

wife a mere equity of redemption. While the testimony shows that the property at the time was of about the value of $6,500, there was a mortgage incumbrance on it of $4,900, leaving a difference of $1,600. Now this balance did not all belong to the creditors of Frank Meyer. From that should be taken his homestead of $500, which he could hold against all the world, leaving his net interest at about $1,100. The testimony shows, fairly considered, that to purchase this property the wife advanced to the husband $1,000 in 1868 and he never repaid it to her, and when the building was being erected she paid of her own means the further sum of $300. This money is traced from the time it was counted out upon the table of her father in the Kingdom of Hanover just before she emigrated to this country. It was twenty-eight years ago. She was a young woman. Meyer was raised in the same neighborhood. Her father was a farmer. Frank was a smith. They came over in the same ship. Betrothed in the Fatherland, their marriage was celebrated here in Cincinnati, and they commenced life here in a very humble way. He worked at the forge. Occasionally she kept a few boarders, and in this way earned something. This way $300 was loaned out by her until, with its accumulations, in 1868, it amounted to $1000, and she drew it from the archbishop and made the first payment on the Laurel street property. This is the evidence of them both, and it is not overthrown. It is upon the creditors to show fraud. It cannot be presumed. These two sums, irrespective of the value of her inchoate right of dower, were a full consideration for the transfer. But irrespective of these sums, the release by her of her dower interest was a sufficient consideration for the conveyance. An inchoate right of dower is no longer an interest of questionable value. 30 O. S., Kuhlman v. Black, 199. Nor was it necessary, as claimed by plaintiff's counsel, when she released this right each time that she should have expressly stipulated for a consideration to be paid by him to her. Our
625 *supreme court, in 32 O. S., Singree v. Welch, 325, where a wife had released her inchoate right of dower in a mortgage without receiving anything for it; but thereafter did in another transaction receive a deed to land which the creditors of the husband claimed should have been conveyed to him, and was, therefore, claimed to be fraudulent, use this language: "And again if she signed the mortgage without receiving any consideration she might have been justified in claiming a recompense for it, in the trade subsequently made."

We are of the opinion, therefore, that the plaintiff has failed to show that the conveyance to the wife was fraudulent, and the petition will be dismissed at plaintiff's cost.

W. L. Buchwalter, for Plaintiff.

T. L. Hildebrandt, for Defendant.

TAXES AND TAXATION.

[Hamilton District Court, 1881.]

Avery, Cox and Johnston JJ.

COMMISSIONERS OF HAMILTON COUNTY v. ADELINE BRASHEARS ET AL.

Where through a clerical error of the county auditor in transcribing the number of acres of land to be valued by the decennial appraiser, and the appraiser values land that has no existence in fact, by reason of such mistake the auditor is authorized by section 1038, Revised Statutes, to correct the valuation as well as description, and the commissioners are authorized to instruct the auditor to refund taxes paid upon such erroneous valuation as provided in said section.

This case came up by petition in error to reverse a judgment of the common pleas, which judgment in that court was rendered upon an appeal prosecuted by Brashears *et al.* against the commissioners for the purpose of recovering five years' back taxes paid upon 1 68-100 acres of land in the Twelfth ward of this city.

Judge Johnston delivered the opinion: The petition was, in substance, that in 1870, at the decennial appraisement the auditor of the county, in accordance with his duties, had all the real estate of that ward transcribed to a separate book for the purpose of passing it over to the assessor of the ward, to enable him, under the law, to reappraise this as well as other property in his district.

Adeline Brashears was at that time owner of 1 67-100 acres, but the auditor in transcribing it by a clerical error transcribed *it as 2 67-100 acres. It was assessed as 2 67-100 acres, making a mistake of one acre. It was assessed at $2,500 per acre, but the total assessment was subsequently reduced by the board of equalization to $3,500. Without discovering this mistake she paid taxes upon a basis of 2 67-100 acres up to the time of filing this petition. Upon discovering this mistake she presented a claim for $433 back taxes to the county commissioners, and asked them to direct the auditor to draw his warrant on the treasurer for a remitter. The commissioners refused. From their decision Mrs. Brashears appealed to the common pleas. The petition set out substantially these facts. To this petition a demurrer was filed, and upon argument the demurrer was overruled, and judgment entered for plaintiffs for the amount of the taxes overpaid. This is alleged as error. 626

JOHNSTON, J.

It is claimed on behalf of the county that this was an error on the part of the appraiser, of a "fundamental nature," and that the auditor or commissioners were not authorized to correct that kind of an error, and section 2800, Revised Statutes, is cited as conclusive of the question. As against this proposition counsel for Mrs. Brashears rely on section 1038 of the Revised Statutes.

The supreme court has construed section 1038, deciding that where the error consisted simply of a clerical error, or a mistake of the auditor, he would have a right to make the correction; but if the error related to a valuation of property that had, as may be implied from the decision, an existence at the time the valuation was put upon it, and it was discovered that it had been valued too high, that that was such a fundamental error as

did not come within the supervision of either the auditor or the commissioners to correct, but the party should be required to go before the board of equalization or auditor of state. In this case, by the clerical error of the auditor, the assessor was led to assess real estate having in fact no existence whatever, giving to it a valuation which would not have occurred but for the error of the auditor. The auditor in discovering his error corrected it, that is as to the number of acres, but the valuation remained the same. The owner paid on an incorrect valuation. We think the error was not a fundamental error, but an error wholly clerical, an error of the hand, not of judgment and discretion, and the assessor having fixed a valuation of $2,500 to something that had no existence whatever, it became the plain duty of the auditor upon the request of the property-holder to certify the fact to the commissioners, and for them to instruct him to draw his warrant for the amount of taxes so overpaid, and it
627 *became the duty of the auditor to correct the error in the valuation as well.

Judgment affirmed.

Evans for Plaintiff in Error.

Brashears, Contra.

RELIGIOUS SOCIETIES.

[Hamilton District Court, 1881.]

Avery, Cox and Johnston, JJ.

GERMAN ROMAN CATHOLIC CHURCH ET AL. v. ADAM KAUS ET AL.

1. A member of an unincorporated church society cannot sue and recover a personal judgment against his coassociates of the society upon a claim contracted by the society while he was a member, and at the commencement of the action still being a member of the society.
2. His remedy is in equity against the property of the society.

JOHNSTON, J.

This is a petition of error to reverse a judgment of the superior court of the city of Cincinnati. The action was commenced in that court for the purpose of recovering a judgment upon an instrument reading as follows: "Camp Washington, September 2, 1878, for value, the German Roman Catholic church of the Heart of Jesus is indebted to——Mossmeyer for the sum of $2,150, which, with six per cent.," etc. (Court read the instrument). Kaus avers in his petition that on the 29th of March, 1879, he, for value, became the purchaser of this obligation from Mossmeyer; that thereafter $1,700 were paid, leaving a balance of some $494 still due. He made the assignor a defendant, and also made John B. Purcell, Archbishop of the Diocese, in whom the legal title was vested, as defendant, and his assignee, Mannix, and also made defendants, Peter Paul and others, trustees of said society, and also made defendants, Joseph Walz, Peter Wittenkind, John Leonard, Geo. Liebling and others, members of said society, and others too numerous to mention and unknown to plaintiff, and offered to bring them all before the court as defendants.

There was an allegation in the petition that this money was borrowed from Mossmeyer, and this obligation was given with the consent of all

these parties, and of all the congregation worshiping at that branch of the parent church under that name at Camp Washington, and that the Archbishop consented to this *loan, and there was a prayer for personal judgment against the trustees named, and against the defendants specially named in this petition, and for an order that the court might declare the plaintiff to have a lien upon this church property for the balance of his claim, amounting to some $500, and for an order of sale. 628

There was a demurrer filed on the ground that there was not sufficient evidence to set forth a cause of action against the defendants; that there was a defect of parties, and for other reasons, which, being overruled, these defendants answered by a general denial, and thereupon the cause went to trial upon submission to the court; and the court found for the plaintiff, and entered a personal judgment against the defendants named as members of this association or unincorporated body, and the court went further to order and adjudge that he had a lien against the property, the church property, which is covered by a church and a parsonage and a schoolhouse, and ordered that if the money be not paid within a certain time that an order should issue to sell the property for the satisfaction of this debt.

The defendants excepted to this judgment and a motion having been filed and overruled, this petition is prosecuted to reverse that judgment; and the main ground of error relied upon is that the court erred in rendering a personal judgment against them in that action, and it is to that we have confined our consideration.

It appears upon the face of this petition that this church was not a body corporate; that, on the contrary, it was an unincorporated body, made up of many members who were coming and going. It has deen decided by our supreme court that where a church body or association of individuals of this character have constructed a place of worship in which to worship according to the creed and doctrines of their church or for educational purposes, or for other purposes have associated themselves together, not a body corporate, that a personal judgment may be recovered against such of them as it may appear, upon the trial of the case, actively took part in the creation of the debt. If, in the building of the church, it can be shown that the trustees of the church, holding the legal title, actively took part in the making of the contract and instructing the work to go on, a personal judgment may be recovered against them; and our supreme court has gone farther and held that the members of that association or religious body not trustees, who it may be shown, took an active part in voting money for the work, in voting to have the contracts made, or otherwise actively participated in the contracting or in the incurring of the obligation for borrowed money to construct the building; that wherever it is shown that these members took this interest, a personal judgment may be *recovered against them in favor of the contractor or the party who loaned the money, if it be for a loan of money. 629

Now, while in this case evidence was introduced tending to show that all these persons against whom this personal judgment was entered did actively participate in the borrowing of this money, and in the affairs of the church, there is one thing that, in our opinion, should have prevented the plaintiff from recovering this personal judgment, and it is this. It is well settled in law that where a number of persons are associated together, either in the construction of a house for religious worship or for any other purpose, and they are not incorporated under the laws of

the state; that where an indebtedness arises between the members of that association, between one member and the other members, he is not entitled to go into a court of law to recover a personal judgment against his associates; that while they together are not strictly what might be termed a copartnership, and liable as between themselves to third party as copartners (for one of the associates has no right to bind the whole congregation, he can only bind himself in actively participating in the borrowing of money); that while they are not strictly partners as between themselves as to the third parties, yet to some extent that selection does exist, and where the association becomes involved and has contracted debts, the creditor has the right to pursue the property, and if he be not a member of the association he may be entitled to a personal judgment against such members as he can show actively participated in borrowing the money, but if he is one of the associates himself, he can no more sue his coassociates—if I may so use the word—than one partner may sue the firm of which he is a member.

It is well settled that in cases of this character, that while the relations of copartners did not exist between these associates, that yet the affairs must be settled upon the theory or principle that they are partners, or in the manner that the affairs of copartnerships are settled and determined.

In the 28th Michigan this principle is clearly and well laid down in the case of Butterfield v. Beardsley. A number of cases were cited in the opinion. It was held that the associates were not partners; that they certainly had no corporate character, and yet they were embarked in a common undertaking for their common profit, and this common undertaking was sustained and was agreed to be sustained by money advanced by each. Now, of course, this is not an undertaking for profit in which these various members are engaged, it was a simple, common undertaking to erect a place of worship, in which to worship after the creed and doctrine of the mother church, of which they were members, but in a sep-
630 arate body under a *separate name, adopted by this special association. That their relation and position were such as to justify a court of equity, in order to settle their interests, to dispose of the common fund, to treat them to some extent as partners, is a point settled by many authorities. 60 Bullard v. Kinney, and so in the 10th California the court say: "Where there is nothing in the constitution of a joint stock company which regulates the share holders as between themselves the general law of partnerships must govern them." And see also 4 Brewster, 101.

Now, a case in 22d Ohio State Reports was cited by counsel for defendant in error for the purpose of sustaining the decision of the court below. That is the case of Devoss v. Grey, 159. That is a case in which the plaintiff in that action was not a member of the association or church. That was an action by a contractor to recover for constructing a Presbyterian church in the town of Greenville, in Highland county, and the supreme court there decided very properly that a personal judgment might be recovered against a deacon or against a trustee if either actively participated in the making of the contract or in the construction of the building and the borrowing of the money, and goes further to decide (if we are to assume that the defendants were members, because it is alleged that they were deacons of the church) that their liabilities as members were not thereby fixed, because a member of an unincorporated religious society cannot be held personally responsible for the debts of the society, unless it be shown that he in some way sanctioned or acquiesced

in their creation. That was the case in which, as I have stated, the contractor for the construction of that church was suing the deacons and the trustees for the purpose of recovering a balance due him, and it was determined that in so far as he was able to show that any of the deacons or any of the elders or any of the trustees or any of the members acquiesced or actively participated in the contracting of the debt, or incurring of the obligation, there could be a personal judgment recovered.

But, in this case, the question as it has arisen upon the evidence, is as to whether Kaus was, at the time he received this obligation, a member of this religious society, worshiping under this assumed name at Camp Washington. It is claimed on the part of the plaintiffs in error that he was a member at the time the church started and until this suit was commenced, and even now, and that makes it necessary to examine the testimony for the purpose of ascertaining what were the facts in that respect. The petition avers that on the 26th of March, 1879, he purchased this obligation from Mossmeyer, the original party who loaned the the money. He avers, that is, the plaintiff does, that on the 29th of March, 1879, said Mossmeyer, for value, transferred this obligation *to the plaintiff herein, and who is now the legal owner and holder thereof. 631

Now, turning to the testimony of the witnesses, we find that Peter Wittinkind, called by Kaus, testified as follows: "I am a member and a trustee from the beginning and now. I was treasurer then; I was the first treasurer. Father Kemper would tell me to issue bonds; I did not borrow this Mossmeyer money; I did not know anything of it at the time. Kaus is still a member of the church." Going over the testimony of Mr. Kaus, he testified, "I am the plaintiff; I bought the note from Mossmeyer; I was a member of the church."

Now, taking the petition in this case, the testimony of Wittenkind, and the testimony of the plaintiff himself, that at the time he bought this obligation he was a member of the church; it leaves little doubt in our mind that in point of fact he was at the time he purchased this obligation, and at the time the suit was brought, a member of this church, and therefore it brings him within the operation of the rule of law, a general principle of law applicable to this case, to-wit: that of copartners; that he was in the position, the affairs of the association not having been settled or determined, to know what was the status of each member to the other, he did not occupy a position at that time to institute a suit against his associates and recover a personal judgment any more than if he had been a member of a copartnership, any more than he would have had the right having become the owner by the assignment of the claim against the copartnership to institute a suit against it to recover a personal judgment, because if he had done so he would necessarily have been required to sue himself, which cannot be done.

Now, while we thus hold that from the record in this case he could not recover a personal judgment against this plaintiff in error, he was entitled to proceed against the church property to enforce his lien, and to that extent, while we reverse the judgment in so far as the personal judgment has been rendered against certain members, we affirm the judgment, but that will require, in our opinion, that the case be remanded and sent to a referee or master, who shall ascertain the creditors or bondholders holding papers against this church society, and upon the property being sold and the amount of its indebtedness having been obtained, it

should be distributed in proportion to their claims, or if there is enough to pay the entire sum to pay off the indebtedness. All that we adjudge here is simply a reversal of the personal judgment, and order the case to be remanded to the superior court for further proceedings. The other part of the decree is affirmed, so far as the personal judgment is concerned, it is reversed.

Long, Kramer & Kramer, Attorneys for Plaintiff in Error.

J. J. Gasser, Attorney for Defendant in Error.

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632 *SEALED INSTRUMENTS.

[Hamilton District Court, 1881.]

Avery, Cox and Johnston, JJ.

JOHN P. BOBE ET AL V. THE MOON BUILDING ASSOCIATION.

Any character or mark intended as a seal to an instrument requiring a seal is sufficient.

This was a proceeding to reverse a judgment of the common pleas, rendered in favor of the association in a suit brought to recover $368, the amount of a deficit of J. B. Hohner, the treasurer, the other defendants in that case being his sureties. It was alleged that in a year after the election of Hohner he resigned his trust and was found to be in default $368, which he failed to pay to his successor. The sureties file separate answers, denying they signed the bond or their liability to pay, or the amount claimed to be due. It was claimed that no liability attached to the sureties for the reason that the bond was not sealed, and that no consideration passed between the sureties and The Moon Building Association.

JOHNSTON. J.

The names of the sureties occur in the beginning of the bond, and in the body of the words are "sealed with our seal, dated August 18, 1877," then signed and at the bottom a flourish.

The question is whether there was not such a compliance with the law as that the parties did in fact sign and seal the instrument. In the body of the instrument they say they did, and the statute provides that any mark or character intended for a seal is sufficient, section 4, Revised Statutes. Strictly then it was sealed, and the fact that it is a sealed instrument imports a consideration. But if it be not a sealed instrument, if this is not the united seal of the parties, the judgment must stand for the reason that the paper is at least a good contract in writing, based on a sufficient consideration, by which the parties become bound to the association. Hohner had been elected treasurer, the association reposed trust and confidence in him. It became exposed to loss thereby, and that fact furnished a consideration for the agreement of the sureties
633 to indemnify the association *against any loss that might occur, if he, Hohner, was permitted to discharge the duties of the office.

Judgment affirmed.

Moulton, Johnson & Levy, for Plaintiff in Error.

Tilden, Buchwalter & Campbell, Contra.

BENEVOLENT INSTITUTIONS.

[Ham lton District Court, 1881.]

Avery, Cox and Johnston, JJ.

†STATE OF OHIO EX REL. OUTCALT V. CHALFANT ET AL.

The trustees of the benevolent institutions of the state can only be appointed by the governor by and with the advice and consent of the senate.

COX, J.

The relator represents that Longview asylum, in this county, is one of the public benevolent institutions of the state of Ohio for the benefit of the insane; that the respondents, James F. Chalfant, Andrew J. Mullane and Balthaser Roth, who reside in Hamilton county, have for a long time past unlawfully held and exercised the office of directors or trustees of said institution, and still continue to do so, without authority of law, and threaten to still continue to do so without appointment thereto by any governor of the state of Ohio by and with the advice and consent of the senate, as it is provided in section 2, article VII, of the constitution of the state, such directors or trustees shall be appointed. Relator, therefore, asks for a judgment of ouster of the respondents from the office they claim to hold.

The respondent's answer setting up respectively claims to the office by appointment under the provisions of section 2 of an act passed by the general assembly April 5, 1878, entitled "An act to provide for the reorganization, government and better regulation of Longview asylum," etc.

James L. Chalfant claims that he holds said office by appointment of the judges of the court of common pleas of Hamilton county, in April, 1878, for the term of three years; Andrew J. *Mullane, by the appointment of the judge of the probate court of the same county, at the same time for a term of four years; Balthaser Roth, by appointment at the same time, and for a term of five years, by the commissioners of said county, and each claims his term has not expired. 634

A general demurrer is filed to all these answers.

The petition alleges, and the demurrer admits, that Longview asylum is one of the public benevolent institutions of the state for the insane, a point which this court decided in the case of Bunker v. Commissioners of Hamilton county, 9 American Law Record, page 371, and which was afterwards reaffirmed by the supreme court of the state, *ex rel.* Longview asylum v. Oglevee, auditor of state, 9 American Law Record, 382 and 36, O. S. R., Longview asylum being then a public benevolent institution of the state, the constitution enjoins that it shall be fostered and supported by the state and subject to such general regulations as may be prescribed by the general assembly. But while the regulation of the affairs of the institution may be prescribed by the legislature, they cannot prescribe any other or different manner of appointing the trustees to manage the institution than that set forth in the constitution. That provides, article VII, section 2, that the trustees of the benevolent and other state institutions shall be appointed by the governor by and with the advice and consent of the senate.

We are aware that for a number of years a portion of the trustees of this institution have been appointed in the same manner as these respondents under similar acts of the legislature. But now, for the first time, it is claimed that this law is unconstitutional in so far as it provides for the appointment of the trustees otherwise than by the governor of the state by and with the advice and consent of the senate.

In this respect we are compelled to hold that the act is clearly unconstitutional, and that the respondents are not entitled to hold the office by virtue of the appointments under which they claim.

Judgment of ouster will, therefore, be entered against all.

†This case was reversed by the Supreme Court. See opinion 37 O. S. 60.

APPEALS.

[Hamilton District Court, 1881.]

Avery, Cox and Johnston, JJ.

REDUS v. GREEN.

Section 4951, provides that the time within which an act is to be done shall be calculated by excluding the first and including the last day, and if the last day be Sunday it shall be excluded. This section applies to the filing of a transcript for appeal from the magistrate's court to the court of common pleas. Therefore if the last day be Sunday the transcript may be filed the next day.

PETITION IN ERROR to the Common Pleas Court.

Cox, J.

To that court the case came from a magistrate. Judge Cox delivered the opinion. Judgment was rendered before the magistrate
635 *on March 5, 1880, in favor of the plaintiff. Defendant gave bond for appeal, and on April 5, filed his transcript. The 5th of April was thirty-one days from the rendition of the judgment, but the 30th was on Sunday. The statute requires transcript to be filed in the court of common pleas on or before the 30th day from the rendition of the judgment. The court below struck the transcript from the files, on motion, because it was not filed in time.

The Revised Statutes of 1880, section 4951, provide that the time within which an act is to be done shall be calculated by excluding the first and including the last day, and if the last day be Sunday it shall be excluded. Under the old statutes the supreme court held that this did not refer to procedure before magistrates, but under the Revised Statutes the provision which formerly applied only to courts of record is made applicable to the third part of the Code which embraces in it the title which governs proceedings and in regard to cases before magistrate courts. Judgment reversed and cause remanded.

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689 *AGENCY.

[Hamilton District Court.]

Cox, Johnston, and Longworth, JJ.

SAMUEL A. WEST, ADMR., ET AL. v. HENRY C. GIBSON ET AL.

West having obtained a loan of $30,000 of Gibson & Young, trustees, through McBurney & Co., their financial agents of Cincinnati, they direct that Cist shall examine the title and prepare the necessary papers, but that West shall pay his fees. Cist having examined the title and prepared the papers in the absence of West, receives of McBurney & Co., agents of Gibson & Young, their check for $20,100, payable to order of one Hulburt, who had a prior mortgage thereon, Cist representing that amount to be due Hulburt, when in fact but $12,100 was due him. Cist is intrusted by Gibson & Young to hold their mortgage and have it recorded, and in a day or two thereafter, in the absence of West and McBurney & Co., give Cist their check, payable to his (Cist's) order, for the balance of the $30,000, of which sum he pays West but $4,500 and appropriates the remainder, representing to West that the balance had not yet been paid to him : *Held*, that

Cist was the agent of Gibson & Young, and not of West; that they were chargeable with Cist's knowledge of the true amount due Hulburt, and they must bear the loss, in the excessive payment made to Hulburt as well as the sum appropriated by Cist to his own use.

JOHNSTON, J.

This was a suit brought by S. R. S. West, in his lifetime, against Gibson and Young, trustees. It comes to this court by appeal from the common pleas. The case grows out of a loan of money sought to be obtained by West, deceased, from the trustees. The amount of the loan sought was $30,000, to be secured by mortgage on a dairy farm in the village of Clifton, in this county. There were some negotiations between West, and Gibson and Young, and they agreed upon a loan of $30,000. McBurney & Co., of this city, were their financial agents here, they being residents of Philadelphia, West residing in Clermont county, Ohio. The property upon which this mortgage was to be secured was already incumbered by a mortgage in fact, although in the shape of a deed absolute, for $20,000 in favor of W. P. Hulburt. Chas. Cist examined the title when West made that loan and received the money. In this last negotiation it was understood that this mortgage incumbrance in favor *of Hulburt was to be lifted by the cancellation of that mort- 690
gage or deed absolute, so that this mortgage might be given upon the land unincumbered. At the time the parties got ready to execute this mortgage and receive the money, Cist also represented Gibson & Young, the lenders of the money, they having directed, as did Mr. Hulburt, that the title should be examined and papers drawn by him, the expense of the examination of title to be borne by West. West and wife executed a release to Hulburt and he executed a release to West. The deed was left in possession of Mr. Cist. West and wife then executed a mortgage to Gibson & Young for $30,000, with notes, and they also were held by Mr. Cist. Mr. Cist waited upon McBurney & Co. the agents of Gibson & Young, and received from them their check for $20,100, payable to the order of Hulburt, but it was delivered to Mr. Cist and not to West, West not being present. The mortgage was shown to McBurney & Co. at the time the check was executed. They allowed Cist to retain the mortgage in order to place it upon record. Cist gave the $20,100 check to Hulburt, and in a day or two thereafter McBurney & Co. gave Cist a check payable to his order for the balance of the $30,000, West not being present, and certain commissions due McBurney & Co. were deducted therefrom. It appears that in the first $20,000 transaction $8,000 was left in the hands of Mr. Cist for the purpose of paying off certain incumbrances claimed by Cist to be upon the land, this with the knowledge of Hulburt. This $8,000, we find, was held by Cist as the agent of Hulburt and not as the agent of Mr. West. In the second transaction we find that Cist was the agent of Gibson & Young, and not of West; that Mr. Cist knew that all West ever received of the Hulburt money was $12,100, and that was all Mr. Hulburt was entitled to receive from him. Notwithstanding this, Mr. Cist caused them to draw a check for $20,100, when in truth and in fact Hulburt was entitled to receive but $12,100. The knowledge of Cist as to the true amount due Hulburt, he being the agent of Gibson & Young, affected them with that knowledge. Cist never paid the $8,000 of Hulburt loan to West, but appropriated it to his own use. The balance Mr. Cist received from Gibson & Young and he paid $4,500 of it to West and appropriated the balance; so that all that Mr. West received of the

Gibson & Young loan, and for which Gibson & Young were entitled to hold a lien against him, was the sum of $17,000. Cist was the agent of Hulburt as to the first $20,000 transaction, and the agent of Gibson & Young as to the second transaction. West instituted this suit when he found out the unfaithful conduct of Cist against Gibson & Young, asking for a reformation of this mortgage, and that it should be so reduced as to represent the correct amount of money received by him
691 *from their agent, Mr. Cist. West died pending the action and the suit is now prosecuted by his administrator and heirs. Gibson & Young filed their answer and cross petition, saying, on the other hand, they were not aware of any unfaithfulness on the part of Cist; he was not their agent, and if any loss was sustained through him, they were not responsible for it. Mr. Hulburt came into the case, but withdrew again, as he was not a proper party. Gibson & Young ask, inasmuch as the mortgage is due, a foreclosure for the full amount. We find as a conclusion of law in this case, that upon the facts found the true amount of the mortgage was but $17,000. It should be reformed and reduced to that amount, that being the true amount received by West.

The mortgage being now due, a decree would be entered for that amount and interest, and unless paid within thirty days an order of sale would go out in favor of Gibson & Young.

Hoadly, Johnson & Colston, and Peter F. Swing, for Plaintiffs.

Sage & Hinkle, Contra.

BILLS AND NOTES.

[Hamilton District Court, 1881.]

Cox, Johnston, and Longworth, JJ.

†Leopold Burckhardt v. Fourth National Bank.

A reasonable effort on the part of the holder of a note to give notice of protest to the indorser is all the law requires. A notice at his place of business or residence is sufficient, whether he be there or not.

Error to the Common Pleas Court.

Cox, J.

The suit in that court was to charge Burckhardt, as an indorser of a promissory note, payable at the Fourth National Bank. Demand was made on the day the note became due, and the notary attempted to serve the indorser with notice of non-payment. The indorser had an office with one Mr. Folger, and his name was still over the door. The notary deposited the notice under the door of this office. Next morning Mr. Folger notified the notary that Mr. Burckhardt was out of the city, and that Mr. Goebel was his attorney. The attorney thereupon sent notice to Mr. Goebel, who said, although he was attorney for Burckhardt in some matters, he was not authorized to receive notice for him of the dishonor of a note, that Mr. Burckhardt had abandoned his residence in this city, rented his dwelling house for two years and was residing in Stetten, Germany, as Consul.

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†This case was affirmed by the Supreme Court without report. 11 B. 148.

Held, Reasonable effort to give notice on the part of the holder of the note is all that the law required. A notice at his place of business or residence is sufficient, whether he be there or not. *If he has abandoned his residence and left no notice of his whereabouts, he 692 cannot complain of a failure to give him notice. We think in the case at bar notice was given sufficient to charge the indorser. The case of William's Bank U. S. 2 Peters, 96, fully sustains those views. Judgment affirmed.

Goebel, for Plaintiff in Error.

Wilby & Wald, Contra.

APPEALS—INJUNCTION.

[Hamilton District Court, 1881.]

Cox, Johnston and Longworth, JJ.

†JAS. C. CALDWELL v. GEO. F. HIGH.

Where an injunction is not vacated by an interlocutory decree, but where the whole case has been tried upon its merits and the injunction has been vacated upon final decree, then by the terms of section 5235, the whole judgment is suspended, as well as the decree of the court dissolving the injunction, the decree for costs and everything else.

APPEAL from the Court of Common Pleas.

Cox, J.

The question presented is one of practice. There was a motion on the one side to allow an injunction, and on the other to dissolve an injunction originally temporarily granted in the common pleas. An injunction was originally granted on the application of Caldwell. The case was heard on the motion as well as upon its merits, and a final judgment given, dissolving the injunction and dismissing the petition. From that decree the plaintiff appealed to this court, and now it is claimed on the one side that the injunction originally granted is not suspended by the appeal, and on the other side that it is.

Section 5226 of the Statutes provide that on an appeal from an interlocutory order made by the common pleas, dissolving an injunction in a case in which that court had original jurisdiction, the appeal shall not suspend the injunction, except by order of the district court. Section 5573 provides that where an injunction has been allowed, and, during the pendency of the action, has been vacated and an appeal is taken, after such trial, from the final order or judgment of said court, an injunction may be granted at any time upon application. Section 5235 provides that when an appeal is granted and bond given, all action in the court below shall be suspended.

Therefore—*Held,* Where an injunction is not vacated by an interlocutory decree, but where the whole case has been tried upon its merits and the injunction has been vacated upon final decree, then by the

†This case was affirmed by the Supreme Court, without report. 10 B. 404.

terms of section 5235, the whole judgment is suspended, as well as the decree of the court dissolving the injunction, the decree for costs and everything else. So that this case comes into the district court upon the final decree with the preliminary injunction still pending and in force. If the preliminary injunction were dissolved upon mere motion,
693 *it would be necessary to renew the injunction in this court. It follows that the injunction is here in force.

S. A. Miller, for Plaintiff.

LANDLORD AND TENANT.

[Superior Court of Cincinnati, General Term, 1881.]

L. S. WORTHINGTON v. THE GLOBE ROLLING MILL.

1. Where a tenancy for a definite term expires by limitation, or a tenancy from year to year is terminated by written agreement, and the tenant holds over without making any new agreement, he is tenant by sufferance.
2. Whether or not such agreement is made, is a question of fact to be determined in each case by the evidence.
3. When in such case the landlord in writing notifies the tenant that if he remains in possession after the last day of the current term he will be held tenant for another year at a named rent payable at specified times, and the tenant replies in writing that he will not be tenant, nor will accede to the terms named; the mere fact of remaining after such last day does not constitute an agreement for another year.
4. If, in such case, the tenant does not complete vacating the premises till four months after the termination of the old term, a notice put up by the landlord that the premises are for rent, remaining on the premises all the time, and payment of money being made by such occupant and received by the owner of the premises, upon mutual agreement, that payment and receipt shall not prejudice the claim of either, such additional facts do not constitute an agreement for another year.

FORCE, J.

This action was heard at special term on submission, and is reserved to general term upon the pleadings and certified bill of evidence.

The action is brought on an alleged contract of lease. The plaintiff avers that the defendant, on or about January 1, 1880, rented certain premises of the plaintiff for one year, beginning January 1, and ending December 31, 1880, was put into possession of the same by the plaintiff,
694 and agreed to pay three thousand, *five hundred dollars rent for the year, to be paid in equal monthly installments, and claims a balance due for the months of March, April and May, the petition being filed in June, 1880.

The defendant denies the allegations of the petition, but admits being in occupation of the premises during the months of January, February, March and April, and avers that it paid part and tendered the remainder of a fair value of such use and occupation.

From the evidence, it appears that the defendant rented the premises for a number of years at a rent each year of three thousand, three hundred dollars, payable each year in equal quarterly instalments; that in October, 1877, it was agreed in writing that the defendant would rent the premises during the year 1878 and pay two thousand dollars rent, pay-

able in quarterly instalments; that defendant remained in possession through 1879 on the same terms; that on November 1, 1879, plaintiff advertised the premises for rent for the year 1880, the last insertion of this advertisement was the 22d of the same month; that on the 12th of November plaintiff notified defendant in writing that he would require possession of the premises January 1, 1880; that he put up in the premises a notice that they were for rent. On the 26th he notified defendant in writing: "If you continue your occupation beyond January 1, 1880, I shall hold you for the entire year, 1880, at an annual rent of three thousand five hundred dollars, payable in equal monthly payments on the first day of each month." On the same day the defendant, by its secretary, replied in writing that it would use its best endeavors to vacate the building by the day named, but would not enter on another year of occupancy and would not be bound by the terms named by the plaintiff. Defendant remained in possession after the 1st of January and did not complete vacating the premises till the 29th of April. The keys were than delivered to plaintiff, who was notified that defendant had moved away. Plaintiff returned the keys. Plaintiff's notice that the premises were for rent remained on the premises during the continued occupation and for some time after defendant had left. Defendant paid some money, which, by consent of parties, was paid and accepted without prejudice to the claims of either.

*Upon this state of facts we cannot say there was an actual contract such as plaintiff claims. That is, in face of defendant's 695
positive refusal to agree to plaintiff's proposition, we cannot say as fact, or fairly infer as fact, that the defendant did agree to them. The claim is that the conduct of the defendant imposed on it an obligation which the law authorizes us to treat as contract, what Pollock calls *quasi* contract.

If we eliminate from the case two facts, one the written notice and acceptance of the termination of the tenancy, the other the continuance of plaintiff's notice on the premises that the premises were for rent, it is easy to find authority to support the plaintiff's claim, equally easy to find authority to support the defendant's claim, and equally easy to find authority that differs from both.

Upon a state of facts, the defendant, according to the supreme court of Tennessee, would be tenant for the whole year upon the terms named by the plaintiff, Brinkley v. Walcot, 10 Heisk., 22. According to the supreme court of Alabama the defendant would be chargeable only for the fair value of the occupation during the time the defendant occupied it, Meaher v. Pomeroy, 49 Ala., 146; while according to the court of appeals of New York the defendant would be tenant for the whole year, but on the terms of the former tenancy. Schuyler v. Smith, 51 N. Y., 309. This decision of the court of appeals is incorrectly cited by the supreme court of New York in Mack v. Burt, 5 Hun., 28, but is correctly cited in the latter case. Smith v. Allt. 4 Abb., New Cases, 205.

The rule in England is clear: "A tenant on sufferance is one who entered by lawful demise or title, and, after that has ceased, wrongfully continues in possession without assent or dissent of the person next entitled—anyone who continues in possession without agreement after a particular estate is ended," Woodfall, Land. and Ten., p. 190. "If a tenant holds over without objection after the expiration of his term, he becomes a tenant on sufferance." *Ib.* p. 575.

A tenant by sufferance is liable for the value of the occupation of the premises so long as he remains in possession. Also the landlord is entitled to recover against him reasonable damages and costs sustained
696 by him in an action at the suit of a party to *whom he had contracted to deliver the premises, but to whom the tenant's wrongful act had prevented him from delivering possession. Bramley v. Chesterton, 2 Com. Bench, N. S. 592.

When a tenant holds over, therefore, his relation and the rule of compensation are fixed by law. This relation, like a tenancy at will, can be changed only by agreement of both parties. "I quite agree with the law that if a party takes possession for a certain time, and holds over, he does not thereby necessarily become tenant from year to year, unless something occurs to show the existence of a new contract." Lord Abinger, C. B., in Waring v. King, 8 M. & W. 571.

Whether or not such new agreement has been made is a question of fact for the jury. Jones v. Shears *et al.*, 4 Ad. & El. 832. Remaining over two months and tendering a sum equal to rent for that time, the lease having been for rent payable annually, is not sufficient to create a tenancy for another year. Ibbs v. Richardson. Payment that will turn such a holding to a tenancy for a year or for year to year, "must be understood to mean payment with reference to a yearly holding." Baron Parke in Braithwaite v. Hitchcock, 10 M. & W., 497.

The rule has not been so uniformly held in the United States. But the general rule as held in England is nowhere laid down with greater emphasis than by Justice, afterward Chief Justice Gibson, in Logan v. Herron, S. S. & R., 459, see p. 469, a case where a tenant for one year remained over two weeks and was then notified to quit: "It is argued that if the tenant remains in possession a single day after the end of the term, he becomes liable for a whole year's rent. The truth is the law is not so; a tenant at sufferance is not liable to pay any rent, as it is the folly of the owner to suffer him to remain in possession after the determination of his estate."†

697 *The precise claim made in this case has been adjudicated in other states. The supreme court of Alabama, in Meaher v. Pomeroy, 49 Ala., 146, held, if a tenant, when informed by his landlord, during the term, that an increased rent will be demanded for the next year, remains silent, and afterward holds over beyond his term, he will be presumed to have acquiesced in the proposed change, and will be bound to pay the increased rent specified; but if he expressly declares when so informed, that he will not pay the sum demanded, no such presumption can be raised against him from the mere fact of his holding over; he then merely holds at the will of the owner, and is liable for a reasonable rent for the time he remains in possession. The same has been held by the supreme court of Missouri, Hunt v. Bailey, 39 Mo., 257, and by the supreme court of California, Stoppelkamp v. Mangeot, 42 Cal., 316, and Skaggs v. Elkus, 45 Cal., 154. These decisions were

†And the superior court of California held, in accordance with the English rule, that when such tenant holds over, it is a question of fact in each case whether or not an agreement is made for another year; and the remaining in possession a month and paying a month's rent, is not conclusive evidence of such agreement. Skaggs v. Elkus, 45 Cal., 154. And the further rule that if the wrongful holding over prevents a new letting, the tenant so holding over is liable for such damage, has also been held in the United States. Stoddard *et al.* v. Waters, 30 Ark., 156.

not in anywise affected by the absence of any written memorandum, for in those states a parol lease for one year is valid.

Directly the contrary, however, has been held in New York, Schuyler v. Smith, 51 N. Y., 309; Pennsylvania, Hemphill v. Flynn, 2 Pa. St., 144; and in Tennessee, Brinkley v. Walcott, 10 Heisk., 22. In New York and in Pennsylvania the court declared the rule to be, that when a tenant holds over his term the landlord has the option to treat him either as a trespasser or as a tenant for a new term of one year.

In the case in Pennsylvania, the rule announced was not contended for by any of the counsel, nor was it required by the facts or by the decision; nor does the learned judge in pronouncing his opinion make any reference to the fact that he was setting aside a well established rule of common law, and was at the same time overruling the vigorous opinion of the ablest of his predecessors on that bench.

In the case in New York, the learned judge announcing the decision of the commission of the court of appeals, sets out in his opinion with the proposition, p. 315: "The law is too well settled to be disputed that when a tenant holds over after the expiration of his term, the law will imply an agreement to hold for a year upon the terms of the prior lease," and adds, p. 317, he had not been able to find any authority to the contrary but *Jones v. Shears, 4 Ad. & El. 832. It is to be 698
regretted that the search for authority was so unsuccessful.

This proposition is claimed to be supported by principle as well as authority. The statement of principle is this: While it is generally true, it is not always true, that it takes two parties to make an agreement. The law sometimes makes agreements for parties which they did not mutually intend. A wrong-doer converts my personal property, never intending to pay for it. I may sue him in trover, or I may sue him as upon a sale, upon an implied promise to pay for it—that is true. The owner may sue in trover for the taking, or in assumpsit for the value of the thing taken; but he cannot sue in trover or assumpsit for other things not taken. A renter of furnished lodgings who carries away a sofa, may be sued in trover or assumpsit for the sofa, but cannot be sued in either trover or assumpsit for the carpet and chairs left behind. So a tenant who wrongfully holds over his term can be sued for the tort in ejectment and action for *mesne* profits, or for use and occupation upon an implied assumpsit for the value of his actual possession. But he can neither be ejected from what he does not possess nor be sued for use and occupation of that which he does not use and occupy.

I cannot but think these decisions of New York and Pennsylvania are judicial legislation; a function sometimes, indeed, beneficially used by courts of last resort, though not to be attempted by other courts.

Our own supreme court has not yet spoken. The first and second sections of the English Statute of Frauds being omitted in our statute; and the amendment adopted in most of the states making a parol lease for one year valid, not being adopted in our statute; and our statute being construed strictly as it is in Armstrong v. Kattenhorn, 11 O. R., 265, it is not so easy in Ohio as in England, and most of the states to construct a tenancy from year to year. Under the form of the statute adopted in Maine and Massachusetts, there is no such thing in those states as a tenancy from year to year.

But in the present case, if there had been a tenancy from year to year, it was terminated by mutual agreement in writing. The defendant

refused to accede to plaintiff's proffered terms or to be tenant at all after
699 the time named in the notice to quit. The *remaining over was wrongful on the one part and by sufferance on the other. The defendant could have been ousted at any moment by the plaintiff. The sign put up by the plaintiff that the premises were for rent remained. Plaintiff was sure of receiving the fair value of the premises so long as they were so occupied. As soon as a new tenant could be found, the defendant could be ejected and the new tenant installed. If the defendant's occupation prevented a new letting the defendant would be liable for such damage.

We find, therefore, that the contract which the plaintiff sues on was not made. We cannot in this action give judgment upon a different liability admitted by the defendant. In another action the plaintiff can recover for the value of the occupation of the premises by the defendant.

Judgment must be for the defendant.

G. W. Worthington and E. B. Maloney, for Plaintiff.

Healey & Brannan, for Defendant.

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702 *BILLS AND NOTES—INTEREST.

[Superior Court of Cincinnati, Special Term, 1851.]

MALLON & COFFEY v. ALEXANDER STEVENS ET AL.

A note payable two years after date, with interest payable quarterly, and providing that upon nonpayment of an instalment of interest the note becomes thereupon due and payable, matures upon the first default in payment of interest; and if payment be not then demanded and notice given, the indorsers are discharged.

FORCE, J.

This is an action by the indorsees of a promissory note against the maker and indorsers. The note is made payable two years after date; but with interest payable quarterly, and a stipulation that upon non payment of any instalment of interest when due, the whole note is then due and payable. The third and all subsequent instalments of interest were unpaid. Payment was demanded and notice of nonpayment given at the expiration of the two years, and not at any earlier date. The indorsers claim to be thereby discharged.

It is not necessary to cite authorities to show that such stipulation is not in the nature of a penalty; or to show that such a stipulation does not affect the negotiability of the note.

703 *Parsons and Daniels, in their books on negotiable instruments, speak with hesitation and doubt as to the claim set up by the indorsers in this case. Perhaps the precise point has not been expressly decided; but it seems to come within the rules given by adjudged cases.

An indorser is discharged unless payment is demanded at the maturity of the note; that is, when it is due and payable. The time when it is due and payable is fixed by the terms of the contract. "The terms of the contract," means, not a single clause, but the whole context. Hence, the maturity of the note in suit, is not absolutely two years after date. If all the instalments of interest are duly paid, in that case the note

matures two years after date; but if an instalment of interest is not paid when due, then, by the terms of the contract the entire note is due and payable; maturity has arrived. The note being then matured, the indorser is discharged unless demand be then made and notice given.

In a case where interest on a note was payable in instalments, but the provision was that upon nonpayment of any instalment of interest, the principal should become due at the option of the holder, if the holder exercises his option and claims the principal, a guarantor of the note becomes thereby at once liable. Seav. Glover, Bradwell, Ill. Aff., p. 335.

When the principal of the note is to be paid in instalments, with stipulation that the whole shall be due upon default in payment of any instalment, and default is made in the successive instalments, but action is not brought until after the last default; in such case, in calculating the amount to be recovered, interest is to be calculated upon the whole from the date of the first default. In deciding this case, Lord Ellenborough said: "On default of payment of any instalment, the whole amount of the note becomes payable; there is no severance of time in respect to the debts becoming payable; by the default the whole becomes one debt, and from that time interest becomes payable." Blake v. Lawrence, 4 Esp., 147.

And in such cases the statute of limitations runs for the whole debt from the date of the first default. Hemp v. Garland, 4 Ad. and El. N. S., 519.

And upon such a note, the indorser is liable for the whole upon demand and notice upon the first default. In this case, Abinger, C. B., said: "The indorser promises that the maker shall pay the first instalment, or, if he does not, that he shall pay the whole." And Parke, B., said: "He is responsible for the maker's performing the whole of his contract." "It is not a contingency, it depends on the act of the maker himself; and on his default it becomes a promissory note for the whole amount." Carlen v. Kenealy, 12 M. and W., 139.

*Judgment against the maker with interest from the date of the first default; the indorser to go hence without day. 704

Mallon & Coffey, for Plaintiffs.

J. F. Baldwin and Logan, Randall & Logan, for Defendants.

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*GOOD WILL—TRADE-MARK. 723

[Superior Court of Cincinnati, General Term, 1881.]

W. B. RICHARDSON v. WESTJOHN AND JONES.

1. Where, at a receiver's sale, one purchases the plant and good will of a dissolved firm and continues the business at the old stand, a member of the old firm going into the same business will be enjoined from soliciting *customers of the old firm to leave the old stand and deal with him, and will be enjoined from enticing employees of the old firm to quit the old stand and work for him. 724
2. Where such old firm adopted the trade name "White Star Steam Laundry," and printed on their bill heads, the name sometimes in full, sometimes "Star Steam Laundry," and designated it on their signs and wagons by a star painted white, in connection with the words "Steam Laundry," and the word "Laundry," and

the establishment was commonly known and called the "Star Laundry," a member of the old firm setting up a new steam laundry, will be enjoined from adopting either of the above names, and from adopting as a device the figure of a star, in connection with the words "Steam Laundry," or the word "Laundry," though the star be painted other color than white.

DECISION.

FORCE, J.

Westjohn and Smith were partners, having a steam laundry. In a suit brought to wind up the business, the assets and good will were sold to plaintiff, Richardson. The sale was confirmed, and the members of the firm were enjoined from in anywise derogating from the good will. Richardson took possession of the laundry and went into business. The defendant, Westjohn, one of the former firm, taking the defendant, Jones, as partner, went into the same business.

It is claimed that the defendants are derogating from the good will so sold, that they have solicited directly the custom of the old establishment, that they have enticed the employees of the old establishment away from it, and that they are using devices the tendency of which is to mislead old customers and others into the belief that the new firm is really a continuation of the old. This last grows out of the following: The name of the old establishment in full being the "White Star Steam Laundry," it was sometimes indicated on signs by a star painted white and the words "Steam Laundry" underneath; and sometimes a star and the word "Laundry" underneath. On some of their bill heads the name is printed in full, "White Star Steam Laundry." On some of their bill heads it is simply "Star Steam Laundry;" and in the trade, the name, "Star Laundry," was the name commonly given to the establishment, people commonly called it the "Star Laundry."

This being the case, it appears that the defendants, Westjohn
725 *& Jones, having a temporary store elsewhere, are about to establish a place of business just across the street from the old establishment; that they are putting up a sign with a star, and underneath the star the words "Steam Laundry," differing from the sign of the old establishment only in the color of the star; that on their wagons going around town, collecting and delivering goods, they have a device made up of a star and the words "Steam Laundry;" and, accompanying that, the name of "Westjohn & Jones."

As to the solicitation of old customers, it is claimed, whether that is a cause of action or not, it is not an infringement of the good will. In the time of Lord Eldon, good will was restricted to a mere right to be a successor of the old firm, and nothing was an infringement of it but a representation by an unauthorized person that he represented the old firm. But now the law is, as stated by Sir George Jessel, that where a man has sold a thing, the seller has no right to take back that thing which he has sold and been paid for; and, therefore, where an establishment with the stand and good will has been sold, if the seller undertakes to solicit and draw away from the old firm the established customers of that firm, he is trying to take back to himself the thing which he has sold and been paid for.

The other part of the injunction asked for is an order restraining these defendants from the use of a star in conjunction with the words "Laundry" or "Steam Laundry." Sir George Jessel said in a case last

year, *In re* Worthington's Trade-Mark, L. R. 14, Ch. Div. 9, it is very surprising the number of cases where a trade-mark applied for coincides pretty nearly with the registered trade-mark of some established firm; that at first he was inclined to think that it was accidental; but where it appeared time after time, week after week, that applications were made with slight variations from the trade-marks of well-established houses, he was obliged to believe that the resemblance was not accidental, but the object was to share in some way with the benefit connected with an established name.

It will be sufficient for the present case to cite two cases decided last year. In Boulnois v. Peak, L. R. 13, Ch. Div. 513, it is stated that the principle is, not that the plaintiff has any property in a particular title, but that he has a right to prevent *others from personating his 726
business by using any such description as would lead customers to suppose they were dealing with the plaintiff. The fact in that case was that plaintiff had an establishment in London called the "Carriage Bazaar," and which was known by that name, and there was no other of that name in London. Defendant having one called the "Carriage Depository," changed the name to the "New Carriage Bazaar," and he was enjoined from using this name because it was so nearly like the other as to lead customers to suppose that they were dealing with the old house.

The case of Orr-Ewing v. Johnston, L. R. 13, Ch. Div. 434, presents, perhaps, every point that is presented in this case. The firm of Orr-Ewing, an English firm, was in the business of making dyed yarn, which they sent to India to be used by the natives. They had various marks. One of them was a label put on the outside of their packages, which consisted of the representation of a crown between two elephants, and underneath them a banner. These elephants were facing inward toward the crown, and were without any harness of any sort. The defendant undertaking also to send dyed yarns to India, got up as a mark on his packages one which had two elephants upon it; but instead of a crown, it had the figure of some Hindoo goddess, a sitting figure with an elephant's head; the elephants, instead of facing inward, faced outward, and instead of being unharnessed, had howdahs upon them with people riding in the howdahs; and the pendant banner, instead of being plain, had words upon it. It appeared, in evidence, that plaintiff's yarn through India was called sometimes the "Elephant Yarn," sometimes the "Two Elephant Yarn." It was held by the court that the mark adopted by the defendants did adopt the designating characteristic part of the mark used by the established firm. Further, that it adopted that part which gave in the India trade the name to the goods, and was liable to deceive; and it did not matter that the plaintiffs, the established firm, had their goods known by one or two several names, they had a right to all of them; and an injunction was allowed restraining the defendants generally from using that mark.

The court held that if one trader appropriates a material *and 727
substantial part of a trade-mark which belongs to another trader, he is bound to use such precautions as to avoid the reasonable probability of error and deception, and the onus is on him to show that purchasers of the goods will not be deceived. If the goods of a trader have acquired in the market a name derived from a part of the trade-mark which he affixes to them, a rival trader is not entitled to use a ticket which is likely to lead to the application of the same name to his

goods, even though that name is not the only name by which the goods of the first trader have been known, or although it has always been used in conjunction with some other words.

The rule then announced as to trade-marks applies equally to trade names.

Injunction is allowed as prayed for.

Sage & Hinkle, Counsel for Plaintiff.

Logan, Randall & Logan, Counsel for Defendants.

STREET ASSESSMENTS.

[Superior Court of Cincinnati, Special Term, 1881.]

CITY OF CINCINNATI v. WILDER ET AL.

1. Owners of property abutting on a street are not relieved from an assessment made necessary by a change of grade on the ground that they were previously assessed.
2. An assessment is not unconstitutional because levied by the front foot, if equal on every front foot, instead in proportion to benefits.
3. Where an improvement of a certain road was paid for by a tax levied under authority of a statute, which allowed roads to be paid for by a tax levied on all property, personal and real, within a radius of one mile of the road improved, constitutes a special tax and not an assessment. But whether tax or assessment, it was not drawn from abutting lots and lands.

FORCE, J.

This is an action by the city to collect by enforcing its lien, an assessment upon abutting property, to pay for the improvement of Walker Mill Road. To the amount of $30,000, the action is brought by the city for its own use; for the rest of the amount, it is brought for the use of the contractor who did the work.

It is claimed that the assessment being by the front foot, and not purporting to be an assessment in proportion to benefit conferred by the improvement upon the respective lots, the assessment is unconstitutional and void. There is, indeed, language used in the opinion pronounced in Chamberlain v. Cleveland, 34 O. S., 551, which seems to sustain the objection. But assessments by the foot front, equal upon every front foot,
728 have been *sustained probably every year since the constitution was adopted, and by every court in the state, and at every term of the supreme court. In some cases the precise point now made has been overruled. In Corry v. Campbell, 25 O. S., 134, a case of assessment by the foot front, evidence was offered by abutting owners to show the amount of benefit received and was excluded; and the exclusion was affirmed by the supreme court. In Cincinnati v. Bickett, 26 O. S., 49, it affirmatively appeared that the lots on one side of the street received greater benefit from the improvement than the lots on the other side. The supreme court held that, notwithstanding this inequality of benefit, the assessment by the front foot must be the same on both sides of the street.

In Chamberlain v. Cleveland, the assessment was not by the front foot upon abutting property, but was upon property benefited by the im-

provement, including property on other streets, and the language in the opinion is perhaps used with reference to such a case. For in a case decided at the same term, Griswold v. Pelton, 34 O. S., 482, the same judge pronouncing the opinion, the right to levy an assessment by the front foot was sustained. And in a later case, Jaegar v. Bare, 36 O. S., 164, the supreme court held that an assessment by the front foot must be uniform on all the abutting property.

The assessment is claimed to be wholly invalid on another ground. The improvement ordered and contracted to be made was not, when the work was begun, a public way; a portion of it was a turnpike, the property of a private corporation. Before work was done on this portion, the city acquired from the corporation the ownership of the turnpike. It is claimed that the city acted without jurisdiction, because a portion of the land on which it resolved to make the improvement was not public property at the time the work was resolved and contracted to be made.

I know of no authority or principle sanctioning this claim. The case of Harbeck v. Connelly, O. S., 229, is to a different effect. That holds that where a city without right enters upon private property, confiscates it and constructs a way on it, the city cannot make the owner pay out of the residue of his *land for the improvement so wrongfully made upon the portion of which he was so dispossessed. 729

The legislature, in section 544 of the Municipal Code, now section 2284 of the Revised Statutes, provide for the acquisition by municipal corporations of the title to land over which a street has been ordered to be made, and including the cost of such acquisition in the cost of the improvement. The supreme court in Cincinnati v. Cincinnati and Spring Grove Avenue Company, 26 O. S., 246, a case like the present, while holding that an assessment cannot be levied when the city constructs only so much of the ordered improvement as lies upon land already appropriated, advised the city to acquire title to the land upon which the remainder of the way was laid out and complete it, and then assess for the whole. And it appears, this advice was followed and no objection made in a subsequent case which went to the supreme court, Krumberg v. Cincinnati, 29 O. S., 69.

It is further claimed that the assessment is illegal, being in contravention of sections 560 and 561, Municipal Code, now sections 2301 and 2302, of the Revised Statutes. They provide that when a street within a corporation is graded in conformity to grades established by the corporation and the expense is assessed on the abutting lots or lands, the owners shall not be subject to any special assessment occasioned by any subsequent change of grade in such street, and these provisions embrace territory added to the territory by annexation.

The grade of the present improvement is a very material change from the surface of the old road, being raised in places more than twenty feet. Many years ago, when Mr. Gest was engineer, the county commissioners established a grade for the road. Subsequently the road was improved by the county commissioners. But, while engineers testifying on the trial differ as to what the Gest grade was or is, the preponderance of evidence is, that it was very different from the grade or surface line of the road as subsequently improved; that the grade varied materially, while the improvement varied little, from the natural surface of the ground.

The improvement was paid for by a tax levied under authority of a
730 statute, which allowed roads to be paid for by a tax levied *on all property, personal and real, within one mile of the road improved. This is a special tax, not an assessment.

But whether tax or assessment, it was not drawn from abutting lots and lands. All the lots in the subdivisions through which the road passed were assessed, though separated by platted streets and ranges of lots from the road.

The assessment is claimed to be invalid on yet another ground. After the improvement had been recommended, ordered, advertised and contracted for, the grade of a portion of it was changed. The change diminished the amount of embankment required, and thus diminished the cost of the work by several thousand dollars. The change was recommended by the board of improvements, ordered by council and agreed to by the contractor; but there was no advertisement or call for new bids. The work done and for which the assessment is made, is not identical with the work originally contemplated and advertised.

An attempt was made to prove that all the owners abutting on that portion of the improvement when this change of grade was made petitioned for or agreed to the change. If the attempt had been successful, it would not have affected this objection; for all owners abutting on the improvement have equal right to demand regularity in the proceedings. But it has already been determined by the supreme court in the much quoted case of Uppington v. Oviatt, that this irregularity is not a defect fatal to a recovery, but only an irregularity which still leaves the abutting owners liable for the fair cost of the work done. As it appears from the evidence that the assessment does not exceed the fair cost of the work done, the abutting property is still liable for the amount of the assessment, unless some other objection is fatal. There cannot, however, be a recovery of the five per cent. penalty, for nonpayment of the assessment when demanded.

Another objection is made, which goes, not to the whole assessment, but to that portion which the city is demanding for its own use. When the city was enjoined from making so much of the work as was laid out over the Warsaw turnpike and the rest of the work was completed, action was brought to recover for the contractor an assessment for so much of the work as was done. This action being defeated in accordance with
731 the decision *in Cincinnati v. Cincinnati and Spring Grove Avenue Company, 26 O. S., 246, the contractor brought suit against the city and received judgment against the city for the contract price of the work done; which judgment has been paid. The contractor having been paid for so much of the work, the city demands for itself the assessment for it. The owners abutting on that part of the improvement claim that the contractors have been paid; the work has been paid for; the claim for which an assessment was to be levied, has been satisfied; and therefore there is no ground for levying an assessment.

When an improvement is made which is to be paid for by assessment, two relations of debtor and creditor arise; an indebtedness from the city to the contractor, and an indebtedness from the abutting owners to the city. The city may pay its debt to the contractor by assigning to the contractor its claim against the abutting owners; or it may pay the contractor directly and then collect for its own reimbursement the assessment upon the abutting property. If direct payment to the contractor is

compulsory instead of being spontaneous, that cannot affect the right of the city to mature and collect its claim upon abutting property.

Sundry lots, upon examination of evidence, were found to be worth less than four times the amount of the assessment, and as to these lots the assessment was according reduced. With this exception the assessment was ordered to be paid without penalty, and half costs to be paid by plaintiff and half by defendants.

Kumler, Crosly & Ampt, City Solicitors, Paxton & Warrington, of Counsel for the City.

Jordan, Jordan & Williams, Forest & Mayer, Gray & Tishbein, Crawford & Bettinger and John J. Gasser, for Defendants.

NUISANCE—WATER COURSE.

[Superior Court of Cincinnati, Special Term, 1881.]

HUGH F. KEMPER ET AL. v. THE WIDOWS' HOME ET AL.

1. When persons owning lands, through which runs a stream, permit and participate in the use thereof as a sewer, they cannot enjoin a similar use by others if reasonable under the circumstances and no actual nuisance is thereby created. They must be held to have waived their natural right to purity in the stream. 732
2. Merely increasing the flow of water in a natural water course does not, like increasing the flow of surface water, give a right of action. Riparian owners cannot complain when such increase is due to the building or change of grade of streets and the improvement of lots fairly within the territory drained by such water course, when its capacity is not exceeded.
3. A water course in a city is, within its capacity, likewise bound to receive such increased drainage as is due to the increase of population along it, including such of the drainage due to human habitation as is usually led into street gutters.
4. No right of riparian owners is invaded when the flow is increased, if not beyond the stream's capacity, by changing the grades of lots to make them conform to the grades of streets upon which they abut, although surface water is thereby thrown into the stream which naturally would not flow there.

HARMON, J.

The plaintiffs say that they own and reside upon real estate in Cincinnati, on Walnut Hills, south of McMillan street, between Park and Grandview avenues; that through their lands, and in the vicinity of their residences, extending from a point north of McMillan street, there is a deep ravine, which now is and always has been a natural water course; that the plaintiffs, or some of them, have enclosed the water course so that the water which formerly ran in an open ravine now runs through an enclosed sewer, which sewer, they say, is a private one, constructed by them for their own convenience. They allege that the water which ran through this water course was pure and limpid, and that the defendants—the Widows' Home, and the Old Men's Home, which are corporations, have constructed, about 800 feet east of the place where the ravine crosses McMillan street, a large building, intended to accommodate several hundred persons; that by the permission of the board of public works of Cincinnati, the authorities of these homes are engaged in laying a drain-pipe from their building to McMillan street, and then west on

McMillan street to the water course, and, unless enjoined, are about to turn into that pipe the waste water of the house, wash water, kitchen water, and the overflow of the privy vaults; that if they are permitted so to do it will create a nuisance in the water course by polluting the
733 water and increasing * the flow, and work irreparable injury. They ask that the authorities of the homes, the city, and the contractors, be enjoined from so doing. A temporary injunct on was allowed, and the case now comes up upon a motion to dissolve it, and the pleadings having been completed, and witnesses heard, in place of affidavits, the case is also submitted for final judgment.

The answer admits that this ravine is a natural water course, but denies that the sewer which the plaintiffs have constructed is a private one. It alleges that the sewer stands in the place of the water course; that it is now and always has been a natural outlet for the drainage of the country in that neighborhood. Defendants deny that any water from privy vaults, or other water [which] will create a nuisance, is about to be thrown into the stream, and generally take issue with the petition.

The case, as presented, naturally divides itself into two parts:

I. The rights of the plaintiffs arising from the character of the water which is about to be thrown into the stream; and

II. The rights of the plaintiffs arising from the throwing of any additional water, at all, into the stream.

It is well settled that the water flowing in a natural stream is the property of those through whose land it flows. The stream itself is recognized as property, and its injury, by diversion or pollution, is actionable, though the American courts do not seem to go so far as those of England in protecting the abstract right to the stream. The question with us seems to be rather as to the reasonableness of the use under all the circumstances of the case, and if reasonable in view of these, the mere fact of the partial pollution of the stream is not actionable. Cooley on Torts, 587; Merrifield v. City of Worcester, 110 Mass., 219. And this same view, as I understand it, is incidentally recognized by our supreme court, in the case of Tootle v. Clifton, 22 O. S., 254.

Now, while it may be true, as claimed by the plaintiffs' counsel, that it is no answer to an action for polluting a stream to show that other persons are engaged in doing the same, and that, therefore, stopping the one will give no relief, because one may consent to some persons invading his rights, and yet not consent to others doing so, yet where the use of the stream complained of as polluting it, is one to which, by the common
734 consent *of all interested, the stream has come to be put, it does not lie in the mouth of any so consenting to complain. As was said by Judge Taft in the case of Hoffman and others against Winslow, a case in this court unreported, but which I have in a printed pamphlet furnished by counsel, which related to the enclosure of Deer creek, and the turning of drainage from the streets of the city into it, where property owners have made a sewer of a water course, and by common consent it has become polluted in that way, no one of the owners can be allowed to claim that things should be restored in the valley to their original condition.

In none of the cases cited by counsel for the plaintiffs for the principle just referred to, as found in Wood on Nuisances, does it appear that the plaintiffs themselves had joined in the use which they complained of and sought to enjoin; but in all those cases persons using and claiming

the right to use the water of the streams in a pure condition, sought to enjoin injurious uses by others. Now, it would be very strange if one could maintain an action at law for the pollution of a stream by a use in which he himself joined; and if he could not maintain an action at law, certainly he would be in no position to ask the aid of a court of equity. Where, by common consent, as I find in this case, a water course has been put to uses which impair the purity of the water, if each owner still retains the abstract right to every possible use of the stream, and to change his mind whenever he pleases as to the state of purity he desires, very serious results might follow. Take Deer creek, or Mill creek, for examples, which have become so polluted by reason of the growth of the city around them as to prevent their use for any purpose requiring purity. If any riparian owner who had acquiesced in their use or inclosure as sewers, should conclude that he would change his mind, and have the stream come to him again as a country brook, gurgling by its purity, it would seem like straining the powers of a court to require everybody else to change their use of the stream in order to protect that abstract right. Could one engaged in a noisome business enjoin others from carrying on the same business because, though he does not see fit to enjoy it at present, he has a right to have the air pure?

In this case, it appears that the city, following the example *of 735
the Madison Turnpike Co., enclosed the water course where it passes under McMillan street, and filled up over it; that these plaintiffs, for about 800 feet south of that, have continued the culvert or sewer, that for a distance of only about 125 to 150 feet the stream upon their lands now remains uninclosed; that then the ravine enters the boundaries of Ashland, a street of this city, not built, but dedicated, and after passing some distance through that street, enters the culvert under Columbia avenue, and then a culvert on the private property of one Mack, below that, and so goes all the way to the Ohio river; so that the space uninclosed is very small. It appears from the evidence that all these plaintiffs drain more or less of the refuse water of their houses into this sewer, and that the water from the gutters of McMillan street, including waste water from a number of houses fronting thereon, has for several years run into it without objection.

Now, I am satisfied from the evidence, without recounting it in detail—clearly satisfied, that the use which the defendants are about to make of the stream or sewer is the same character of use to which the stream, by common consent, has already been put; that the defendants do not propose to throw into it water any more offensive than already goes there; that the water proposed to be cast into it, so far as the pollution of the stream is concerned, will not appreciably injure it, as it is used, and has been used for years; but, on the contrary, by increasing the flow of water, will rather work a benefit, by preventing stagnation. I am as clearly satisfied that the proposed action of defendants will injure neither the health nor the comfort of plaintiffs, nor interfere with the enjoyment of their property, nor create a nuisance, in any sense. Such water runs, and has for years run in hundreds of gutters in this city, and while it is not as pleasant or poetical as that of a country brook, it is one of the things residents of cities must endure. The complaint now made of the stream arises, not from such drainage as defendants propose, but from privy drains which the evidence shows some have turned into it.

So far, then, as concerns the character of the water proposed to be thrown into this stream, I find that the plaintiffs have not made out a case entitling them to an injunction.

736 *This brings us to the second position of counsel for plaintiffs, which is, that, without regard to its character, the defendants have no right to throw into the stream any water that would not naturally reach it from natural cause alone. It appears from the evidence, that the city granted permission to lay an underground pipe, with the proviso that it should be laid along McMillan street, and should belong to the city when laid. It was all laid before this action was brought, and belongs to the city. So far as the laying of the pipe underground is concerned, it would seem that it makes no difference to the plaintiff's case. If their rights are to be invaded, they will be invaded by the fact that the water will pass into their water course, and it does not concern them how it gets there. The case, therefore, is the same as though the city should permit the defendants to turn the water from the building into the open gutter, and it should pass then into the water course.

The plaintiffs claim that most of the lot of the defendants, including the site of the building, formerly turned the surface water falling upon it to the northward, entering Bloody run, and then into Mill creek at Carthage, though the evidence shows that defendants' lot does not abut upon that stream or upon any of its branches, and has no communication with it by any street or alley, or otherwise, McMillan being the only street or alley upon which it abuts; that the city changed the grade of McMillan street so as to cause more of it to slope toward this water course than formerly. It is admitted that the street, in front of the defendants' property, all the way west to the water course, does now slope toward the water course. And plaintiffs claim that because the defendants, by means of the down-spouts from their building, and the drain-pipes from their house, propose to throw this water into the street, and then permit it to go into this sewer or stream, their rights are invaded by the mere fact of that additional water being thrown into their water course, and that it is an invasion of their right actionable because continuous, and enjoinable because the remedy at law is not adequate. The authorities which plaintiffs' counsel rely upon to sustain this position, all refer, however, to the flow of surface water from higher to lower land where there is no water course, and in such a case the doctrine is well settled, with some ex-

737 *ceptions, which do not seem to [be] very well defined in Ohio, to the effect that the flow may be increased to a certain extent by the necessary and proper use of the higher land, that an increase by the act of man of the water which flows upon the lower estate is an invasion of a right, and actionable *per se*—that the servitude in such case is to receive the natural flow of water as it comes from the heavens in the form of rain and snow.

Now, if that same principle applies to a water course, the plaintiffs' position is well taken. But I find that the authorities do not establish the same principle as applying to a water course. In the case of Miller v. Laubach, 47th Pa. State, 154, (which case, by the way, is cited by Mr. Boynton, one of the present judges of the supreme court, who argued the case of Butler v. Peck, 16th O. S., 347, which was relied upon by counsel, and which was a surface water case), the court said that there was a distinction between the flow of surface water upon land, and the flow of water in a water course, and that the property owner may increase the

flow of water in a water course without being liable to an action, although he could not do so with the surface water. The same principle is recognized in The Niles Works v. Cincinnati, 2 Sup. Ct. Rep., page 405, and in the case of Hoffman v. Winslow, already referred to.

It is admitted by counsel, and settled by the authority of these cases, that the city has a right, by change of street grades, to increase the flow of water in a water course, and that riparian owners cannot complain of such increase. But it is contended by counsel for plaintiffs that the increase so permitted is simply that due to water naturally falling in the streets, or, at most to that naturally falling upon the lots abutting upon the streets, and that it does not apply to water caused by human habitation, or human agency. I do not find, however, in these cases, any such limitation. They both refer to Deer creek, and it appears in both of them, that the city, by changes in the grades of its streets had added to the thousand acres which naturally drained into Deer creek, some forty-nine acres more, and turned the drainage from the streets in the forty-nine acres, and from the lots abutting upon those streets, into Deer creek, which the court said they had a right to do. It is not expressly stated that the drainage so thrown into Deer creek was rain water falling upon the streets and *abutting lots. The court's language is, "Drainage from the lots," 738
which includes all drainage which streets usually receive from lots in a thickly-settled region without underground sewers, as those forty-nine acres were. And it is proved in this case, and the senses of the court daily prove the same thing, that one of the uses to which a street is commonly put in this city, where there is no underground sewer, is to receive from the lots such water as that in question here. And, therefore, in these cases, there can be no question but that the drainage that was thrown into Deer creek, was not only what fell from the heavens, but what the habitation of man upon the lots necessitated.

Now, so far as the portion of water which might drain northward from defendants' lot is concerned, it seems to me clear that when the city changes the grade of a street, the owner of a lot upon the street has a right to conform his lot to the grade of the street, and that he is not bound, in so doing, to see to it that the water shed upon his lot remains exactly as it was as God made the country. Roberts v. Chicago, 26 Ill., 249.

In this case, McMillan is the only street which touches defendants' property, and if there is any place to which they have a right to let the water run, it is to this street; and it being admitted that the change of grade in McMillan street imposed upon this water course an additional servitude, the authorities satisfy me that it includes the carrying-off of this water from defendants' premises. It will be found in the case of Hoffman v. Winslow that the charges given by Judge Taft to the jury, and the charges refused by him, bring out clearly these principles.

And there is a class of cases which would seem to establish the right of the city to drain its sewage into natural water courses, subject probably to the condition that owners have waived the right to purity in the streams. See the cases already referred to, and in addition to them, the case of Munn & Borton v. Pittsburg, 40 Pa. St., 364, and of Marfield v. City of Worcester, 10th Mass., 116.

It was strenuously urged by counsel for plaintiffs that if the right of these defendants to cast their water into this water course is established by the court, or the city's right to permit them to do so, it might result in

imposing upon the owners of this water course an unlimited amount of
739 such water, and that *this water course might be turned into a general sewer for the whole surrounding country of Walnut Hills. I do not mean to say that the right of the city to increase the volume of water by changing the grades of its streets, is unlimited. An unreasonable use of that power might subject the city to action; or, the unreasonable use of the right of private persons, either as to amount, or as to the character of the water which they so drain, creating a nuisance, or overtaxing the natural capacity of the water course, might give a right of action, reasonableness of use being the test, as already said.

All that is necessary for me to decide in this case, and all that I do decide, is, first, that, considering the character and condition of this stream and the present use to which, by common consent, it has been put —for while plaintiffs call it a private sewer, it remains a public water course—no injury will arise to plaintiffs by reason of the character of water defendants propose to turn into it which entitles them to an injunction, and that no right of the plaintiffs will be invaded which entitles them to an injunction by reason of casting this water, without respect to its character, into this water course. Whether a right of action might arise to them if private persons, or the city, should unreasonably abuse the right, it is unnecessary to say.

The motion to dissolve the injunction will be granted, and a judgment entered for the defendants.

Thos. McDougall and W. M. Kemper, for Plaintiffs.

J. W. Warrington, for Widows' Home, *et al.*

Powel Crossley, for the City.

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23 *AGENCY.

[Superior Court of Cincinnati, General Term, March, 1881.]

Harmon, Force and Foraker, JJ.

ROBERT SOUTTER & CO. v. JOHN N. STOECKLE.

1. When two persons deal with each other, the law presumes that they act as principals.
2. If one would relieve himself from the liabilities of a principal on the ground that he was an agent, the burden is on him to show his agency. And not only must he show his agency, but he must go further, for the mere fact of agency is not sufficient to relieve him, and show that his principal was disclosed.
3. By disclosing or naming his principal, an agent may relieve himself—but by disclosing his principal is meant that he must be so disclosed as to bind him —*i. e.*, he must be disclosed for the purpose of making him responsible, and the other party must be made to understand that he is dealing with the agent only as agent.
4. A mere incidental remark or statement made by an agent in the course of a transaction which he is carrying on in his own name, from which it would appear that he had a principal behind him, without any bringing of the principal or his name into the transaction, is not sufficient to relieve the agent on the ground that he was acting as the agent of a disclosed principal.
5. When it is said of such cases, "The test is 'To whom was credit given?'" and when such like expressions are used in such connection, credit in the sense of financial responsibility or moral integrity is not meant, but credit only in the sense of recognition as a principal.

FORAKER, J.

This case is reserved upon the evidence. It was tried at special term before a jury five different times. The first three trials resulted in a verdict for the plaintiff. The fourth time there was a verdict for the defendant. The fifth jury disagreed. All the verdicts having been set aside, and the jury finally disagreeing, the parties consented to waive the intervention of a jury, and submit the case to the court upon the same evidence *that was adduced before the jury at the fifth trial, which being done, the court upon motion, reserved the case as stated. 24

The action is brought to recover the sum of $10,696.03, with interest from the — day of ——, A. D., 1872, that being the amount of loss sustained by the plaintiffs, on account of the sale by them at that time, as brokers, of thirteen Union Pacific R. R. income bonds of the face value of $1,000 each, which turned out to be counterfeits, and which plaintiffs were compelled to replace with genuine bonds at the cost and loss to them of the amount named. They claimed to recover from the defendant on the ground that the bonds were placed in their hands for sale by him, acting through the firm of S. B. Keys & Co.

Stoeckle defends on the ground that he acted in the transaction as an agent for a disclosed principal.

The admitted and proven facts in the case are, so far as it is necessary to state them, that in the year 1872, the plaintiffs were brokers, engaged in business as such at the city of New York, and handling on commission, among other things, bonds of the character here in question.

S. B. Keys & Co. were a firm engaged in business as bankers and brokers at the city of Cincinnati.

The defendant was also a broker engaged in business as such at the city of Cincinnati.

About the 25th day of August, 1872, Stoeckle called upon Keys & Co., and inquired the price of Union Pacific R. R. bonds, and offered to sell the ones in question. Keys & Co. declined to buy, remarking that they did not know anything about the bonds offered, and that they would not buy them anyhow, unless from some one well identified and responsible, for the reason, among other things, that they had been notified of the robbery of a bank in Baltimore a short time before, and the taking of a large amount of these bonds.

Keys & Co. asked Stoeckle where the bonds were to come from. He answered, "from a cattle dealer, from the west, then in his office." Nothing further was said by either Keys & Co. or Stoeckle throughout their negotiations about the owner of the bonds, and Keys & Co. and the cattle dealer were not brought together in any way. But it appears that at one time during the negotiations, Stoeckle expressed anxiety to consummate the *transaction as "he wished to make some money." And he may have made other incidental remarks from which it could be inferred that he had a principal behind him. 25

Keys & Co. declining to buy the bonds, Stoeckle came back the next day and asked if they would not accept them as collateral security for a loan of money. This also was declined, and finally after several interviews Keys & Co. offered, as the only and best thing they would do, to send the bonds to their business correspondent at New York, with

instructions to have them examined, and, if all right, to quote the price for which they could be sold, and then if the price suited him they could order them sold accordingly, and in case of sale, upon notice thereof, they would give him a check for the amount of the proceeds without waiting for the remittance from New York.

The next morning Stoeckle brought in the bonds, and told Keys & Co. they should send them to New York as they had proposed. Thereupon Keys & Co. took the bonds, gave him a receipt describing them and reciting that they were received from John N. Stoeckle. They also opened an account with Stoeckle on their books.

They forwarded the bonds to the plaintiffs, who were their business correspondents at New York, with a letter of instructions calling attention to the Baltimore robbery and asking them to have the bonds examined, and if all right, to quote price at which they could be sold.

The bonds reached Soutter & Co. in due time. They, not being familiar with them, sent them to Morton, Bliss & Co., who were the agents at New York City of the Union Pacific Railroad, and more familiar than anyone else with the bonds, and requested them to examine them and report whether or not they were all right. Morton, Bliss & Co. reported that they were all right. Thereupon plaintiffs telegraphed accordingly to Keys & Co., and that eighty-six and a fraction cents could be had for them.

Keys & Co. communicated this to Stoeckle, and were directed by Stoeckle to have them sold, which they at once did, and then, upon notice from Soutter & Co. that the sale was made, Keys & Co., as they had previously promised, gave to Stoeckle their check for $11,217.94,
26 that being the full amount of the proceeds *of sale less only a commission of $47.86 and a few dollars of charges for expressage, etc.

Stoeckle deposited the check he thus obtained to his credit in his own bank, drew his own check for $10,632.76, had it cashed, carried the money to his office, where he took out between two and three hundred dollars for his compensation, and handed the balance over to a man who called himself Henry Pardee, and for whom, as his principal, Stoeckle claims to have been acting throughout as an agent.

Pardee thereupon tied up his ten thousand and odd dollars in a handkerchief and went away; he has never been heard of since.

Stoeckle testifies that he saw him about the city several times afterward, but we are of the opinion from all the evidence that Steockle is mistaken as to that.

Two or three months later it was discovered that the bonds were counterfeits and Soutter & Co. were called upon to redeem them, and did. They thereupon, through Keys & Co., notified Stoeckle, tendered back to him the counterfeits and demanded that he make good the loss.

Stoeckle claimed to have acted merely as an agent, and denied all liability. Thereupon suit was brought.

The question is, therefore, whether or not upon these facts the plaintiffs can recover upon an implied warranty of genuineness, and this depends on whether Stoeckle acted as a principal, or as an agent, in his transaction with Keys & Co.

When two persons deal with each other the law presumes, in the absence of anything to show the contrary, that each is acting for himself as principal. If one claims that he did not act as principal, but as agent, the burden is on him to show his agency by proof. The burden

is therefore on Stoeckle to show that he acted as an agent in his transaction with Keys & Co. It is not sufficient, however, to relieve one of the liabilities of a principal to show that he in fact was but an agent. To have this effect the agency must be disclosed. As the books say, he must name his principal.

It is clear to us from the facts that Stoeckle was known to Keys & Co. as a broker; that he stated that the bonds were to come from a cattle dealer from the west, then in his office; that *he wanted to make some money out of the transaction, and such like circumstances, coupled with the general features of the transaction, that Keys & Co. did understand that Stoeckle had a principal behind him for whom he was acting. 27

If, therefore, the mere fact of known agency were sufficient to relieve one from the liability of a principal, Stoeckle would be relieved here. But we think it well settled law that for one to relieve himself upon such ground he must not only make known his agency, but he must deal for his principal, in his name, and as his agent.

The question is not, therefore, what the relations were between Stoeckle and Pardee, but what were they between Stoeckle and Keys & Co.

Stoeckle presents himself at the office of Keys & Co., and informs them that he has certain bonds to sell, and commences negotiations for their sale. He makes no reference to his principal until asked where the bonds are to come from. He then indefinitely answers: "From a cattle dealer from the west, now in my office." Keys & Co. make no other inquiry concerning him. The negotiations proceed, but not in the name of the cattle dealer, for it does not appear that it has yet been spoken; certainly not spoken for the purpose of introducing him into the transaction. When the bonds are received by Keys & Co. and forwarded to New York and sold, they are received from Stoeckle. The receipt is to him, in his name; the account is opened with him; the sale is for his account; the proceeds are carried to his credit; the check for the same is given to his order. No one else appears or is known in the transaction.

That this is not such a naming of his principal as relieves an agent from liability is manifest from an examination of the authorities.

In *ex parte* Hartop, 12 Vesey, 352, Lord Erskine says: "No rule is better ascertained or stands upon a stronger foundation than this, that where an agent names his principal, the principal is responsible, not the agent; but for the application of that rule the agent must name his principal as the person to be responsible." In Wheeler v. Miller & Towle, 2 Handy, 149, the court says: "Where one person deals as for himself, he is presumed to be principal, and if he would avoid liability as such he must *not only disclose the fact that he is acting as agent for another, but he must disclose the name of that other person, so as to bind him, and not deal in his own name; otherwise he is to presume that credit is given to himself." 28

To the same effect are Gurney v. Wormsly, 4 Ellis & Blackburn, 133; Thompson v. McCullough, 31 Mo., 222; Worthington v. Cowles, 112 Mass., 30; Parker v. Winlow, 7 Ellis & Blackburn, 947; Holt *et al.* v. Ross, 54 N. Y., 475, and numerous other authorities that might be cited.

The quotations given express in our judgment the rule that governs.

According to them it is not sufficient for the agent to simply disclose that he is an agent, nor is it sufficient if he goes further and merely mentions the name of his principal.

As Lord Erskine puts it, "he must name his principal as the person to be responsible." The disclosure must be more than a casual observation or accidental incident of the negotiations.

The other party must be made to understand that he is to look to the principal.

According to Judge Spencer in Wheeler v. Miller & Towle, the agent to avoid liability as principal, "must not only disclose the fact that he is acting as agent for another, but he must disclose the name of that other person, so as to bind him, and not deal in his own name."

As we have already shown, Stoeckle carried on this transaction throughout in his own name. The circumstances and the manner of his disclosure to Keys & Co., that the bonds came from a cattle dealer from the west, then in his office, and his several references to his principal, are such as to conclusively negative the idea that he disclosed his principal, "so as to bind him." There is absolutely no testimony to show that he either attempted or intended to do any such thing. All that was said or done upon which any such thing can be claimed, was clearly only accidental, not intended for such purpose, and not calculated to warn Keys & Co., or put them upon inquiry in any manner. Inasmuch, therefore, as there was no such naming of Pardee by Stoeckle as was necessary to bring him into the transaction as the person with whom Keys & Co., dealt, and inasmuch as they gave him no
29 credit, never *met him, and had no knowledge of him, except the indefinite information that he was a cattle dealer from the west then in Stoeckle's office, given in the manner we have seen, we are forced to conclude that Keys & Co. did not deal with Pardee. And inasmuch as they must have dealt with somebody, and that somebody must have been either Stoeckle or Pardee, it follows that as between Stoeckle and Keys & Co., Stoeckle was a principal.

It will be observed that we arrive at this conclusion independent of the evidence offered to show that there was a custom existing among the brokers in Cincinnati, whereby, as plaintiffs claimed, Stoeckle would be liable as a principal, upon the facts of the case, for such a transaction. We disregard that evidence for the reason that we think the law clearly covers the case, and that a resort to the question of custom is unnecessary to fix the rights involved. But it is necessary to consider still another question.

It is claimed for the defendant that the law makes an agent liable as a principal, when the principal is not so disclosed as to bind him, only on the ground that the person dealing with him must have given him credit. And in support of this the cases above cited, among others, are relied upon.

The claim therefore that in a case where an agent has acted for an undisclosed principal, but at the same time without any credit given him, he will not be liable. And it is said that that is the case.

They say, the fact that Keys & Co. did not regard Stoeckle as responsible, and refused to take the bonds from him without inquiry, and declined to advance any money until after they had been examined in New York, and were reported from there as all right, all go to show conclusively that they gave no credit to Stoeckle, but acted entirely upon the faith they attached to the report from New York.

It is undoubtedly true that Keys & Co., were not willing to do what they did; relying for their protection upon the mere fact that Stoeckle delivered them the bonds. They were not willing to act until the assurances were received from New York. But it does not follow that no credit was given to Stoeckle such as *is contemplated by the law when it uses that term in such a connection. 30

Speaking upon this point in the case of Wheeler v. Miller & Towle, 2 Handy, 149, Judge Spencer says at page 153: "The test of liability in this case is said by Story, section 263, to be 'To whom is the credit given? Whether to the principal alone, or to the agent alone, or to both. But how can it be said that the credit is given to the principal, when the principal is not named or known at the making of the contract?' " This is a fair illustration of the language used upon this question by all the authorities.

What is meant by it? Does it mean, as is here contended, that credit must be given the agent, before he can be made liable, in the sense that he must be considered financially responsible and morally honest and reliable? We think not. On the contrary, we think that the agent of an undisclosed principal may be held liable for his transaction, though he may have been in regard to it thoroughly distrusted in these respects from the beginning to the end of it. The credit here spoken of is quite a different thing. It simply means, who was recognized as principal? In other words the question over again, which we have already answered, viz.: With whom was the transaction?

This is apparent from the language of Judge Spencer, just quoted. He says the credit must have been given to the agents, since the principal was not named or known. What credit? Not credit in the sense that the agents, who were the defendants in that case, were to be looked to in any way for the payment of the paper there negotiated, but credit in the sense that somebody must hold the place of principal, and have the credit necessary to be a principal in the transaction, and inasmuch as the agent's principal was not named or known, it must have been the agents, who were thus credited, and for that reason were principals as between themselves and the person with whom they were dealing. This credit Stoeckle had at the hands of Keys & Co. in his transaction with them. For these reasons (his liability as an implied warrantor being admitted) we hold that the law imposes upon him the hardship of the loss that has arisen from this unfortunate matter, and the judgment of the court will be accordingly.

*FORCE and HARMON, JJ., concurred. 31

King, Thompson & Maxwell, Attorneys for Plaintiff.

John F. Follett and McGuffey, Morrill & Strunk, Attorneys for Defendants.

MORTGAGES—SURETIES.

[Superior Court of Cincinnati, General Term, April, 1881.]

Harmon, Force and Foraker, JJ.

ELIJAH JONES v. THOMAS TURNER ET AL.

1. A mortgage given to secure the debt of another, the mortgagors assuming no personal liability, is released by an extension of time of payment of the debt secured made without the mortgagor's consent.
2. The principle that delay in enforcing payment does not release a guarantor except to the extent he is injured thereby, does not apply where the delay is due to an extension of time without his consent.

HARMON, J.

Plaintiff seeks judgment against Thomas Turner as maker and William Turner as guarantor of a promissory note for $3,000 at one year. He also seeks, as against the other defendants, Elizabeth A. Hubbell, Thomas B. Hubbell and Abbie S. Turner, foreclosure of a mortgage given by them to secure the payment of said note.

Thomas Turner makes no defense. William Turner avers that he has been released from his guaranty, and the other defendants aver that their property has been released from the lien created by said mortgage, by reason of two extensions of said note, each for one year, agreed upon by plaintiff and Thos. Turner in consideration of a higher rate of interest and without their knowledge or consent. Plaintiff denies that there were such or any extensions. The conclusion we have reached upon this defense makes useless the consideration of any other.

The court at special term made and entered certain findings of fact and conclusions of law, whereupon plaintiff moved for a new trial and for judgment, notwithstanding such findings, which are in the nature of a demurrer, challenging the correctness of the conclusions of law.

32 Upon these motions and a bill disclosing *all the evidence, the case was reserved for decision here.

The only ground of the motion for a new trial is that the findings are not supported by, but are contrary to, the evidence. The testimony of plaintiff and Thomas Turner is in conflict as to the second extension, the first being admitted, and William Turner's consent thereto appearing upon the back of the note, but we think the circumstances corroborate the testimony of Thomas Turner sufficiently to turn the scale in favor of defendants.

It is clear from the evidence that William Turner neither knew of nor consented to the second extension, that the mortgagors knew of or consented to neither extension, and that the form and nature of the transaction was notice to plaintiff of their relations to it. The motion for a new trial is, therefore, overruled.

The conclusion of law drawn by the court was that William Turner was discharged from liability upon his guaranty by the second extension, and that the property of the other defendants was released from the lien of the mortgage by the first extension.

It is too clear to require reference to authorities that a guarantor is released by a definite extension of time, agreed upon between the creditor and principal debtor for a valuable consideration without the guarantor's consent. These extensions were for definite periods in consideration of an increased rate of interest. Even an agreement to pay the same rate would have been sufficient consideration under our decisions. Plaintiff's counsel rely upon the finding of the court, that Thomas Turner was insolvent at the expiration of the first extension and has ever since remained so, so that William Turner has not been in fact injured by such extension. In case of mere delay a guarantor is not discharged, except to the extent that he has been injured thereby. But in case of an extension of time he need show no injury. The law presumes it, and that conclusively. He is injured by the change in the terms of his obligation, by the loss of his right during the period of the extension to pay the debt and proceed against his principal, and of his right to require the creditor to so proceed.

The question as to the effect of the extension upon the mortgage

*lien is, so far as we are advised, a novel one in Ohio. There can be no question as to its effect upon the personal liability of the mortgagors had they by signing the note, or otherwise, undertaken such liability. They would have been discharged upon the principle just referred to. They did not, however, undertake any personal liability. They merely mortgaged their real estate, the condition being that the mortgage should be void, "if the said Thomas Turner (who was a party to the mortgage, because said Abbie S. Turner, one of the owners of the property, was his wife) should pay or cause to be paid his certain promissory note," describing it by date, amount and time to run. 33

Two of the most cherished principles of courts of equity are to guard with jealousy the rights of sureties, and to look at the real nature of every transaction rather than its form. It would naturally follow that, where the real intent and effect of a transaction is the securing by one person of another's debt, the court will be governed by the same principles, whether the transaction be an executory personal contract or an executed contract *in rem*. This certainly should be done [true] where the aid of the court is required to give effect to what the parties have done, however it might be if the contract were so fully executed as to require no aid from the court.

In this case while the contract by which three of the defendants secured the payment of Thomas Turner's note, is executed at law, as a conveyance of the legal title of their property, investing plaintiff with certain consequent rights, it is in equity merely a security for the debt which the aid of this court is needed—prayed to enforce by foreclosure and sale. If defendants would be released from a promise to devote their property generally to the payment of this debt, why shall they not be released from what amounts, as the case is presented to us, to a promise to devote this particular lot to its payment?

There is no analogy as claimed between this case and Fisher's Executors v. Mossman, 11 O. S., 42. It was there held that though a note was barred by limitation, the creditor might still enforce his rights under the mortgage securing it, the note and mortgage being distinct instruments to that extent. Yet it is well settled that the mortgage is a mere incident to the debt, and in *equity, though not at law, passes without deed by assignment of the debt. If so, any satisfaction 34
or discharge of the debt must and does release it. It surely will not be claimed that when there has been any discharge of the debt without payments, as by sealed release or discharge in bankruptcy, the creditor may still enforce his mortgage. But lapse of time does not discharge the debt, it merely prevents suit upon it. For all other purposes it still exists. Extensions without his consent, however, discharged the surety utterly from the obligation of the debt, and, in equity, at least, its securities die with it. Had the mortgagors signed the note therefore they would be released from liability thereon, and their property from the mortgage as well. The fact that they did not sign the note changes the form, but not the nature of their relation to the transaction. If not sureties they are in every respect of the nature of sureties.

The cases show that most, if not all, of the principles relating to suretyship have been applied to such mortgages. In Ryan v. Shawneetown, 14 Ill., 20, a mortgage to secure an issue of municipal bonds to a given amount was held released by an increase of the bonds issued.

In Knight v. Whitehead, 26 Miss., 245, a debtor was held liable in implied assumpsit, to repay one who had mortgaged his property as security, and had been compelled to pay to save his property. In Purris v. Coostapan, 73 N. C., 575, a mortgage was held released by the misappliance of other securities received by the creditor from the debtor. In Wilcox v. Todd, 64 Mo., 388, a mortgagor was held entitled to compel the creditor to first exhaust the property of the debtor, while in White v. Ault, 19 Ga., 551; Smith v. Townsend, 25 N. Y., 479; Bank of Albion v. Burns, 49 N. Y., 170, such mortgages were held to be released by extension of time without the mortgagor's consent.

In all these cases there was no personal liability of the mortgagors.

In also Wolf v. Banning, 3 Minn., 202; Scheidle v. Weisblee, 16 Pa. St., 134; Christiner v. Brown, 16 Iowa, 130, 2 Story's Eq. section 1373.

35 *It is agreed that these mortgagors do not stand in the position of sureties, because the evidence shows that they are all related to Thomas Turner, and that it was understood before they gave the mortgage that he should go into business with the money borrowed upon the note if [it] secured, and take Thomas B. Hubbell, one of the mortgagors, into his employ. We do not think that the giving of an inducement by a debtor to a person, to become his surety, prevents that person from enjoying the rights of a surety. If such person had nothing to do with the principal transaction; if he incurred no debt of his own; if he merely became liable to pay the debt of the other, he comes fully within the definition of a surety, Smith v. Sheldon, 35 Mich., 42, no matter what, as between himself and the principal, induced him to become surety.

Both principle and authority, therefore, require us to overrule the motion and enter judgment for defendants.

FORCE and FORAKER, JJ., concurred.

J. P. Bocock and A. B. Huston, for Plaintiff.

J. S. Conner and Cox & Cochran, for Defendants.

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49 *LIBEL AND SLANDER.

[Hamilton District Court, 1881.]

Cox, Johnston and Longworth, JJ.

PAULINE MACK v. WM. MCGARY, ADMR.

In an action to recover damages for slander, the defendant filed a general denial: *Held*, that defendant might introduce evidence tending to prove a justification and offers of apology on his part, and that it was error for the court to charge the jury that, if they found such facts to exist, their verdict should be for defendant.

PETITION IN ERROR to the Superior Court of Cincinnati.

The action was instituted by the plaintiff against the defendant's intestate to recover damages for slander. The plaintiff was a saleswoman in Bell and Miller's store, in this city, where the defendant lost her pocketbook, and accused the plaintiff with having stolen it. The defendant filed an answer denying each and every allegation contained in the petition. During the trial the defendant introduced evidence tend-

ing to show justification, to which the plaintiff objected and took her exceptions. This and certain exceptions to the charge of the court below formed the grounds of the petition in error.

LONGWORTH, J.

Judge Longworth announced the opinion of this court. He held that the court below did not err in admitting the evidence tending to prove the justification and offers of apology on the part of the defendant's intestate to the plaintiff, but that the court below clearly did err in charging the jury that, if they found such facts to exist, their verdict should be for the defendant. For this reason the judgment of the court below was reversed, and the cause remanded.

Simrall & Simrall, for Plaintiff.

Jordan & Williams, Contra.

BILLS AND NOTES—DURESS.

[Hamilton District Court, 1881.]

Cox, Johnston and Longworth, JJ.

ROBERT S. COLEMAN v. THE MERCHANT'S NATIONAL BANK.

1. A material alteration of a note after execution and delivery renders it of no effect.
2. Where a note is given a person under a special contract to enable such person to raise money for his own use, and the amount of the note is left blank and the person taking it fills up the blank with an amount not authorized, a recovery may still be had upon it.
3. The fact that a note was paid under duress, is immaterial if the note ought to have been paid by the maker. It makes no difference whether it was paid under a threat or not.
4. Duress, to avoid a contract, must amount to a threatening of personal harm, or a deprivation of liberty or of property.
5. A mere threat of injury to one's credit cannot be held to be duress in law.

PETITION IN ERROR to the Superior Court of Cincinnati.

It appeared that plaintiff gave Wm. E. Davis, now deceased, his accommodation note for $1,850. The defendants discounted the note. Davis subsequently paid $500 on the note, and a new note was executed for $1,350. This second note was blank, both as to its date and as to the *place where it was payable. He directed his clerk to fill 50
these blanks, and then took it to the defendants and had it discounted. When the note became due, Coleman refused to pay it. It was in evidence that the cashier of the bank threatened Coleman that if he did not pay the note, he would destroy his credit in such a way as that he could not obtain money on discount at any other bank in the city, there being arrangement between the banks by which that thing could be done, that Coleman being terrified at the possible loss of his credit in this manner, paid the note. He now sues to recover back the amount thus paid.

LONGWORTH, J.

Judge Longworth decided the case. He held that there could be no doubt but that a material alteration of a note after execution and delivery would render it of no effect. But here the note was given to Davis under a special contract to enable him to raise money for his own use. Courts have gone so far as to decide that in a case of that character, where even the amount of the note is left blank, and the person taking it fills up the blank with an amount not authorized, a re-

covery may still be had. In this case the note could have had no effect until the date was filled up. The note having the words "payable at" on it, it was implied that some place of payment should be inserted in the note. Inserting the place of payment did not increase plaintiff's liability; on the contrary it restricted it. If Davis had no authority to fill these blanks the note was absolutely worthless. Davis had the right, therefore, to fill up the blanks.

Whether the note was paid under duress, therefore, was immaterial. If the note ought to have been paid by the plaintiff, it makes no difference whether it was paid under a threat or not, though it is hard to conceive that such a threat as this could constitute in law duress. Duress, to avoid a contract, must amount to a threatening of personal harm, or deprivation of liberty or of property. It was claimed that deprivation of credit was a deprivation of property. In a certain sense it is, but a mere threat of injury to one's credit cannot be well held duress in law.

Judgment affirmed.

C. L. Lasson, for Plaintiff.

Herron & Anderson, Contra.

FIXTURES.

[Hamilton District Court, 1881.]

Cox, Johnston and Longworth, JJ.

ISAAC BATES v. THOMAS G. NESKI.

1. A lessee may lawfully remove before the expiration of the lease, improvements, whether movable or fixtures, placed upon the land by him during the term.
2. The fact that the lessor reserves a lien upon the lessee's interest in the term and for all arrears of rent, does not reserve a lien on an improvement made by the lessee, and a judgment against the lessee, ordering the removal of a wall encroaching on the lot of an adjoining owner, binds the lessor, though he were not a party to the action.

APPEAL from the Court of Common Pleas.

The case came up on an application for the allowance of an injunction *pendente lite*. The plaintiff averred that he was the owner of a lot in *Betts' subdivision; that he leased the property perpetually to
51 one Elizabeth Nolte, and she assigned her lease to Charlotte Wolfhorst, who is now in possession of the property; that after the lease was executed the lessee built upon the premises a house; that the lease provided for a lien upon the term of years and the right of the lessee therein for all arrears in the rent; that in certain proceedings in the court of common pleas, brought by one Mrs. Neski against Mrs. Wolfhorst, the assignee of the lease, it was adjudged that one wall of this house should be torn down, it encroached upon the property of Neski, but to this suit the plaintiff was not a party. He alleges that the judgment is not binding upon him; that it was erroneous; that the sheriff is about to tear down the wall of this house, and he asked to have an injunction against the defendant Neski from having that done.

LONGWORTH, J.

Judge Longworth decided the case; holding that, as far as the plaintiff is concerned, he not being a party to the judgment in favor of Neski, he was not estopped to question its correctness in so far as it affected him; but whether it did affect him, or whether he had any

right, was another question. The lease did not give the lessor a lien upon improvements. The current of the modern authorities is that a lessee may lawfully remove before the expiration of the lease, improvements, whether movable or fixtures, placed upon the land by him during the term. Mrs. Wolfhorst had the right, therefore, to remove this house during the pendency of her lease. There was no claim that the rent was in arrears. If Mrs. Wolfhorst had the right to tear down the house as against the lessor, a decree against her in favor of another person binding upon her will also be binding upon her lessor.

SURFACE WATER.

[Hamilton District Court, 1881.]

Cox, Johnston and Longworth, JJ.

HENRY RUFFNER v. THE COOPERATIVE LAND AND BUILDING ASSOCIATION, No. 1.

Where a flow of water upon the premises of a property owner is necessarily increased from the building of a village and not from any negligence or improper conduct in the building of such village, no liability attaches in consequence of such act. Such act constitutes *damnum absque injuria*.

ERROR to the Superior Court of Cincinnati.

Ruffner brought suit, alleging that he was the owner of a farm adjoining the village of Bond Hill, which the defendants laid out, separated from it by the Paddock Road; that the surface of the land east of him, where the village now is, had always drained north, except a small portion which flowed westward; but that the flowage of water upon his premises was increased by the laying of the streets running eastward and westward through the village, cutting deep gullies in his farm to his damage in $3,000, for which amount he asked judgment and an injunction. *The question before this court was whether the court below erred in arresting the case from the jury on plaintiff's testimony. 52

LONGWORTH, J.

Judge Longworth decided the case, affirming the decision of the court below. To say, he said, that where a flow of water is increased necessarily from the building of a village, and not from any negligence or improper conduct in the building of that village, would be to say that hereafter villages shall not be built unless with the incurring of this liability. The evidence tended to show that plaintiff suffered some damage, but much less than the amount claimed; but there was no evidence tending to show any negligence or unlawful or improper conduct by which this damage was done. Such a use of one's property was a lawful use, even if slight injury or great injury did result from it. It is *damnum absque injuria*. The court below intimating great doubt on this question, refused to decide it, and put his decision upon the ground that the defendants had a clear right to turn their surface water upon Paddock Road, and that it was then the duty of the county commissioners to take care of that water, and plaintiff had his remedy against them for any injury suffered. The court below was right upon this ground, although Judge Longworth had some grave doubts as to the correctness of the decision. The court had searched in vain the statutes to find anything granting power in the commissioners

to take care of this water which comes upon public roads. No statute enjoins it upon them as a duty. They have the right to make ditches, etc., to take care of the water as they see fit. If there were any duty enjoined upon the commissioners to provide for such water, the question would be very clear. If such duty does exist, it is to be implied from public policy.

Judgment affirmed.

Stimmel & Davis, for Plaintiff.

John W. Warrington, Contra.

MORTGAGES—MARSHALING LIENS.

[Hamilton District Court, 1881.]

Cox, Johnston and Longworth, JJ.

ALEX. LONG ET AL. v. A. HARBERS ET AL.

Where a "blanket" mortgage covers several pieces of property, and each is afterwards mortgaged, the lots shall contribute in the reverse order from that in which the mortgages are given.

LONGWORTH, J.

The opinion in this case was delivered by Judge Longworth. This case involves questions of the utmost difficulty and doubt. Yet, strange as it may seem, there is no dispute as to the principles of law involved, nor is there any dispute as to the facts. The difficulty arises entirely in the application of the law to the facts. In the view we take of the case, the decision of one question disposes of all. The facts of the case, briefly stated, are these:

Mills & Kline were holders of a mortgage covering four lots of
53 ground, *No. 52, No. 53, No. 54 and No. 55, admitted to have been the first lien upon these lots. Rover, who had given the mortgage to Mills & Kline, sold Lot 52 to one Harper, with the knowledge of Mills & Kline. Subsequently he mortgaged Lot No. 53 to the Star Building Association; still later he mortgaged Lot No. 54 to the Moon Building Association; and lastly he sold Lot No. 55 to one Schneidlwest, with the knowledge of Mills & Kline, who released that lot from the operation of the mortgage. The question now arises as to the rights of priorities of these lienholders.

The rule has been long established in Ohio that where a "blanket" mortgage covers several pieces of property, and each is afterward mortgaged, the lots shall contribute in the reverse order from that in which the mortgages are given. For instance, when No. 52 was mortgaged, the equity of that lot was such that the mortgagee had the right to have the other lots, fifty-four and fifty-five, first exhausted in the payment of the "blanket" mortgage. Now Mills & Kline released No. 55 from the operation of their mortgage when it was sold, and there is no doubt but what if that release was made with the knowledge of the existence of the mortgages of the Star and Moon Building Associations, Mills & Kline would be charged at least with the value of that lot upon their "blanket" mortgage before they could proceed against the others.

The question arises: Did Mills & Kline have such knowledge at the time the release was executed? There are many decisions to the effect that actual knowledge is necessary. Constructive knowledge is not sufficient to defeat the rights of the first mortgagee. Mr. A. E.

Carr was attorney for the Star Building Association, and his testimony is admitted to be correct. Mr. Carr says he examined the title for the Star Building Association, that he had some difficulty in determining Mills' boundary line, and he desired to know from Mills how far his line extended on Sherman avenue. For that purpose he called upon Mills, and told him the object of his visit, that he was examining the title for the Star Building Association, which association was about to make a loan to Mr. Rover upon this lot, and wished to know where Mills' line was. He also told Mills that he would expect him [Mills] to exhaust the other lots before he took this. Mr. Mills said he knew nothing about that; that it was a question for the lawyers. The mortgage was subsequently executed. This was the only notice of the existence of the mortgage. The question is, whether this notice of the existence of the lien was sufficient: *Held* (following 11 Michigan Report, page 25): It is not the duty of the mortgagee to make inquiry. If it were his duty to make inquiry, then this notice would have been sufficient. This was simply a statement that the building association was examining the title, contemplating a loan. The notice must be direct. Otherwise, the first mortgagee would be put to the labor of examining the title. The rule *at best is a hard one against the mortgagee, who 54
ought to have the right to deal with his own property as he pleases, without considering how it will effect the security of other parties. Equity, however, will take care of the interests of third parties, provided they notify the first mortgagee of the fact. They must give notice that they have a lien. A mere notice that they are examining the title to see whether they will take the property is not sufficient.

Judgment accordingly.

Cowan, Long, Kramer & Kramer, Attorneys for Plaintiff,.

Hoadly, Johnson & Colston, Tilden, Buchwalter & Campbell, Contra.

*REVIVOR. 58

[Hamilton District Court, 1881.]

†GEORGE W. DUNGIN, JR., v. BEN. F. BRASHEARS ET AL.

Refusal to permit a revivor of an action after a year has passed is discretionary with the court and not reviewable unless abuse is shown.

LONGWORTH, J.

Judge Longworth delivered the opinion in the case. The ancestor of the present plaintiff in error was a minor, and, together with other parties, brought suit in the superior court in ejectment against Benjamin F. Brashears and White. Pending the action Brashears died, and the suit was revived against his executor. Judgment below was rendered for defendants quieting their title against the claims of plaintiff. At the time this judgment was rendered one of the plaintiffs was dead, this fact was unknown at the time. But upon discovery of this a petition in error *coram nobis* was filed setting forth the death. The court found he had died before judgment rendered, and found there was manifest error, and reversed the judgment so far as his interests were concerned, but dismissed the petition in error *coram nobis* in respect to the other plain-

†This case was affirmed by the Supreme Court Commission. No report. See 12 B., 312.

tiffs. To this judgment a petition in error was filed, and the district court reversed and remanded the case. Thereupon the plaintiff filed his motion in the superior court to revive the action, and the court, upon hearing, overruled the motion.* Upon this ruling the present petition in error is prosecuted. It is claimed, in the first place, that the interests of the plaintiffs were joint, and that if an action is revived in the name or in the behalf of one party, that this will revive the whole action so that the other parties, against whom judgment has been already entered, may also prosecute their case again. No such tenancy as joint tenancy exists in Ohio. Persons having a community of interest in Ohio are tenants in common. Therefore, a judgment may be rendered in favor of one and against his coplaintiff in the same action.

But, as to the right of George W. Dungin, Jr., to have the suit revived to the extent of his claim, the question is somewhat different. The superior court refused to revive the action even in favor of Geo. W. Dungin, Jr. He claims that, as a matter of right, he could have the action revived. The Code provides that an action may be revived by the representatives of a deceased. The action, however, dies for the
59 *time being, until galvanized into life by proper proceedings. If the application for revivor is made within the time prescribed by law, it is a matter of right; but this right may be lost by the lapse of time. Section 5188, Revised Statutes, provides that a revivor cannot be had of right, after the expiration of one year from the death of the party. George W. Dungin died in 1875, four years before the application for revivor was made. The application not having been made within a year, it lay within the discretion of the court, and the judgment of the court cannot be reversed here, unless it appear that that discretion was abused. No bill of exceptions is furnished, and we do not, therefore, know what the circumstances were which induced the court to refuse a revivor of the action. Having no facts before us we cannot say the discretion was abused.

Judgment affirmed.

A. G. Collins, for Dungin.

Brashears, Contra.

181 *CORPORATIONS.

[Hamilton District Court.]

Cox, Johnston and Longworth, JJ.

CITY BUILDING ASSOCIATION NO. 2. v. ROBERT ZAHNER.

Where the promoters of a corporation go forward in good faith and contract debts which are necessary to the creation and advancement of the corporation, and the corporation afterwards avails itself of the benefit of those acts, the corporation is liable.

JOHNSTON, J.

Zahner originally brought this action to recover the sum of twenty-five dollars for professional services rendered in preparing articles of incorporation for the association, and he recovered a verdict in the court
182 *below for that sum. Defendant denied the employment, setting up that Zahner was present at a meeting for organization, and volunteered to serve on a committee on incorporation, which was appointed, and that he performed this service as a gratuity, expecting to become attorney for the association. There was a conflict of testimony on this

point, and the question was one of fact for the jury, and the court would not reverse the finding of the court below unless the verdict was manifestly against the weight of the evidence. We cannot say that it is.

Another point raised in the case was whether it was possible for a corporation to incur a debt before it had in fact become a corporation. In this case the corporation availed itself of the labors of Mr. Zahner, and thereby ratified his work. We find upon an examination of the authorities that where promoters of a corporation go forward in good faith and contract debts which are necessary to the creation and advancement of the corporation, and the corporation afterward avails itself of the benefit of those acts, the corporation is liable, and upon the plainest principles of justice and right it should be held. Zahner stood in the relation of *accoucher* to this infant incorporation. When it became able to stand and act for itself it availed itself of his labor—it ratified what he did for it, passing a vote of thanks in his favor and proceeding to organization and business under the act of incorporation prepared by him (79 Pa. St., 54; Bell's Gap Re v. Christy; 2 Nevada, 257; Paxton v. Bacon Mill Mining Co.

Judgment affirmed.

TAXES AND TAXATION.

[Hamilton District Court, 1881.]

Cox, Johnston and Longworth, JJ.

W. P. HULBERT v. JAMES S. WISE.

1. Where the county auditor makes an error in making too low a computation of additions required by the board of equalization: *Held*, that such error is merely clerical and its correction by the auditor is legal.
2. It is not necessary that all the members of a board of equalization be present when adding to or decreasing the assessed value of property. A majority are sufficient to transact the business of such board. When the record fails to show this, the legal presumption is that the board proceeded according to law.

JOHNSTON, J.

The action was instituted by Hulbert to recover back taxes on a piece of property thirty-three feet front, on Fifth, between Vine and Walnut streets. The property was assessed at $41,950. The state board reduced the assessment nineteen per cent., making the valuation of the property $34,000. Plaintiff says that by mistake the property was entered upon the books at a valuation of $39,990. The evidence disclosed the fact that the city board of equalization had added $17,000 to the valuation of the property and it should have been entered for taxation *at some $42,390. This was clearly within the authority 183
of that board. An error in the computation on the part of the county auditor occurred in entering the valuation at $39,990, of some $2,400. This is not a fundamental error, but one being purely clerical, and one that the auditor could correct under the statute, 21 O. S., 273; State *ex rel* v. Commissioners of Montgomery County, and he did so. It was also claimed that this board was not a legal body, that it was necessary for all the members to come together and act, and it is claimed that the proceedings do not affirmatively show that they were all present. We think a majority are sufficient to transact the business of such a board. There is nothing in the record to show that a majority was not present. The legal presumption is that the board proceeded according to law.

Judgment affirmed.

BILLS OF EXCEPTIONS.

[Hamilton District Court.]

Cox, Johnston and Longworth, JJ.

C. H. WOOLUMS v. E. SCHOTT.

1. A bill of exceptions does not become a part of the record simply by a minute entry on the docket of the justice that either party excepted to the justice's opinion upon some question of law or evidence.
2. A bill of exceptions before a magistrate must be spread upon the docket.

The action was originally commenced by Schott to recover $124. The wages of the defendant below, Woolums, were garnisheed. Woolums moved to discharge the attachment and filed an affidavit, claiming the money to be exempt. The motion was overruled. A bill of exceptions to this ruling was filed. The common pleas court held that no sufficient bill of exceptions was embodied in the record. The bill of exceptions was not spread at length upon the record.

JOHNSTON, J.

It is for errors appearing upon the record that the judgment of the court below may be reviewed. A bill of exceptions does not become a part of the record simply by a minute entry on the docket of the justice that either party excepted to the justice's opinion upon some question of law or evidence. An exception to the opinion of a court is one thing, a bill of exceptions another.

Our supreme court has construed section 204 of the old justice's act, holding that the bill must be spread at large on the justice's docket, 29 O. S., 600. This section remains the same in the Revised Statutes. Hence what purports to be the original bill of exceptions only having been brought to the common pleas, and not a certified transcript of the justice's docket containing the bill, that court correctly held that no proper bill of exceptions was before it, that it was not a part of the record and could not be examined.

Judgment affirmed.

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184 *CONTRACT—CUSTOM—PLEADING.

[Hamilton District Court, 1881.]

Cox, Johnston and Longworth, JJ.

WILLIAM PULLAN v. COCHRAN & FEARING.

Where parties contract with full knowledge of a custom existing in a certain trade, which custom fulfills all the requirements of the law, and the contract is silent concerning matters governed by custom, the court is at liberty to infer that the parties contracted with reference to this custom. But where one sues upon such contract and expects to rely on such custom he must aver it, else demurrer will lie.

ERROR to the Court of Common Pleas.

LONGWORTH, J.

Error to the court of common pleas in sustaining a demurrer to a second amended petition. The plaintiff in his petition alleged that

in 1878 he was engaged in this city in business under the firm name of Tappan, McKillop & Co., and that he entered into a contract with the defendants, which he set out in his petition, whereby he was to furnish the defendants with certain information for the period of one year touching the standard of their customers, and so forth. At the close of the contract occurred a clause agreeing to the payment of fifty dollars on account of the defendant's subscription for the term ending December 31, 1879. This suit was brought before the year had expired. The petition also contained an averment that by the custom well understood and heretofore acted upon by persons transacting this kind of business, the sum of fifty dollars was due and payable on the day on which the contract was entered into.

Judge Longworth announced the opinion of the district court. He remarked that the contract was in writing; that no ambiguity was to be found in its terms. By the settled adjudications, the construction of the clause concerning the payment of the fifty dollars is that it should be payable when the service had been rendered, at the expiration of the year, and not before. It is true where parties contract with full knowledge of a custom existing in trade, which custom fulfills all the requirements of the law, and the contract is silent concerning matters governed by custom, the court is at liberty to infer that the parties contracted with reference to this custom. But the petition did not allege that the contract was made with any reference to this custom. On the contrary, the pleader was careful to avoid any such allegation. If the pleader had alleged in the petition that the defendants had agreed to pay the fifty dollars in advance, a demurrer would not lie. If the defendants had answered denying any such agreement, then the question whether such evidence was admissible in evidence as tending to show whether the parties had agreed to it would properly arise. It cannot arise in this petition, for there is no allegation that the custom had anything to do with the contract.

Judgment affirmed.

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*CORPORATIONS. 263

[Hamilton Common Pleas Court, August, 1881.]

†T. F. RYAN ET AL. V. THE MIAMI VALLEY R. W. CO. ET AL.

1. Where interest is stipulated to be paid to a stockholder owning stock in a railroad, as, for instance, in subscriptions where interest is to be paid upon the amount until the road is completed, the interest is not payable except out of profits.
2. Where a subscription to stock was secured by other subscriptions and sale of bonds, and by the false representations of the officers of the company that the necessary amount had been secured, the person subscribing was induced to receive and pay for the stock; such facts do not constitute a defense against a creditor seeking to enforce the stockholder's liability.
3. Defects or irregularities in the organization of corporations cannot be taken advantage of by a stockholder in a controversy with a creditor. In other words, one who appears to be a stockholder is estopped when he is pursued by a creditor.

†This case is cited in Miller v. Ratterman, 47 O. S., 141, 158.

AVERY, J.

This is an action by judgment creditors of the railway company to
264 enforce the statutory liability of stockholders. Two *of the defendants, Thomas F. Thompson and R. B. Wilson, are holders of what purports to be preferred stock issued by the company under the act of May 5, 1877, entitled an act to authorize railway companies to issue preferred stock. For their defense, they set up, first, that the issue, although stock in name, was simply the form of a loan; and, second, that the subscription was conditioned not to be binding until one hundred thousand dollars had been secured by subscription to the common and preferred stock and by sale of the company's bonds at not less than eighty cents on the dollar, and they allege that by the false representations of the directors of the company that the amount had been secured, they were induced to take the stock and make payments. By way of cross petition, they ask to be admitted as creditors against the company for the amount of their shares.

The question under the first defense, and upon the cross petition, turns entirely upon the construction of the act authorizing the issue of the stock. 74 Ohio Laws, 183.

The first section of that act authorizes the directors of any narrow gauge railway company, whenever, in their opinion, it might be to the interest of the company, for the purpose of construction or equipment, or erecting depots, or, to meet liabilities incurred, or that may be hereafter incurred for real estate purchased or leased, to issue preferred stock, which shall not exceed in amount fifty per cent. of the authorized capital stock of the company.

The second section provided that before any such preferred stock should be issued, a majority of the directors, at a meeting for that purpose, should declare by resolution their intention to make the issue, the amount and the purposes, and should obtain the written consent of a majority in interest of all the stock subscribed, on which the subscribers should be entitled to vote, and make a record of such consent on the minutes of the company.

The third section, that when the consent was obtained, the directors might issue the stock, in the amount and for the purposes provided for in the resolution, and that the company might guarantee to the holders a semi-annual or quarterly dividend, not to exceed eight
265 per cent. per annum, payable at such place *as the directors should designate, the preferred stock to be sold as may be deemed advisable, at not less than par, and, by the resolution of the directors, the unpreferred stock to be entitled to dividends only out of the surplus of profits after setting apart a sum sufficient to pay dividends on the preferred stock.

Section four, that any company issuing such stock should reserve the privilege of redeeming and canceling it at par at any time after five years from the date of the issue, and that the owners should have the option of converting the same into unpreferred stock whenever they should elect.

Section five, that the holders of such stock should not be entitled to vote any shares at any election until six months after default of payment of any dividend, provided such dividend should remain in default for six months after the same became due, and that they should be entitled to vote only so long as the default should continue.

Objection is made that under this act no interest was created in the profits. So far as this rests upon the mere fact of the guaranty, the authorities are that where dividends are guaranteed, the guaranty is not for payment in any event, but for payment simply out of profits. Taft v. The R. R. Co., 8 R. I., 310; Lockhart v. Van Alstyne, 31 Mich., 76; Prouty v. The R. R., 4 Thompson and Cook, 230-40, N. Y. S. C.; Henry v. R. W. Co., 1 DeGex & Jones, 606, 637; Stevens v. R. W. Co., 9 Hare, 313. Even where interest is stipulated to be paid to a stockholder, as, for instance, in subscriptions where interest is to be paid upon the amount until the road is completed, the interest is not payable except out of profits. Cunningham v. R. R., 12 Gray, 411; R. R. v. Alleghany County, 63 Penn. State, 126; Barnard v. The R. R., 7 Allen, 512; McLaughlin v. The R. R., 8 Mich., 100. So far as the objection rests upon the language of the act, the case differs from Burt v. Rattle, 31 O. S., 116. In that case the question was between declaring an act of the legislature unconstitutional and declaring that it simply authorized a loan, and the supreme court found no difficulty in determining that surplus profits meant gross earnings, for the reason that it was provided in the statute that expenses should be paid out of the same. Say the court: "The *word 'profits' is evidently used for earnings, because it makes the expenses as well as the dividends payable out of the profits, whereas, there are no profits until the expenses are all paid or deducted." The language of the statute in the present case is not subject to that criticism. The provision is that by the resolution of the directors, the unpreferred stock shall be entitled to dividends only out of the surplus of the profits after setting apart a sum sufficient to pay the dividends of the preferred stock sold, not providing, as in the act that was construed in the case of Burt against Rattle, that expenses, also, should be paid. The participation in the profits, it is true, is limited, that is to say, to dividends not to exceed eight per cent. per annum. The statute does not expressly provide that they may not be permitted to prorate after such payment with the rest of the stockholders, but it is probably the better construction that, although not expressed in the statute, that result is to be implied. Usually, plans of this character for the issuing of stock provide, after payment to the preferred stockholders, they shall be permitted to prorate with the rest. But the uniform construction has been that they shall only be permitted to prorate after the common stock has received out of the profits an equal share, and even if it be said that here no such result can follow because of the statute, it is enough to say that the power of classification involved in the issue of preferred stock is not inconsistent with giving to the preferred class a stipulated portion, and to the common stockholders all the rest.

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The objection, again, is that the act provides that the privilege of redeeming the stock at any time after five years, shall be reserved by the company. But this is merely an option to be exercised or not as the company see fit, and which could not be compelled by the stockholder. An option of repurchase, in connection with other circumstances, may be evidence of a loan, but it is not so, of itself. 28 O. S., 371.

The act further provides that at the option of the stockholder, the preferred stock may be converted into unpreferred stock whenever he may elect. If this has the effect of destroying the character of the stock and converting it into a loan, there can be no preferred stock

under the law of this state, for the general statute—Revised Statutes,
267 3263—makes the same provision *in respect to the convertibility of the preferred stock which that section of the statute authorizes. In the case of Lockhart v. VanAlstyne, 31 Mich., 76, the stockholder had an option of converting, within a year, into the common stock of the company, but in that case, he was nevertheless held entitled to the rights of a stockholder, and only the rights; not to those of creditor.

In the case of Melvin v. The LaMar Insurance Company, 80 Illinois, 445-454, upon a subscription to stock, the right was reserved to compel a purchase at any time by the company at the election of the stockholder. But, say the court: "Whether they should be resold or repurchased by the company was entirely at the option of the stockholder, and not in any manner detracting from the completeness of his title. The option was a right secured by the contract, above and in addition to the absolute title." In the case of Taft v. The R. R., 8 Rhode Island, 310, it was required that the company should specify a time for the redemption of the stock, and it was further provided that after such time had been fixed, the stockholder should have the right to compel the redemption. But, say the court: "The relations between these parties are obviously those between shareholders and the corporation. They are not, on the face of the contract, those of creditor and debtor. A corporation may issue bonds or other obligations convertible at certain times and upon certain conditions into stock." They may issue stock, as is in this case, redeemable at a certain time, and upon certain conditions. The objection finally is that the right of voting was suspended, or, at least, only given under condition, and that it is essential to the character of stock that it should be voted upon. But it is not essential to the character of stock that it should be voted upon. There may be cases arising where the policy of the law itself, in the absence of legislation, would prohibit voting upon stock, although the stock itself would be left in its character as stock. So where a corporation takes its own stock as security for a debt, or in payment of a debt; and to prevent the merger which might happen where taken in the name of the corporation, it is taken in the name of trustees. Trustees are not permitted to vote, for the reason of policy, that otherwise a
268 *corporation itself might control its own management to the detriment of the minority of stockholders, applying corporate funds to the benefit of a majority, and controlling the management to the detriment of a majority of those holding stock. *Ex parte* Holmes, Cowan, 426; R. R. Frog Co. v. Haven, 101 Mass., 398; State v. Hunton, 23 Vermont, 594, is an instance of the policy of the law as declared by the legislature touching voting upon stock, the statute in that case being, that no stockholder who is not a resident of the state shall vote at any meeting of the company, either in person or by proxy.

This statute under which the right of the preferred stockholder to vote begins only after his dividends are in default is an indication of the policy which, for some reason, the legislature thought fit to adopt as to voting upon the stock, and is not to be taken as an indication that what is called stock in the act is not really stock.

The purpose of this act is declared in the title: "To authorize railway companies to issue preferred stock." The object is general, applying not only to companies, to corporations then, at that time, in existence, but those that might thereafter be. The language, throughout,

is for the issue of stock. If it was for a loan, the requirement that the directors should declare by resolution their intention to issue preferred stock could have been intended only as a formality—a disguise. Such intention is not to be imputed to the legislature. Besides, if that be the construction of the act, the act, itself, is unnecessary. Railroad companies have the inherent power to contract debts, and to pledge for the payment their property or earnings.

But it said that in the case of Burt against Rattle, there were similar reasons, and yet, that in that case, the supreme court construed the act not as authorizing the issue of stock, but simply as authorizing a loan. The act in that case was somewhat different from the act in this. It does not require a resolution of the directors declaring their intention, nor that such resolution and the consent of the stockholders should be entered upon the minutes. It provided further that the company might guarantee not simply the dividends, but payment of stock. It provided that the holders should have no right whatever to vote at any time at the meetings of the corporations, but the essential *difference, and this was the point upon which, whatever be the language of the judge, the decision turned, was that the act provided that the holders of such stock should not be liable for the debts of the corporation. In State *ex rel.* Attorney General v. Sherman *et al.*, 22 Ohio State, 411, it had already been held by the supreme court that a statute making no provision for the liability of stockholders, under the constitution, was itself unconstitutional, and in that case the court observed that probably the constitution would execute itself; and, indeed, that would seem to be reasonable in the absence of a specific provision. But here was a case in which the legislature had provided that the liability which the constitution declared should inhere in stock did not exist. Between construing the statute unconstitutional, and construing it unnecessary, there was simply a choice as to which of the two intentions should be preferred; and the result of the case, in my judgment, is merely that the supreme court were able to construe the statute so that it was unnecessary, because as a matter of preference it was better to suppose that the legislature intended an act which was unnecessary than that they intended one which was unconstitutional. But it is said again that the case of the Westchester Railroad v. Jackson, 77 Penn. State, is decisive of this. In that case the language of the statute was more like the language in the present case. The action was in assumpsit for dividends that had been guaranteed at the rate of eight per cent. from the time of payment for the stock. Dividends were declared by resolution of the directors many years after the stock had been taken by the preferred shareholders of four per cent. upon the common and preferred stock alike. The court held that the plaintiff was entitled to recover eight per cent. upon his stock from the time of payment for the stock, and was not bound, although under resolution of the directors, to share with the common stockholders. But this case did not put the right of the plaintiff upon any other ground except that he was a stockholder. If a creditor, his right to recover would have been independent of any profits made or dividends declared. But the holding was simply that the defendants having made a mistaken distribution of money admitted to be in their hands, the plaintiff could recover. Say the court: "The dividends which the defendants

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270 *declared in July, 1873, proved them to be in possession of ample funds. Unquestionably the time had arrived when it was legitimate for the plaintiff to call on them to perform their contract. It is not in any shape an effort to coerce the policy or control the discretion of the directors. It is not an attempt to enforce the declaration of the dividend. That has been declared. But the defendants have made a mistaken distribution of money they admitted to be in their hands, and which legally belonged to the plaintiff."

Now, in the course of this opinion, it is observed that the payment of these shares and the issuing of these certificates made as complete a contract with the preferred shareholder as if he had been a purchaser of bonds instead of a subscriber for stock. And it is said again: "In effect, it was an agreement for the advance of money to an embarrassed railroad company." And again, "that the corporation may issue new shares, and give them the preference as a mode of borrowing money, where it has power to borrow on bond and mortgage, as preferred stock is only a form of mortgage." The citation there is Redfield on Railways, section 237; Everhart v. The R. R. Co., 4 Casey, 323.

Everhart against the R. R. Co. was an action between a subscriber for stock and the company upon a subscription, and to defeat the action, he set up that there had been a radical change in the constitution of the company by an act which authorized preference among stockholders. But the court held that the issuing of preferred stock was simply a scheme of finance, and it would be no matter to a stockholder who was receiving the benefit of the money by its application to a common enterprise whether they obtained it by borrowing upon a loan, or by issuing preferred stock.

Redfield on Railways, section 237, cites Bates v. The Androscoggin Railroad, 49 Maine, 491, which case read in connection with the language of the supreme court of Pennsylvania, in the Westchester Railroad case, seems, to my mind, to indicate the true import of the language. Reference has already been made to the case of Melvin v. The Insurance Company, in the 80th Illinois, where the court, treating of a right 271 of redemption secured against the company in favor of the *stockholder, say: "It was a right secured by contract, above and in addition to the absolute title of the stock." Now, here, comparing the language in the Westchester Railroad case with the point decided in Bates v. the Androscoggin Railroad Company, it would appear, as it seems to me, that what is meant is not that the act under which the stock was issued affected the character of him to whom it was issued as a stockholder, but, that as a stockholder, it gave him a collateral right which, although under statute, was a right as by contract against the company. In Bates against the Androscoggin Railroad Company, which was a case of the issuing of preferred stock under a resolution of the company that after paying interest to the bondholders, twelve per cent. in semi-annual dividends should be paid to the holders of stock, the court held that: "The certificates of stock are not the basis of an action for the dividends, but merely evidence of the ownership of shares." And again, that: "In such action for dividends, it is not sufficient to allege that the plaintiff took and paid for stock and, at the commencement of the action, was the holder thereof, but the declaration must show that he continued to be the holder during the time covered by the action." In other words, he was a stockholder with a

collateral right to contract, not for a dividend undeclared, since it has been held, in the case of Williston v. The R. R., 13 Allen, that no such right can exist in favor of a stockholder without making him a creditor, but it was a right, after a dividend had been declared, to enforce what the statute gave him against other stockholders." In the case of the Westchester Railroad, the statute was put upon the same footing as the resolution was in the case of Bates against the Androscoggin Railroad. Say the court: "Mr. Gray's subscription was made upon the faith and in view of the statutory stipulations, and of these the plaintiff has the right to require the performance by the defendant. She is entitled to receive just what the company agreed to pay when the money was obtained." Not as interest, for it has been observed this was not an action for interest, but for dividend; but dividends having been declared, and improper distribution made, the right of the stockholder was to stand upon the act as evidence of his contract with the company, and he was not to be affected by the resolution of the directors that there should be *four per cent. equally upon the preferred and common stock. This same relation of a stockholder as 272
a holder of stock and a creditor as for the amount of a dividend that has been declared is recognized in the case of McLaughlin against the Detroit and Milwaukee Railroad.

This case is distinguishable from the case of Williston v. The Railroad, in the 13th Allen, and is so distinguished in the opinion of the Massachusetts supreme court, for while it is held in the Williston case that there can be no such action as by a creditor for a dividend not declared by the company, this case of McLaughlin v. The Detroit and Milwaukee Railroad, in the 8th Michigan, is distinguished in the opinion upon the ground that it was an action for a dividend that had been declared. Say the court, 8 Mich., 103: "The stipulation in the certificate for the payment of interest constituted a contract between the company and the plaintiff as individual; it created the relation of debtor and creditor to the extent of the semi-annual interest. The company could no more change, affect or modify his rights or their liability under this contract by resolution or by law than they could affect their contract with a stranger." But in that case the plaintiff has held to be a stockholder. In the Winchester R. R. case plainly he was held to be as stockholder. The point of difficulty was to relieve him from the effect of the resolution of the directors by which the dividend was declared alike upon common and preferred stock. The court took the distinction. It is not necessary here to affirm the distinction. My effort is simply to explain the decision, so that it shall not only not conflict with the conclusion to which I have come, but that it shall harmonize with other decisions which reflect the state of the law.

My conclusion is that the demurrer to the first ground of the defense, and to the cross petition, will be sustained.

The second ground of the defense presents a different question, but one controlled by settled principles. That ground of the defense is that the subscription was upon condition that one hundred thousand dollars should be secured by other subscriptions and by sale of the company's bonds, and that by false representations that the amount had been secured, the defendant was induced to receive certificates and make payment for the *stock. Now, it is a general principle that 273
defects or irregularities in the organization of corporations cannot be

taken advantage of by a stockholder in a controversy with a creditor. Eaton v. Aspinwall, 19 New York, 119; Aspinwall v. Sacchi, 577-331; Thomas v. Clarke, 34 Ohio State, 46-63. In other words, the principle is that one who appears to be a stockholder is estopped when he is pursued by a creditor. The reason is that the appearance of being a stockholder would induce confidence in the company by a creditor, and to delay until the company was insolvent to set up the defense, would be something like fraud. Slocum v. The Gas Pipe Company, 10 R. I., 112-115. The reason is stronger when the defense is not a defect in the organization of the corporation, but representation by an officer under which a party has been induced to receive stock. He becomes a stockholder; the condition of things under which his appearance of owning stock induces confidence is the same. The case is stronger against him for the reason that there is no defect in the organic act constituting the body. There is a corporation with capacity to issue stock. Where there are irregularities, that might be a question. But, as between a creditor and stockholder, no such question can be made. Where, then, the only defense is that he was induced by a representation, certainly such a defense cannot be made available when a stockholder is pursued by a creditor after the company has become insolvent. Upton v. Englehart, 3 Dillon, 496; Ruggles v. Brock, 13 New York Supreme Court, 164; Thompson on the Liability of Stockholders, 142-143-146-155.

The result is that the demurrer will be sustained likewise to the second ground of defense.

C. B. Simrall, Attorney for Plaintiffs.

Bateman & Harper, R. B. Wilson, T. F. Thompson, Attorneys for Defendants.

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305 *STATUTE OF LIMITATIONS.

[Hamilton District Court, 1881.]

Cox, Johnston and Longworth JJ.

F. SCHOCK v. J. A. FRAZER & CO.

Where an action on an item of account was brought on the day before the statute of limitations would begin to run which action was dismissed without prejudice; and a second suit was begun a day later, which was also dismissed; and four days later, this, the third action was commenced and judgment rendered; *Held*, that this cause of action was saved under the provisions of section 4991, Revised Statutes.

ERROR to the Court of Common Pleas.

JOHNSTON, J.

Statute of Limitation. Judge Johnston delivered the opinion in this case. This action was originally commenced by J. A. Frazer & Co., before a justice of the peace, to recover against F. Schock upon an account for goods sold and delivered. The defense of Schock to this action is the statute of limitation; and secondly, *res adjudicata*. In the court below judgment was rendered in favor of Frazer & Co., a separate finding being made of the facts and of the law. According to the

finding of facts, it was admitted that the last item of the account sued on was sold September 16, 1872, in this city. The first action on this account was commenced September 15, 1878, being the day before the statute would begin to run. This action, as the transcript shows, was "dismissed without prejudice to a new action." A second suit on the account was commenced on the 16th of September, and dismissed on the 20th of September "without prejudice to a new action." This, the third action on this account, was commenced on September 24, 1878, and a judgment was rendered for J. A. Frazer & Co. This action was commenced more than six years after the cause of action accrued.

Section 4991 of the Revised Statutes provides that "if, in an action commenced in due time, the plaintiff fail otherwise than upon the merits, and the time limited for the commencement of such action has at the time of such failure expired, the plaintiff may commence a new action within one year after such date."

We think the record clearly shows that the first action was commenced originally within the statute. Whether the testimony went to the merits of the case or not does not appear. The presumption is that the justice of the peace did act properly within his jurisdiction. For all that appears the testimony may have disclosed that plaintiff was not at the time of the first action a resident of the township; or, that the debt had been extended and was not yet due. At any event the first two cases were dismissed without prejudice. We think, taking the whole record together, the case was saved, although, I may say, as by fire, from the statute of limitations. It also appears from the transcript that there never had been a trial of the facts in controversy upon the merits, whereby plaintiff became barred on account of *res adjudicata*.

Judgment affirmed.

Pummill, for Plaintiff in Error.

F. A. Thompson, Contra.

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*REFUNDER OF TAXES. 306

[Hamilton District Court, 1881.]

Cox, Johnston and Longworth, JJ.

GEORGE M. IVES v. THE COMMISSIONERS OF HAMILTON COUNTY.

1. The errors for which a refunder of taxes may be had are clerical errors simply, not fundamental errors.
2. Where a city has appropriated lands by condemnation proceedings and the owner continues to pay taxes on the same, he not having notified the auditor to take such lands off the tax duplicate; such payment of taxes is not through any error on the part of the auditor, but from his own fault in not having the correction made, and no refunder of taxes will be allowed.

ERROR to the Court of Common Pleas.

Cox, J.

The petition sets up that Ives was owner of several acres of land on Spring Grove avenue, Cincinnati; that, in 1874, a portion of his land

was taken by the city for the purpose of widening Spring Grove avenue; that the portion so taken was worth $1,360 in proportion of the whole valuation; that no deduction was made from the tax valuation of the property, although the property so condemned was not liable to taxation since the condemnation, and that he continued to pay taxes upon the property without regard to any deduction down to 1879; that, in 1879, upon his application, the auditor struck off from the duplicate that part which had been condemned for city purposes. Thereupon he also applied to the commissioners for a refunder of the taxes erroneously paid. The commissioners rejected his claim and the court of common pleas on demurrer to the petition, affirmed their action. Plaintiff claims to recover, under section 1038 of the Revised Statutes, which provides for the refunder of any erroneous taxes or assessments, charged or collected in previous years. The supreme court has given a very close and technical construction to that statute. Under this construction, the errors for which a refunder may be had are clerical errors simply, not fundamental errors. Was the error in this case a clerical error, or was it fundamental? It is not claimed that by reason of any act of omission or commission on the part of the auditor, this property was still left on the duplicate. It was properly placed on the tax duplicate in 1870. It became the duty, after the condemnation, not of the auditor, but of the owner of the property, to have it taken off from the duplicate. It was the duty of the owner to notify the auditor, and to give him a description of the property appropriated by the city. If the owner paid the taxes erroneously, it was not the fault of the auditor, but his own fault, in not having the correction made.

Judgment affirmed.

Stimmel & Davis, for Plaintiff in Error.

County Solicitor Evans, Contra.

SET-OFF.

[Hamilton District Court, 1881.]

Cox, Johnston and Longworth, JJ.

ANDREW DOPPLER v. JOHN COX.

An unliquidated demand for damages is a proper subject for set-off, provided it arises out of some contract.

ERROR to the Court of Common Pleas.

LONGWORTH, J.

This case came into the court of common pleas on appeal from a justice of the peace. The *petition on appeal alleged there was due to
307 plaintiff from defendant the sum of seven dollars for goods sold and delivered. Defendant admitted the statements of the petition, but pleaded forty dollars damages for the nondelivery of a quantity of barrel staves by Cox, the plaintiff below. A demurrer to this answer was sustained by the court of common pleas. The question is whether a set-off must be for a liquidated sum, or whether unliquidated damages

arising from breach of a contract may be set off. Section 5075 of the Revised Statutes reads as follows: "A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract, or ascertained by the decision of a court." Nothing is provided in terms that it shall be for a liquidated sum. This question has never been authoritatively decided by the supreme court of Ohio. We have, however, no hesitation whatever in holding that since the passage of the present Code of Procedure, an unliquidated demand for damages is a proper subject for set-off, provided it arises out of some contract. We think the court below erred in refusing to allow defendant to plead this set-off.

Judgment reversed and cause remanded.

S. M. Johnson, for Plaintiff in Error.

Cormany, Contra.

BASTARDY.

[Hamilton District Court, 1881.]

Cox, Johnston and Longworth, JJ.

†EDWARD HAZZARD v. THE STATE EX REL. ANNA DICKSON.

Where the township trustees have not expended anything for the support of the bastard child, the mother under the bond being the beneficiary and real party in interest is entitled to prosecute the bond in the name of the state.

ERROR to the Court of Common Pleas.

LONGWORTH, J.

The action was brought below by the State of Ohio, for the use of Anna Dickson, against E. Hazzard *et al.*, on a bond given by Hazzard in a bastardy proceeding. The exceptions are all based on the same theory of the case. It was claimed, in the first place, that an action could not be instituted by the mother against the putative father in the name of the state without it appearing that the State of Ohio, by its counsel, prosecuted the suit. Another ojection was made, namely, that no entry appeared upon the minutes of the court continuing this recognizance from the November term of 1878 to the following term, at which defendant was convicted, and that the condition of the bond was therefore broken. The supreme court has decided that an action upon a bond of this character must be brought by the State of Ohio, the state being the sole obligee in the bond. The state, however, has not a *scintilla* of interest in the bond, but stands in the position of a naked trustee for the benefit of whom it concerns. It would be imposing upon the attorney general and upon prosecuting attorney duties, which it would be almost impossible for them to perform, to bring suit upon all bonds in which the state is obligee. We see no *objection to the party who has a real interest in the bond bringing an action in the 308
name of the state without showing direct authority upon the part of the state to bring the suit. Now, is the mother in such a case the real party interested? This depends upon the circumstances. The theory

†This case was affirmed by the Supreme Court Commission. No report. See 11 B., 252.

of our Code in bastardy proceedings is that the putative father shall be required to provide for the support of the child. Where the township trustees have not expended anything for the support of the child, the mother, under the bond, is the beneficiary, and is entitled to prosecute the bond in the name of the state. The obligee in the bond stands in the position of a mere naked trustee.

Now, as to the second ground of error. If in the November term, when the court adjourned, no entry had been made continuing this recognizance, it would have been at an end. It appears that two minute books were kept for room 5—one for divorces and bastardy entries and the other for criminal cases. These books are kept by separate clerks. One of the books at the end contains an entry containing all matters pending in that court. The other recites simply an adjournment. It is claimed this latter one is the book relating exclusively to cases of this nature. On the other hand, it is claimed that there is but one court of common pleas for this district, and that an adjournment by the court in any one of these subdivisions is an adjournment of the court of common pleas. The effect of the subdivision into rooms is precisely the same as if No. 1 were one county and No. 2 another county. Each room has its minutes under the control of the presiding judge therein. An entry in any one of the minute books of any room, reciting that all matters pending in that court are continued, is an entry continuing everything pending in that court, whether the minute books are kept by different deputies or not.

The keeping of separate books for the same room is simply a matter for the convenience of the clerks.

Judgment affirmed.

Wulsin & Worthington, for Plaintiff in Error.

E. A. Guthrie, Contra.

AGENCY.

[Hamilton District Court, 1881.]

Cox, Johnston and Longworth, JJ.

CYRUS WEST, ADMR., v. J. N. STOECKEL.

A contract with a real estate agent to pay him a certain commission for securing a certain loan on a leasehold with which to buy in the reversion, does not entitle the agent to his commission on his procuring a person who will loan the amount provided the title is made a fee simple. The borrower only contracted to pay if the agent got a loan with which to clear the title to the land, and not if the agent could get a loan provided the title was clear.

ERROR to the Superior Court of Cincinnati.

LONGWORTH, J.

Stoeckel brought suit in the superior court to recover $300, alleged to have been due as commissions under a contract made with Mrs. Martin during her life. He claims that Mrs. Martin, being owner of certain leasehold premises, with a privilege of purchase, and somewhat
309 incumbered by liens, *agreed with him to negotiate for her a loan of $15,000, for which she was to pay $300 commission, the intention

being to use this $15,000 in purchasing the fee and paying off the incumbrances; that acting under this contract he procured an offer from a Mr. Cole, who was willing to advance the $15,000 as soon as the liens were cleared up and the title made good; but when she went to the parties in whom the fee was they refused to give her a deed, and therefore the transaction failed. Stoeckel claims to have performed his part of the contract, says that it is no fault of his that the loan was not perfected, and claims his commissions. The jury found a verdict for the plaintiff.

We do not think the verdict was sustained by the evidence. Mr. Stoeckle got an offer of a loan on the property, provided all incumbrances were paid off. This was the very purpose for which that $15,000 was wanted. Mr. Cole was unwilling to advance one cent until this was done. It was not Mrs. Martin's fault that she was not able to obtain this deed, and we are unable to see at any event how there was any breach of it upon her part, and unless there was a breach of it upon her part, plaintiff is not entitled to recover anything. The payment of the $300 was conditional upon Mr. Stoeckel obtaining this $15,000 for her. She had not contracted with Mr. Stoeckel that she would pay him $300 if she could get $15,000, provided the property was clear, but that she would pay him $300 provided he would get her $15,000 with which to clear off the incumbrances. The facts thus show there was no breach of contract upon the part of Mrs. Martin, and inasmuch as this suit sounds for a breach of contract there can be no recovery.

Judgment reversed.

Challen, for Plaintiff in Error

O'Connor, Glidden & Burgoyne, Contra.

BILL OF EXCEPTIONS.

[Hamilton District Court.]

Cox, Johnston and Longworth, JJ.

NICHOLAS MEYER v. B. SHROEDER.

Where a reviewing court is called upon to review alleged errors, the bill of exceptions must state affirmatively that all the testimony in the case is set out in it, and the transcript must show that the bill of exceptions was allowed, signed and sealed.

ERROR to the Court of Common Pleas.

Cox, J.

The case below was an action of replevin to recover possession of certain property, on the part of Meyer. A judgment was rendered below in favor of defendant. We are unable to examine into the errors alleged, because the transcript does not show that any entry was made upon the docket allowing, signing and sealing the bill of exceptions, nor does the bill of exceptions state affirmatively that all the testimony in the case is set out in it. Both of these things are requisite.

Judgment affirmed.

Jessup, for Plaintiff in Error.

J. Schroder, Contra.

310 *DEMURRERS—CREDITOR'S BILL.

[Hamilton District Court, 1881.]

Cox, Johnston, and Longworth, JJ.

ROBERT F. CARVER v. THOMAS WILLIAMS ET AL.

1. A demurrer having been filed out of time, the court is not bound to consider it; but, having considered it, it was equivalent to giving leave to file it after default.
2. A creditor's bill which merely avers that the judgment sought to be realized was recovered by plaintiff against defendant is insufficient to create a claim upon the defendant, and is therefore demurrable. There being no allegation that the judgment was rendered by a court in Ohio having jurisdiction.

ERROR to the Superior Court of Cincinnati.

LONGWORTH, J.

The petition alleged the recovery of a judgment by the plaintiff against the defendant on the — day of August, 1880, for the sum of $50 and costs, upon which judgment execution was issued and "no goods" returned; that Williams conveyed certain real estate to his daughter Eleanor without consideration, and in fraud of plaintiff's rights, and that Williams had no other property subject to levy. The defendants defaulted on the 10th of November following; but, six days afterward, without leave of court, they filed a general demurrer to the petition, which demurrer was overruled. They excepted; answers and a reply were filed, and, on trial, judgment was rendered for plaintiff. A number of errors were assigned, but the court was of the opinion that only one was required to be considered, to determine the case namely, the assignment of error in overruling the demurrer.

The demurrer having been filed out of time, the court below was not bound to consider it; but, having considered it, it was equivalent to giving leave to file it after default. The Code, with reference to the filing of creditors' bills, has provided that it shall be sufficient in such case only to aver that the judgment upon whch the bill is brought was duly rendered, the object of this provision being to avoid the necessity of so much statement as was required under the old system of pleading in such cases. The only averment in this case was that the plaintiff had recovered a judgment against Thomas Williams. For all that appeared in the petition, the judgment might have been rendered by a court of incompetent jurisdiction or by a private individual and have been of no validity at all, and although it was alleged that the judgment still remained in force and effect, it had, however, no greater force and effect than it had when it was originally rendered. While such reasoning might seem at first thought hypercritical, a moment's consideration would make it appear otherwise, for if the judgment was ordered by the United States court of this district, no creditor's bill would lie in the state courts. So the judgment might have been rendered in any of the courts of our sister states, in which case a demurrer would lie to the petition.

It might be contended that the proceeding was not a creditor's bill but a proceeding in chancery to set aside a fraudulent conveyance. In the third Ohio State, 148, Judge Thurman has held that the hearing

of a bill founded upon a judgment is a proceeding in aid of execution. The judgment is conclusive, and the fraudulent nature of the transfer becomes unimportant; whereas, if the bill was to set aside a conveyance fraudulent *against creditors it must appear that the party is 311
a creditor, that he has a valid claim and that the conveyance was against his rights. If against the rights of others, he cannot recover. There was no allegation in the petition that the defendant was indebted to the plaintiff, unless it arose in the mere statement that he recovered a judgment against defendant. Inasmuch as that allegation was insufficient to create a claim upon the defendant with a judgment, it could not in the absence of a judgment. There being no allegation that the judgment was rendered by a court in Ohio having jurisdiction the demurrer was properly interposed and improperly overruled.

Judgment reversed.

REFUNDER OF TAXES.

[Hamilton District Court, 1881.]

Cox, Johnston and Longworth, JJ.

MARY J. PERRIN v. COUNTY COMMISSIONERS.

MARY L. HARRISON v. COUNTY COMMISSIONERS.

1. Where a lot is assessed in bulk and the assessor erroneously describes it as fronting fifty feet instead of forty-three feet, such facts do not constitute sufficient grounds to warrant a refunder of taxes. It not appearing that the valuation was made by the front foot.
2. Where a lot is valued by the front foot, and the assessor returns an excessive frontage, the owner is entitled to a refunder under section 1038 of the Code.

JOHNSTON, J.

The action in the first of these cases was commenced before the county commissioners, the plaintiff asking for a refunder of $105 taxes paid upon an erroneous valuation of property on Gilmore alley. The plaintiff alleges that in 1870 her testator, Oliver Perrin, was the owner of a lot fronting forty-three feet thereon, but the district assessor erroneously described it as fronting fifty feet; that the excess of seven feet was valued at $780, and that he did not discover the error until 1880, when the auditor corrected the taxes for 1879, the treasurer deducting the taxes upon the seven feet; that thereupon he asked the auditor to call the attention of the county commissioners to the fact that for five years he had been paying taxes erroneously on these seven feet, and asking them to order said auditor to draw a warrant for the remittal of this sum of money. The commissioners refused to make such order and the cause was appealed to the common pleas court. A petition was filed, and to this petition the commissioners interposed a demurrer on the ground that the facts did not constitute a sufficient ground of action. Upon the consideration of this demurrer it was sustained and judgment entered for defendant. It is now sought to reverse that judgment.

The Judge (Johnston) was of the opinion that the averments of the petition did not make out a good case against the commissioners. If it had appeared that the valuation was made by the front foot, and that the erroneous description was carried into the valuation, it would be different. The statute provides that the district assessor must go upon the premises, and upon actual view and the best information he can gather, fix the true value in money of the property. The presumption was that the officer performed his duty; that he went upon the premises and considered there but forty-three feet, and that he valued it at its *true
312 value* in money. It did not appear that he valued the property at so much per foot, or that the total valuation represented fifty feet at any sum per foot. The total valuation is not set out. For all that appeared in the petition, the assessor valued it in bulk as he had a right to do, and it might be that the total valuation fixed for the fifty feet was not more than the true value in money of the forty-three feet. If so, plaintiff was not prejudiced. It does not appear that there is any error in the valuation on account of a clerical error, and the commissioners only being authorized to order a refunder of taxes charged and paid through a clerical error committed, the court below did not err in sustaining the demurrer and entering judgment for the defendants.

Judgment affirmed.

Storer & Harrison, for Plaintiff.

Charles Evans, for Commissioners.

In the second case, that of the Harrisons, it was alleged that they were the owners of thirty-two and a half feet on Fourth street, west of Walnut; that the property was erroneously entered upon the duplicate as thirty-four and a half feet, and that the assessor valued the land erroneously at the rate of $450 per front foot. The petition in this case fell under section 1038 of the Code, and the court below in overruling the demurrer to the petition erred.

Judgment reversed.

MARRIED WOMEN—JUDGMENTS.

[Hamilton District Court, 1881.]

Cox, Johnston, and Longworth, JJ.

SCHULTZ v. MYER.

In a suit before a magistrate, having no chancery jurisdiction, a personal judgment cannot be rendered against a married woman.

ERROR to the Court of Common Pleas.

LONGWORTH, J.

This case is in error to the court of common pleas. The plaintiff brought an action against Elizabeth Myer, a married woman, before a justice of the peace, and asked judgment upon a contract made between himself and her prior to her marriage. The justice having decided the case, an appeal was taken to the court of common pleas. The plaintiff filed a petition making her defendant, and setting out that prior to her marriage she had made a contract with him, and asks judgment for the

amount claimed. He alleges that she was owner of separate property. The case coming on for trial, the defendant pleaded coverture and answered to the merits of the case. The court below found the facts alleged in the petition were true, but that no judgment could be recovered against the defendant, and dismissed the action. Error was thereupon prosecuted.

The Court (Judge Longworth) said they had so often decided the question involved in this case, that they should not consider it necessary now to render an opinion, had it not been claimed that the case of Patrick v. Littel, recently decided and reported in the thirty-sixth Ohio State, announced a modification in the rulings heretofore made upon the rights of married women in such cases. After a consideration of that case in it bearing upon the one before him, the court was of the opinion that it made no modification as claimed. That case simply decided that, in a court of chancery upon a contract made by a married woman for the benefit of her separate estate, the court has jurisdiction to render a personal judgment against her, but it nowhere overruled its *previous decision that, in a suit before a magistrate, having no 313
chancery jurisdiction a personal judgment cannot be rendered against a married woman.

Judgment affirmed.

BILL OF EXCEPTIONS.

[Hamilton District Court, 1881.]

Cox, Johnston and Longworth, JJ.

SCHOTT v. HUNT.

A bill of exceptions taken before a justice must be entered at length upon his records and signed and sealed before a reviewing court can act upon them.

JOHNSTON, J.

This case originated before a justice of the peace, in which there was an attachment issued. A motion was made by the defendant to dissolve the attachment, which the justice of the peace refused to do. Thereupon a bill of exceptions was taken, and that branch of the case removed to the court of common pleas by the defendant. He claimed before the justice that he was the head of a family, and not the owner of a homestead, and that the money garnisheed was necessary for the maintenance of himself and family. The court of common pleas reversed the judgment of the justice and refused to discharge the attachment. Thereupon Schott, the defendant in error, excepted, and here prosecutes this petition in error for a reversal of the judgment of the common pleas. It is not denied that the bill of exceptions taken before the justice never was entered at length upon the records of the justice, but simply a minute entry "bill of exceptions filed," made in his docket, the original bill accompanying the transcript. When the petition in error was prosecuted, nothing was before the court except a transcript of the justice's docket, which did not contain a bill of exceptions. The plaintiff in error claims that there has never been upon the face of the record from the justice's court any bill of exceptions showing the proceedings

before that court, and therefore there was nothing to authorize any reversal of the judgment, all proceedings so far as shown by the transcript, being regular and according to law. The difficulty lies in the omission to make the bill of exceptions a part of the record before the justice by causing it to be entered at length upon his docket. Sections 595 and 6565, require this to be done. If the justice refuses so to do, he may be compelled to enter it at length on his docket. In this holding, we but follow the opinion of the supreme court in the case of Huston v. Huston, 29 O. S., 600.

Judgment of the common pleas reversed.

Shay & Kary, for Schott.

Judge Hilton, Contra.

LIFE INSURANCE.

[Hamilton District Court, 1881.]

Cox, Johnston and Longworth, JJ.

†WILLIAM LOW v. THE UNION CENTRAL LIFE INS. CO.

1. Where a policy of life insurance contains a condition that, if any representation made in the application for insurance should be false, the policy would be void, and it is shown that the applicant made a misrepresentation as to his age, although not willfully made, is material and the policy is thereby rendered void.
2. If the policy is simply voidable on the election of the company, then the express contract that all premiums theretofore paid should be forfeited would apply.
3. The representations in a policy of life insurance as to the age of the insured is simply for the benefit of the company, and can only be taken advantage of by it.

ERROR to the Superior Court of Cincinnati.

LONGWORTH, J.

This case is on error to the superior court. Low filed a petition against the defendant in the superior court alleging that in 1876, Michael Low was insured by the defendant in $3,000 for his benefit; that he continued for four years to pay premiums upon the policy regularly, and in June, 1880, came to the office of the insurance company to pay the premium on the day it was due, but the officers of the company refused to receive it or to recognize the policy; that he thereupon brought
314 suit to recover the premiums already paid. The defendant's answer admits *all the facts, but alleges that the policy contained a condition that, if any representation made in the application for insurance should be false, the policy would be void; that it was alleged in the application that Low was fifty-eight years of age, while he was in fact several years older, and having found out that fact they refused to recognize the existence of the policy. To this answer no reply was filed. The plaintiff introduced the policy of insurance and rested. The defendants declined to offer evidence. The court was requested by the plaintiff to instruct the jury that, he having admitted the fact that the representation was false, was not a sufficient defense to the plaintiff's claim, unless it was alleged and proved that it was willfully false and fraudulent, which instruction the court refused to give; judgment was rendered upon the verdict, and this proceeding in error is instituted to reverse it.

The court, in disposing of the case, said that the question to be determined arose in precisely the same way as though a demurrer had been filed to the petition; the answer admitted the facts alleged in the petition and the reply, the facts alleged in the answer, and the introduction of the policy in evidence was merely surplusage. The petition alleged that the statements in the application for the policy were

† This case was affirmed by the Supreme Court, with report. See 41 O. S., 273.

averred to be in all respects true by the insured, they being treated as warranties, and, further, that one of the conditions of the policy was that should the policy become void by reason of a violation of any of the conditions, the payments made thereon should be forfeited to the company. The contention of the plaintiff was twofold. First, he insisted that the mere fact that the representation was false would not release the company from its obligation under the policy unless it appeared that the representations were willful or fraudulent upon his part; and, second, that if he was not right in this assumption, the policy became null and void *ab initio* by reason of this breach, and, having become void, all premiums paid under it were wrongfully paid, and he has a right to recover them back.

As to the first claim, the plaintiff based it upon the authority of several cases cited, but by a consideration of those cases, it distinctly appeared that the policies upon which they were brought expressly stated that they should be void if it should appear that any statement was willfully false or fraudulent. Such a condition was not in the policy in this suit. The representation was that the insured was fifty-eight years of age, when, in reality, he was several years older. He was, in fact, sixty-seven years old, as appeared by a deposition, not, however, in evidence. Such a misrepresentation was clearly a material one.

As to the second question, if the company wrongfully declared the policy forfeited, relief could be granted the plaintiff, 33 O. S., 459. If, on the other hand, the policy was void *ab initio* such relief would also be granted; for money paid by way of premiums on a void policy may be recovered back. But, if the policy is simply voidable on the election of *the company, then the express contract that all premiums theretofore paid should be forfeited would apply. The representation in the policy as to age is simply for the benefit of the company, and can only be taken advantage of by it. The insured was not in the position to say that his own misrepresentations should void the policy. The defendant in this case had the right to forfeit the policy. The statutes provide that, after a certain number of years, the company are estopped from forfeiting the policy, except a misrepresentation as to age. 315

Judgment affirmed.

*TAXES AND TAXATION. 443

[Hamilton District Court, 1881.]

Cox, Johnston and Longworth, JJ.

†WESLEY M. CAMERON v. W. S. CAPPELLER, AUDITOR, ET AL.

A judgment in favor of a party becomes a taxable credit when it becomes a liquidated demand by the judgment rendered by the court.

ERROR to the Court of Common Pleas.

JOHNSTON, J.

This action was commenced originally in the common pleas court, by the present plaintiff in error, to restrain the defendants from proceeding to collect the taxes for the years 1876-7-8, upon an additional return of personal property, made by the auditor, of $45,000, during those years. Cameron alleges in his petition, that in March, 1881, he received a notice from the county auditor, citing him to appear before him, and to show cause why he should not be compelled to make an additional return of personal property for taxation during the years named—1876, '77 and '78. He alleges, that in accordance with the notice, he did appear before that officer, and did make full explanation, and as he avers, and as appears from the deductions he makes in his petition, he felt that he had satisfied the auditor reasonably that he had, during those years, made a full return of all personal property liable to be taxed, as belonging to him. Yet he alleges, that notwithstanding his full and accurate statement, in which he said he had accounted for all personal property to be listed and subject to taxation, belonging to him in those years, the auditor, nevertheless, proceeded to, and did add to his taxable personal property, for those years, $45,000. He alleges that the statement embodying the reasons why this increase was made to his taxable chattels, was, that in 1873 he

†This case was reversed by the Supreme Court. See opinion, 41 O. S., 533

recovered a judgment against the city of Cincinnati for $73,000, being a balance due for constructing for the city of Cincinnati the Cincinnati hospital, and that, on that account, and by reason of there being credits not accounted for by him, the auditor assessed him an increase of his taxable chattels in the sum of $45,000. He proceeds to allege in his petition that this was unjust; that, while it is true he commenced suit against the city of Cincinnati, and recovered a judgment of $73,000—or, rather, as he says in his amendment, that Wesley M. Cameron & Co. recovered it, there being two partners, one Cameron, and the other Mr. Sawyer—in the superior court of Cincinnati, that cause was carried by petition in error to the general term of that court, and from that court to the supreme court of Ohio; that there was so much doubt involved in his right to recover, that no one would have been willing, he alleges, to have taken that claim off his hands, and to have assumed the expenses incident to this transaction, the attorney's fees, as he alleges being large, and the referee's costs being large. He alleges that during these years, 1876, 1877 and 1878, it had no cash value; that it was liable to be reversed and decided that he could not recover anything against the city of Cincinnati; that it was not a credit within the meaning of the statute and that he ought not to have been required to return it for taxation, nor did he, and that the action of the county auditor in adding this amount to his taxable personal property was illegal, unauthorized and unjust. He says that this judgment was affirmed at the December term of the supreme court of Ohio, for 1878; that out of the first money paid he was obliged to, and did pay the sum of $15,000 for attorney's fees, for one-half of which, only, he was liable. He alleges that he was the owner of an interest to the extent of one-half in this judgment, and so liable for one-half of the counsel fees, and such other expenses, as might be assessed against him for referee's fees which amount is not stated. He further alleges, that no other statement of the reason for placing upon his personal return for taxes the $45,000, was assigned excepting as to this case; and that, if anything in addition was placed against him, on account of any property that had not theretofore been returned, it is included under the phrase "and other credits." For these reasons, he alleges, the auditor having placed this upon the duplicate, and the auditor having passed the duplicate over to the county treasurer and the county treasurer being about to enforce the collection of the regular annual tax upon this additional return of personal property of $45,000, he asks that a temporary injunction might issue, and, upon a final hearing, that a perpetual injunction might issue against the collection of any taxes upon this alleged erroneous valuation or addition to this personal property. The record shows that a temporary restraining order was issued, that after filing the petition, the defendants demurred generally to the petition on the ground that the same did not state facts sufficient to constitute a cause of action against the defendants, and did not entitle him to the equitable relief prayed for. And thus the case was submitted for the consideration of the court below, and the court, upon full consideration, sustained the demurrer of the defendants to the petition, and, it appearing upon the record that plaintiff did not desire further to amend, the final judgment was entered against the plaintiff, dismissing the petition at his costs, to which Cameron, the plaintiff in error, excepted. This petition in error is prosecuted for the purpose of reversing that judgment.

That the auditor of the county had the right to call upon Cameron to make a full return of any personal goods or chattels that he may have omitted, whether intentionally or by mistake, there is no doubt. Sec. 2782 of the Statutes gives the auditor that authority. Like a statute that gives the board of equalization authority to add to a person's personal property return, this section requires that the reasons why the increase is made shall be set out, except, that in a board of equalization it provides, that the reasons for the increase shall be spread upon its journal or minutes. The provision, as to the auditor, is in this wise: "And the county auditor shall, in all such cases, file in his office a statement of the facts or evidence upon which he made such correction; but he shall, in no case, reduce the amount returned by the assessor without the written assent of the auditor of state," etc.

Hence, it was within the authority of the auditor to call upon Mr. Cameron to make a full return, if he had failed to do so, of his taxable chattels for the years of 1876, 1877 and 1878. And it appears that he did so, and, as stated in the petition, assigned as a reason for placing $45,000 more upon his personal return, that he had failed, during those years, to account for any part of this judgment entered in his favor in the superior court of Cincinnati.

As already stated, Cameron claims, through his counsel, that because this judgment was liable to be reversed, and that the supreme court was liable to decide that

he had no cause to recover whatever, that until the supreme court finally passed upon this judgment, or any part of it, it was not a proper subject of taxation, and that he was not required under any statute of the state, to return it as a credit or an asset of any kind subject to taxation as other chattel property. Sec. 2734, of the Revised Statutes, under the head "Listing Personal Property," is very broad and comprehensive; and that provides that "every person of full age and sound mind shall list the personal property of which he is the owner, and all moneys in his possession, all moneys invested, loaned, or otherwise controlled by him, as agent or attorney, or on account of any other person or persons, company or corporation whatever, and all moneys deposited subject to his order, check or draft; and all credits due or owing from any person or persons, body corporate or politic, whatever in or out of such county." Section 2737, of the same chapter, among other things, says that "such statement shall truly and distinctly set forth, first, the number of horses and cattle;" proceeding down to the 14th item, that provides that the statement shall truly and distinctly set forth "the amount of credits as hereinbefore defined," which has just been read in section 2734. Section 2739 provides for the valuing of personal property: "In listing personal property, it shall be valued at the usual selling price thereof, at the time of listing, and at the place where the same may then be; and if there be no usual selling price known to the person whose duty it is to fix a value thereon, then at such price as it is believed could be obtained therefor, in money, at such time and place; investments in bonds, stocks, joint stock companies, or otherwise, shall be valued at the true value thereof, in money; money, whether in possession or on deposit, shall be entered in the statement at the full amount thereof, excepting that depreciated circulating notes shall be entered at their current value." Then follows this distinct provision: "Every credit for a sum certain, payable either in money, property of any kind, labor or service, shall be valued at the full amount of the sum so payable, except that if it be for a specific article, or for a specified number or quantity of any article or articles of property, or for a certain amount of labor or services of any kind, it shall be valued at the current price of such property, or of such labor or service, at the place where payable.

Now, the question arises, whether a judgment that has been entered upon a claim arising upon a contract for work and labor done and materials furnished in constructing a house—in this case a hospital—after a judgment has been entered thereon by a court of competent jurisdiction, notwithstanding it may have been carried by proceedings in error to a higher court, at that time becomes a credit. The word "credit" or "credits," as used in this law relating to taxation of property, must be considered in connection with its context. We find the first use of the word "credit" or "credits" in connection with taxation occurring in the second section of article XII, of the constitution, which provides, that "laws shall be passed assessing, by uniform rate, all moneys, credits, investments in stock," etc. It is the command of the constitution that all credits shall be assessed or taxed for the purpose that the owner may bear his portion of the public burden. The context in the statute that carries out the provision of the constitution provides, that "every sane person shall list all moneys, credits, stocks and bonds." We think that a fair interpretation of this word "credits" is that it means any sum of money due, any demand or claim due or owing from one person to another, whether payable in money or any other specific personal property, and that when a claim is reduced—especially where it has grown out of a contract for work and labor done and materials furnished—where it has been reduced and liquidated, (if it was necessary to liquidate a demand of that kind), and becomes a judgment by a court of competent jurisdiction, it is, in our opinion, the highest evidence of indebtedness, of a debt due, of a debt that is receivable, within the meaning of the decision to which I will make reference, in Massachusetts, cited as applicable by counsel for plaintiff in error. From the moment it entered in a judgment, this claim for services and work and labor done and materials furnished, became a liquidated debt, a demand, a debt or demand receivable; it became a credit in the hands of the person to whom it belonged, or in whose favor the judgment was rendered. It became a debt receivable, for the reason that it appears, after the judgment had been entered in the superior court of Cincinnati, no *supersedeas* was interposed, to prevent the suing out of an execution. Therefore Cameron could have collected this judgment against the city of Cincinnati. The case in 106th Mass., to which we have referred by counsel, is a case very unlike this upon the facts. It was a case where the public authorities of a city imposed a tax upon a certain sum of money that had been awarded to a landowner, for land taken by the corporation for street purposes. By the law of Massachusetts its assessors allowed the owner $75,000 for a strip of ground taken to widen

the street. But it seems that the landowner had a suit pending, as is required by their statutes, to assess these damages by a jury. That suit had not been determined when this proceeding was taken to enjoin the collection of this tax. This case is found in 106th Mass. Reports, page 540, John A. Lowell against Street Commissioners of Boston. Ames, J., says: "The claim for compensation for land damages, upon which this tax was laid, was uncertain in amount. It is to be submitted to a jury, which may increase or diminish the amount awarded by the city; and for this reason, as well as from its special character, it is not a debt technically, or in the sense of that term as used in the pleading and in legal proceedings." At the close, the court says: "We are of the opinion, therefore, that, until the damages to which a landholder is entitled under the statutes of 1866, C., 174, have become fixed and receivable, (these are the important words in our opinion) as his absolute personal estate, they do not constitute a debt liable to be included in his ratable estate, under the general statutes." Now, as we have stated, this judgment of the superior court of Cincinnati, entered in 1873, never was reversed. The claim before the court, originally, was for $64,000. The case went to a referee, and he tried the case with all the functions, so to speak, of a court, and entered a judgment for $75,000 in favor of the plaintiff in error. The cause was then reserved to the general term of the superior court, and they cut down the finding and judgment of the referee some $2,000, entering a judgment in favor of Cameron for $73,000; and then the city carried the case to the supreme court by proceedings in error, and there it remained until 1878, at the December term of that court, when the supreme court commission affirmed the judgment of the general term of the superior court of Cincinnati, and Cameron recovered, not only the amount of the judgment entered by the general term of the superior court, of $73,000, but a judgment of interest, with interest thereon at six per cent., running back through all of the time when he had made no return of this property for taxation, as required by law. Cameron alleges in his petition, and sets out a copy of the statement made by the auditor, when he placed against Cameron the additional sum of $45,000, that he had no authority to add anything else than his interest in this judgment; and the copy of the statement does not show why the auditor did proceed to charge against Cameron anything else than his interest in this judgment. I have read the statute where it authorizes the auditor to make the increase that he thinks proper against a person who has made an improper return, that he must set out a statement of all the facts upon which he is acting; and, in our opinion, unless he does set out the reasons upon which he has acted, he cannot, legally, increase the amount of a taxpayer's personal return. The return, to the extent of the interest of Cameron in this judgment, the facts in relation thereto, as set out in the petition, and taken from the statement of the auditor, are, in our opinion, sufficient. The petition alleges, and it is admitted by the demurrer, that the judgment was for $73,000; and Cameron avers as a fact, and it is admitted to be true by the demurrer, that the extent of his interest in the judgment was only one-half, or $36 500, and that he was liable for one-half the attorneys' fees, or $7,500. Yet the auditor increased his personal return in the sum of $45,000, and why he increased it over the amount of one-half this judgment less one-half of the attorneys' fees does not appear from any statement made by the auditor, when he did this thing.

It is the opinion of this court, that the demurrer to this petition in the court below should have been overruled and an injunction entered against these defendants collecting taxes upon any greater sum, against Cameron, by reason of this error, than upon the sum of $36,500. one-half of the judgment, less one-half the counsel fees paid by him, $7,500 interest, however, to be added to this one-half of the judgment, from the time of its rendition in 1873, up to 1876, and then one year additional interest for the year 1877, and one year additional interest for the year 1878, less, each year, the one-half of the attorneys' fees, for which he was chargeable, and which he has since paid.

Unless the parties desire to amend, by filing an answer other than by demurrer, it is a case in which this court is au horized to enter such judgment here, as should have been entered by the court below; and the judgment should be, here, under the statute, that the judgment below should be reversed and an injunction issued against the collection of any taxes upon any sum in excess of Mr. Cameron's one-half of the judgment, with the interest added thereon, from 1873, less one-half the attorneys' fees. In other respects the judgment below is correct.

Yaple, Moos & Pattison and C. D. Robertson, Attorneys for Plaintiff in Error.

Goss & Peck and Chas. Evans, Attorneys for Defendant in Error.

Decided Friday, December 2, 1881.

* DEATH BY NEGLIGENCE—PLEADING. 444

[Hamilton District Court, 1881.]

Burnet, Avery and Cox, JJ.

THOMAS HARTZELL v. JOHN SHANNON, ADMR.

Under the present statutes in an action by an administrator for damages for causing death, it is necessary to set out in the petition who are the beneficiaries of the action.

ERROR to the Superior Court of Cincinnati.

BURNET, J.

John Shannon, the plaintiff below, as administrator of his deceased son, brought an action against Thomas Hartzell to recover damages for the death of his son, alleged to have been occasioned by the negligence of an employee of the defendant below. There was a demurrer filed to the petition, which was overruled by the court below. It is alleged as a ground of error that the court below erred in overruling the demurrer and that the demurrer to the petition ought to have been sustained. The petition alleges that the plaintiff is sole administrator of his infant son, James Shannon, deceased; that his son was born May 17, 1877, and died on January 5, 1880. That is the only allegation—if you call it an allegation—setting out who are the beneficiaries in this action, who are entitled to receive the fund, if there should be a recovery by the plaintiff. It alleges simply that the plaintiff had been appointed administrator of his deceased son, naming him. This action is brought under the provisions of the present Revised Statutes, the accident having occurred a few days after these statutes took effect and the death following two or three days after the accident. There is a difference between the present law and the original statute in Ohio upon this subject, in naming the beneficiaries and in the distribution of the fund. The law of 1851, giving the right of action where death shall have been produced by the negligence of another, provides that every such action shall be brought by and in the name of a personal representative of such deceased person, and the amount so recovered shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed in the proportion required by law in relation to the distribution of personal estates, and in every such action the jury may give such damages as they may deem fair and just, not exceeding five thousand dollars, with reference to the pecuniary injury resulting from such death to the widow and next of kin of such deceased person. The administrator, although not beneficially interested in any way except as he may receive his commissions from the results of the action, is the party plaintiff; the persons to whom this amount was to be distributed, under that law, were the widow and next of kin. It was held by Judge Spencer, at an early day, in a case reported in 1 Disney, p. 259, upon a demurrer to a petition, that it was necessary to set out in the petition under the old law the names of the parties who were to be the beneficiaries of the action, the widow, if there was any, and the next of kin. This was held by Judge Spencer upon demurrer, sustaining the demurrer because the petition omitted to make these averments. We are not aware of any case in which this practice has been departed from in

Ohio. In 78 Illinois Report, page 68, it was held that it is necessary under a law similar to our statute to set out in the petition the names of the parties who are entitled to the fund to be distributed. In a brief case, on motion to allow the filing of a petition in error, reported in 26 O. S., 522, Weidner v. Rankin, the court said that the defendant was not interested in the distribution of the fund, but that the plaintiff, the administrator, at his risk, must ascertain who are to be the distributees and make the distribution. We understand that to mean that at his risk, he must name in his petition truly who are the parties, as beneficiaries, and that the defendant would not be concerned if there were a false averment, except that it might put him to a disadvantage in making his defense in the case.

But the present statute differs very materially from the statute under which these decisions were made. Section 6135 reads: "Every such action shall be for the benefit of the wife or husband and parents and children, or if there be neither of them then for the next of kin, of the person whose death shall be so caused, and it shall be brought by and in the name of the personal representative of the person deceased, the damages not exceeding in any case $10,000, as they may think proportioned to the pecuniary injury resulting from such death, to the persons respectively, for whose benefit such action shall be brought." Before this amendment the jury had nothing to do in their finding with the distribution to the beneficiaries. After the judgment was obtained the distribution of the money was to be determined simply by the statute. But under the statute as it now stands, the jury must determine how the money is to be distributed, and in order that this may be properly determined, it should appear upon the record who the distributees are. Besides this, the amount to be recovered is determinable by ascertaining the pecuniary loss occasioned by the death to the parties who are the beneficiaries of the action. They may be near of kin, and they may be remote of kin, and it is a part of the cause of action to set out who these parties are. We think that the court below erred in overruling the demurrer.

The demurrer to the petition should have been sustained and for this error, without examining any other question in the case, the judgment will be reversed.

Hildebrandt & Hildebrandt, for Plaintiff in Error.

William Disney, Contra.

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445 * **MORTGAGES—PARTIES.**

[Hamilton District Court, 1881.]

†R. S. HAMILTON, TRUSTEE, ET AL. v. CLARK JACOBS.

The *cestui que* trust is a necessary party in an action affecting his interest—more necessary than the trustee.

ERROR to the Superior Court of Cincinnati.

COX, J.

In the superior court suit was brought to foreclose a mortgage given by Hamilton as trustee on property he had conveyed to Mrs. Farley, but in

† See 4 C. C., 250, for case having same title. The Circuit Court case was affirmed by the Supreme Court. No report. See 22 B., 354.

which conveyance the right was reserved, or given to him to convey or dispose of the property without consent of *cestui que* trust for any purpose he deemed proper, for her benefit. He mortgaged the property to Jacobs, giving his note as trustee, endorsing it in his individual capacity and guaranteeing it. Hamilton was made defendant. On motion, Farley and his wife, the *cestui que* trust, were ordered to be made codefendants, but neither of them was, in fact, served or made defendant. A decree was taken against Hamilton as trustee, ordering the property to be sold, and that upon sale all his interest as trustee and the interest of the *cestui que* trust be forever barred. It is claimed that the court erred in rendering this decree. We think there was error. The *cestui que* trust should have been made a party defendant. By our statute all parties having an interest are necessary parties. By the decision of numerous cases the *cestui que* trust is a more necessary party than the trustee himself. This principle is laid down by almost every authority you can find upon the subject.

The same principle is laid down in Story's Equity Pleadings, page 183. It has been held not necessary to name the trustee, as the beneficiary has the real interest in the case, and the beneficiary should be a party in all these cases. We think that for this reason the judgment should be reversed, and an order be made that the *cestui que* trust be made party defendant.

S. A. Miller, Attorney for Plaintiffs in Error.

Champion & Williams, Contra.

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*TRUSTS—STATUTE OF FRAUDS. 477

[Hamilton District Court, December 14, 1882.]

Cox, Burnet and Johnston, JJ.

†JAMES W. O'CONNOR v. MARY J. RYAN, EXECUTRIX, ET AL.

Where the owner of a certain lot conveys it to another, no consideration being paid by the grantor, but the grantee executed certain promissory notes to him, with the understanding that upon their maturity he would pay them and surrender them cancelled, upon which the grantee would reconvey to the grantor; but instead, the grantee, without the grantor's consent, conveyed the property to a third person for a nominal consideration, but in fact without any consideration, in trust, however, that such third person should convey the property to the original grantor: *Held*, that this did not constitute a mortgage, and the contract being by parol, did not constitute an express trust grafted on the deed, but is within the statute of frauds, and one to whom the grantee conveyed with a parol trust to convey to the original grantor, cannot set up the statute of frauds which the original grantee had not chosen to set up, but had waived by the indirect attempt to fulfill the contract.

PETITION IN ERROR to the Superior Court of Cincinnati.

BURNET, J.

This is a petition in error to reverse a judgment of the superior court of Cincinnati, upon the grounds, principally, that the judgment of the superior court was contrary to the weight of the evidence and contrary to the law of the case.

O'Connor filed his petition in the superior court, alleging that in 1851 he became the owner in fee of the lot of land described in the petition; that in 1858 he con-

†This case was affirmed by the Supreme Court, with report. See opinion, 41 O. S., 368.

veyed the property to C. E. Nourse; that there was no consideration paid to him by Nourse, but that Nourse executed to him his promissory notes for the benefit of O'Connor, with the understanding and agreement that O'Connor should pay the notes at their maturity and upon the surrendering of them cancelled to Nourse, Nourse would reconvey the property to O'Connor; that in fact he did pay the notes and surrendered them cancelled to Nourse, but that Nourse in the year 1861, without the consent of O'Connor, conveyed the property to John B. Ryan, by a deed of general warranty, for the nominal consideration of $1,500, being the same consideration mentioned in the conveyance of O'Connor to Nourse, but in fact without any consideration paid by Ryan, who knew the circumstances attending the conveyance to Nourse, but in trust, that Ryan should convey the property to O'Connor, the trust, however, not being recited in the deed from Nourse to Ryan, but resting in parol.

The petition claims that O'Connor since the date of his purchase in 1851 has been in possession of the property; that the conveyance from O'Connor to Nourse was in equity a mortgage; that Ryan did in fact execute a deed for the conveyance of the property, and deliver the same to O'Connor, but that he omitted in the deed to give the name of the grantee, and that the outstanding legal title in the heirs of Ryan is a cloud upon his title. And he asks that the conveyance of Nourse to Ryan shall be declared to have been in trust for the benefit of the plaintiff, and that the trust be determined, and that the cloud be removed from his title, and for general relief.

To this petition there is an answer filed by the widow, Mary L. Ryan, who was appointed administratrix of her deceased husband.

The answer of Mrs. Ryan admits the several conveyances stated in the petition, but avers, that the conveyance from O'Connor to Nourse was not a mortgage, but intended to be an absolute deed; that the deed from Nourse to Ryan was not upon any trust, but was intended to be an absolute deed; that there had been money transactions between Ryan and O'Connor, which, up to the time of the death of Ryan, had not been settled, and there was a large indebtedness remaining due from O'Connor to Ryan; that the conveyance mentioned in the petition as having been executed by Ryan and his heirs was not intended to convey the property to O'Connor, nor in fact delivered to O'Connor, but that it was intended when there had been a final settlement between Ryan and O'Connor, that the deed should be perfected and delivered to O'Connor. She claims, that the matters litigated in this transaction, had already been adjudicated by a former case in the superior court, in which O'Connor had filed a petition, upon identically the same cause of action, against the same defendants, which had been dismissed.

There are answers and cross petitions filed by some of the heirs, in which they deny that the deed from O'Connor to Nourse was a mortgage, and the deed from Nourse to Ryan was a trust deed, and they claim that property absolutely belonged to their father in fee. They deny also, that O'Connor was in possession of the property.

The court below found for the defendants and dismissed the petition.

Now it is claimed on the part of the defendants, in whose favor the case was decided below, that the original petition was for quieting title by the owner of the property, of plaintiff, who alleged himself to be the owner of the legal title in fee and in possession of the property, and that the proof, so far as there was any competent evidence in the case, set up a different cause of action from that alleged in the petition, and therefore, the judgment of the court below dismissing the petition, should not be reversed.

We do not understand the petition. On the contrary the petition does allege that the legal title had passed by virtue of the conveyance to John B. Ryan, but in trust for the benefit of O'Connor; though it does allege the continued possession of plaintiff from the time that he originally acquired the property, down to the time of the action being brought.

The petition, therefore, which is not, perhaps, very artistically drawn, is in substance a petition by the beneficiary, under a deed, upon which he seeks to engraft a trust by parol, to require the trustee to convey to him the trust property.

It is claimed by the plaintiff, that the deed made by O'Connor to Nourse was in equity a mortgage.

We do not think so. The transaction between O'Connor and Nourse, is this: O'Connor conveyed the property to Nourse. Nourse executed his notes to O'Connor and a mortgage upon the property to secure the payment of the notes. The mortgage and the notes were delivered to O'Connor, who thereupon used them, and afterward furnished the money to Nourse as the notes fell due, to pay them, and they were surrendered cancelled with the mortgage to Nourse.

The allegation is, that the understanding and agreement was, that when they should be thus surrendered, Nourse would reconvey. Now this does not constitute a mortgage. The deed from O'Connor to Nourse was not to secure the payment of a debt to Nourse, it was not to indemnify Nourse against a debt made by O'Connor upon which he was surety. On the contrary, the deed was made to enable O'Connor to procure from Nourse the paper given in consideration of the conveyance made by him to Nourse. The object, therefore, was to procure the notes and a mortgage from Nourse to O'Connor. Nor on the other hand, can it be said to be a deed with an express trust engrafted upon it by the parol agreement of the parties. The object in making the deed was not the performance of some trust. The object was to procure, as I have said, the notes and mortgage from Nourse; it is true, for the benefit of O'Connor. The relation then existing between O'Connor and Nourse, when O'Connor had paid the notes and surrendered them to Nourse, was that of parties to a contract in which Nourse had agreed, at the time of the conveyance of the property to him, that he would reconvey to O'Connor, upon the performance of a consideration for a reconveyance, namely the payment and surrender of the notes and mortgage, and that contract rests in parol.

It is claimed on the part of the defendants that this being a contract within the statute of frauds, the plaintiff cannot enforce it, and therefore the decree dismissing in favor of the defendants below, should not be reversed. In this we cannot agree with the defendant. It was indeed a contract by parol for the conveyance of real property, but it was not void. It was a question of evidence between the plaintiff and the defendant Nourse, and Nourse might waive the proof and admit the contract and he would be bound by it.

Third parties could not compel him to set up the statute of fraud in defense of the action. He is not a party to the action. Nor could they plead—in the circumstances in which Ryan stood in this case—the statute of frauds in his behalf, if he saw fit to waive it. He did waive the statute. According to the proof, as claimed by the plaintiff, he did waive the statute and undertook to fulfill his contract, not directly, but indirectly, by conveying instead of to O'Connor, to Ryan, in trust for O'Connor.

The fact then, that this contract rested in parol is no reason why the judgment below should not be reversed.

It is claimed also by the plaintiff, that the infant defendants in this action, some of them, were not served, and that the court therefore was without jurisdiction to render any final judgment in the action; that the action in its nature was a joint action, and without obtaining jurisdiction over all the defendants, the court could not render any decree except one of dismissal without prejudice.

And to sustain this position the case of Penn v. Hayward, 14 Ohio State, 302, is referred to.

It is claimed that that case decides that an action for a specific performance of a contract brought against the heirs of a decedent, was a joint action as against his heirs, and that without jurisdiction over all the defendants the court could render no decree. I do not understand the decision—speaking for myself—to go to that extent. In that case some of the defendants were nonresidents of the state, but resided in Indiana. The land was situated in the state of which they were residents. At the time of the decree all of them were residents of the state where the land was. There was an attempt to serve the nonresidents by publication. The court held that the publication was not authorized by the statute, the land not being within the jurisdiction of the court; and as the parties were all residents at that time of Indiana, and complete relief might be given by the court in Indiana, whereas the court in Ohio could not give complete relief they thought it best to dismiss the petition and remand the parties to the court within whose jurisdiction it was; thus exercising the sound legal discretion of the chancellor, to which a petition for specific performance is addressed.

We do not understand the case, therefore, to go to the extent that is claimed for it. At any rate it is not authority for the claim of the plaintiff, that this judgment should be reversed as to all of the defendants, because the court did not obtain jurisdiction over the persons of some of them.

We are referred to Evans v. Iles, 7 Ohio State, 233, and Capron v. Van Noorden, 2 Cranch's Reports, 126.

Neither of these cases is parallel to this. In both of them, the court, whose judgment was reversed, had no jurisdiction of the action, and the courts held that under those circumstances, in behalf of the plaintiff, although he himself had resorted to the court, to use the language of our supreme court in the case of Evans

v. Iles, he could not complain against the action of the court in entertaining jurisdiction, yet as the judgment was absolutely void, it was set aside. In this case that is not so. The superior court had complete jurisdiction of the action. It had undoubted jurisdiction of most of the defendants. The title held by the defendants was devisible. They were copartners, they were not joint tenants. The entire decree, therefore, should not be reversed for the reason that some of them were not served with process, and for myself, I doubt whether the decree should be reversed as against any of them for that reason. It was a decree in their favor. It was a decree that as to some of the defendants would be undoubtedly valid, so far as this ground is concerned. But we are not ready to say that the court did not obtain jurisdiction over all the parties to the suit. The infants were of different ages, some of them over fourteen years of age, and some under fourteen years of age at the time the process was issued. The statute provides that as against infants under fourteen years of age, it shall not be sufficient to serve the infant alone, but the guardian or the father must be served likewise, or if neither of these can be found, the mother, or the person who has the care or control of the infant, or with whom he lives. And if neither of these parties could be found, or if the minor be over fourteen years of age, service upon him alone will be sufficient. The petition in the superior court does not give the ages of the infants; the ages do not appear upon the process that was issued. It was claimed that under these circumstances the court would presume that all things were rightly done, and therefore that the infants were properly served, the process showing that each of them had been in fact served. This presumption will not prevail against infants. Moore v. Starks, 1 O. S., 369.

We are furnished, however, with the means of ascertaining the ages. In the former suit, a transcript of the record of which is attached to the bill of exceptions, the petition did recite the ages of the several infants, and from that we learn that all the infants with the exception of the two youngest when they were served, were over fourteen years of age. We find the process returned as served upon these two and served upon their mother as natural guardian. The father was dead. That appears in the pleadings. Subsequently the guardian of these infants was served by other process. The court appointed a guardian *ad litem* to defend for them, and in the entry making the appointment, find the fact, that the infants were served with process.

The guardian *ad litem* and the statutory guardian, both file answers in their behalf in the action. It appears from the bill of exceptions that in fact they were all represented by counsel at the trial of the cause.

Under these circumstances, for the purpose, as against the infants, of holding this decree to be void, we will not say that the court did not have jurisdiction over them. One of the infants was served on the return day of the writ, and that was the sole defect in the service. It has been held that service upon the return day of the writ is not void, but voidable, although the statute says the officer must serve the party before the return day of the writ. Meisse v. McCoy, 17 O. S., 225. Applying similar reasoning to the other defects in the service of process, although the service upon the infants, and the service upon the guardian, were at different times, under different writs, it would not be held void, even if it should be held voidable. The decree is in favor of the infants. It would be going a great way, for the purpose of reversing this decree as against them, to hold that it should be reversed, because the court had no jurisdicton over them.

It is claimed in behalf of the infants in whose behalf a court of equity will regard every defense, that the statute of limitations has run in their favor. We do not think so. Within the ten years, if the limitation of ten years should apply, a former action was brought in the superior court, and within one year from the dismissal of that action, this action was brought. That action was dismiseed, not upon a trial upon its merits, but because the plaintiff made default. It was therefore a dismissal without predjudice, and whilst it was no bar to this action it saved the plaintiff his remedy as against the statute of limitations, if the statute of limitations would run. But the action is to enforce an express trust, a trust created as it is claimed, by parol, but nevertheless an express trust, against which the statute of limitations will not run.

Upon the trial of the action, the plaintiff offered the deposition of C. E. Nourse, to sustain his cause of action. It is objected that this deposition was taken upon notice to only a part of the defendants in the action; that at the time the notice was given, one, at least, of the defendants, had not been served with process. It was a defendant residing in the state of Nebraska, and who was served by a copy of the summons and a copy of the petition, sent to Nebraska for that purpose,

whose service indeed, or the return thereof might be the subject of criticism, but was cured by his appearance, and his being represented at the trial by his counsel. This service was before the deposition was taken, but after the notice was given. The return of the service was not until after the deposition had been taken. It was claimed that as to him the deposition is simply upon the footing of an affidavit, taken without notice to a party in interest. When the deposition was offered, counsel for defendant speaking in behalf of all of the defendants, objected to the testimony as incompetent. This was in the progress of the trial. The deposition was received by the court, and the ruling of the court reserved upon the objection. The statute requires, when exceptions are taken to depositions, that they shall be made in writing and filed in the case, before the case is called for trial, unless for incompetency or irrelevancy. And to exclude the entire deposition for defect of service, there must be a written exception filed in the case before the case is called for trial. If the party who is taking the deposition find himself without evidence, as he may, upon such a motion, he will not be pressed into trial, but may take means to bring his evidence in some other way. This was not done.

Section 5273 of the Revised Statutes provides, notice shall be served upon the adverse party, his agent or attorney of record, or left at the usual place of abode of such party, or his agent or attorney, and the deposition shall only be used against such parties as are served with notice in one of the modes prescribed.

But the following sections provide how it shall be excluded for this cause or any other cause, that makes the deposition itself incompetent to be offered as evidence.

Section 5284. Exceptions to depositions shall be in writing, shall specify the grounds of objection, and shall be filed with the papers in the cause.

Section 5285. No exception other than incompetency or irrelevancy shall be regarded, unless made and filed before the commencement of the suit.

The deposition was therefore properly offered. It is claimed that the testimony of Nourse should not have been received, because he was an incompetent witness. In the first place that he was a proper and necessary party to the suit and that as a witness he must be treated as if he were in fact a party to the suit.

The case of Hubbell v. Hubbell, 22 Ohio State, 221, holds, that an intermediate trustee who has conveyed his title is not a proper or necessary party in an action for the enforcement of a trust.

Nourse therefore was not a necessary party to the suit. It was claimed, however, that he was an interested witness and therefore he should be treated as if he were a party to the action under the last clause of section 5242, that when a case is plainly within the reason and spirit of the last three sections, though not within the strict letter, their principles shall be applied.

We do not think that this clause will preclude the testimony of Nourse in the action. He had parted with his title; he had conveyed to Ryan, as he says, in trust for O'Connor. He was estopped to reclaim the property by his conveyance; he had no direct interest in this action. The fact that possibly if the action failed against Ryan, there might be an action subsequently against him in behalf of O'Connor, was not such an interest in this action as should exclude his testimony as an interested witness. The witness, there, was a competent witness.

The court below, as it was stated in argument, and as it was claimed upon this trial found that the deed from O'Connor to Nourse was a deed in fraud of creditors, and that therefore O'Connor had no equity to reclaim the title. We do not see in the testimony the evidence, that this deed was for the purpose of defrauding creditors. But if it were, and it appeared that Nourse recognizing the right of O'Connor undertook to reconvey or took steps towards a reconveyance of the property to O'Connor, which in equity did not belong to himself, but belonged either to O'Connor or to his creditors—and there are no creditor shown to be existing in this case—a court of chancery would kindly help him in performing the act that he undertook to perform and if he did not succeed in reconveying the title as he undertook to do, the court would give him all the necessary aid to accomplish the purpose. So that if it were (as it is said the court below found) a deed for the purpose of defrauding creditors, it would be no defense to plaintiff's petition.

The testimony of Nourse, who it seems deceased not long after he had given his deposition, for he was becoming an old man, whilst in many parts it was not very clear, and in some of the details evidently his memory was not good, yet was positive and distinct that the conveyance to him by O'Connor was for the benefit of O'Connor to enable him to use the paper which Nourse should execute, and that he did agree with O'Connor to give him back the title as soon as this purpose had been accomplished, if O'Connor paid the notes and returned them to him cancelled. He

was a banker at the time. He testifies that O'Connor brought the money to him, as each note matured, to pay the note. That the notes were paid over the counter, in his office; that he never gave anything to O'Connor for the property, that he always understood it to belong to O'Connor. That Ryan had been the trusted agent of O'Connor in the transaction of his business, settling up his affairs, when he got into trouble, because of his inability to meet his engagements; that he desired to rid himself of the responsibility and reconvey the property to O'Connor; and therefore, looking upon Ryan as his trusted agent, and thinking it safer for O'Connor that the property should be conveyed to Ryan rather than directly to O'Connor, he made the conveyance to Ryan. That when the property was originally conveyed to him by O'Connor, Mr. Ryan came with O'Connor and with Thos. J. Gallagher, his attorney, to him, importuning him to accept of the conveyance and make his notes and mortgage for the amount, for the benefit of O'Connor. That he resisted the importunity for a while, but at last he yielded and did receive a conveyance of the title; that after the notes were paid to get rid of the title and give it back to O'Connor he adopted this method, only because he thought it was safer for O'Connor; that he feared O'Connor's creditors might perhaps come down upon the property and sell it out, if he made a direct conveyance to O'Connor.

Now there is no testimony to contradict all of this.

We are aware of the fact that in order to engraft an express trust upon an absolute deed which contains no mention of any trust, especially upon a deed of general warranty, where the trust would be in favor of the party from whom the conveyance was received originally, there must be strong and unequivocal evidence.

This evidence appears to us to meet that requirement.

We think, therefore, that the court below erred in rendering the decree for the defendants and it will be reversed and remanded for a new trial.

O'Connor, Glidden & Burgoyne and Taft & Lloyd for Plaintiff in Error.

Stallo, Kittredge & Shoemaker, for Defendants in Error.

Decided Wednesday, December 14th.

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480 *LANDLORD AND TENANT.

[Hamilton District Court, 1882.]

Cox, Burnet and Johnston, JJ.

†JULIUS TRESSEL v. EXECUTORS OF LONGWORTH.

JOSEPH LONGWORTH v. MACK ET AL.

Where one leases a large tract of land and afterwards leases it to a building association, which divides and subleases, giving the lessees the privilege of purchase; but the building association being in arrears for the ground rent, the lessor instituted proceedings to foreclose its lien, failing to make the lot holders parties and buying in the whole, it stands in the same position as the association, and therefore the lot holders have a right to redeem.

Cox, J.

Judge Cox announced the opinion in these cases, both of which came up on appeal from the common pleas and involved the same questions. The petition set forth that the executors of Longworth leased some 5,000 feet front of land on the eastern side of the Columbus and Wooster Road to Robb and Fee, the latter agreeing to pay on a valuation of $17.50 per foot, and the lease being for twenty years; that the executors covenanted to convey to Robb and Fee on the payment of $86,000; that they further, at the request of Robb and Fee, executed a lease to the Undercliff Land

†The decision of Common Pleas is found 4 B., 961.

and Building Association No. 2, by which the same terms were given to that association, with this proviso, that the executors agreed to give any member designated by the association a deed for a lot at any time the member paid for the lot, provided the terms and conditions of the lease made by Robb and Fee and the building association were complied with. Tressel alleges that he became a member and erected a house on a certain lot, and that about fifty others erected houses; that the agreement was one by which the association was to be created for the joint benefit of the estate of Longworth, and of Robb and Fee, and that it was held out to the members that when any member paid for his lot he should have a deed for it whether the ground rent was paid to Longworth or not; and it is claimed by Tressel that the executors, in violation of the rights of plaintiff, claimed that $6,000 is due from the association *as ground rent, and commenced a suit to foreclose and sell the property, Tressel being advised not to interfere, as he would be dealt with fairly; that about fifty houses were erected, at a cost of about $40,000, and were bought in for a nominal sum by the executors. 481

The court remarked that by the terms of the lease made by the executors to the building association, whenever a lot holder paid for his lot the executors would give him a deed, provided the ground rent on the entire property was paid at the time. Tressel having this right, and not being made a party to the suit of the executors, has now the right to bring his action to test his right to relief, but he cannot demand of the executors a deed until he complies with the terms upon which they leased the property. Undoubtedly this was a great hardship to many who had built houses upon the property, and the court would gladly relieve them if they could do so, but was unable to grant any relief further than that the court below granted, namely, that the parties could now tender the amount due on the lease, upon which they would be entitled to deeds for their respective lots. To give them an opportunity to do so ninety days' time would be allowed to redeem.

ERROR—PLEADING.

[Hamilton District Court, 1882.]

Cox, Burnet and Johnston, JJ.

MARKS V. HARRIS.

A petition on an appeal bond which merely states that the bond was executed, and approved by the justice and that the judgment was rendered in favor of appellee against the appellant, is demurrable, there being no averment that there ever was a suit in the magistrate's court.

BURNET, J.

This was a petition in error to reverse a judgment of the common pleas, in favor of Harris, on the ground that the petition in the original action did not state facts to constitute a cause of action. The action of the common pleas was brought by Harris on an appeal bond. The petition set out that Marks executed the bond, which was approved by the justice of the peace, that thereafter a transcript was filed in the common

pleas and judgment rendered in favor of the appellee against the appellant. A demurrer had been sustained in the original petition, and it was claimed now that the amended petition was defective. There was no answer, and judgment was taken by default. Judge Burnet, announcing
482 the opinion of the court, said that *the facts set out were not sufficient. There was no averment that there ever was a suit in the magistrate's court. Nothing is given out but a copy of the petition with the endorsement of approval by the magistrate. The petition is defective, and the judgment should be reversed and cause remanded.

CHATTEL MORTGAGES.

[Hamilton District Court, December 2, 1881.]

† WEBER ET AL. v. THE GAMBRINUS STOCK CO.

The statement required by the statute to be made by the mortgagee in a chattel mortgage is not notice to a subsequent party, unless signed by the mortgagee, his agent or attorney.

ERROR to the Superior Court of Cincinnati.

Cox, J.

This is a petition in error to reverse the judgment of the superior court of Cincinnati. In that court a petition was filed by the Gambrinus Stock Co. against Weber, a constable, and others, plaintiffs in execution, setting forth that on the 25th of April, 1879, Roettger had executed and delivered to them a mortgage upon certain property on Vine street, in a restaurant, to secure a claim due by Roettger to the Gambrinus Stock Co.; that they had, in that mortgage set forth all the property that they had in the establishment, and that the Gambrinus Stock Co., by its agent, Mr. Boss, had, upon the mortgage, made a statement of the amount due, as required by the statutes, but that the officer before whom it was taken committed an error in that he had not set forth who made the statement and affidavit, and that the agent omitted to sign his name to the statement. They go on, then, further, to say that Weber, the constable, and the plaintiffs in execution, claim this mortgage is defective in not setting forth upon it a statement of their claim as required by law, and that they were entitled to levy upon the property, had levied upon it, and were proceeding to sell it upon execution; and the plaintiffs in this case ask that the officers be enjoined from proceeding to sell the property upon the execution. And they allege that, as soon as they discovered that they had levied upon the property, and discovered the mistake in not having the claim upon the end of the mortgage filled up with the name of the agent who had made it, (and his signature to it), that they had at once procured that to be done, and refiled their mortgage; and now they claim, that this has made the mortgage complete, and that it was a notice that the original claim, although defective, or even if it were defective as to giving notice to subsequent obtainers of execution, that it was now perfect by the signature of Boss, their agent, and dated back and made to come previous to the time when the levy was made upon it by Weber and the execution creditors, and they ask that the constable and the execution creditors be enjoined from proceeding to sell the property upon execution; that a receiver be appointed; that they be permitted to set forth their claim upon the mortgage; that the property be sold, and that they have the proceeds declared to be the first lien upon this mortgage of the premises. The case was tried before the court, and in the progress of the trial the plaintiffs sought to introduce parol testimony to show that the first claim made on the 25th day of April, 1879, upon the mortgage, although not purporting to be made by the agent or the attorney for the Gambrinus Stock Company, which we understand to be a corporation, nor signed by him, was, in fact, made by Mr. C. Boss, who was the agent of this Gambrinus Stock Company, but was omitted to be signed by him, by the

† This case was reversed by the Supreme Court. See opinion, 41 O. S., 689.

neglect of the officer. The court admitted this testimony and corrected the mistake, ordered the property to be sold; it was sold by the receiver, the funds brought into court, and the court directed that the funds be first applied to the payment of the mortgage, declaring it to be the first lien upon the property, and the balance, some $12 to be applied to the payment of the execution creditors by this judgment. Defendants excepted and now ask to have it reversed.

The simple question to be decided, is, whether the claim put upon the first mortgage complies with the requirements of the statutes. If it does, then the mortgage creditors are entitled to the first proceeds of the sale. If it does not, then the execution creditors are.

The statute provides that, before a chattel mortgage shall be a notice to subsequent *bona fide* purchasers or creditors, the mortgagee must, himself, or by his agent or attorney, enter thereon a true statement in dollars and cents, of the amount of his claim, and that it is just and unpaid, which statement shall be verified before some justice of the peace, or other officer authorized to administer oaths. Now, this statement simply says this: "State of Ohio, and County of Hamilton. The mortgagee named in this mortgage, being duly sworn, makes oath and says: This claim against (blank) mortgager is a true statement as herein annexed, amounting to the sum of $1,000, under the statute of claims, and is just and unpaid." And then it is certified to by the officer that he was sworn. But it does not appear who made this affidavit It says: "mortgagee." The mortgagee is a corporation, and could not make the affidavit. It must have been done by the agent or by the attorney; but that person is not named, nor is the affidavit signed. It is claimed, however, that this is a defect which does not go to the substance of the case; that if the statement were made, although not signed, it is still valid; and the argument is made from the wording of the statute, that it is simply that the party shall make an affidavit; while the affidavit to petition to be filed in the court requires it to be signed, that the law does not require this affidavit to a mortgage to be signed, and that a simple statement upon the back of it as in this case, is sufficient notice. We are cited to a case reported in the 19th Ohio State Reports, page 291, case of Ashley v. Wright, "where the written statement required by the statute to be entered on such mortgage was verified before a notary public, duly authorized to administer oaths, but the certificate of such verification was not authenticated by the affixing the notarial seal thereto: *Held*, that such authentication is not required by the statute, nor is necessary to the validity of the mortgage." The court, in deciding that case, says: "It is evident that in many cases the law authorizes and requires an oath to be administered, but neither requires nor contemplates the authentication of the fact that such oath was administered by a certificate of any kind. The validity and legal effect of such oaths do not depend upon a subsequent authentication; but upon the fact that the oath was taken and subscribed by a proper officer. And under this statute, the court there saying, the seal was not necessary, the plaintiffs rely that this mortgage shall come. But the court goes on further in deciding that case, and, we think, strikes right at what is the proper construction of this law: "Here the statute simply requires," they say, "that the statement shall be verified, that is, sworn to, before some officer authorized to administer oaths. And in the absence of any requirement as to a certificate, we think it is sufficient, that the proper affidavit be in fact made, and that for the purpose of notice to the world no formal solemnities are necessary other than the signature of the affiant to the proper affidavit, and the official statement of the officer that the affidavit was subscribed and sworn to before him." Now, we think, that the court means to say, in regard to this affidavit on the back of the mortgage, although it need not be necessary for the notary to put his seal to it, yet it is necessary for the affidavit to show who the affiant is, and that his name should be to the affidavit, and that this should be certified to by the officer; and, until this is done, it is not a notice to the subsequent purchaser, or to the world, of the validity of the mortgage. A majority of the court are of the opinion that this statement is insufficient, in law, to give notice to the execution creditors. It is claimed, however, that the creditors had, in fact, notice of this mortgage, though that is denied. The testimony is very conflicting. But we think, that the testimony does not show that they had any notice. Upon this ground, the judgment should be reversed and that, as the petition contains all the facts in the case necessary to enter a judgment in this case, we can enter the judgment here, fixing the priorities according to these facts; that is, give the priority to the execution creditors.

JOHNSTON, J., dissenting opinion.

Nothing of course can be claimed for the affidavit that was made and subscribed after the executions were levied. I have always felt that the case in 19th O. S., Ashley v. Wright, 291, was authority for inferior courts, in construing the statute, relating to chattel mortgages, to give it a liberal and not a technical construction. If there has been a substantial compliance that is sufficient. (31 O. S., 554, Gardiner v. Parmalee.)

The supreme court in the case referred to (19 O. S.), say, that neither a certificate or authentication of the verification was required (p. 295.) In direct terms they decide that the seal of office of the notary was not necessary and intimate that the want of such seal and authentication, if the verification was denied, would simply throw the burden of proof on the mortgagee; that is, he would be obliged to resort to oral testimony to establish the fact of verification, as was permitted in the case at bar, and for which error is assigned. Here the statement is properly endorsed on the mortgage. The names of the mortgagor and mortgagee are disclosed by reference to the mortgage referred to in the affidavit—the amount of the debt, and that it is just and unpaid. The notary certifies, that this statement was sworn to, gives the date, signing his name with office title, and affixes his seal of office. The mortgagee being a corporation, of course the only way the verification could have been made, was through one of its officers or agents—as the evidence shows it was in fact done. Construing this act with the liberality that the supreme court shows, it would not, I think, be going too far to say that the notary, having certified that the statement was sworn to, the presumption arises that that officer did what the statute prescribed he should do, and that an agent of the mortgagee was in fact sworn to the statement by him. The act no more provides that the affiant shall sign the statement than that the notary shall certify, or attach his seal, neither of which latter it seems is necessary. In the Ashley case referred to, while the court at the close of the opinion say, that one of the solemnities to be observed in the signing of the affidavit it will be observed that this was not the question before the court for decision, that part of the decision is *obiter dictum* merely. The syllabus contains no reference to that question. Upon the subject of verification all that was decided was, that the omission of the notary to affix his seal did not invalidate the mortgage—nothing more.

Baldwin & Bruner, Attorneys for Plaintiff in Error.

Von Seggern, Phares & Dewald, for Defendant in Error.

Decided Friday, December 2, 1881.

483 *PREFERENCE OF CREDITORS.

[Hamilton District Court, December 2, 881.]

Cox, Burnet and Johnston, JJ.

J. C. A. SACK v. LOUIS A. HEMANN ET AL.

A preference of certain creditors in a conveyance by an insolvent debtor is valid under the Ohio insolvent law and does not constitute fraud.

ERROR to the Superior Court of Cincinnati.

BURNET, J.

The plaintiff in error filed his petition in the superior court of Cincinnati against Louis A. Hemann, one Thieler, and one Moeser, for the sale of real property, or, to have a conveyance declared to be fraudulent and to have been executed for the purpose of injuring or defrauding his creditors, alleging that he was one of the creditors of Louis A. Hemann, the petition being filed under the provision of the statute authorizing a creditor to file such a petition and have the conveyance declared to have been fraudulent, and to have an assignee apointed to administer it, the petitioner, upon having given notice, to have a priority of all other credi-

tors, who do not come in and aid him, bearing their proportion of the expense of the enterprise, having a priority over other general creditors who will not come into the action. The petition was afterwards amended, declaring that the conveyance of the defendant, Hemann, to Thieler, was in trust, the defendant, Hemann, being insolvent, for the benefit of certain specified creditors alone, and asking that it shall be held to be in trust for all his creditors. The two causes of action, then remain. They seem rather inconsistent, but they remain, however, in the petition. The evidence shows that Hemann was indebted to Thieler in an amount of between $2,000 and $3,000; that he was indebted, also, to one Biesinger in the sum of $1,700; that there was a mortgage already existing on the property, in favor of Moeser, for the sum of $2,000; that the property which he conveyed to Thieler who was his largest creditor among those mentioned, was worth about $5,700; that he conveyed it to Thieler upon his assuming to pay off the mortgage to Moeser, to pay the $1,700 to Biesinger, and to credit the sum of $2,000 upon the debt of Hemann to Thieler; that thereupon Thieler gave his note to Biesinger for the amount that was due from Hemann, to Biesinger, and Hemann received back the note that was outstanding from himself to secure that debt; and that Thieler did credit Hemann with the sum of $2,000 on Hemann's indebtedness to Thieler, these amounts equalling precisely the consideration named in the deed for the property, $5,000. The debts were subsisting. The consideration upon which the conveyance was made, was carried out by the grantee. He in fact did assume the two debts, the note to Moeser, who was the mortgagee, and the one to Biesinger, who, hitherto, had no interest in the lien upon the property: and he did credit Hemann with the amount he agreed to credit him upon his indebtedness to himself.

The transaction, therefore, was a conveyance from Hemann, upon the consideration of $5,700 to Thieler. That the consideration was not all paid to Hemann, or that a part of it was simply a credit upon an indebtedness of Hemann to Thieler, does not alter the case or invalidate, in any way, the transaction. It was a conveyance, according to the proof, upon full consideration received for the property. There was no badge of fraud in the transaction, unless it be that a preference, by a man who is insolvent, of some creditors over others is a badge of fraud.

In Ohio this has never constituted a fraud. Under the bankrupt law it would be different; bnt in Ohio a party is at liberty to prefer one creditor over another when he is in failing circumstances. Nor is there any trust in the transaction. It was not provided by the contract between the parties, that Thieler was to sell the property, to pay himself $2,000, to pay Moeser $2,000, and to pay Biesinger $1,700, leaving any surplus, if there should be any under such circumstances, to go to Hemann; but he assumed the personal obligation to pay the mortgagee, and to pay the lien, and, in fact, did credit the sum of $2,000 to Hemann. If the property brought more than $5,700, in case he should sell it, he, nevertheless, was bound to pay the consideration in the manner in which he had stipulated. There is no trust in this transaction.

The decree of the court below was rightfully against the plaintiff, and the judgment will be affirmed.

Von Seggern, Phares & Dewald, Attorneys for Plaintiff in Error.

G. Tafel, Attorney for Defendant in Error.

Decided Friday, December 2, 1881.

484 *COUNTERCLAIM.

[Hamilton District Court, 1882.]

Cox, Burnet and Johnston, JJ.

ADOLPHUS H. SMITH v. WM. C. MINCHELL, [MINCHIN.]

It is immaterial whether plaintiff dismisses his case so far as defendants counterclaim is concerned. The entry of dismissal only dismisses plaintiff's cause of action and leaves defendant's counterclaim in court for trial.

ERROR to the Court of Common Pleas.

JOHNSTON, J.

Smith was defendant below. The action was commenced below to recover upon a draft clothed in the following language: "$2,240. August 17, 1876. Pay to the order of myself $2,240, value received, and charge to account of Adolphus Smith. To Lafayette Bank." It was indorsed on the back, "Adolphus Smith." Plaintiff sets out in his petition the usual averments, and closes by asking judgment against defendant for the amount of this draft. Motions of different kinds were made by the defendants in the court below, some of which were sustained, and finally the defendant was required to plead, which he did by answer. In his answer he denied any indebtedness whatever upon this instrument to Minchell. The defense is: First—a general denial; secondly—the defense is that the draft was obtained from him by a person unknown to him by means of fraudulent representations; that plaintiff had knowledge of said fraud, and plaintiff did not obtain it before it became due, nor for a long time thereafter, wherefore defendant asks that the draft may be ordered delivered up and canceled, and for such other proper relief as defendant might be entitled to. Thereupon defendant also filed certain interrogatories which were demurred to and demurrer sustained. The defendant filed an amendment to his answer. The transcript of the docket and journal entries is not prepared as it should be. It is very defective in not setting out all the docket and journal entries as it should do in coming to a court of review. He proceeds to amend his answer by filing an amendment No. 2 to the answer. In this he sets up substantially this state of facts: that Smith was in the state of Florida at the time this draft was given, and that certain persons to him unknown, represented that they were the projectors of a lottery, a scheme of chance they were then carrying on at the city of Augusta, and that he was induced by fraudulent representations to believe that they had a lottery there and had a right to conduct it; that he was thus induced to take tickets of them to the value of $2,241, for which he gave this draft. He says he discovered afterwards that there was no such lottery to take place; that the scheme was a fraud throughout, and he pleads, among other things, that the statutes of Florida provide that it shall be unlawful to conduct a lottery in that state.

It seems that after the case was begun the plaintiff must have become sick at heart, for without the assistance of counsel, he dismissed the petition at his own costs without prejudice. The plaintiff here asks to reverse the judgment of the court in entering the dismissal, in order that the case may be heard on his counterclaim for the cancel-

ation of the draft. The effect of the dismissal, we think, did not go to the extent of dismissing the counterclaim. Where a party files a counterclaim and the facts disclosed in the answer and cross petition would entitle him to equitable relief, it is immaterial whether plaintiff dismisses his cause of action, he may do so with or without the consent of defendant, but it only dismisses his own cause of action, and so it did in this case. The defendant is still in court upon his counterclaim, and it stands for trial, there being no release. Whether it is a case that presents a cause for equitable relief we will not say. Looking at the papers, it seems to us, these parties being engaged *in an unholy enterprise in Florida, the court might leave them just as it finds them. 485

Section 5315 of the Revised Statutes provides that if a set-off or counterclaim be pleaded, the defendant shall have a right to proceed to the trial of his counterclaim or set-off, although the plaintiff has dismissed his cause of action or fails to appear. In the 30 O. S. Reports, p. 126, it was decided that where the cross petition presented a case that would entitle defendant to equitable relief the dismissal of the plaintiff's cause of action did not carry with it the counterclaim or cross petition of defendant. In our opinion, therefore, the action of the court below, in dismissing plaintiff's cause of action was not erroneous. The judgment must therefore be affirmed.

Jordan & Bettman, Attorneys for Plaintiff in Error.

Victor Abraham, Contra.

APPEAL—PARTITION.

[Hamilton District Court.]

Cox, Burnet and Johnston, JJ.

HENRY ROBINSON v. WILLIAM BARUFF ET AL.

An appeal does not lie from an order confirming or refusing to confirm a sale in partition. A petition in error furnishes the only mode of review.

BURNET, J.

This case came up for a hearing on a motion to dismiss an appeal. The action was for partition of certain real estate. The real estate was offered for sale and sold under these proceedings as free of dower. The question now was, whether to the order of confirmation an appeal would lie to the district court. This question was decided by the supreme court in the case of Reeves *et al.* v. Skennet, 13 O. S., page 574. In that case the supreme court held that an appeal would not lie from an order confirming or refusing to confirm a sale, but that a petition in error furnishes the only mode of review.

Appeal dismissed.

Boyce & Boyce, for Plaintiff.

BUILDING ASSOCIATIONS—ESTOPPEL.

[Hamilton District Court, 1881.]

Cox, Burnet and Johnston, JJ.

THE VICTORIA BUILDING ASSOCIATION v. THE ARBEITER BUND.

A shareholder in a building association is estopped from denying the validity of an excess of stock above the twenty shares allowed by statute to be held by him.

BURNET, J.

The petition in error was filed to reverse part of a judgment rendered by the court of common pleas. The action was brought in the court below by Henry Roeder against the Arbeiter Bund, for the purpose of subjecting property of the Arbeiter Bund to the payment of the judgment which he held. And this is the petition of the Victoria Building Association. Foss & Schneider and other parties were made defendants, as having liens upon the property, in order that the liens might be marshaled. The Arbeiter Bund had become a member of the Victoria Building Association, having twenty shares of its stock. J. P. Helmnke was also a member, having five shares of the stock, five shares amounting to $2,500. The Arbeiter Bund had made a loan from the Victoria Building Association, upon its twenty shares, in its full value. There had been a loan, also, to the full value of the five shares held by him. Both of these liens were secured by mortgages executed by the Arbeiter Bund upon this property which is the subject-matter of this suit. These two mortgages, if both valid, were the prior liens upon the property. Roeder held a judgment lien; Foss & Schneider had a mortgage lien, and I believe there were other liens. Upon the trial of the cause in the court of common pleas it was found by the decree, that the shares standing in the name of J. P. Helmnke were, in fact, issued to the Arbeiter Bund, and, being in excess of the number of shares allowed by the statute to be held by any one member, they were void, and the loan that was made by the association to the Arbeiter Bund, or to Helmnke, and on which the money had been received by the Arbeiter Bund, was invalid, and could not be collected by the building association. It was claimed by the parties who alleged that this loan was invalid, that the shares of stock, although they stood in the name of Helmnke, in fact, belonged to the Arbeiter Bund; that one of the articles of the constitution of the association required that the members should sign the constitution; that they were to be considered members who took the shares and signed the constitution, and that Helmnke had never signed the constitution. The evidence, however, showed that the practice of signing the constitution had fallen into disuse among the members, and that the members did not observe that requirement of the constitution. A book was issued, however, to Helmnke, and he was regularly credited with the payments of his dues and his premiums upon this loan. It appeared, however, that the loan was for the benefit of the Arbeiter Bund; and if the point of law were well made, that the ownership of the shares, in excess of the number allowed by the statute, would invalidate the instrument given to secure a loan based upon those shares, then the decree was right, under the evidence in this case. The statute does provide that no member of

the association shall own more than twenty shares in his own right. Now, whether that would include the case where a third party takes shares in his own name for the benefit of one who is already a shareholder to the extent that the law permits, or not, is not necessary, as it seems to us, to decide in this case.

It is claimed, in behalf of the defendant in error, that the mortgage given to secure the five shares in excess of the twenty shares which the Arbeiter Bund might have owned, upon the theory that they belonged to the Arbeiter Bund, would be void, because the Victoria Building Association was without power to issue those shares and to make a loan founded upon those shares. Now the Arbeiter Bund has received the money loaned. It has given its mortgage. It never proposed, and now it is not in its power to refund the money received and to cancel the transaction. It is estopped, therefore, to deny that the Victoria Building Association might make the loan which it received; and third parties [who] would make the defense in the interest of the Arbeiter Bund in order that their claims may come in and have precedence, are equally estopped, unless they fulfill the equitable obligation which rests upon the Bund, to reinstate the building association in its former rights, its former position. It is not necessary for us to proceed to argue this question, for it has been recently settled by the supreme court, in the case of Samuel W. Elliot v. The Greenfield Building and Savings Association, where Elliot had taken thirty-seven shares in the building association, and had received, by way of loans, the value of those shares from the association at different times, and made his mortgages to secure them. It was held by the supreme court that the mortgages, in the order of their priority, would be good against a third party holding a subsequent mortgage upon Elliot's property. That decision settles this case. It is not necessary to say anything more about it.

Judgment reversed.

Phillip Roettinger, Jr., and Rufus King, Attorneys for Plaintiff in Error.

J. R. Von Seggern, Attorney for Defendant in Error.

Decided Friday, December 2, 1881.

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*TAXES AND TAXATION. 486

[Hamilton District Court, 1882.]

Cox, Burnet and Johnston, JJ.

HIRSCHMAN v. J. G. FRATZ, TREASURER, ET AL.

1. Before a board of equalization in a city of the first class can legally increase the amount of a person's return of personal property made under oath in the absence of personal knowledge on the part of the board of the person's property, some evidence must be submitted to a majority of such board, and be considered by such majority.
2. Where the only evidence submitted was that of the person claimed to be in default for a proper return, and his statement was heard by one member only of the board, who thereafter reported it to the full board in the absence of such person, and the statement was, that his return under oath was in all respects correct and true, and such board thereupon added to such person's return, such addition is unauthorized and void, and the collection of taxes levied thereon may be enjoined.

JOHNSTON, J.

This action was commenced in the common pleas court for the purpose of enjoining these defendants from collecting a tax of $86.79, growing out of, as the plaintiff alleges in his petition, the unlawful addition of $3,000 to his chattel property return for the year 1879, and was tried in this court upon appeal. The petition alleges, in substance, that the plaintiff was doing business in 1879, on Pearl street; that he was a merchant; that in May of that year he was called upon, as is done with every person owning property, to make a return of his personal goods and chattels for taxation, to the ward assessor; that he, accordingly, did so in 1879, and returned, as subject to taxation, chattels in the shape of merchandise amounting to $17,240, and swore to his return as being true; that on the 25th of June he received a notification from the annual city board of equalization requesting him to appear before that board, and that he did so; that he was brought into the presence of one [member] only of the board, and interrogated by that member as to whether he had made a proper return of his goods and chattels as provided by law; his return was handed to him, and he examined it and said that that return was correct; he was then told to go away, which he did; that shortly thereafter he received a notification from this board to the effect that the sum of $3,000 had been added to his chattel property. Perhaps, I might for the purpose of clearness read these essential averments of the petition as to what he was required to do, and what was done when he appeared before the board: "That he said to this member of the board to whom the board had attempted to delegate all authority on the question of increase of said taxation, and then try to advise the board thereon, and then and there stated to said Fearing, the member of the board, that his return was correct, and that said board of equalization thereupon, without any evidence whatever, added to his return the sum of $3,000." These averments appear by way of amendment to the original petition. It was made just at the time the trial took place in the court below. The petition then proceeds to aver that thereafter the auditor charged up as against this $3,000, the regular taxes for 1879, and sent his duplicate to the county treasurer, Fratz, and that the treasurer was about to enforce the collection of the tax, and prays that an injunction may issue to restrain the defendants from the collection of these taxes, on the ground that this additional sum was added wholly without authority, and that the tax assessed was illegal and void. There was a general denial of allegations of the petition, and the issue thus joined was presented to this court for trial upon the evidence. The plaintiff testified and also called as witnesses Michael Ryan, Albert Schwill and the county auditor. The testimony of the plaintiff substantially supports all the allegations of the petition. He testifies that he was a merchant; that he was acquainted with the value of his stock in trade in the month of April, 1879; that, while it was true that he could not read or write except the reading of his own name, yet he had careful and competent clerks who made out his invoices, and that he knew that the return of $17,240 was a correct return. He testifies that shortly after making out this return, which was sworn to positively, he appeared before the board of equalization; that when he appeared, he was ushered into the presence of one person who claimed to be a member of this board, a Mr. Fearing; that he was not sworn, but he simply produced his notice and was interrogated by this individual alone, in the absence of any other member of

the board; he was asked to state whether he had not made an insufficient return, and he says that he responded, "No," and said that statement was correct and embodied fairly and truthfully all the property of which he was owner and liable to taxation. Something was said about adding to the return, and he remonstrated and said that that return fully represented all his goods and chattels subject to taxation at the time he made the return. He says that he was then notified by this single member to go home; that that was the only evidence given by him to this member, or that was offered while he was present; that he was not asked to produce his books, or invoices, or any paper connected with his business, nor to send any of his clerks or bookkeepers to be examined; that the next he knew was a notification that $3,000 additional had been added to his return, for that year, by the board. Then he sought his lawyer, and this suit was brought to enjoin the collecting of these taxes. The only other witnesses who were examined were called by the plaintiff, the auditor, Michael Ryan and Albert Schwill, all of whom testified they were members of this board of equalization, in 1879. None of them, when interrogated, were able to recall this man's case, but described the course of procedure followed that year, and perhaps before and since that time, by similar boards of equalization, and that procedure was as follows: The board consisted of six citizens of the city in connection with the auditor, making seven in all. It was customary to divide this board into subcommittees of one, two, and sometimes three members; that parties who were summoned before the board to give testimony as to whether they had made a proper return or not, were directed to go before one of these subcommittees, and that said committee heard their statement, whether under oath or not, and that probably during that day or the next, or sometime during the sitting of the board, it reported to the board, or to a majority thereof, the statements of such persons as were summoned to appear, and upon those statements of the subcommittee, consisting sometimes of one, sometimes of two or three members, the board would act, and add to or diminish the return of the persons summoned. The records of the board, or journal of the proceedings, were offered in evidence by both parties, and they show that at the time of this alleged increase the majority of the board was present, although none of these members were able to say, whether in fact there was a full board or a majority present, or whether this man's case had ever been heard, or upon what particular evidence it was that the board had seen fit to increase the amount of his return in the sum of $3,000.

That this board had the authority to increase the amount of this person's return when properly acting in their capacity as a board, there can be no doubt; and inasmuch as this board, when properly constituted, is invested with large powers in increasing the returns of persons made under oath, it is but proper, inasmuch as it derives its power to act from a special statute, that its power to act should be confined strictly within the scope of that statute. It has been intimated that the plaintiff should not be permitted to go behind the journal of the board. It is but proper to remark, that while this board in one sense exercises judicial power, it is not a court of record like this, but it is a tribunal created by special legislative enactment, and is therefore of special and limited jurisdiction. It has been decided by our supreme court at different times, that the records of such tribunals or boards do not import, as the records of this court, absolute verity, but their jurisdiction to act in the premises may be

inquired into, and that a court may go behind the records and look into their proceedings to see whether or not they have acted within the scope of their authority; whether or not they have exercised proper jurisdiction in the premises. This principle is laid down in 12 Ohio St., 272, Adams' Lessees v. Jeffries, and 3 Ohio St., 499, Sheldon's Lessees v. Newton. Now, in determining whether or not this board acquired jurisdiction to consider the evidence of this man, and any other evidence it may have had before it, and was authorized to add this additional sum of $3,000 to his personal property return, is a question that arises upon the evidence in the case. The weight of the evidence is clearly to the effect that a majority of this board, which by statute is required in order that it may do business legally, never was in session to hear and consider this man's evidence or, so far as the testimony shows, any other evidence that was in this case brought before it. The defendants offered no evidence even tending to show that the board itself had any knowledge of this man's affairs. The only evidence before the board was the evidence of the plaintiff himself, a simple statement, not under oath, in the presence of but one of the seven members of that board; and the statute specially provides that it requires a majority of the seven members, at least four members, to legally alter, either by adding or taking from the return of personal property made under oath. He was entitled to a joint consideration of his case by at least a majority of the board.

We are therefore necessarily forced to the conclusion in the case, that the full board never having exercised judgment upon the evidence submitted to it, never acquired proper jurisdiction over the man's case, and consequently proceeded without authority and without law to add to his personal return. The fact that the journal presented here shows that the majority, if not all of the members, were present on June 25, 1879, is, by the testimony submitted by the court, overthrown, and the plaintiff had the right to produce evidence for the purpose of overthrowing the record of this board of special, limited jurisdiction. To compel the plaintiff to submit to this additional sum, would be to compel him to pay taxes thereon without any proper basis or foundation therefor, and virtually, under the guise and name of taxation, to the extent of the taxes that he would be bound to pay thereon, to confiscate that portion of his estate, which is flatly in contravention of the constitution of the state and in contravention of all well-settled principles of public policy. I have referred to the fact that this board is invested with extraordinary powers; they have the right, upon such evidence as may be presented to the board, either to increase or diminish the return. It must act on evidence submitted before it, or upon a personal knowledge of the facts. It cannot exercise its power without evidence, or such personal knowledge. It cannot act flatly in the face of the only evidence submitted to it. To do so is an arbitrary and unauthorized exercise of power. 35 Ohio St., 405, Fratz v. Miller. From the evidence submitted in the case at bar, it would seem that the addition of the $3,000 was directly against the only evidence submitted, and hence unauthorized, even if it had been submitted to a full board. There is no method provided by which the party aggrieved may appeal to a higher tribunal for review, and the only course, therefore, to defend against a proceeding of this kind is by injunction.

We are clearly of opinion that testimony may be introduced for the purpose of impeaching the record of this tribunal of special, limited jurisdiction, and to show whether in point of fact it acquired a right law-

fully to do what it has done. From all the evidence in the case we are clearly of opinion that the board never acquired authority to add this sum to plaintiff's return, because no evidence was submitted to a majority of the board, and because, if submitted even to a full board or majority, there was no evidence whatever to authorize any addition. It was all the other way, and the tax being illegal and unjust, it is our duty to enjoin its collection. A perpetual decree to that effect may be entered.

Yaple, Moos & Pattison, Attorneys for Plaintiff.

County Solicitor, Contra.

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*LIBEL—EVIDENCE—DAMAGES. 488

[Hamilton District Court, 1882.]

Cox, Burnet and Johnston, JJ.

†CINCINNATI GAZETTE CO. v. R. M. BISHOP.

1. A publication in a newspaper, of the plaintiff, in a public office, as governor of the state, in a matter of which the court will take judicial notice that he must exercise *quasi* judicial functions, such as the hearing of charges against a subordinate officer, which publication in its headline uses the word conspiracy, and in indirect language charges him with entertaining with alacrity groundless charges, and unreasonableness in conducting the trial, tends to diminish public respect and confidence in such officer, and to accuse him of a breach of trust, and is actionable. Such language is not legitimate criticism, for it charges facts. False charges are not criticism.
2. Plaintiff may read more of libelous articles than was embodied in the petition in order to show malice.
3. Every citizen has a right to comment on the conduct of a public officer, but a newspaper has no greater right to do so than the individual has.
4. Plaintiff in a libel suit is entitled to the open and close, though the publication is admitted, for he has the right to show in chief the amount of damages, and express malice in addition to the malice implied, in order to enhance damages.

BURNET, J.

This is a petition in error to reverse the judgment of the superior court of Cincinnati. The errors assigned are:

First—That the verdict is against the law.

Second—That the verdict is against the weight of the evidence.

Third—That the court erred in rejecting evidence that had been offered by this plaintiff in error, and excepted to at the time.

Fourth—That the court erred in admitting testimony offered by the defendant in error, objected to by the plaintiff in error, and excepted to at the time.

Fifth—That the court erred in its charge to the jury, and excepted to at the time by the plaintiff in error.

Sixth—That the court erred in denying the plaintiff in error the right to open and close the case, to which the plaintiff excepted to at the time.

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†This case was dismissed by the Supreme Court Commission for want of preparation. See 11 Bull., 300. For Superior Court decision see 4 B., 1082.

As to the first assignments of error, we cannot examine into them—that the verdict is against the law, and that the verdict is against the evidence—because the bill of exceptions does not set out all the evidence in the case.

Nor does it appear that the court erred in rejecting evidence offered by the plaintiff in error, and excepted to at the time. The bill of exceptions does not disclose a single item in evidence offered by the defendant in error which was not admitted.

The action in the superior court was to recover damages for alleged libels, published by the defendant against the plaintiff.

There were two counts, setting up two distinct libels. To this petition there was a general demurrer. The court is of the opinion that both counts in the petition did set out facts sufficient to constitute causes of action. The demurrer therefore was properly overruled. Upon the overruling of the demurrer, the defendant filed an answer setting up as defense, if they may be regarded as two distinct defenses, these allegations:

1. The defendant admits the publication of the articles set forth in the petition and denies that they are false, malicious and defamatory, or that they bear the construction placed upon them by the plaintiff.

2. Defendant further says that so far as said articles state any matter of fact they are true as the defendant believes, and that the charge contained in said article against the plaintiff was that he was conducting himself in a partisan manner in the exercise of his office, and did not imply any personal corruption on his part. Defendant denies that plaintiff was damaged by any of said statements, and prays to be hence dismissed.

On motion of the plaintiff, so much of the first clause of this answer as denies that the articles published were "malicious and defamatory, or that they bear the construction placed upon them by the plaintiff," was stricken out, leaving this clause simply denying the falsity of the articles alleged to be libelous. The court refused to strike out any portion of the last clause of the answer. Thereupon the plaintiff filed a reply denying all the allegations of the answer, except the allegation that admits the publication of the articles.

The case went to trial before a jury, and the defendant claimed the opening and closing of the case, upon the ground that the answer admitted the publicatiou of the articles, and in effect alleged that they were true, thus pleading a justification. The defendant claimed that it had the affirmative, and therefore should have the opening and closing of the case. The court denied it. We think the court was right. It is well settled and has been recently so decided by our supreme court, that the plaintiff in a libel suit has the opening and closing of the case. Whilst it is true that libelous matter is presumed by the law to be both false and malicious, and therefore there is a technical right to the plaintiff upon the admission or proof of the publication of the libelous matter to recover; yet that is not all the right of the plaintiff, but he has a right to introduce in chief such evidence as will show the amount of damages which he may claim from the jury. He may show in addition to the presumed legal malice, express malice, for the purpose of enhancing the damages.

The plaintiff, to sustain the issue on his part, introduced not only the words that were set out in the petition as published by the defendant, but the whole of the articles from which these words were selected. There were two distinct libels alleged to have been uttered and published

on different days in the newspapers of the defendant. The defendant objected to the reading to the jury of more of those articles than was embodied in the petition. The court overruled the objection, and permitted the whole to be read. We are of the opinion that the court did not err. The plaintiff in a libel suit may prove other words published by the defendant, both at the time of the alleged libel and at any time subsequent to the publication, either before or after the commencement of the suit, for the purpose of showing the malice that instigated the articles that are alleged to be libelous, for the purpose of showing express malice. The ground of the objection was not stated. The purpose for which the evidence was offered was stated. The evidence was lawful for this purpose, and we do not think it was error on the part of the court to permit the evidence to be given.

The plaintiff also offered in evidence other articles published by the defendant in regard to the same subject-matter, which constituted the staple of the libelous articles, and the defendant objected.

The ruling which we have already made, applies also to these other articles offered in evidence. There was no error in admitting them.

The plaintiff in error alleged that the court erred in its charge to the jury. There was no general exception to the whole charge of the court, but to different portions of it. It is necessary to refer to the different portions excepted to, in order to pass upon the allegations of error in the petition.

The court in its charge said:

"Now, in so far as any of the facts charged in the articles have a tendency to injure or disgrace, in the manner in which I have just described, in the sense in which the plaintiff claims, the law presumes that they are not true, and casts the burden upon the defendant to satisfy you by a fair preponderance of the evidence that they were."

We do not see any error in this charge. It is sufficient for the plaintiff to prove that defendant has published words that are actionable in regard to him. If the defendant claims that the words are true, it is necessary for him to plead the truth of the words, and the burden of showing the truth, which will make the justification, rests upon him. There was no error therefore in this charge.

The following is also excepted to:

"Then, if you shall have found that the articles, or either of them, did convey the meaning claimed by the plaintiff, then the law implies that they were maliciously made; that is, if an article, if words which charge another with an improper course, with improver motives, which tend to bring him into disgrace, either as a man or a magistrate, are falsely uttered, the law presumes that they are maliciously uttered; that is, uttered with a design to injure; that is to say, if a person does an act willfully and without justification or excuse, which injures another, or tends to injure another, then the law says you shall say that he intended to do what the natural consequence of the act was to do."

The court in its charge to the jury stated that any injurious act done by one to the other, was in contemplation of law a malicious act. That it was not necessary to show spite, to show anger, but simply to show the intentional, injurious act, and the law implies malice.

This is undoubtedly true, and it applies to a case of libel. The publication of libelous words, which are untrue, does imply malice.

This also is excepted to:

"Therefore, if you find these two questions in favor of the plaintiff, viz., the meaning of the article and its falsity, the plaintiff will be entitled to a verdict for some amount, and then you will consider what that amount shall be."

There is no error in this charge of the court. If the matter published be false and libelous, the plaintiff is entitled to a verdict, at least for nominal damages.

Again—"By that is meant simply this: I said that the law presumes that when a man publishes falsity of another, and charging or imputing to him conduct or motive which should tend to injure or disgrace him, or to lower his standing, the law presumes that it is done maliciously; that is to say, what is known as malice is an intent to do another a wrong; that is, an intention to do a thing which was done, and the natural consequence of which must be known at the time to the person who did it."

The same rule will apply to this charge. There is no error in this.

Again—"It is sufficient, to maintain the action, that the law presumes, until the contrary is made to appear, that the person intended to do just what he did."

This, taken in its connection, is not erroneous.

Again—"It is not a defense in the sense that an honest belief of the truth, if found, should entitle the defendant to a verdict; but it is proper for your consideration, if you find that to be the fact, in mitigating the damages, and enabling you to determine what the amount should be."

Nor do we find any error in this portion of the charge: "He who publishes a libelous matter on another, does it at his own peril, and not at the peril of the party against whom he publishes it. His honest belief that the article is true, may relieve him from the implication of express malice, and may mitigate the damages, but it will not justify; nothing short of the actual truth can be pleaded in justification."

The court charged the jury, that if they found the matters stated in the alleged libelous article to be true, they should render their verdict for the defendant; and properly charged the jury, that the mere belief by the defendant that the articles are true, if in fact they are false, would not form a justification, but simply might be proven in mitigation of damages.

Again—"But if they find that it did, and that it was false, that then the plaintiff is entitled to a verdict."

To understand this we must read the context. The paragraph of the charge in which it occurs, is this:

"I have already told the jury that if they find that this article had not the meaning which the plaintiff claims; if it had not the meaning which tended to bring the plaintiff as a man or an officer into public disgrace, or injure his reputation, the defendant is entitled to a verdict; but if they find that it did, and that it was false, that then the plaintiff is entitled to a verdict."

There is no error, either, in this portion of the charge.

Again—"And the fact that the defendant is the publisher of a newspaper, cuts no figure in the case with respect to the right to comment upon the conduct of a public officer. Every citizen of the country has a right to comment and criticise the conduct of a public officer, a newspaper no more nor no less than anybody else."

It is difficult to conceive what error there is in that statement. A newspaper is nothing but paper and ink. The publisher of a newspaper is the party who publishes the libel, and whether a man prints a libel and circulates it among perhaps ten thousand readers, or writes a libel and circulates it among two or three persons, who are permitted to read it, is not material, except that perhaps, a jury, in assessing damages, would give a larger verdict against the party who gave the greater circulation to the libel It is hard to conceive, how any person could claim, that a newspaper is exempt from responsibility in publishing false and libelous matter. I am speaking now merely of the question of law upon which the court passed. The merits of this particular case are not before us, because the bill of exceptions does not set out all of the evidence. It is one of the self-imposed offices of a newspaper to criticise the conduct of public officers, having in view the public good and preservation of the political and moral interests of the entire community, holding up to just criticism any public officer who prostitutes his office to improper purposes; and in doing so, a newspaper would undoubtedly be justified by the law, no more, however, than any private individual. The responsibility which rests upon the publisher of a newspaper, is the same as that which rests upon a private individual, except, perhaps, as the means of working injury is far greater in the publisher of a newspaper, the responsibity should be more rigidly enforced.

And the defendant further excepted to such part of the charge as read as follows:

"Let it be understood, that I have told the jury that if a public officer is charged with doing an act which tended to weaken public confidence in him as an officer, as well as to weaken his standing as a man, to bring him into disgrace or contempt, or if charged with being actuated by a motive which would weaken public confidence in him as an officer, falsely, that it would be libelous in the sense that it would entitle him to a verdict for some amount."

We are unable to see any error in this portion of the charge.

These are the portions of the charge that were excepted to by the counsel for the defendant. The jury rendered a verdict for a small amount of money as damages,—small, I mean in comparison with the amount that was claimed, and with reference to all the circumstances of the case; the verdict being for $500 damages.

The case of The Cincinnati Gazette Co. v. Timberlake, 10 O. St., 548, is an instructive one. Timberlake had brought an action in the superior court of Cincinnati, which, being tried before Judge Gholson, resulted in a verdict and a judgment in his favor. The case is reported in 1 Disney, 320. On error to the general term, it was affirmed by Judges Storer, Spencer and Gholson. The decision of the general term was affirmed by the supreme court. In speaking of the general principle involved, the supreme court says: "The framers of our state constitution have thought proper to provide, expressly, in that instrument, that 'no law shall be passed to restrain or abridge the liberty of speech or of the press.' But the same instrument which guarantees to every citizen the right freely to 'speak, write, and publish his sentiments on all subjects,' declares that he shall also be 'responsible for the abuse of the right,' and that 'every person, for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law.' The liberty of the press, properly understood, is not, therefore, inconsistent with the

protection due to private character. It has been well defined as consisting in 'the right to publish with impunity, the truth, with good motives, and justifiable ends, whether it respects government, magistracy or individuals.' Kent J., in The People v. Croswell, 3 Johns Cases, 337. And this definition of it is embodied in our own state constitution, which provides, that ' in all criminal prosecutions for libel the truth may be given in evidence to the jury; and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted.' "

We do not find any error in the record of the proceedings of the superior court, and its judgment is, therefore, affirmed.

Thomas C. Campbell and William M. Ramsey, for Plaintiff in Error.

Alphonso Taft and C. B. Simrall, Contra.

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491 ***ADVANCEMENTS—PARTITION.**

[Hamilton District Court, 1882.]

Cox, Burnet and Johnston, JJ.

†AMANDA BURBECK ET AL. v. MALVINA SPOLLEN ET AL.

1. An advancement is a gift by anticipation from a parent to a child of the whole or a part of what it is supposed said child would inherit on the death of the parent.
2. Whether the property be given as an advancement, and to be accounted for in the final distribution, or given absolutely without reference to such distribution, is a question to be decided by the intention of the parent at the time of the gift.
3. The reversioners of an estate are not entitled to ask for partition proceedings. The right only extends to those who have the possession or an immediate right to the possession of the lands sought to be partitioned.

Cox, J.

This case comes on appeal from the court of common pleas. The plaintiffs seek partition of four separate pieces of property in this city which they allege they, in common with the defendants, inherited from their father, Ezekiel Cutter, deceased, who died intestate. They allege, however, that three of the defendants, to wit, Malvina Spollen, Ella Pattison and Harriet Cord, have each received from their father, by way of advancement, a lease for natural life, each of which is more than the full share and interest to which either of them would be entitled, and therefore ask that all of said premises be partitioned to the plaintiffs subject, however, to the leasehold right given to the defendants by the decedent in his lifetime on three separate parcels.

Defendants answering deny that either of said leasehold estates granted was by way of advancement, and ask the court to protect their rights.

The testimony shows that Ezekial Cutter had five children, four daughters and one son. That in his lifetime, desiring to make such dis-

†This case was affirmed by the Supreme Court in Burbeck v. Cutler, 13 B., 491, on authority of Tabler v. Wiseman, 2 O. S., 207. No report.

position of his property as he thought proper, executed four leases January 27, 1873, one to Malvina Niles, now Spollen, for her life, provided she survived the lessor, on lot No. 251, Hopkins street, held under perpetual lease from Betts. The condition of the lease was that the lessee should pay to the lessor or assigns, five hundred dollars per annum in equal quarterly installments during the natural life of the lessor, the lessee paying taxes, etc.; and that after the death of the lessor the lessee should pay all taxes, etc., and to the executors of lessor fifteen dollars annually during the life of the lessee. Providing also, that if lessee should assign this lease or her interest be sold under execution or otherwise, or for non-fulfillment of any condition of the lease, the lease should be void. These premises were at this time under rent to tenants. At the same time he took an order from Mr. Niles on the tenants, authorizing him to collect the rents and place the same to her credit in satisfaction of her indebtedness to him under the lease. On the 10th day of March, 1873, he executed a similar lease to Mrs. Cord for *one-half of lot 11, on Gest 492
street, west of Freeman, reserving a ground rent of two hundred and fifty dollars during his life, payable in quarterly installments, but that after his death the ground rent should be only twelve dollars per annum and taxes, and a similar assignment of the rent to her father was made.

On the 7th of July, 1873, he made a similar lease to Mrs. Pattison, of the west half of lot 8, in section 30, Betts' subdivision, reserving a yearly rent of three hundred dollars, payable in equal quarterly installments during his life, and after his death the sum of twelve dollars per annum and taxes, and took a similar assignment of the rent to himself to pay amount due him as rent matured.

He also executed a similar lease to his son, Volney, of the lot on Clark street, for a rental during the life of lessor and nominal rent after his death and during the life of his son.

The three leases to the daughters were accepted by them and by the father procured to be recorded on the day of the execution of each, and he collected and appropriated to himself the rents of all during his life.

That to the son was not accepted by him, because, as he states, it gave him no interest in the premises until after his father's death, and so it was not completely executed, and the father died with that lot unincumbered.

It is now claimed that all these leases to the daughters were advances to them, which should now, on partition of the estate, be assessed at their value, and that value deducted from what would otherwise be each of their respective share of the estate. Our statutes (Revised Statutes, section 4169) provide that if any real or personal estate has been given by any intestate in his lifetime as an advancement to any child or children, it shall be considered and held to be a part of the estate of the intestate in the distribution of the estate. An advancement is defined to be "a gift by anticipation from a parent to a child of the whole or a part of what it is supposed said child would inherit on the death of the parent." It is simply anticipating the distribution which the law would make at his death, so that the child may enjoy it in advance of the time the law, by death, would give it, and to be treated as a part of the estate in the final distribution. Whether the property be given as an advancement, and to be *accounted for in the final distribution, or given absolutely without 493
reference to such distribution, is a question to be decided by the in-

tention of the parent at the time of the gift. 23 Penn. St., 85; 11 Johns., 91; 2 McCord, 103; 26 Vermont, 665. And this intention is to be determined, as any other question, from the document itself, the acts and expressions of the parties, and any other legal evidence bearing on the point.

No particular form is necessary to indicate the advancement or the intention. Maddux Ch. Pr., 507; 4 Kent's Com., 418; 16 Vermont, 197.

Taking the evidence in this case we do not think it evinces an intention on the part of the intestate that these leases should be treated as advancements. The entire property is of the value of about $8,000. The leases and assignments are all in the handwriting of the intestate. He reserved the whole value of the estate to himself during his lifetime, and his evident intention was to give to his children intelligently just that share of his estate which each required, incumbering each of the four pieces with a similar lease to each of his three daughters and one son, making one lease to one of his daughters less onerous on account of her delicate health, and not giving anything to Mrs. Burbeck until the final distribution, because she was then in affluent circumstances, being worth in her own right property valued at $20,000, and then leaving the whole remainder of the estate, subject to these leases, to be divided among all his heirs. His entire object failed because the son would not accept the lease to him. But this did not affect the *status* of the other three, nor is there any evidence that he ever undertook to change it afterward, but left that designed for the son to go into the general distribution of his estate. Nor is there anything in the character of the leases which would indicate that the value was to be deducted from what would otherwise be the share of these daughters. Their estates, although favorable in some particulars, are not as to others. They are subject to the taxes and assessments, they are not assignable, and cannot be sold under penalty of forfeiture.

We hold, therefore, that these leases are not to be treated as advancements in the distribution of the estate.

The next question is as to how shall the partition be made.

494 *By Revised Statutes 5754, tenants in common and coparceners of any estate in lands, tenements and hereditaments within the state may make or suffer partition thereof in manner hereinafter prescribed.

There is no difficulty as to the Clark street property, for in that they are all tenants in common, and it is not incumbered by any life estate.

As to those tracts incumbered by the life leases, our supreme court in Tabler v. Wiseman, 2 O. S., 207, have held that "neither reversions nor remainders can have partitions, the right only extending to those who have the possession or an immediate right to the possession of the lands sought to be apportioned."

Neither of the plaintiffs, they being both reversioners, can demand partition of the lots held by the defendants under life leases.

But the defendants being the owners of life estates, and also owning an interest in the remainder in fee, may have partitions. Morgan v. Staley, 11 Ohio Rep., 389; Tabler v. Wiseman, 2 O. S., 207.

These owners of the life estate and also remainders do not in the pleadings ask for partition of that so held by them, and they only can demand it. If they desire to amend by inserting a prayer to that effect, partition will be made of the whole estate subject to the leases, otherwise it will only be that unincumbered by such estate.

*MORTGAGE—LEASE. 505

[Superior Court of Cincinnati, General Term, 1882.]

Harmon, Foraker and Force, JJ.

JAMES T. WORTHINGTON v. LOUIS BALLAUF.

The mortgagee of a leasehold, not in actual possession, is not, in this state, even after condition broken, an assignee of the lease.

FORAKER, J.

This case was reversed upon the evidence.

From the pleadings and the evidence it appears that in 1830, Jacob Burnet, being then the owner thereof, leased a lot on Fifth street to Lyman McBride, for ninety-nine years, renewable forever. That by a covenant contained in the lease, the lessee bound himself, his heirs and assigns, to pay all taxes levied on the property during the term; that the plaintiff had succeeded to the title of Burnet, and that in 1875 one Clara Witte, having by *mesne* assignments become the assignee of the lease, jointly with her husband mortgaged the leasehold estate, together, with other property, to the defendant, to secure the payment of two certain notes made by her and her husband. This mortgage was given on the 5th day of February, 1875, and the notes of even date therewith, were one for $552.50, at sixty days, and the other for $1,000 at one year.

The notes were not paid when they became due, and by such nonpayment the condition of the mortgage was broken. Ballauf never took actual possession of the premises, but in September, 1875, he was made a defendant in a suit brought in the court of common pleas, to sell the property, and he there filed an answer setting up his mortgage and asking protection of it. In that case, a sale having been made of some of the other property, his mortgage was fully paid, but it was not cancelled of record, but kept alive by order of the court, for the protection of a junior lienholder.

After the condition of this mortgage was broken, certain taxes that had been levied on the leasehold premises, amounting in all to about $1,500, became due and payable. The plaintiff contends that the mortgage to Ballauf made him the assignee of the lease, and that as such assignee he was bound by the covenant to pay all taxes, and consequently that he should have paid the taxes referred to, and that his failure and refusal to do so was a breach of that covenant, to plaintiff's damage in the sum of $1,500, for which judgment is asked.

The question is, therefore, whether the mortgagee of the leasehold, after condition broken, not in actual possession, is an assignee of the lease.

This must depend on, first, what constitutes an assignment of a lease, and secondly, what is a mortgage?

As to what constitutes an assignment of a lease it is unnecessary to observe further, for the purpose of this case, than that it must convey to the assignee the whole term and the whole estate of the lessee. If a day of the term, or a particle of the estate, be reserved, the transaction is not an assignment, but a subletting. Taylor on Landlord and Tenant, section 426.

A common law mortgage vested the legal title in the mortgagee, subject to the performance of the condition of defeasance. Upon condition broken, that title became absolute at law. The mortgagee could be divested and the mortgagor reinvested with the title only by a reconveyance.

Equity intervened and gave the mortgagor a right of redemption, but the mortgagee's title remained absolute at law until redemption occurred. So wholly was the title passed, that a second mortgagee took no title whatever, either before or after condition broken, simply because there was none remaining in the mortgagor to pass. And the mortgagor, on bill to redeem, was required to pay not only the whole of the mortgage debt, but all other debts he might be owing the mortgagee. If he would have equity he must do equity.

And so numerous cases might be cited to show that the legal title was wholly and absolutely passed at law by a common law mortgage, to the mortgagee, after condition broken.

This being true, it naturally and necessarily followed that it should be held, as in the case of Williams v. Bosanquet, 1 Brod. & B., 238, that the mortgagee of a leasehold was an assignee, and being such, bound at law, whether in or out of actual possession, by the covenants of the lease. This is so clear that it seems strange that Lord Mansfield should have fallen into the error of holding the contrary in Eaton v. Jacques, 1 Douglass, 438. But his mistake arose, as he makes manifest in his decision, from his application to the case of the equitable as contradistinguished from the legal character and qualities of a mortgage. In doing so, however, he but foreshadowed what the law of mortgages has since come to be in many of our states. But we are not concerned with the law of mortgages in England except as a starting point for the investigation of the question: What is a mortgage in Ohio? An examination of our supreme court decisions shows the establishment of a wide difference between a common law mortgage and an Ohio mortgage. We deem it unnecessary to review the different cases in detail. We content ourselves with the single observation that commencing with the case of the Lessees of Ely v. Maguire, 2 Ohio, 223, we have an unbroken line of cases holding that no legal title passes to anyone until condition broken, and that upon condition broken it only passes to the mortgagee as between mortgagor and mortgagee; that as to all the rest of the world the legal title remains all the time in the mortgagor.

As consequences of this holding a great number of apparently inconsistent features and propositions have become engrafted upon the law of mortgages in this state. To say that a mortgage is a legal conveyance, and yet that it does not convey anything, or that its execution and delivery do not affect the title, but that failure to perform the condition passes it; that the legal title is in the mortgagee for one purpose and in the mortgagor for another; that it is in the mortgagee as against the mortgagor, but in the mortgagor as against all the rest of the world; that the mortgagee may be stripped of his title by mere payment, without any act on his part, or that he may convey his legal title to another by merely transferring the debt to which his mortgage is an incident, and yet that he cannot, independently of a transfer of the debt convey to a stranger any title whatever, even by deed; that where there are a half dozen mortgages given by the same mortgagor upon the same premises,

the legal title passes, as between the mortgagor and mortgagee, to each mortgagee upon condition broken, presenting in the case put, an instance of seven different and independent coexisting legal titles to the same property, are only a few of the many such apparent inconsistencies.

But are they inconsistencies? Manifestly they are not in harmony with our ideas of a common law mortgage.

But this we think only proves that a mortgage in Ohio is something different. What the extent of the difference may be, in all respects, it would probably be difficult to point out and accurately define. It will be time to do that when the case is before the court.

It is sufficient for our present purpose to say that the equitable principles governing the doctrine of mortgages have so far overcome the legal technicalities and rules pertaining thereto, that a mortgage has ceased to be regarded as anything more than that for which it is intended, viz.: a security for a debt. And being intended as a security for a debt, and so treated, it is allowed only such legal effect as may be necessary to make it available as a security. Hence it is that the mortgagee has no legal title, before condition broken, because none is necessary to fully protect his security; and it is for the same reason that, after condition broken, he has no legal title as against anyone except the mortgagor. With the legal title in him as between him and the mortgagor, he has the basis for every legal remedy to which he can resort for the protection and enforcement of his security. But this qualified title, which, as we have seen, may exist, at the same time, in a half dozen different persons, is not that complete and absolute title, constituting the whole estate, necessary to be passed to create an assignment. The mortgagee of a leasehold, not in actual possession, is not, therefore, in our opinion, after condition broken, an assignee of the lease. It follows the judgment should be for the defendant.

FORCE and HARMON, JJ., concurred.

Wm. Worthington, for Plaintiff.

Kebler & Son, for Defendant.

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*JUDGMENT LIENS. 559

[Superior Court of Cincinnati, General Term, 1882.]

Harmon, Foraker and Force, JJ.

FULTON BUILDING ASSOCIATION v. JOHN J. HOOKER ET AL.

1. Where a money judgment at special term is reversed at general term, and such judgment of reversal is in turn reversed by the supreme court and the judgment at special term affirmed, the lien of such judgment does not relate back to its original rendition as to *bona fide* mortgages given by the judgment debtor while such judgment stood reversed upon land upon which the judgment had been a lien.
2. The pendency of the proceedings in error to reverse the judgment of reversal, does not operate as *lis pendens*, so as to affect persons dealing with the real estate of the judgment debtor.

HARMON, J.

The question presented by the bill of evidence upon which this case was reserved is one of priority of liens upon certain real estate of defendant Hooker.

C. H. Kilgour asserts by cross petition the lien of a judgment against Hooker, obtained by him at a special term of this court, June, 1870, upon which execution was issued, and, on November 25, 1871, levied upon the property in question. This judgment was reversed by the court in general term, upon petition in error, in January, 1873, Hooker having by injunction stayed sale upon the execution pending such proceedings in error. Kilgour thereupon filed a petition in error in the supreme court to reverse the judgment of reversal, upon which in January, 1881, he obtained a judgment reversing the decision of this court in general term and affirming the judgment at special term. More than five years after the rendition of the original judgment and the levy of execution thereunder, after the reversal thereof in general term, and pending the proceedings in error in the supreme court, plaintiff and certain of the defendants herein obtained from Hooker mortgages upon said real estate, to secure money loaned by them, by virtue of which they assert liens. Kilgour now claims that by virtue of the judgment of the supreme court, his lien is revived as of the date of his levy under his original judgment. The mortgagees claim that as to them, being *bona fide* purchasers while his judgment stood reversed, Kilgour's judgment is not so revived.

At common law, money judgments were not liens upon real estate. Such liens are created only by our statutes, to which we must look for their creation, duration and effect. By section 421 of the Code, as in force at that time, this judgment became a lien from the first day of the June term, 1870. By section 422, it would have ceased to be a lien five years from the issuing of the execution levied November 25, 1871, no execution having issued since, if there had been further proceedings with regard to it.

It is contended by Kilgour, that this judgment has never ceased to operate as a lien, first, because of the injunction so obtained by Hooker against its enforcement; second, by reason of the provisions of section 449, now section 5415, R. S.

It must be, if it is not, conceded that Tucker v. Shade, 25 Ohio St., 355, is conclusive against the first proposition, unless, as argued, the principle of that case *i. e.*, that an injunction against execution will not prevent a judgment from becoming dormant, does not apply to an injunction merely in the nature of a stay of execution pending proceedings in error. As the only ground alleged for this distinction is the provision of section 447, the two questions above stated are resolved into one, viz: Was section 447 intended to, and did it have the effect of keeping alive the lien of Kilgour's judgment after its reversal in general term?

From the language of that section it would seem to relate only to priorities among different liens. It enacts that no judgment shall operate as a lien to the prejudice of subsequent judgment liens, unless execution be issued and levied within a year from its rendition. Where the judgment of a higher court is remanded to the common pleas for execution, the year is made to run from the first day of the term at which the mandate is received. Then comes the provision that "nothing in this section shall be construed to defeat the lien of any judgment creditor who shall fail to take out execution and cause a levy to be made as herein provided, when such failure shall be occasioned 'by appeal, proceedings in error, injunction, or a vacancy in the office of sheriff,' etc., until one year after such inability shall be removed."

The lien of a judgment from which an appeal shall be taken is preserved as to all the world except subsequent judgment creditors by other sections, 646, Revised Statutes, sections 5236, 5376. The lien of a judgment to which proceedings in error are pending, needed no such preservative provision. It is not affected. Injunction against execution cannot affect the lien of a judgment. So that these provisions, in connection with the phrase, "as herein provided," would naturally seem to refer to the lien of a judgment as against subsequent judgments rather than to its lien generally. In other words, the section was not intended to modify sections 421 and 422. This seems to have been the view taken by the supreme court of the law from which this section descended. Norton v. Beaver, 5 Ohio, 178. Though it may be mere *obiter dictum*, it is not without weight in confirming a conclusion reached *obiter*.

But assuming with counsel for Kilgour, that the provisions of section 447 apply to judgment liens generally, preventing them from becoming dormant, etc., we are unable to see in them anything which preserves the lien of a judgment after the judgment has, by reversal, ceased to exist. After the decision of the general term, Kilgour was not prevented from issuing and levying execution by reason of proceedings in error or the injunction. He had nothing upon which to issue execution. The subsequent proceedings in error were instituted by himself. The injunction only restrained him while the proceedings in error were pending in the general term. It expired by its own terms when those proceedings ended. When these mortgages were given, Kilgour merely had a pending preservation suit against Hooker.

The express preservation by the sections above cited—which we do not understand it to be claimed, apply to other than technically appealed cases, and we therefore need not give our reason for holding that they do not—of the lien of a judgment vacated by appeal, excludes, by a familiar maxim, the idea of any such intention with regard to the lien of a judgment reversed and held for naught by a court of competent jurisdiction.

While the decision of the supreme court was in form a mere affirmance of judgment at special term, it was in effect a new judgment, certainly as to *bona fide* intervening mortgages.

The absence of legislation giving effect to a judgment as a lien while there is no judgment, which is almost in the nature of a contradiction of terms, is not supplied by any principle or decision. No authority has gone further than that upon the vacation of the judgment of reversal the original judgment is revived and relates back to time of rendition only in so far as to retain its priority over liens existing prior to its reversal, which liens were acquired subject to it, but not as to *bona fide* liens while it stood reversed. Freeman on Judgments, section 381, and cases cited.

This seems to us a just rule so far as it relates to intervening liens. We are not called upon to pass upon it as to others.

The doctrine of *lis pendens* has no application here. So far as appears in evidence, Kilgour's action was for the money only, and had no relation to the real estate in question. His right as to that was dependent upon his recovering judgment, and was merely incidental to such judgment. The levy made no difference. It cut no figure in the proceedings in error to the supreme court. They related simply to his right to the money judgment.

The entry at special term finding Kilgour's lien prior to that of the mortgagees, having been made irregularly and without notice to them,

the motion to set it aside, upon which the case was reversed, will be granted, and an entry made in conformity with this decision.

FORAKER and FORCE, JJ., concurred.

Healy & Brannan and Desmond, for C. H. Kilgour.

Von Seggern, Phares & Dewald, for Mortgagees.

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560 *MORTGAGES.

[Superior Court of Cincinnati, General Term, 1882.]

Harmon, Foraker and Force, JJ.

WALLACE SHILLITO ET AL. v. MATTHEW B. MCMAHON ET AL.

Any purchaser of real estate of the heirs of a decedent is subject to the contingency that he might have to respond to charges upon the property created by the death of the party or by his will, and if the case was referred to a master it would produce no result, as the court could not act upon the report.

FORCE, J.

In this case a motion to refer the case to a master, the opinion was announced by Judge Force. The original suit was to foreclose a mortgage on the interest of John Shillito, Jr., in real estate which he derived under the will of his father, John Shillito, Sr.

Mrs. Rogers, the sister of the plaintiffs, was made a defendant, and filed a cross petition setting up another mortgage covering the same property. McMahon and Marshall Robins brought other suits against John Shillito, Jr., and instituted proceedings in attachment, and Robins obtained a judgment in the superior court, which was afterwards reversed in the district court.

In this case McMahon and Robins filed answers and cross petitions, the executors to the will of John Shillito, Sr., and all the legatees under it being made parties, and it was claimed that the legacies were charges on the real estate, and that, therefore, no decree could be entered foreclosing the interest of John Shillito, Jr., nor an order of sale granted until the case was sent to a master to ascertain what his interest was, and for the marshaling of liens.

The court remarked that the will of John Shillito, Sr., after granting certain legacies, gave to John Shillito, Jr., one-fifth of the residue of his estate, real and personal, but this court could not go into the question of the debts of the deceased, nor the amount of his credits, nor in fact do anything else but to order the sale, subject to whatever charges were upon the property created by the will, the jurisdiction in equity being transferred and placed exclusively in the hands of the probate court. Any purchaser of real estate of the heirs of a decedent is subject to the contingency that he might have to respond to charges upon the property created by the death of the party or by his will, and if the case was referred to a master it would produce no result, as the court could not act upon the report. The motion should, therefore, be overruled, and the ordinary decree of foreclosure entered.

Hoadly, Johnson & Colston, for Robins.

Ramsey, Matthews & Matthews, for Plaintiffs and Mrs. Rogers.

*EQUITY. 564

[Hamilton District Court, 1882.]

Cox, Burnet, and Johnston, JJ.

†G. VOIGHT v. FREDERIKA VOIGHT ET AL.

Equity will not relieve a party against the consequences of his own neglect.

ERROR to the Court of Common Pleas.

JOHNSTON, J.

The action was commenced originally by plaintiff in error to obtain an injunction against defendants in error, enjoining them from consummating a judicial sale of property which had belonged *to him. The plaintiff alleges that in 1871 he sustained the relation of husband to the 565
defendant, Frederika Voight; that some trouble arising between them, he conveyed a piece of real estate to her, which was to be in full satisfaction of any claim she might have against him as her husband; that subsequently, in 1876, she filed a petition for divorce and alimony, and obtained a divorce and decree for five hundred dollars alimony against him; that he was not aware of the prayer for alimony, although the record shows he was personally served with a summons; that in 1881 an execution was issued on this decree for alimony, and levied upon another piece of real estate owned by plaintiff, which was sold under this levy. This action is brought to enjoin the consummation of this sale, it being claimed that the conveyance to the wife barred her right to alimony: *Held*, This defense was open to him in the divorce suit, and also in the proceedings under which the property was levied on and sold. Equity will not relieve a party against the consequences of his own neglect.

Judgment in favor of defendants affirmed.

C. D. Robertson, for Defendant in Error.

C. H. Blackburn, Contra.

ATTACHMENT.

[Hamilton District Court, 1882.]

Cox, Burnet and Johnston, JJ.

‡SAMUEL PRITZ v. JOHN B. DRAKE & CO.

Where an attachment is issued before a justice against several defendants and judgment is rendered in favor of plaintiff against all the defendants, and one of them appeals the case, and on appeal judgment was rendered in his favor but against the other defendant by default: *Held*, that the right to sue on the release bond was perfect.

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†This case was dismissed by the Supreme Court for want of preparation. 11 B., 252.

‡This case was dismissed by the Supreme Court Commission for want of preparation. 11 B., 823.

ERROR to the Court of Common Pleas.

BURNET, J.

Defendants in error, who were plaintiffs in the court below, are hotel keepers in Chicago. In the original action out of which this suit arose, one Leo Gooding and the firm of Levi & Co., of New York, were defendants, the action being brought before a magistrate to recover the sum of $200. An order of attachment was issued in that case, and the Burnet House was garnisheed. On the next day after the service upon the garnishee, a bond was given for the discharge of the attachment, signed by the plaintiff in error, Pritz, as surety. The action came to *trial, and a judgment was rendered in favor of Drake & Co,, against all the defendants. An appeal bond was executed on behalf of defendants, Levi & Co., but Gooding made default. A demurrer in the common pleas by Levi & Co. was sustained as to them, and a judgment was rendered against Gooding. Drake & Co. then brought their action before the justice of the peace upon the bond that had been given for the discharge of the attachment, and a judgment was rendered in favor of the plaintiffs. The common pleas, on appeal, affirmed this judgment: *Held*, The appeal bond being only in favor of Levi & Co., and a judgment having been rendered in their favor in that action, there was no such remedy on the appeal bond. Upon obtaining a judgment against Gooding, the right to bring an action upon the bond given to discharge the attachment was made perfect.

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Judgment affirmed.

Long, Kramer & Kramer, for Plaintiff in Error.

Champion & Williams, Contra.

BILLS AND NOTES—PARTITION.

[Hamilton District Court, 1882.]

Cox, Burnet and Johntson, JJ.

F. H. ROWECAMP, ADMR., v. HENRY MEYER.

Where certain real estate is sold under partition proceedings and the purchaser of the same executes notes as part of the purchase price, and the administrator of the estate does not seek to go upon the property, but seeks to subject these notes in the hands of an innocent purchaser, and treat them as assets of the decedent, the estate being in debt: *Held*, that the rights of a *bona fide* purchaser of the notes before maturity are paramount to those of the administrator.

ERROR to the Court of Common Pleas.

JOHNSTON, J.

The action was originally brought by Henry Meyer on a note and mortgage which had been assigned to him before maturity by Maria C. Teping, who is since deceased. The executors of Mrs. Teping answered, admitting liability on the note, but averring that Rowecamp, administrator, claimed the note belonged to the estate of Richter. By interpleader, Rowecamp, administrator, was made party to the suit, and the question now

is as to whether Rowecamp, administrator, or Meyer is entitled *to this note. It appears that certain real estate belonging to the estate 567
of Richter was sold under partition proceedings, among the heirs, and Mrs. Teping purchased the property at that sale, giving this note as part of the purchase price. The administrator sets up that this real estate was subject to the payment of all debts of the decedent, his personal estate not being sufficient to pay the debts, and, therefore, belonged to the administrator, and not to the heirs, and for the same reason the proceeds of sale belonged to him and not to the heirs.

The court below, upon these facts, found, as matter of law, that Meyer was entitled to collect this note and dismissed the cross petition of the administrator. The administrator had set up substantially these facts in the partition sale, but no finding was made in his favor in that case.

The administrator in this case does not seek to go upon the property, but seeks to pursue the fruits of the sale and treat them as assets of the decedent. All that we desire to say is, that so far as the administrator seeks to subject these notes in the hands of an innocent purchaser, the rights of a *bona fide* purchaser are paramount to those of the administrator.

Judgment affirmed.

Cowan & Ferris, for Plaintiff in Error.

Pohlman, Contra.

GAMBLING.

[Hamilton District Court, 1882.]

Cox, Burnet and Johnston, JJ.

†GEORGE W. WARD ET AL. v. JOHN RITT.

A party to a bet, the money being put in the hands of a stakeholder, may sue the stakeholder to recover back the amount contributed by him, it being still in the stakeholder's hands, but demand and refusal is first necessary.

BURNET, J.

The defendant in error, John Ritt, in 1876, made a bet with one Gibson, upon the presidential election, which was shortly thereafter to occur, the bet being, upon the part of Ritt, that Tilden would be elected, and on the part of Gibson that Hayes would be elected. Each of them put up the amount of his bet, the sum of $50, in the hands of George W. Ward, plaintiff in error, as stakeholder. Upon the 5th of March, 1877, the day after the inauguration of Mr. Hayes, Ward paid over the amount of money in his hands as stakeholder to Gibson, the winner of the bet. On the 8th of May following, Gibson returned the money to Ward, and refused to have anything further to do with it. Upon the same day, but after the return of the money to Ward, Ritt began his action before the justice of the peace, against both Ward and Gibson, to recover the

†This case was reversed by the Supreme Court Commission, without report. See 18 Bull., 138.

amount of his bet, $50. A judgment was rendered in favor of Ritt against Gibson, by the justice, and a judgment in favor of Ward for costs. Ritt thereupon filed his petition in error. Subsequently he dismissed his petition in error as to Gibson, leaving the case to stand Ritt v. Ward, for the reversal only of that part of the judgment, which discharged Ward from liability. Ward and Gibson also filed their petition in error, to reverse the judgment which Ritt had obtained against Gibson. Judgments of reversal were given in both cases. They then stood for trial in the common pleas, and upon motion the two cases were consolidated. Upon the trial there was a finding of facts, there being no dispute about the bet or the amount of it, nor about the payment of the money to Ward by the winner, Gibson, nor as to the return by Gibson of the money to Ward, the original stakeholder, and before the action was brought before the justice of the peace, nor that there had been any tender of the money made, either by Ward or Gibson, to Ritt. A judgment was rendered in favor of Ritt against Ward for the amount with interest from the day on which the action was brought before the justice.

There is no doubt about Ritt's right to receive this money under our statutes. The only question is as to whether in this action, upon the facts as found in the court below, he has a right to recover. Our statutes against gaming make illegal any bet made, and give the loser, where the money has been paid over on the bet, a right to recover from the winner the amount of the money so paid. The transaction is by our law an illegal one, and promissory notes given for the amount of the bet are void and cannot be enforced. As against the stakeholder, who stands between the two parties as the agent of each, and as a kind of umpire between them, upon their renouncing the bet before the delivery of the money deposited with him to the winner in fulfillment of the bet, and notifying him of such renunciation, either party is authorized to receive again the stake deposited with him. But without this notice the statutes give no such remedy against the stakeholder. It gives no remedy at all, in fact, against the stakeholder, except upon notice that the whole thing was "off," to use the curt expression in regard to such matters; and if, in the absence of such notice, the stakeholder, after the contingency shall have happened that under the agreement would authorize the winner to take the property, gives it over to the winner, the stakeholder's hands are washed of the transaction, and there is no action against him. In this case Ward did in fact, upon the election of Hayes, pay over the money to the winner. He was then acquitted. But it seems that the winner, whether because proceedings were threatened against him, or because his conscience troubled him, or for whatever reason desiring to be also acquitted, hands back the money to the stakeholder, and declares his intention to have nothing to do with it. Thereupon the action is brought against both. The question now is, whether upon the facts found, there having been no demand made by Ritt of Ward for the return of the money, Ritt can maintain the action which he has brought.

The sections of the Revised Statutes in question are 4270 and 4272. If, while the money was in the hands of Gibson, Ritt had brought his action against Gibson alone, undoubtedly he could have recovered. It was unnecessary for him to make any demand of Gibson, Gibson having unlawfully received the money, and although Ritt was *particeps criminis*, the statute, nevertheless, gave him the right to recover the money

back. And if Gibson received the money and assuming to keep it, or to use it for his own purposes, should hand over the same package of money to a third party who knew of the manner in which it was acquired, for the purpose of transferring title to such third party, Ritt might then bring action against such third party. To recover the property of the person to whom it was so transferred, no demand would be necessary. The receiving of the money by the winner with intent to keep it is a conversion of it to his own use. The transfer of it with intent to pass title to a third person, with notice to such third person, is also a conversion to his own use on his own part, and he also is treated in the law as a wrong-doer, and an action of trover would lie against him to recover it. From the findings in this case the court is warranted in supposing the $50 returned to be the identical $50 which was originally staked. The simple act of receiving the money by the winner, if followed up by no other act on his part, was a conversion by him to his own use, and he would be liable for conversion as in trover. Now, if Ward is to be placed in the same attitude towards Ritt, Ward also must be treated as a wrong-doer and as having converted the money of Ritt; but it seems to a majority of the court that that is not the legal attitude which he occupied. In transferring the money to Ward, the purpose of Gibson was not to give the title of it to Ward. The act itself did not flow from an assumption on the part of Ward that he himself owned the title, but, on the contrary, it was an act in disclaimer of the whole transaction, and an effort to return the money to the stakeholder and to get rid of a responsibility and of all claim of title to it. When it was so done it was, of course, Ritt's money, and Ritt was entitled to it, and upon an action for money had and received, he might recover it. But, the money having come originally into Ward's hand by the voluntary act of Ritt, we can find no liability to Ritt to return it until it was demanded by him, and it having afterward come into the hands of Ward by the act of Gibson, an act that involved no wrong doing either on the part of Gibson or Ward, before an action can be brought the party must be put in the wrong by a demand and a refusal to pay. According to a finding of the court below, that was not done.

In order to hold Ward in this case, without first proving a demand or refusal to pay the money, he must be held as in tort and upon trover. There must be an intent, or some act, amounting to a conversion, else it is not conversion, although he knows the property is not that of the party who gives it to him. As it appears to the majority of the court, the action of trover could not be maintained against Ward. Originally Ward was the agent of Ritt to pay over the money upon a certain contingency. He might do this, in the absence of notice to the contrary, upon the happening of the contingency, and escape liability. He did do this, Gibson, afterward repenting, returns the money to Ward for the purpose of getting rid of all responsibility in the matter. Possibly Ritt might still have followed Gibson and recovered from him the amount of money that had been paid to him. After he transferred it he might have brought this action against Ward for money had and received to his use; but the money not having come into the possession of Ward, coupled with any undertaking to pay it to Ritt, or in any wrongful way as

against Ritt, he must give Ward an opportunity to pay it to him by demand. He has no right to put him to costs until he has first made demand.

Judgment reversed, and cause remanded.

Stimmel & Davis, for Plaintiffs in Error.

S. F. Hunt, for Defendant in Error.

JOHNSTON, J., Dissenting opinion by

I cannot concur in the opinion announced by the majority of the court. Considering the origin of this controversy I feel that I should state some of the reasons for my dissent. The case is here not by bill of exceptions containing the evidence submitted to the judge of the common pleas, whose judgment has been reversed. There would seem to have been little if any conflict in the testimony, for that judge having found the facts and the law separately, no fault is found with the finding of facts, but only with the application of the law thereto. From this finding it appears that this $50, bet by Ritt and Gibson was held by Ward, that the contingency upon which the bet hinged occurred, and Ward decided the money of Ritt as won by Gibson, and it was therefore paid over to him. He received it into his own hands. He retained it for some two months, and then, as the finding shows, delivered the money bet by Ritt to Ward. Ward accepted it, and then offered to deliver it back to Gibson, who refused to take it, saying that he would not have anything to do with it. The court found as a fact, that Ward never offered to deliver it to Ritt, and that Ritt did not demand it of Ward. Suit then was brought for the money against Ward as well as Gibson, before a justice. Gibson was thereafter dismissed from the action by Ritt. Upon this finding of facts, the common pleas court adjudged that Ritt was entitled to recover of Ward his $50. That court found, that, to entitle Ritt to recover, it was not necessary that he should have demanded his money of Ward before commencing his suit. It was not claimed by counsel of Ward upon the hearing in this court, that a demand was necessary, but upon the contrary, in open court he stated that no demand was necessary when the question was put to him by the court. He claimed a reversal wholly upon another and different ground, to wit: That Ward, having in the first instance paid the money of Ritt over to Gibson without any demand or notice from Ritt not to do so, that his liability to Ritt thereupon ceased. The reversal here being based solely upon the ground that Ritt was not entitled to commence his suit without first demanding the money of Ward, the only question to be considered is: Was such demand necessary?

From the finding of facts it is incontrovertible, that Ritt and Gibson, with Ward, from the inception of this transaction, were engaged in violating the criminal laws of this state, Ritt and Gibson being principals, and Ward an aider and abettor. Each and all of them were charged with full notice of the statute law against betting upon the result of a presidential election. Section 6939, Revised Statutes. It is equally incontrovertible, that under the laws of this state prohibiting gaming and betting (section 4260, *et seq.*), that, although Ritt voluntarily and in his own wrong paid this money to Ward, and Ward, without any notice from Ritt not to do so, paid it over to Gibson, that Ritt's title to the money was not thereby lost, nor his right to recover the same. At common law

he could not have recovered it back, but by force of the positive statute law of this state he could. It remained as much his money when in the hands of Gibson, as if it had never left his possession. What were Ritt's legal rights up to this time if he chose to exercise them? Unquestionably to sue under section 4272, Revised Statutes, and recover it back in an action of debt—money had and received to his use, or for the conversion of it. Was Gibson entitled to any demand before suit was brought? Unquestionably not, for the statute provided just what it is necessary for the loser to allege, and neither demand or notice is intimated. Gibson then, having thus unlawfully obtained possession of the money, every hour he held it, he tortiously held it. If there is anything well settled in the law, it is, that a person, who illegally and tortiously holds the property of another, can pass no title whatever therein, even to a *bona fide* purchaser for full value. Gibson not therefore being entitled to any demand before suit, did Ward, to whom he two months thereafter delivered this money, no matter for what purpose, acquire any greater or different right? Was any new obligation thereby imposed upon Ritt? I think not. How did his knowledge of the history of this money differ from that of Gibson? Was he an innocent party even in any sense of the word? Certainly not. Did any title pass to him? Certainly not. He was not then either a stakeholder or agent for Ritt. That relation had ceased two months before. Ritt was neither advised nor present so far as the record shows, when Gibson, unwilling it would seem longer to have it about him, turned the money over to Ward. He does not seem to have been consulted, although his money was being passed from the possession of one person to another, neither of them having the slightest claim, title or interest in it whatever. Gibson, knowing it was Ritt's money, should have returned it to him, the same as he should if he had seen Ritt drop it accidentally in passing along the street.

Ward knew what Gibson's duty was in the premises as well as Gibson, and when Ward consented with him, in the absence of Ritt, to receive the money after he had ceased to be a stakeholder, and especially after he offered it back to Gibson and he refused to take it, a duty—a legal as well as moral duty, devolved upon him to at once deliver or offer to deliver it to Ritt. This he did not do. Is a person who illegally and tortiously obtains possession of property, entitled to demand before suit? By a long line of the most respectable authorities it has been decided that he is not. In fact, there are no decisions to the contrary that I have been able to find. That being the law as to the original party, does a person, who, with full knowledge of the illegal taking and tortious holding of that party, upon receiving such property from him without the assent of the lawful owner, become entitled to demand or notice from the lawful owner before he commences suit to recover the same or its value?

I have found the authorities just as uniform as in the case of the original tortious holder; all the authors upon common law pleading, text-writers, and the decisions uniting in this, which is the test question. If the party against whom suit is brought by the lawful owner for the recovery of the property or its value, came into the possession of the property lawfully or innocently—if his possession was lawful, as for instance he had bought at a constable's sale property that did not belong to the judgment debtor, the lawful owner must first demand the property of him before bringing his action—otherwise he must fail.

If, however, the party sued did not come lawfully into possession of the property—if he had even bought innocently of a party who was illegally or tortiously holding the property at the time, and especially if he had full knowledge of the unlawful holding or tortious possession of the property of the person from whom he received it, in either case the lawful owner is not required to make any demand or give any notice before he commences his action—for the very fact of taking possession of property with such knowledge is of itself a conversion of the property. This rule is reasonable and just, and in my opinion clearly applicable to the case at bar. Was either Gibson or Ward entitled to notice that this property belonged, legally belonged, to Ritt? The opportunity of knowing that it was Ritt's property; that the holding was illegal, was open as well to their understanding as it was to the understanding of Ritt. The law never requires either a vain or foolish thing to be done—Ward, as to Ritt, when he received and took possession of the money from Gibson, without Ritt's knowledge or consent, did not occupy the relation of stakeholder. That relation, as already stated, had ceased two months before. He stood toward Ritt as any other third party having full knowledge of all the facts of the unlawful and tortious holding of the property of Gibson from the start. The majority of the court think that Ward was not unlawfully or tortiously holding the money when sued, because Gibson, in passing it over to him, did not assume to pass any title or treat it as his own, or rather disclaimed the title thereto, and that Ward did not receive it as property of which he became the owner through Gibson. That is to say, that Gibson, after having violated the law, having committed the crime, and Ward having aided him in so doing—having violated the criminal statute against betting to the fullest extent possible, having become penitent, is entitled, notwithstanding, to occupy a more favorable position than he otherwise would. The *locus poenitentiae* that the law favors, is as I always understood it to be found and exercised at some point in the illegal transaction, before the illegal act is committed. If before the bet had been decided and the money delivered to Gibson he had gone to Ward and demanded and received his money back, and refused to have anything further to do with the illegal transaction and its consummation thereby had been prevented, he would then have occupied a favorable position in law; but having allowed the illegal act to be fully consummated, his penitence will not avail him anything.

He remained just as liable to criminal punishment after handing the money over to Gibson, as on the day he received it. Knowing who the lawful owner was, instead of returning the property to him, in passing it over to one who had no right to it, he did assume as against the lawful owner to clothe another with the possession, with *prima facie* ownership, and in my opinion he remained liable to Ritt in a civil action for the money, notwithstanding he had turned it over to Ward, and might alone have been sued, had Ritt so elected. Our supreme court has had occasion to express itself plainly upon the right of evil doers to recover back money in consummating an illegal transaction. De Palos v. Jones & Hooker, 28 Ohio St., 251. And again, when Ward tendered and offered to pay or deliver the money back to Gibson rather than to Ritt, the lawful owner, as the record shows he did, he (Ward), thereby assumed the right to dispose of the money—an act of itself amounting to a conver-

sion, thereby making a demand upon him unnecessary. 1 Chitty's Pleadings 174, (Star.)

A brief reference to some of the other authorities is but proper.

In 2 Starkie's Reports, 306, Hunt v. Gwinup, an action of an assignee in bankruptcy to recover goods sold in fraud of the act. Lord Ellenborough used this language: "The very act of taking those goods from one who had no right to dispose of them was of itself a conversion." And this was confirmed by the whole court of King's Bench, and no demand was made or required before suit; and to the same effect are 1st C. & P., 400; 3 do. 101; 1 Selwin, N. P., 11 Ed., 1370–1 and 5 East, 407.

In Chitty's Pleadings, 16th Amer. Ed., the principle is thus laid down, page 173, (Star): "In the case of a conversion or wrongful taking, it is not necessary to prove a demand and refusal, and the intent of the party is immaterial; for, although the defendant acted under a supposition that he was justified in what he did, or as a servant of and for the benefit of another person, he will be equally liable to this action (trover)."

In the courts of this country, in the many cases following these English authorities, 1st Cushing, 536, Stanley, Admr., v. Gaylord, may be referred to as containing the most elaborate opinion: "If the bailee of a chattel, who has no authority as against the bailor to retain or dispose of it, mortgage it as a security for his debt, and the mortgagee take possession under the mortgage, the bailor may maintain an action of trespass therefor against him, without a previous demand." And many English authorities are cited with approval, among them the case of Hunt v. Gwinup, already noted. In 11 Cush., 11, this case is followed.

In the case of Price v. Van Dyke, 6 Hill, 614, where the controversy was about a note that was assigned to an attorney for collection by one who was not the lawful owner of it, the court says, among other things: "The question is, whether this action could be maintained without a previous demand. It is settled that replevin in the *detinet*, as well as *cepit*, will lie for a wrongful taking, and in that case no demand was necessary. * * * If he (defendant) knew, or had any reason to believe, that he was dealing with one who acquired the property unlawfully, he may be treated as a wrongdoer without any demand by the true owner." And 3d Hill, 282, is cited.

In 2 Fairfield, (11 Maine) 30, Galum v. Bacon, the court say: "Where a party is rightfully in possession of property belonging to another, he does not unlawfully retain it, until after a demand by the true owner and a refusal. But if the taking is tortious, no such demand is necessary. * * * Whoever takes the property of another without his assent, express or implied, or without the assent of some one authorized to act in his behalf, takes it in the eye of the law tortiously. His possession is not lawful against the true owner." The action was trover for the conversion of a horse. It will be borne in mind that Ritt was not consulted, and so far as the record shows, knew nothing of the change of his money from the possession of Gibson to the possession of Ward. And bearing upon the same principle are 15 Mass. 311; 4 Greenl. 306; 22 Pick. 18; 13 N. H. 494. In 20 Wisconsin, 464, Oleson v. Merrill,—a replevin case—the court says, upon the subject of demand: "Property wrongfully taken is wrongfully detained until it is restored to the possession of the person rightfully entitled to it. In that case of course no demand need be made."

There is a very well considered case in Nevada, where the whole case of demand and notice is fully discussed. Case of Gold and Silver Mining Co. v. F. A. Trittle et al., 4 Nev. 494.

No case appears to have been decided in Ohio involving directly the question at bar, or any case bearing so strong an analogy as the English cases cited. The case approaching more nearly than any other is to be found in 13 Ohio, 40, Bancroft v. Blizzard. It really covers the principle running through all these cases. It has reference, however, to the original wrong doer. The court say: "As to the necessity of a demand upon a constable who has levied upon goods not belonging to the judgment debtor before suit, no such necessity is perceived." The reason of course being that his act was wrongful. In Wright's Reports a number of cases are to be found of conversion of property and actions for replevin. In all of these, it is decided that where the holding was lawful, a demand was necessary. They are all cases in which the holding was lawful. Undoubtedly the court must have decided that a demand would have been unnecessary if the holding had been unlawful. Lastly, reference must be made to a case in 1st Sneed (Tenn.) 405, case of Revier v. Hill, that fully sustains the judgment of the common pleas—sustains it as an action brought under our statutes to recover back money lost at betting or gaming. The Tennessee statute and our statutes upon gaming and betting are exactly alike, providing for the recovery back of the money from the winner or winners. The fact that the winner has disposed of the money or property to another does not defeat the recovery against the person who received it, knowing the facts. True, the property bet was a promissory note, but the court say that money as well could also be recovered. The decision is brief.

"These notes and securities were won from plaintiff by Thomas Holcombe in an unlawful game of cards. They were assigned by the plaintiff to Holcombe, and by him to defendant, who had full knowledge that they had been won at said unlawful game, and they were taken by him to secure an existing debt. His Honor, the circuit judge, instructed the jury that the action could not be maintained, as the defendant was not the winner of the notes. In this we think there is error. It is true, that the act of 1799, chapter 8, section 4, provides in terms for an action against the winner to recover money or goods lost at play. But if he delivers money or goods to another who has notice of his defect in title, such person stands in the place of the winner, and can have no better title. This is true in other cases where an assignee or purchaser has notice of a defective title. He holds subject to the claim of the rightful owner. In a case like this the rule applies with peculiar force, as a different construction would in a great measure defeat the object and policy of the law. Let the judgment be reversed and the cause be remanded."

It will be observed from the finding of facts that the money paid over to Ward was the identical money paid by Ritt to Ward. Such a holding was considered as within the spirit of the law, and in my opinion not improperly. The Tennessee statute provides for no demand before suit, and none was made. Our statute provides for none. None in this view of the case was required. In no aspect of this case, therefore, was Ward in my opinion entitled to any notice or demand before Ritt sued for his money. Upon principle, as well as authority, the judgment of the common pleas was correct, and should have been affirmed, and not reversed.

*JUDGMENTS. 568

[Hamilton District Court, 1882.]

Cox, Burnet and Johnston, JJ.

SOPHIA SCHIFF, EXECUTRIX, v. HENRY SENTKER.

A reviewing court will not, in every case when incompetent evidence has been introduced, reverse the judgment rendered by the lower court, when it appears that the other evidence introduced necessarily gives such party a right to recover.

ERROR to the Court of Common Pleas.

JOHNSTON, J.

The defendant in error was plaintiff below. The action was that of replevin to recover the possession of twenty-five milch cows claimed by Sentker to belong to him. The petition contained the usual averments. The executrix denied that the plaintiff at the time of the commencement of his action was the owner of these cows; but, on the contrary, averred that they belonged to her by virtue of an attachment suit instituted by her *against one George Goldsmith, who at the time of the levy made 569
was the lawful owner of these cows. After the attachment suit was commenced she obtained a judgment against Goldsmith for $570. There was a verdict for the plaintiff below, assessing the damages at $25. The chief assignment of error relied on is that the court below erred in permitting certain testimony to go to the jury, testimony given by the plaintiff, Sentker, himself, as to alleged facts that occurred during the lifetime of the deceased, Abram Schiff. We are of opinion that in so far as the testimony of Sentker related to facts that occurred during the lifetime of Schiff, the court erred in allowing it to go to the jury. It has, however, been decided by our supreme court, that it is not in every case where incompetent evidence has been introduced that a reviewing court will reverse, when it appears that the other evidence introduced necessarily gives the party a right to recovery. From a careful examination of the testimony we are of the opinion that the verdict is clearly sustained by all the evidence.

Judgment affirmed.

Forrest & Mayer, for Plaintiff in Error.

C. Bates, Contra.

PLEADINGS—ROAD SUPERVISOR.

[Hamilton District Court, 1882.]

Cox, Burnet and Johnston, JJ.

M. LANTER v. J. M. LATHROP.

In an action brought by a road supervisor to recover for the amount of work defendant was required to perform on the road district where he resided, the petition must aver the age of defendant, so far as to show liability on his part to do such work. This being a jurisdictional averment, the overruling of a demurrer to its omission is error.

ERROR to the Court of Common Pleas.

JOHNSTON, J.

The original suit in this case was brought by Lathrop, the supervisor of a road district, to recover for the amount of work which the defendant was required to perform on the road district where he resided. It was claimed there was error in the common pleas court in overruling a demurrer to the petition.

It was held by this court that all the rights which the supervisor has are given to him by the statute creating the office. That statute pro-
570 vides that the supervisor shall notify all persons *annually in his district, between the ages of twenty-one and fifty-five years, except persons permanently disabled, or pensioners of the United States, etc, that they shall perform two days' labor on the roads. The defendant claimed that, as the petition failed to state the fact that he was the owner of a team and plow, it was defective. It did not appear from the record what was the age of the defendant, and that being a jurisdictional averment, and a right of action does not exist at common law, but under the statute, that fact should have been alleged in the petition, as the statute will not be enlarged by implication.

The court below having erred in overruling the demurrer, the judgment will be reversed and the case remanded.

Mallon & Coffey, for Plaintiff in Error.

HOMESTEAD.

[Hamilton District Court, 1882.]

Johnston, Moore and Smith, JJ.

DUBY GREEN v. W. H. FISCHER ET AL.

Where the claim of a plaintiff in a pending action is sought to be subjected by his judgment creditor by creditor's bill against him and the defendant in such action, it is too late for such plaintiff to claim exemption in lieu of homestead of the amount found due in such suit after verdict and payment of it over to the judgment creditor, though by reason of an excessive payment by mistake to the judgment creditor, an adjustment is still to be made.

ERROR to the Superior Court of Cincinnati.

MOORE, J.

The order to the superior court, to which the petition in error was filed, was entered by said court on February 24, 1881, in the cause wherein the plaintiff in error and the Consolidated Street Railway Company were defendants, and the defendants in error, W. H. Fisher and Samuel A. Duncan, were plaintiffs.

The plaintiff in error, Duby Green, was plaintiff in case No. 34,745 of said superior court, against the Cin. Cons. Street Ry. Co., being an action to recover damages for personal injuries, and pending in August, 1879. The case ended on the 28th day of January, 1881, in a verdict of $500 for the plaintiff.

In the case below Fisher & Duncan filed their petition on the 21st day of August, 1879, claiming that said Green was indebted to them in the sum of $300, with interests and costs, upon a judgment in their favor against Green, rendered in the state of Indiana, and that the Cin. Cons. St. Railway Co. was owing said Green a large sum of money, and asked that a sum sufficient to satisfy said claim be appropriated from the amount due from the Railway Co.

On December 24th, 1880, the court entered a judgment or order in favor of said Fisher & Duncan, finding that the said Green was prosecuting an action against the said railway company, in which he claimed to recover a large amount of money, and ordering the railway company to hold, subject to the order of the court, any sum for which the said Green might thereafter obtain final judgment against it in said cause. On January 6th, 1881, a motion was made to set aside this order, but it was not acted upon until January 26th, when it was overruled.

The order of December 24th, 1880, stood unreversed and in full force on the 28th day of January, 1881, when the verdict for $500, was rendered against the railway company, in favor of Green.

On January 31st, three days after, no motion for a new trial having been filed in the case of the railway company, a judgment on the verdict was entered.

On the 2d day of February, 1881, in the case below, the court made an order requiring the railway company to pay the amount of said judgment so recovered to the said Fisher & Duncan, out of which they were to satisfy their said claim against Green. On the same day the money was paid to the attorneys of Fisher & Duncan, but on the following day, February 3rd, it was discovered that the payment exceeded the amount due Fisher & Duncan by $147.11, and the order was modified, and the excess $147.11, was returned or rather paid to the clerk of the court by the attorneys of Fisher & Duncan, to be credited to said Green in case No. 34,745.

On February 3rd the said Green filed his motion in the court below to vacate the order of February 2d, whereby the money was paid to Fisher & Duncan, asserting that the money was exempt under sec. 5441, Revised Statutes of this state, he, Green, being the head of a family and having no homestead, and that he had no opportunity to assert his claim. A motion or formal application for an allowance of $500 in money in lieu of a homestead was not filed until the 8th day of February following. Green had, on the 3rd day of February, filed a motion and an affidavit for an allowance of exemption in the railway case No. 34,745.

It appears that on the 15th day of February following, and while his motions to vacate the order of February 2nd, and its modification and for an allowance for exemption were under consideration by the court, and, without the knowledge of his attorney, Green drew from the clerk the $147.11, the balance of the $500 judgment, deposited to his credit, and appropriated it to his own use. On the 24th of February, following, the court overruled Green's motion to vacate the said order of February 2nd, and its modification of the 3rd and for the allowance for exemption—to the overruling of which said Green excepted.

This order of February 24th, 1881, is the error complained of here.

It is urged by the plaintiff in error that he is deprived of his exemption, that the amount of his judgment was paid over to his creditors without giving him a reasonable opportunity of making a demand. The evi-

dence presented below on the motion to set aside the order of the court and for an allowance of exemption shows that on the 28th day of January, 1881, the verdict in the railway case in favor of Green, brought into prominence a possible fund of $500, which might be the subject of an exemption, and more especially was it apparent that a real fund was about to be created, after three days had passed and, no motion for a new trial having been filed, a judgment on the verdict was entered. Green and his attorneys then certainly knew the only course left in the case to be pursued, was that of paying over the $500 in satisfaction of the judgment. Green did not present his demand until the day after the amount of his creditor's claim was paid over by an order of the court in the other case. He did not file his demand in the case below until the 8th of February, five days later. Beyond this we find an earlier warning to Green, that his creditors, Fisher & Duncan, claimed an interest in his future recovery in the railway case, by the order of December 24, 1880, by which the railway company is ordered to hold any amount which may be recovered by Green, subject to the claim of Fisher & Duncan. The record shows that the sum of $342.49 was paid to Fisher & Duncan on February 2, without objection on the part of Green. The attorneys for Green assert that they had no knowledge of the payment or the intention of the court to make the order. We will assume it to be true, as the record shows that the attorneys for Green were expecting to make a demand for the allowance of the exemption, and that great activity was displayed by the attorneys of Fisher & Duncan in getting possession of the amount of Green's judgment against the Railway Company, for it seems that the judgment was rendered on Monday, January 31st, and by Wednesday, the 2nd of February, the amount of it was paid over to the attorneys of Fisher & Duncan. Yet in the absence of fraud or false representation this does not present anything more than vigilance of an unusual character on one side, and the feeling of confidence on the other, that so much haste in getting possession of the money would not be used.

However it does appear that Green's exemption was casually mentioned in a conversation between the attorneys for the respective parties, on Saturday, January 29, but this was the first and only mention of the subject prior to the payment of the money.

The question to be determined is whether Green was in time with his demand on the third and the eighth days of February, 1881.

The record shows the court was right in making the order of July 2d, giving Fisher & Duncan the amount of their claim. Green had not, at that time, even mentioned to the court an intention to claim his exemption. The nature of the proceedings already had in the matter warned Green that a simple order of the court, liable to be made at any time after verdict in the railway case, would appropriate and pay over to the creditors the amount of this claim without an hour's delay. The right of exemption of the class herein named is a purely personal privilege, of which the debtor alone or his family can take advantage, and the court is not bound to assume that a demand will be made, or that the debtor is entitled to exemption as a matter of right. If a debtor desires to have the benefit of the exemption act he must claim it; if not, his silence will be construed as a waiver.

It is claimed by the plaintiff in error that the court below, having had jurisdiction of the parties and the subject-matter, should have restored the money upon demand, however late. We cannot concur in

that view. The action of the court was final and the creditor had the money.

Green had his remedy at any time subsequent to the verdict in the railway case, if not before that time, but he stood by reserving the matter in his own mind until the court had ordered the money paid away, in pursuance of an order having effect several weeks before.

It is suggested by counsel that the receipt of the $147.11 by Green, the balance of the $500, while his motion for allowance for exemption was under consideration by the court, operated as an estoppel to Green to claim any benefit thereby. We attach no importance to this. Green had a right to receive the $147.11. His claim consists in the demand for the return of the $342.39 received by Fisher & Duncan out of his $500 exemption under the statutes.

We determine the question solely on the ground that the plaintiff in error waived his right to the benefit of the exemption act by not making his demand in time.

We are of the opinion that the action of the court below is not erroneous in the manner complained of.

Judgment affirmed.

E. P. Bradstreet, for Plaintiff in Error.

Wilby & Wald, Contra.

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*REFUNDER OF TAXES. 571

[Hamilton District Court, 1882.]

WILLIAM M. DICKSON V. COUNTY COMMISSIONERS ET AL.

Where lands are appropriated for free turnpike purposes, and the owner continues to pay taxes on the whole, he not having notified the auditor to make the transfer on the tax duplicate, such owner is not entitled to a refunder of taxes thus erroneously paid by him.

JOHNSTON, J.

This action was brought for a refunder of taxes alleged to have been wrongfully collected off the lands of the plaintiff in Millcreek township. It appeared that a free turnpike was laid out through the plaintiff's land, the land appropriated embracing one and sixty-three hundredths of an acre, and after this appropriation the entire land of the plaintiff, forty-nine acres, remained for taxation on the duplicate, and the tax was collected. He claimed that this was unjust and that the commissioners should order a refunder. A demurrer to the petition was interposed by the county.

Judge Johnston, in announcing the opinion, said it was sufficient to state that the court adhered to a former decision it had announced on this question affirming the judgment of the common pleas in the case of Ives against the commissioners. It was the duty of the plaintiff to make the application to the auditor, and produce his title papers, and until that was done the county had a right to presume he did not desire to have a transfer, and in some instances after such appropriation the abutting

landowner may retain an interest in the highway, subject to the easement of the public. The majority of the court were of opinion, therefore, that the court below was correct in sustaining the demurrer.

Judgment accordingly affirmed.

W. L. Dickson, for Plaintiff.

Charles Evans, Contra.

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572 *COMMON CARRIER—PLEADING.

[Hamilton District Court, 1882.]

†THE GREAT WESTERN DESPATCH CO. v. WILLIAM GLENNY & CO.

Fraudulent representations to a common carrier must be pleaded, or they cannot be proven.

ERROR to the Court of Common Pleas.

BURNET, J.

Defendants in error, who were plaintiffs below, brought the action below to recover the value of two lots of plate glass which had been shipped to them from New York by way of the line of defendant, the defendants being a firm doing business as common carriers under the laws of Ohio; that the defendants so negligently performed its duty that the glass was broken before delivery. The answer admits that defendant was a common carrier, and denies every other allegation in the petition. The plaintiff offered in evidence a portion of a deposition taken in New York. To this deposition was attached a bill of lading for the glass shipped. The goods actually shipped were plate glass. The bill of lading called for "rough glass." The defendant sought to read in evidence the parts of the deposition that had been omitted by plaintiff, and the court below sustained an objection to the reading. The declared purpose of offering these omitted parts was to show that a fraud had been practiced on the defendant by describing the glass to it as rough glass and not as plate glass. *Held*, The answer not pleading fraud, the defendant could not introduce evidence of fraud in order to avoid its liability.

Judgment affirmed.

Durbin Ward, for Plaintiff in Error.

Ramsey, Matthews & Matthews, Contra.

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622 *BANKS AND BANKING.

[Hamilton District Court, March, 1881.]

Johnston, Smith and Moore, JJ.

S. KUHN & SONS v. O. I. FRANK.

A person giving his check for the purchase of a note and mortgage represented to be genuine, the check being to the order of the owner of the ground and delivered to the broker who negotiated the sale, but who in fact had forged the note and mortgage, and such broker identifying to the bank on which the check was drawn, some person whom he represented to be the payee, whereupon the bank paid the check to such person, the maker of the check not discovering the fraud until a year afterwards, when the mortgage came due, and then notifying the bank, such maker may recover the amount of the check from the bank.

†This case was reversed by the Supreme Court. See opinion 41 O. S., 136.

SMITH, J.

A proceeding to reverse a judgment rendered in the superior court against Kuhn & Sons, a banking firm in this city.

Frank was a depositor in their bank, and claimed that the defendants, without his order or consent, had paid over to one Leonard $914, and charged this amount to his account. The answer of Kuhn & Sons puts in issue the allegations in the petition. Leonard was a real estate agent and note broker, and went to Frank with a note for $1,050 for sale, the note purporting to be secured by a mortgage on land located on the corner of Wade and John streets. The note and mortgage had all the appearance of genuine instruments, the latter being duly recorded, and the note having indorsements of payments of interest. The testimony showed that when Leonard called on Frank for the purpose of negotiating the note, he represented that Mrs. M. L. Howard, a lady on Walnut Hills, whose name he mentioned, was the owner of the note and mortgage. Frank, believing the representation to be true, and that this was a genuine note and mortgage, agreed to the purchase, and closed the negotiations with Leonard, the amount to be paid being $1,040, deducting a certain amount for examination of title and as a commission, and gave a check payable to the order of Mrs. M. L. Howard, who was represented to be the owner. A lady representing herself as Mrs. M. L. Howard called at the bank with the check, and the bank requiring that she should be identified, she brought in Leonard, who identified her as the payee, and Leonard indorsed the check as the identifier, whereon the bank paid the check.

The bankers subsequently returned to Frank his pass-book, with the check charged up to him, and the matter remained in that condition for over a year, both parties being satisfied. When the note and mortgage became due it was ascertained that Leonard was guilty of certain fraudulent acts, and Frank being notified that the note and mortgage were fraudulent, and that the lady whose name had been mentioned in the transaction knew nothing about it, notified the bankers and tendered back to them the check, and demanded that he should be credited with the amount. The bank refused, and hence this suit.

The claim of Frank is this: That having deposited his money with the bankers, they, without his authority, had paid the check, and that he is not bound by the payment. It was claimed on the part of the bank that if there had been a fraud perpetrated on Frank, he is now too late in bringing the suit, there being laches on his part; that the bank was led into the matter by the conduct of Frank in giving a check of that amount to a person who was not the owner, and without knowing the legal rights of the lady who was alleged to be the owner of the note.

Judge SMITH remarked that the case was certainly a hard one. Innocent persons have been imposed upon by the fraud of a third party; but in determining the rights of the parties in such a case, the principle which regulates the law between bankers and their depositors is well settled. It is the duty of the banker to keep the money of his depositor safely, and to pay out on his order. If a check is payable to bearer it is paid to the holder. If made payable to a specific person, then the banker must pay to the payee, or some one claiming under the payee by a genuine indorsement. If the banker has neglected to pay to the payee, or pays

on a forged indorsement, then it is his misfortune or loss, and he cannot charge it up against the owner of the fund. It is true, if the depositor by any negligence, or by any course of dealing between him and the banker, has induced or contributed to the payment of such a check, then he would lose the right to recover. But on examination of the record in the case, the court could not see where the depositor had been guilty of legal negligence, by which the loss should fall on him. The banker has a right to say: "We will not pay checks unless payable to bearer, or we know the payee." But when the banker, as in this case, pays a check to a stranger, he does it at his own peril, and if he pays a check to a person not entitled to it, the depositor is not bound. It appears that Leonard was known to both parties, was known to Frank, and it was likely the bankers supposed they were justified in paying the check. It was a case where a man of hitherto good reputation turns out to be a rascal or a swindler. He perpetrated a double fraud. He imposed upon Frank in obtaining a genuine check for a note and mortgage that were worthless, and imposed upon the bank in falsely identifying a woman who was not the woman she was represented to be. But the two frauds were independent of each other; and notwithstanding the fraud which Leonard had practiced on Frank, still if the bank had done its duty in satisfying itself that this lady was the party she represented she was, it would not have got into this difficulty. It was claimed that there was negligence on the part of Frank in not demanding the money before the time he did demand it. But that question was determined in the case of Ellis & Morton v. The Trust Company, 4 Ohio St., 628, where it was held that as soon as a party discovers the fraud it is sufficient to make the demand. The court cited several authorities, viz., Moore on Banking, 335, and the following cases, viz.: Dodge v. National Exchange Bank, 20 Ohio St., 234, and same case again in 30 Ohio St., 1; also, Graves v. American Exchange Bank, 17 New York, 205; Welsh v. German American Bank, 73 New York, 424.

In the last named case it appeared that Welsh was a commission merchant, and had a customer named Johnson, for whom he sold goods on commission, and one Swindels, the confidential clerk of Welsh, from time to time presented to Welsh fictitious accounts of sales, showing balances due Johnson, and at the same time presented him checks filled up for the amounts shown to be due Johnson in these accounts, and payable to the order of Johnson, which checks were signed by Welsh, and delivered to his clerk Swindles to be sent to Johnson—Swindles forged Johnson's endorsement, and negotiated the checks, which were paid by the defendants, the German American Bank. These transactions continued for nearly two years, and twelve of these checks were thus used. As soon as Welsh was informed of it he demanded of the bank the money paid on the forged endorsements. The court held he could recover, and in giving the opinion of the court, Andrews, J., says: "The plaintiff Welsh had the right to assume that the bank, before paying the checks, would ascertain the genuineness of the endorsements. He was deceived into giving the checks by the fraud of Swindels, but this did not affect the action of the bank, nor in a legal sense did it contribute to the frauds perpetrated on the defendant. The fraud committed upon the plaintiff and upon the bank were independent and unconnected frauds, and the fact that the plaintiff entrusted the checks to his clerk to

send to Johnson, who forged the endorsements, made him no more responsible than if he had entrusted them to an expressman to carry to Johnson, and the expressman had forged the name of the payee and passed them to the defendant."

This reasoning applies with great force to the case at bar. We think the judgment ought to be affirmed.

Follett, Hyman & Dawson, for Plaintiff in Error.

Hoadly, Johnson & Colston, for Defendants in Error.

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*CASUALTY INSURANCE. 625

[Hamilton District Court, 1882.]

Johnston, Smith & Moore, JJ.

THE KNICKERBOCKER CASUALTY INS. CO. v. N. E. JORDAN, ADMR.

In an action by the administrator of the assured on a policy of casualty insurance, which contained a clause forbidding an assignment of the policy, it is no objection to a recovery that one of the heirs or distributees of the fund sold her interest therein after suit begun.

ERROR to the Court of Common Pleas.

JOHNSTON, J.

This case was submitted to the court, the intervention of a jury having been waived. The action there was by the administrator to recover the sum of $3,500, for the death of his intestate, alleged to have occurred by accidental drowning on August 23, 1879, in the Ohio river, near Aurora, Indiana. The averments in the petition were in the usual form, alleging the decease, that the death was accidental, and that the policy was in full force at the time his death occurred, and praying for a judgment against the insurance company for the sum of $3,500, and setting out also the substantial parts of the policy, or ticket, as it is sometimes called. The defenses to the petition of plaintiff were various, I may say, four-fold. The first defense was that the condition of the policy was broken by an assignment of the policy during the lifetime of the assured; secondly, that the nature, cause and manner of death of the deceased were not within the provisions of the policy, and that death was not caused by injury effected through "outward force and accidental means;" thirdly, that the death of deceased was caused wholly or in part by physical disease or infirmity, and that the nature and cause of death were incapable of positive proof. Finally, another defense was set up by way of supplemental answer, that since the commencement of the action, it originally having been commenced by two administrators of deceased, by Jordan, appointed administrator in this county, and by one Worley, who was appointed administrator in Indiana. Against the consent of the company the suit was discontinued here as to the Indiana administrator, and it is claimed that the action having been commenced jointly, it should have proceeded

that way. A reply was filed to these various defenses denying the facts set up therein.

There was a judgment, finding that the death of the assured was within the terms of the policy, holding the company responsible on account of his death by accident, to the personal representative of the deceased, Jordan, for the sum of $3,500 and interest, and judgment was entered accordingly. There was a motion for a new trial filed, the ground for a new trial chiefly relied on being that the judgment of the court below was contrary to law. This motion was overruled, and exception taken.

This case is not without its peculiarities. It seems that the deceased, F. W. Cheek, was a person of about thirty-five years of age. He was born near the place where he came to his death by drowning; at least the evidence discloses that during the most of his life he lived near Aurora, Indiana. The evidence further discloses the fact that he made Cincinnati his home prior to the time of his death. For a number of years he took tolls at the avenue gate near Cumminsville. He was unmarried. There is some evidence that he frequently visited Aurora, having many relatives there, and having been in business there. The evidence was that his sole surviving heirs were his two sisters, Mrs. Curtis and Mrs. Hill, the latter residing, at the time of his decease, in Missouri. While he was not tall of stature, he was robust and stout of body; the weight of evidence is that he was a healthy young man. About the time that he was contemplating a visit to his sister in Missouri, he became possessed of a premonition of approaching casualty and danger, as she states in a letter, which I will read. Upon the day that he wrote this letter to his sister, laboring under this premonition, he obtained this accident policy upon his life, and an insurance in two other companies not involved in this action, all eastern corporations. It is unnecessary to read the whole letter. This policy was applied for and actually issued on August 19, 1879, and to commence on August 23, 1879, and to continue in force for ten days, and was an insurance against injuries that might occur to him from external force and violence, rendering him incapable of pursuing his business, or resulting in his death. After obtaining the risk, on the same day, he writes to his sister, Mrs. Hill:

"Dear Sister: As I expect to see you in a few days from now, I will only write you a few lines. * * * I will go down to Aurora in the morning, remaining there a few days and start for Missouri. * * * Some claim that a premonition of death is but an idle fancy. Let that be as it may. Each one is entitled to his own opinion. If I meet you in safety it may be only a notion with me, but you need not say anything about it. But, owning to an incident in the recent past, I thought I would take out an insurance on my life. * * *

"(Signed), F. W. CHEEK,
"375 West Third St., Cincinnati, Ohio."

On the 23d day of August, the day this risk was to take effect, he with an acquaintance named Byron, went down to the usual place of bathing in front of the town of Aurora, and stripping, went into the water. They first bathed themselves partially so as not to suffer a chill or other ill effects, probably, from going into the water suddenly. The testimony is that this young man was an expert swimmer, and that both he and Byron after swimming about for some time, Byron heard the deceased

call for help; that upon looking for him, he saw him with his face towards the shore, using only his right hand or arm. He then disappeared under the water. In a moment he appeared, and shouted for help again, and to throw a plank to him. His comrade started for him, but before he reached him he sank and was drowned. His body was recovered next day. Different persons testify that when found, his arms and limbs were drawn up against his chest, as though he had died from cramps. His relative, Mr. Wotley, was appointed administrator. Shortly after his death his sister, Mrs. Hill, wrote to Mr. Worley, enclosing this policy insuring him against accidental injury or death. That administrator came here, and upon the advice of counsel, Jordan was appointed administrator in Ohio, the young man having resided here, and the policy having been taken out here.

It is claimed that this policy specially exempted the company from liability either for accident, or death occurring through other than outward force and accidental means; that the company was not liable for either injury or death from natural disease or causes.

Among other conditions of the policy are these: The Knickerbocker Insurance Co. assures the party against injury received through outward force and accidental means, or in case of death through injury received as aforesaid. * * * The insurance shall not extend to injuries received from exposure to dubious and unnecessary danger and peril, and while violating the rules of any company or corporation, or while taking a part in any gymnastic sports. * * *

We observe from the terms of this policy that it nowhere specially stipulates that it will not be responsible for an accident or from death ensuing from an accident by drowning, and it occurs to the court that if it had been the intention of this insurance company, which was incorporated and chartered on the seaboard where persons are accustomed to bathe, and where deaths by drowning are most frequent, to except insurance against death by drowning while bathing, it certainly would have had a stipulation of that kind in the policy. It contains almost every other possible exception. There has been no direct adjudication in this state upon a question of this kind, and but a few in the United States. Perhaps the oldest report of a case of this kind is to be found in the 6th Hurlstone & Norman, 838, Trew v. Railway Passengers' Association Company. That case has since generally been followed and approved in England. There is a case to be found in the January, 1881, number of the Law Reporter, Winspear v. The Accident Ins. Co., 42, and a case in the August number, 1881, of the same authority, case of Lawrence v. The Accidental Ins. Co., 216, both cases well considered, and are authorities that fully sustain the judgment of the common pleas in the case at the bar. The Trew and Winspear cases are both of them cases of drowning. The Lawrence case was death from being run over by a train of cars.

In the Trew case, Cockburn, C. J., announcing the opinion, said: "If the jury found that he died in the water, they might readily presume that he died from drowning. It is true that death occurs in the water in some instances from natural cause as apoplexy or cramp in the heart, but such cases are rare, and only a small proportion to the number of deaths which take place from the action of the water. We think it ought to be submitted to the jury to say whether the deceased died from the action of the water or natural causes. If they are of the opinion that

he died from the action of the water causing asphyxia, that is, death from external violence within the meaning of this policy—whether he swam to a distance and had not strength enough to regain the shore, or on going into the water got out of his depth."

In the Winspear case, the insured, while riding across a shallow stream, was seized with an epileptic fit, fell into the stream, and was drowned. As in the Trew case, the court (Lord Coleridge, C. J.) held that the company was liable, having insured the party "against any personal injury caused by accidental, external and visible means," and his death not having been caused by "injury arising from natural disease, or weakness, or exhaustion, consequent upon disease," against which the company did not insure.

The Lawrence case was where the party insured, standing upon the platform at the railroad station, expecting to go upon the train, was seized with a fit and fell forward upon the track, and the engine and train ran over him. The court held that the proximate cause of the death was the engine and train—not the fit.

In all these cases in which the principle is fairly considered, the immediate cause of the death is sought for, in determining whether the death or injury ensued from natural disease or accidental and external force or violence. A person afflicted with epilepsy may, and they do, fall frequently in a spasm, but soon recover, and apparently suffer no evil effects therefrom; but if by chance he is seized and falls from his horse or wagon into the water, and taking water into the lungs through breathing, suffocation or asphyxia is produced and death follows therefrom, very properly we think the action of the water in cutting off or stopping respiration is an external force, and is the immediate cause of death, and not the spasm.

Now, whether Cheek was seized with a fit or cramp in the arm or limbs, or both, does not clearly appear. In the light of these English cases it would make no difference, the immediate cause of death being drowning. The evidence in this case does not show that he came to his death other than by drowning. From the testimony it clearly appears, that he was a healthy person; that he was an expert swimmer; that he had bathed there before; that unexpectedly he became disabled and was unable to swim, for he cried for help, turned toward the shore and called for a plank to be shoved out to him, and not securing assistance he sank out of sight and was found dead the next day beneath the water. The court below found as a fact from the evidence that his death was caused by accidental drowning, and, we think, correctly. When a person is found drowned, the presumption is that it was accidental. This is to say, the presumption is against voluntary drowning or suicide. 47 New York, 52. To the same effect is the case of Reynolds, Exr, v. Accidental Ins. Co., 22 Law Reporter (Times), 820, and the only American cases bearing upon the question are to be found in 47 New York Court of Appeals, 52, and 24 Wisconsin, 28.

It is claimed that the action should have been dismissed below upon the ground that the claim had been assigned by Cheek to Mrs. Hill, and that the policy, by its terms, became forfeited. Also that one of the administrators, having been dismissed from the action, the remaining administrator, Jordan, could not maintain the action alone. As to the assignment of the policy, it does not, either in law or fact, appear to have been assigned. A form seems to have been drawn upon the back of the

ticket, but it was not signed by Cheek or anyone for him. It was not signed at all. The right of recovery passed, by the terms of the policy, therefore, to his administrator. As to the dismissal of Worley, the administrator appointed in Indiana, the action was commenced by Jordan, the administrator appointed in this state, jointly with the administrator appointed in Indiana. Afterwards, upon the written consent of the sole heirs of the deceased, that he might be so dismissed, and that the action might proceed in the name of Jordon alone, the court so ordered, and in this we can see no error to the prejudice of the company. It can never be subjected to the danger of a double recovery, as the sole heirs of Cheek consented that Jordon, administrator, might prosecute the action alone. In fact, the Indiana administrator was, in our opinion, an unnecessary party in the first instance.

Objection is also made, that one of the heirs sold her interest in the policy after suit. We see no error in refusing to dismiss upon this account. She had a vested interest in the sum recoverable on account of her brother's death, and it was assignable; and furthermore, the action was not being prosecuted by her, but by the administrator. Upon the whole record the judgment below was correct, and will be affirmed.

C. D. Robertson, for Plaintiff in Error.

Jordan, Jordan & Williams, for Defendant in Error.

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*BUILDING ASSOCIATIONS—USURY. 626

[Hamilton District Court, 1882.]

Johnston, Smith and Moore, JJ.

HOME BUILDING ASSOCIATION v. C. H. BONING.

For the purpose of loaning money by a building association, the parties have a right to stipulate the amount of the premiums, and the usury laws cannot be appealed to for protection, there being no fraud or imposition practiced.

APPEAL from the Common Pleas Court.

SMITH, J.

This case came up by appeal from the common pleas, where a judgment was rendered in favor of the Building Association against Mrs. Boning. Judge Smith delivered the opinion. The action below was by the association to foreclose a mortgage, and a judgment was recovered against the defendant, and an order of sale issued, and from that order the defendant appeals to this court.

It appears that ten years ago the association was organized, divided into shares of $500 each; that Mrs. Boning subscribed ten shares, and that in January, 1875, she desired to effect a loan *of $5,000, and became a bidder for a loan under the rules of the society, it having 627
stated meetings at which the privilege of borrowing money was placed at auction, Mrs. Boning appeared from time to time as a bidder, and succeeded in obtaining a loan on her bid, bidding $473 per share premium. So that to obtain a loan of $5,000 the premium was $4,730, which she agreed to pay, and, furnishing her security, she received that amount,

giving a mortgage for $9,730, the condition being to pay so much weekly dues, interest and so much premium. After she obtained her money she paid her weekly dues, $5 a week for the ten shares and $5 a week for the interest, being five and two-tenths per cent. per annum on the loan, and fifty cents per week on each share for premiums, her entire weekly payments amounting to $15. Having made payments to the amount of $3,000 she failed thereafter to pay, and the association brought suit.

It was claimed by the defendant that this premium of $473 per share is in itself an extortion contrary to the spirit of the statute, which permits premiums to be taken for loans, and is, in substance, almost a confiscation of the property; and she asks that she be allowed to pay the money actually received and a reasonable rate of interest, and, after the payment of principal and interest, that she be released from any other payments.

The Court: It does not appear that there was any fraud or imposition practiced on Mrs. Boning. She had the same privileges granted to her as other members, and it does not appear that this bidding, though apparently large, was greater than other bids made at that time. Where no fraud or imposition is practiced, parties have a right to make such a contract as they please for the use of money, except for the protection which the usury laws furnish to the borrower. It is only the law prohibiting usury which furnishes this protection to the borrower; but when a party steps into a building association to borrow money, he is out of the protection which the usury law gives to those who borrow. By statute the usury laws do not apply to building associations. So that, for the purpose of loaning money by a building association, parties have a right to stipulate, and the usury laws cannot be appealed to for protection. By statute the building association had a right to loan out money, to be repaid by weekly dues, for interest and such rate of premium as had been
628 agreed to, and although, apparently, *the sum agreed to here was a very large sum to pay for the use of money, it is more apparent than real, for although the sum of $9,730 is set out in the mortgage, yet it is to pay so much a week on account of each share, not until the whole amount was paid, but until each member of the association had received the par value of his share, and this defendant, being a member and shareholder, was interested as others in the receipts and premiums of the association, she receiving herself premium and interest at that rate; so that if the premium was large on the other side, the amount she was to pay by way of dues, until each member received the par value of his share, might be greater or less, and it was not after all a very exorbitant rate of interest, though apparently a large sum in the outset. The ground taken by counsel for the defendant did not appear to this court to be made out, and the party having obtained the loan is bound to pay what she agreed to pay by the terms of the mortgage. In two cases cited by counsel in the argument, Building Association v. Bebout, 29 O. S., 252, Building Association v. Gallagher, 25 O. S., 208, the premiums reserved secured were as large as in the present case. It appears, however, that at the expiration of four years from the date of the loan, the directors had the privilege to double the amount of premium, and in this case, in reference to his loan made in 1875, the directors passed a resolution increasing the amount which the borrower had to pay from fifty cents to one dollar a week. It is the opinion of the court that this increase cannot be in-

cluded in the mortgage. The defendant is bound to pay according to the terms of the mortgage. Decree rendered finding the amount due for premium at fifty cents per week per share.

Mannix & Cosgrave, for the Association.

Forrest & Mayer and Crawford, Contra.

*PARTNERS AND PARTNERSHIPS. 686

[Hamilton District Court, 1882.]

Johnston, Smith and Moore, JJ.

HENRY MEYER v. JOHN OBERHELMAN.

Where plaintiff took in defendant as partner, under an agreement that plaintiff should furnish all the capital, and should receive six per cent. on half thereof, and that profits and losses should be equally divided, and a statement of his assets and liabilities was made as a basis, showing a surplus of assets over liabilities of about $65,000, and at dissolution, defendant claimed that certain old accounts in the original statement were worthless then and still worthless, and that in paying interest on them as part of the capital, he had paid more than his share: *Held*, the account must be taken. 1, crediting each other partner with half the net profits; 2, charging defendant with six per cent on one-half the whole capital, as originally stated; ascertaining the value of the disputed accounts remaining on the books as capital, and charging the depreciation of same to profit and loss.

ERROR to the Superior Court of Cincinnati.

MOORE, J.

The record shows that prior to the 1st day of January, 1877, Henry Meyer, the plaintiff in error, conducted business as a tobacconist in the city of Cincinnati. His brother-in-law, John Oberhelman, the defendant in error, and the defendant below, had been in his employ, prior to that time, for about seven years, as bookkeeper. It appears by the statement of both parties that on the 1st of January, 1877, Henry Meyer desiring to advance his brother-in-law, and to give him an advantage, agreed to take him into partnership. Thereupon a copartnership was formed, the terms of which were reduced to writing, and appear as a part of the record in this cause.

The important items of that arrangement, and the only items to which reference is necessary at this time, are the first, second and third. The first item required Henry Meyer to contribute all the capital. The second required John Oberhelman to pay interest at the rate of six per cent. per annum upon one half of the amount of the capital contributed by Meyer or the investment, as it is called in the agreement. The third item defined the interest of the parties to be equal in the profits and expenditures. Having signed the agreement, the following was to be entered upon the first page of the ledger of the new firm.

CINCINNATI, January 1, 1877.

Henry Meyer has this day associated with him John Oberhelman, and has invested the capital heretofore employed in his business, John Oberhelman to pay him six per cent. interest on one half of the capital; gains and losses to be divided equally.

court ordered that the sum of $762.48, paid by Oberhelman as interest upon the $12,082 should be returned and should be a part of the judgment which it afterward rendered.

We infer that the court proceeded upon the theory that these assets, contained in the statement of particular assets amounting to $12,082 and set forth in the record, had no value at any time during the course of the partnership. It does not appear to us by the record that at any time during the course of the partnership the parties met, or that they ever agreed that any value whatever should be attached to these accounts. It does not appear, by any express stipulation in the contract of partnership, between the parties, that any values whatever were to be attached to these assets. It appears, upon the whole, that the business of Henry Meyer & Co. was continued along as before under Meyer alone, with this exception: That Oberhelman was allowed a one-half interest in the concern, he to pay, as a consideration for the same, six per cent. interest upon the one-half of a certain amount specified, or ascertained from the statement upon the first page of the ledger, being the amount of the interest of Henry Meyer in the partnership, or rather the difference between the resources and liabilities.

In ascertaining the rights of the parties under the contract of partnership set forth, in construing the terms of that contract, we are not compelled to differ with the court below in its finding and judgment. We are of the opinion that the court below erred in returning to Oberhelman, the $762.48, the amount of interest, because we consider that Oberhelman entered into an agreement to pay six per cent. interest upon the one-half of Meyer's contribution of capital stock to the firm as set forth on the face of the ledger, as a consideration for the one-half interest in the business.

We are also of the opinion that in arriving at the rights of these partners, the court below should have gone back and ascertained the exact condition of these partners when they began, under their contract, and have construed their rights, wherein they differed as to the character of the disputed accounts and their value. We are of the opinion that some value should have been attached to these accounts. If no value was attached at the time they went into partnership, some value should have been attached at sometime during the course of the partnership, and more particularly at the time of dissolution. At the time of dissolution there should have been some assessment of their value, especially of the disputed accounts; in other words, the depreciated value of the particular accounts in question, and included in the $12,082, should have been ascertained. If they were worth anything then to the parties, the defendant certainly had a right to have a settlement upon the basis of their true value in money, and if they were retained by Meyer, he should give Oberhelman credit for the same, and be charged with his share of the depreciation.

We are of the opinion that the value of these accounts should be ascertained at the time of the dissolution, and that the depreciation be charged to the account of profit and loss. If they remain as assets of the firm, Oberhelman is certainly entitled to his share of their value, if they have any. It seems to have been understood, that if anything was realized on these accounts, the amount was to be turned into the partnership fund, and in that event Oberhelman was to be entitled to the benefit of such gain. These accounts, considered as assets, were contributions to

the partnership fund, and remained in that fund as the assets of the firm, and not having been charged to the profit and loss, and carried along, as before stated, by common consent of the parties, to the day of dissolution, they should now be treated at their true value, if they have any. Testimony should be taken, and the depreciation charged to profit and loss.

The judgment of the court below will be reversed, and the cause remanded, with instructions to take an account between the parties, as follows:

First—To give each party credit for one-half the net profit of the business.

Second—To charge Oberhelman with 6 per cent. interest on one-half the capital contributed by Meyer, as indicated upon the first page of the ledger.

Third—To ascertain the value of the accounts making up the capital of Meyer, or such as are disputed by the parties and remain on the books as capital, and charge the depreciation of same to profit and loss.

Logan & Logan, for Plaintiff in Error.

Jordan, Jordan & Williams, for Defendant in Error.

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*STATUTE OF FRAUDS. 688

[Hamilton District Court, 1882.]

Johnston, Smith and Moore, JJ.

McCammon v. The Wheeler & Wilson Sewing Machine Co.

A yearly hiring by parol made on December first, the same to take effect on January first, following, is clearly within the statute of frauds, as it could not be completed within a year from the time of its being made.

Johnston, J.

Judge Johnston announced the opinion in this case, which came up on error to reverse a judgment of the superior court. McCammon instituted his action in the superior court to recover $387, alleging that on December 12, 1878, being in the employ of the defendant company, in this city, he called on the officers of defendant at its chief place of business, in Bridgeport, Conn., and entered into a contract with the company, whereby they agreed to employ him for one year, commencing January 1, 1879, at $1,800 per annum, payable in sums of $150 per month; that he entered on the service, and continued to discharge his duties until March 1, 1879, when, without just cause, the company dismissed him, and that he was unable for some time to obtain employment, and was damaged in the sum of $387. It was found that this petition in its statement of facts encountered the statute of frauds, and therefore it was amended, and the petition on which the issue was joined, and the case tried, alleged the contract was entered into on January 1, 1879, and that the plaintiff was discharged on March 31, 1879. The defendant answers by general denial, and also alleged that the contract fell within the statute of frauds, as being incapable of being performed within one year from the time it was entered into. The judgment below was for the de-

fendant, and the claim now is that it was contrary to law and the evidence.

The court remarked that the case involved an important question of law, arising frequently in the commercial community. They had examined the record to ascertain whether the verdict was contrary to the evi-
689 dence. It appears that McCammon *went into the employ of the company in 1872, commencing in a subordinate position, until in 1878, he rose to the position of general agent in this city, receiving a salary of $1,800 per year payable in monthly installments. Toward the close of 1878 he learned from some source that a party named Howard, an agent of the company, was applying for his position, and therefore he went to Bridgeport and waited upon the officers of the company, desiring to know if he was to be superseded, and, if he were to remain, whether it would be without being subject to the contingency of being dismissed arbitrarily, and without cause. He testifies the president assured him there was no certainty he would be superseded, but if that should be the case he would continue in the employment of the company, in another position, at the same salary. On returning to Cincinnati he learned that Howard also had started to Bridgeport, and on December 12 he received a letter notifying him that Howard was appointed to take his place, the company stating that this would not interfere with his remaining. McCammon commenced, however, to look up another place, and states he would have taken one if offered, but not succeeding he entered upon his contract of January 1, 1879, and performed it faithfully, when Howard, complaining to the company that he did not cooperate with him, he was discharged, as he alleges, with the consent of the company. The witnesses, on behalf of the company, testified that McCammon was assured he should remain in the capacity of bookkeeper, but was told he might be discharged at any time the company thought proper, and that that was its rule throughout the United States in employing its agents. Whatever hardships there might be in his being removed from his position after so long and faithful service, yet, taking his own testimony and applying to it the correct principles of law, there was not a hiring for a year as claimed by him. It lacked definiteness as to time as well as compensation. His statement that he was looking for another place goes far to show that his mind was not fixed that the hiring was for a year. If there had been a yearly hiring previous to this time, what occurred at Bridgeport would have broken up the arrangement. The minds of the parties never met upon a contract for a yearly hiring, and, if made at all, it was a contract made on December 12, 1878, to take effect on Janu-
690 ary 1, 1879, *clearly within the statute of frauds, as it could not be completed within a year from the time of its being made. Although a person may have been in the employ of another for a series of years, receiving a yearly salary in monthly installments, there is no inflexible rule of law whereby, if he enters upon a new year, thereby there is a hiring for another year. Such a hiring can only arise by the agreement of the parties. The weight of the evidence clearly was that the company would not and never had hired any of its employees by the year, but that their services could be dispensed with at any time. The court reluctantly came to this conclusion, where as here it appeared a party who had rendered so long and faithful a service had been summarily dismissed, but the company from the testimony had the right, at the end of

the month, if not at any time, to terminate the employment, and, having done so, the court below decided properly in favor of the defendant.

Judgment affirmed.

Stimmel, for McCammon.

Hicks, for the Company.

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*STOCKHOLDERS' LIABILITY. 38

[Superior Court of Cincinnati, General Term, 1882.]

Force, Harmon and Worthington, JJ.

†C. H. KILGOUR v. THE PENDLETON STREET RY. CO. ET AL.

1. Time does not begin to run against the right of creditors of a corporation to enforce the liability of persons who have assigned stock held by them when the debts were incurred, until failure, by reason of their insolvency, to collect from the assignees of such stock.

*2. A decree in an action against stockholders, who were such at its commencement, assessing upon them the liabilities of the corporation in proportion 39 to the amount of stock then held by them, does not conclude the creditors from afterward, by supplemental petition, seeking to enforce such contingent liability of stockholders defendant, who, before the commencement of the action had assigned other stock.

HARMON, J.

This action was commenced in 1868, to enforce the liability of stockholders in said railway company. All those who then held stock were made parties. It was referred to a master to take an account of all the debts and assets of the company, and "of the stockholders of said company, the amounts of stock held by each of them and for what length of time the same has been so held, and the assessment that will have to be made upon said stock to liquidate the debts of said company." On June 25, 1870, the master filed his report stating the debts, liabilities and assets, and "the present stockholders of the road," with the amount of stock then owned by each, and the "assessments required upon each one to pay the present and contingent debts of the company." Among the stockholders were A. D. Bullock & Co., owning thirty-two, and John J. Hooker, owning one hundred and fifty-eight shares. On June 29, 1870, a decree was entered confirming the report, giving judgment against each of the stockholders served, for the amount so assessed against him, and appointing a receiver to collect and receipt for the same or issue executions therefor if not paid. The decree further authorized the receiver to collect, by suit or otherwise, the amounts assessed against stockholders not served. He was directed to distribute the money so collected *pro rata* among the creditors of the company after paying the costs of the action, and to report to the court his proceedings as such receiver.

The amount so adjudged against John J. Hooker on his hundred and fifty-eight shares of stock was $3,219.30, with interest.

On January 14, 1873, the decree was reversed as to John J. Hooker, by the judgment of the court in general term, which judgment of reversal was in turn reversed, and the original decree affirmed, by the supreme court in January, 1881.

In March, 1882, plaintiff, by leave of court, filed a supplemental *petition, 40
alleging that execution has been issued upon said judgment against Hooker, and returned wholly unsatisfied, that Hooker is insolvent, and has no property whatever, that the shares of stock whose ownership by him was the basis of said judgment, were transferred to him by said A. D. Bullock & Co., August 17, 1867, they having been the owners thereof prior to that time and after all the debts of the

†This case was reversed by the Supreme Court, by the case of Bullock v. Kilgour, 39 O. S., 543.

company were contracted, and prays for himself and the other creditors that they be adjudged liable to make good said assessment against said stock.

To this petition A. D. Bullock and Henry Lewis, the members of said firm, demur generally, and also specially, upon the grounds that the statute of limitations has run in their behalf and that the former decree herein is a bar to the relief now sought against them.

The demurrer does not seem to be seriously pressed upon the general ground. The allegations are certainly sufficient to entitle plaintiff to the benefit of the principle established in this case as reported in 36 O. S., 667. It is not alleged, but certainly is to be presumed from the former findings as to the amount required, and the present allegation of Hooker's insolvency, that the judgment now sought is necessary to pay plaintiff's and other claims against the company.

As to the second ground, we understand the decision just cited to be that while the liability of former owners of stock for debts incurred prior to its transfer by them, attaches at once, the right of the creditors to enforce, it does not arise until the demonstration of noncollectibility by reason of insolvency of the assessments therefor, made upon its owners at time of suit. 36 O. S., pp. 677, 681.

When Hooker became in fact insolvent, does not appear, but he could not have been insolvent as to plaintiff and other creditors of this company until after the decision of the supreme court in January, 1881. Until then they had no claim against him, and since then none of the periods of limitation contended for as applying to such liability have elapsed.

As to the third ground it is argued for defendants that plaintiff's rights which he now seeks to assert are concluded by the former decree upon the principle of *rem adjudicatum*.

41 *Counsel rely upon Petersine v. Thomas, 28 O. S., 596, in which it was held that "this principle embraces not only what was actually determined, but every other matter the parties might have litigated in the case." The latter cases of Porter v. Wagner and Cramer v. Moore, 36 O. S., pp. 471 and 347, which do not refer to Petersine v. Thomas, announce the rule that "the question is not what the court might have decided in the former action between the parties, but what the court did in fact decide as shown by the record."

If these cases are inconsistent, the latter ones must of course prevail; but they are not. In Petersine v. Thomas it was held that a former decree for alimony was a bar to an action for further alimony based upon facts bearing upon the amount which should be allowed, which might have been, but were not, brought to the attention of the court in the former action. The expression "every other matter the parties might have litigated," therefore, clearly does not refer to other independent subject-matter of litigation, but merely to matters necessarily included in and bearing upon the actual subject-matter of the action. As to such matters the plaintiff, having had her day in court, might perhaps more properly, as in Sargent v. Bridge Co., 27 O. S., 235, also relied upon, be said to be estopped by her own negligence or voluntary waiver, than by the judgment; although the latter might be held to have passed upon them, on the theory that the court is, in a collateral proceeding, conclusively presumed to have been fully advised.

In Porter v. Wagner and Cramer v. Moore, judgments dismissing actions for equitable relief after full hearing were held not to bar subsequent actions at law upon the same facts, because, from the peculiar principles relating to equitable relief, mere refusal to grant it did not necessarily imply a finding against the party seeking it as to the facts upon which he relied. The court might have found the facts all in his favor and still have refused the relief for want of equity on the very ground that he had a remedy at law. The records did not show that the court had found the facts and it could not be presumed from mere judgments of dismissal.

42 *Certainly no stricter rule is to be applied to a supplemental petition in the same case than to a petition in a different case. The question here is, therefore, does the record show that the court at the former trial in fact passed upon the matters now set up or require us to presume that it did, or that plaintiff must be held to have neglected or waived them? It is clear that all the court in fact did, was to find that certain persons were then stockholders and give judgment against them based upon the stock they then held, although all transfers of stock which had been made, including that by A. D. Bullock & Co. to Hooker, were set out in the cross petition of John Kilgour, the principal object of which was to obtain relief on account of an alleged invalid attempt to issue an increased amount of stock. Even if the court might have then proceeded to find who had formerly held the various shares of stock and adjudge them contingently liable, it plainly did not, in fact, either do or refuse to do so. Nor can it be presumed to have done so or

that such action was waived. Inquiry into or decision of that question could have had no bearing whatever upon the findings and judgment in fact made and entered.

The only remaining question is whether, in the present state of the record, such action may be had as is now sought by the supplemental petition. It is contended for defendants that, the former decree being final and the action no longer pending, the supplemental petition is "in the air," and moreover, that by the rules of practice such pleading at this stage of the case cannot be considered.

The decree, however, shows upon its face that it was not final in the sense that no further action by the court was contemplated. Among the liabilities reported and found were unliquidated demands, then in suit, to the amount of $10,000; and that sum was included in the estimate upon which the assessment was made. The receiver was expressly ordered to report his proceedings to the court. If such contested liabilities should be either defeated or reduced, there would be a balance in his hands to be disposed of. If he should fail to collect any of these assessments, there would be a deficiency. It *cannot be said, therefore, that the case is 43
not still pending for any action by the court which may now properly be invoked.

The analogies of the former equity practice may, it is conceded, be used in determining what may be done under Revised Statutes 5119, providing for the filing of supplemental petitions. Under that practice supplemental bills were allowed after as well as before decree. Such bill might ask action in aid of the decree—to help carry it into full execution. It might seek relief upon some matter omitted from the original bill as well as further relief upon a matter not omitted. The only limitations were that such bill, after decree, must not seek to change or review the decree, but, taking it as a basis, seek to extend it, or to add to it something not inconsistent or foreign. Mitf. & Tyler, Pl. & Pr. in Eq., 160–1; 2 Daniell Ch. Pr., *p. 1536 and n. 6; Story Eq. Pl., section 338; Cropper v. Kuepman, 2 Young & Coll., 338; O'Hara v. Shepherd, 3 Md., Ch. 306.

One of the tests was whether, if not set out in it, the original decree could be pleaded in bar. 2 Daniell Ch. Pr., *p. 1536, n. 6. If so it would be a bill of review, or in the nature of one, which under our practice would be improper. This test, from what has already been said, the pleading in question safely passes, and considering the contingent nature of the liability it seeks to enforce, and the fact that all relief of this sort must be had in the same action, we think the action sought may now properly be taken in this way, if indeed it is not the only proper way as might be contended with some force in view of the fact that the nature of the liability seems to be regarded by the supreme court, in the case already referred to, as rather in the nature of a guaranty of collectibility from the owner of the stock at the time of suit than in the nature of suretyship for him.

This is a new question of practice in this class of cases, and if it were doubtful upon principle the argument from inconvenience would have weight. It would be imposing a needless burden, both upon parties and courts, to require in every case the tracing of the ownership of the various shares of stock and the adjustment of the various contingent liabilities of former owners, without awaiting the result of the attempt to collect *from those who are stockholders at the time of suit, 44
at least in cases where both are within the jurisdiction of the court.

The demurrer is overruled.

FORCE and WORTHINGTON, JJ., concur.

Healy, Brannan & Desmond, for Plaintiff.

Wm. M. Ramsey and Mortimer Matthews, Contra.

SET-OFF.

[Superior Court of Cincinnati, General Term, July, 1882.]

Force, Harmon and Worthington, JJ.

†CLEVELAND RUBBER CO. v. E. F. BRADFORD.

A claim for unliquidated damages, though arising upon contract, is not the subject of set-off under the Code.

FORCE, J.

The plaintiff sues for the price of goods sold and delivered.

The defendant admits all the allegations of the petition, but claims damages for breach of warranty by the plaintiff in prior transactions of sale in an amount exceeding the plaintiff's claim and demands judgment for difference. To this the plaintiff demurs. The matter set up by the defendant is not counterclaim. It is set-off, if set-off embraces claims for unliquidated damages; otherwise it is not. The only question presented, therefore, is this: Does set-off under the Code, embrace claims for unliquidated damages arising upon contract?

The precise question was before Judge Spencer of this court in Evans v. Hall, decided January, 1855, and reported 1 Handy, 534. The Code being then just enacted, I, as counsel for defendant, claimed that set-off being purely a creature of statute, and the prior statute having been repealed by the Code, its definition could be found only in the Code; and the language of the Code, varying from the language of prior statutes, was broad enough to include all claims arising upon contract, whether liquidated or not. Counsel for plaintiff, Mr. Groesbeck, one of the commissioners who drafted the Code, contended that the commissioners had no intention to change the scope of set-off, and that the language used by them in the Code did not, in fact, change it. Judge Spencer, in a considered opinion, sustained Mr. Groesbeck, and held that set-off, under the Code, as under prior statutes, included only liquidated claims.

In October, 1855, Judge Gholson, in Roots v. Nye, 2 Handy, 229, and Judge Storer, in McCullough v. Lewis, 1 Disney, 564, made the same ruling. The three judges constituting this court, in special term, in three different cases, gave this interpretation to the Code, before the Code was much more than one year old. This ruling reflected the general opinion of the bar of the state at that time, and was followed by the courts of this county uniformly and without question for twenty-six years. This interpretation having been so fixed and so followed, and the supreme court having made no ruling to the contrary, it must be made very clear that it is wrong, to warrant us in overruling it.

The fact, that the commissioners who framed the Code, did not intend to change the character of set off, of course does not settle the meaning of the Code. The meaning of a statute is determined by what the statute says, not by what its framers intended it to say. It is in order therefore to consider whether or not the framers of the Code had reason to claim that their work wrought no change in the law of set-off.

The commissioners, in their report, state that they were aided in their work by the reports of the commissioners of Massachusetts, New York, Kentucky, Indiana and Missouri. The Massachusetts Code gave an elaborate and detailed definition of set-off. In New York the tentative Code of 1848 contained no provision about it. But the Code of 1858, which our commissioners used, discarded wholly the old and well-known terms, set off and recoupment, and used in place of both, the newly coined word "counterclaim." After stating in general what a counterclaim must be, it adds, it must arise out of one of the following causes of action: "1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action. 2. In an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action." The report of the Missouri commissioners copied precisely the language of the New York Code. The Indiana Code expressly stated that set-off included unliquidated as well

† This case was overruled by the Supreme Court in the case of Needham v. Pratt. 40 O. S., 186.

as liquidated claims. The Kentucky Code, differing from all the rest, simply provided that "a set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract, or ascertained by the decision of the court."

Our commissioners selected the provision which had been adopted in Kentucky, and incorporated it without change in the Ohio Code. By selecting the Kentucky section, and rejecting the sections adopted in the other states, the commissioners refused to give a detailed definition of set-off, as was done in Massachusetts, and refused to state expressly that it included unliquidated damages, as was done in the Indiana Code. They borrowed from the New York Code the new term "counterclaim," which included unliquidated and liquidated demands alike; but, departing from the New York Code, they confined this term to claims growing out of the subject-matter of the plaintiff's action. While they said that claims unconnected with the plaintiff's cause of action must be such as arise out of contract, they refused to adopt the New York provision that any cause of action arising out of contract, may be advanced by the defendant against the plaintiff. Differing from the New York Code, they retained the old word "set-off," for such unconnected demands advanced by the defendant. But the use of this word varies in one particular from its use in the old statutes. The old statutes do not say "a set-off" must be, etc.; they allow "debts," etc., to be "set-off." But as the demands allowed to be set-off by all the the statutes from the original act of George II to the adoption of the Codes, had been interpreted by the courts to mean liquidated demands, the term "set-off" had grown up outside of the statutes into use and universal acceptance as a term designating a liquidated demand. The term "a set-off" was as carefully introduced into the Ohio Code as it had been excluded from the New York Code, because the two codes were intended to express different things. The commissioners then were certainly not unreasonable in supposing that the code which they drafted, made no change in the rule that only liquidated claims could be set-off. And accordingly, a few years later, the court of appeals of Kentucky, in an elaborate opinion, held that our commissioners had not misinterpreted the language of the Kentucky Code, just as the judges of this court held, that the commissioners did not misunderstand the effect of the language they used.

The prevailing opinion of the bar, at the time of the enactment of a statute as to the meaning of its terms, has weight, but has never been held binding. It is therefore in order to consider what ground there was for the prevailing opinion upon the adoption of the Ohio Code, that its provisions did not change the nature of set-off.

It is conceded that in Ohio, prior to the Code, only liquidated demands could be set-off. The original statute, the act of 9 Geo. II. simply provided that mutual debts could be set-off. The courts held that the word debt imported a liquidated demand. In Ohio, the acts of 8 January, 1810, 1 Chase 647, and of 24, February, 1816, 2 Chase 956, provided that it should be lawful for the defendant to set-off "any debt, contract or demand," against the plaintiff, and section three of those acts provided that where a plaintiff should be "indebted" to the defendant in any debt, contract or demand if the defendant should fail to set-off the same, he should be barred from recovering costs in any suit subsequently brought upon the same. The contract which could be set off, was therefore a contract on which the plaintiff was "indebted" to the defendant, and therefore, by the accepted law, was a liquidated demand The act of 19, February, 1824, Swan's Revised Statutes of 1841, p. 850, provides: "In all actions and suits brought on any specialty, contract, bill, note, promise or account, in any court of this state, it shall be lawful for the defendant * * * to give notice * * * "of any debt, contract, book account or other liquidated demand against the plaintiff which he may be desirous to have set-off," and this remained in force until repealed by the Code. Hence as the section in the Code under consideration used the term, "a set-off" which had never been used anywhere except as meaning a liquidated claim, and used in connection with it the word "contract," which had always been used in the legislation of Ohio as meaning a liquidated demand when used to designate a matter that could be set-off, it was in accordance with the rules of statutory interpretation to hold that the word "contract" was used in that section of the Code as meaning a liquidated demand.

This rule of construction as applied to the matter now under consideration, is illustrated by a course of decisions upon another branch of the law. Bankruptcy, like set-off, is a creation of statute. The bankrupt act of 1841 protected from discharge, debts "created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee or while acting in any fiduciary capacity." The supreme court of the United States held that the words "any fiduciary capacity,"

were restricted by the connection with "executor, guardian or trustee," to mean a technical trust, and not to include such relations as factor and agent.

This act was repealed. Subsequently the act of 1867 was passed, which, in the corresponding section, omitted the characterizing words, "executor, administrator, guardian or trustee," leaving the section to read "created in consequence of a defalcation as a public officer, or while acting in any fiduciary character."

The supreme court of Massachusetts in Cronan v. Cutting, 104 Mass., 245, held the word in the acts of 1867, to mean the same as the words in the act of 1841; that the words "any fiduciary capacity," in the act of 1841, having received an interpretation by the supreme court, Congress must be presumed to have used substantially the same words in the latter act in the same sense, and that the words which gave color in the first act were omitted in the second, because they were no longer necessary.

Wells, J., in pronouncing the opinion said: "The argument that the omission, in the act of 1867, of the specific trusts named in the act of 1841, by removing the reason, or one of the reasons for the construction given to the earlier act, indicates that "fiduciary character" was in a different sense in the later act, does not strike us as entitled to much weight. * * * On the contrary, it appears to us that the inference is quite as legitimate that Congress omitted the enumeration of specific trusts for the very reason that the term "fiduciary capacity" has, by judicial construction, received a fixed definition; and with intent that the phrase should carry that definition into the new act. The specific enumeration was omitted, because all were included in the term "fiduciary." The association of those specific trusts originally was held to be an indication of intent in the general purpose. That intent having been ascertained, has been affixed to the general term, and becomes a legal construction."

The reasoning and the decision of the court have been followed in later cases in the same court and in every subsequent decision by a national court upon the point. Justice Davis in the sixth circuit, in Grover & Baker v. Clinton, 5 Biss, 324; Chief Justice Waite in the fourth circuit, Owsley & Co. v. Henry Corbin & Co., 2 Hughes, 433; the district court for the Eastern district of Pennsylvania, Keime v. Graff, 17 N. B. R. 319; and the district court of the Southern district of New York, In re. Smith, 9 Ben. 494. The decision in the last case was given under such circumstances that it must of necessity have had the concurrence of Judge Blatchford, then circuit judge, now a justice of the supreme court of the United States.

Owing to the diversity of the statutes of the various states, it is not easy to find precedents one way or the other, interpreting directly the section of the Ohio Code now under consideration. State ex rel. v. Eldridge, 65 Mo. 584; and Green v. Willard & Co., 1 Mo. App. 202, cited in an excellent recent work on the Ohio Code (Bates' Pleadings, Parties and Forms), are not founded upon the original Missouri Code, but upon a later statute, substantially the same as the act of 9 Geo. II., and found in Wagner's Statutes, p. 1273. And Wheelock v. Pacific Pneumatic, etc. Co., 51 Cal. 22; cited in the same work, is founded upon a statute copied without change from the New York Code.

Kansas, Nebraska and Kentucky, have precisely the same section as that in the Ohio Code. The supreme court of Nebraska, Beyer v. Clark, 3 Neb. 161, cite and follow the decision of Judge Spencer in Evans v. Hall. The supreme court of Kansas, in Stevens v. Able, 10 Kan. 584, hold on the contrary that the section permits unliquidated damages, to be set off. The court of appeals of Kentucky in Shropshire v. Conrad, 2 Met., decided in 1859, and followed ever since, decided in a thoroughly considered opinion in the same way with Judge Spencer. In the opinion in this case the difference between the New York Code and the section adopted in Kentucky and Ohio is clearly indicated. "Although it (the section in the Kentucky Code) declares that a set-off must be a cause of action arising upon contract, it does not say that every cause of action arising on contract shall constitute a set-off." And again "if a radical change in the subject of set-off was intended to be made by the Code, the reasonable presumption is that such an intention would have been clearly indicated. Every cause of action arising upon a contract would have been declared to be a good set-off, and then no doubt could have existed as to the meaning of the section under consideration."

Mr. Pomeroy, in his work on Civil Remedies, section 798, says that the decision in Evans v. Hall is clearly wrong. But he cites it as if it were a construction of the New York Code, and thereupon calls it erroneous. He also says it has been overruled by later cases; but fails to cite the cases, and could not have cited any outside of Kansas. Judge Swan is a notable exception to the statement that the prevailing opinion of the bar of Ohio was in accord with Judge Spencer's decision. If Judge

Swan had given no reason for his opinion it would have had weight. But he gives as the reason for his opinion, the identity of the Code of Ohio with the Code of New York. The reason failing, the weight of the opinion fails.

The supreme court of Ohio has not decided the question—perhaps; but the court has used language bearing upon it. In Lancaster Manufacturing Co. v. Colgate, 12 Ohio St. 344, in construing section 108 of the justice's act, Judge Scott, pronouncing the opinion of the court, says that section "refers only to such liquidated demands as are the proper subject of set-off, and not to unliquidated damages, which only become the subject of counterclaim, when "arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim." And the syllabus says the section "refers only to such liquidated demands as are the proper subject of set-off, and does not authorize the subdivision of a claim for unliquidated damages arising from a single transaction, and which may be the proper subject of counterclaim, but not of set-off." The points decided in the case have no bearing upon the question now under consideration, but not only the judge pronouncing the opinion, but the whole court, speaking officially through the syllabus, do for the purpose of elucidating the decision, explicitly declare that, under the Code, unliquidated damages are not the subject of set-off, but only of counterclaim.

The case of Neil v. Greenleaf, 26 Ohio St. 566, as I understand it, is substantially a decision of the matter; but in calling it substantially a decision, I do not undertake to speak for more than myself. Neil and Greenleaf, having been partners, and having dissolved, Neil having sold his interest in certain chattels to Greenleaf, for a specified price, payable at a fixed date, brought an action for the price when the same had accrued. Greenleaf, in answer, did not dispute the facts of the plaintiff's claim, but stated that a large balance was due to him from the plaintiff from their partnership transactions, asking to have their entire transactions referred to a master, and that the balance due him, as ascertained, should be set off against the plaintiff's claim, and that he should have judgment for the excess over it. The case went to the supreme court on the question whether it was appealable or was a jury case. The precise point decided was, that, having consented that the whole case, including his claim for goods sold and delivered, should be referred to a master, the entire case became one of equity jurisdiction, and was therefore appealable. But the court, in giving its decision in the syllabus, expressed it in three propositions. The first is: "In an action for the recovery of money, the defendant cannot, without showing the insolvency of the plaintiff, or some other cause giving the court equitable jurisdiction, have an account or settlement of a partnership between the parties, for the purpose of setting off any balance to be found due him on such settlement."

The court therefore decided that the claim set up by the defendant was not a proper matter of set-off. But it was a claim for money alleged to be due under a partnership agreement; that is, it was "a claim arising out of contract." It is no objection that the claim could be established only by an equitable proceeding; for under the Code equitable claims can be set off as well as claims at law. If the partnership had been adjusted and the balance found, there is no question that such balance could be set-off. Dana v. Barrett, 2 J. J. Marshall, 8. The only difference is that the ascertained balance is liquidated, and the unascertained balance is an unliquidated claim. It is true that no particular sum could be held to be payable before adjustment; but that is the precise characteristic of all unliquidated claims. This decision seems identical with the decision of the court of appeals of Kentucky. Taylor v. Stowell, 4 Met. 175, that if the plaintiff is insolvent, the court in its exercise of the equity power will permit a defendant to set-off an unliquidated claim. In deciding, therefore, that the defendant's claim was not the subject of set-off, the court only decided, what the court declared in 12 Ohio St., 344, that an unliquidated claim is not the subject of set-off, but only of counterclaim.

We are advised that the district court has held that set-off under the Code includes unliquidated claims. The district court speaks with authority in this county, and it is the respect due to it that has induced us to state so fully our reasons for not following its ruling. We, occupying the seats once filled by SPENCER, GHOLSON and STORER, do not feel warranted in overruling their decision upon the meaning of a section of the Code, their decision having been confirmed by the decision of the court of last resort of the state from which Ohio borrowed that section, followed without question by all the courts of this county for twenty-six years, and sanctioned by the express language if not the express decisions of the supreme court, until we shall be admonished to do so by the supreme court.

The demurrer to the answer is sustained and judgment may be entered for the plaintiff upon the petition.

W. E. Jones, for Plaintiff.

Baker & Goodhue, Contra.

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46 *GUARDIAN AND WARD—WITNESSES—COURTS.

[Superior Court of Cincinnati, General Term, July, 1882.]

JULIANA MEIER v. BARBARA HERANCOURT, EXRX., ET AL.

1. This court has jurisdiction of an action upon a guardian's bond for breach in not paying over the balance in the guardian's hands when the ward became of age.
2. Whether in such an action the petition should aver that the guardian's accounts have been settled in the probate court, and the balance as claimed, ascertained, *quære?* But if it should, and does not, where these allegations are made in the answer, and sustained by the evidence, and no objection is taken to the form of the petition until after the evidence has closed, and cause reserved to general term, judgment will not be rendered for defendant because of such defect in the petition.
3. If a witness is competent to testify upon any subject, a general objection to his being sworn should be overruled.
4. Where testimony of a party is heard subject to a general objection to his competency because the adverse party is the executor of a deceased person, and it does not appear whether the events testified to occurred before or after the death of the testator, and the executor makes no motion to strike out the testimony, but presents counter evidence, without further insisting on his objection, it will be presumed that the party is a competent witness upon the matters as to which he has testified.
5. Where a guardian's bond is broken by his failure to pay over to his ward the balance in his hands when the ward becomes of age, his sureties are not released by the mere fact that the ward, shortly after becoming of age, gave the guardian a receipt in full, without any payment in fact, which was filed in the probate court by the latter with his final account, with a corresponding entry in the account charging the ward with the sum so stated to be paid, and that such account was confirmed by that court.

WORTHINGTON, J.

This is an action upon a guardian's bond, the breach assigned being the failure of the guardian to pay to his ward, on her arrival at age, the amount then in his hands. The case has been reserved for judgment upon the pleadings and the evidence.

1. On the argument before us, it was suggested that this court had not jurisdiction of the action. It was not disputed but what the action fell within the general language of the Revised Statutes, section 493, paragraph 8; but it was claimed that article IV., section 8 of the constitution gives the probate court jurisdiction to settle guardian's accounts; that Revised Statutes, section 524, makes that jurisdiction exclusive, and that this action falls within that jurisdiction.

The accounts of a guardian mean his dealings on account of his ward, while the relation of guardian and ward exists, and over these the probate court has sole jurisdiction. Subsequent dealings after the ward has become of age have nothing to do with the guardian's accounts. At that time the relation of guardian and ward has ceased, and that of debtor and creditor has begun; Crowells Appeal, 2 Watts, 295; and both parties

have passed beyond the control of the probate court, except as to matters which occurred while their former relation subsisted.

The difference between payments in the course of administering a trust, and payments on distribution, after the trust has been otherwise fully administered, has been before the supreme court repeatedly in the case of executors, and it has always been held, that decisions by the probate court, upon payments of the latter class, except in so far as authorized by the statute now found in Revised Statutes, section 6190, are not conclusive. Negley v. Gard, 20 Ohio, 310; McLaughlin v. McLaughlin, 4 Ohio St, 511; Swearinger v. Morrison, 14 Ohio St., 424; Cox v. John, 32 Ohio St., 532 Hence such decisions were not made in the course of settling accounts. If this is true as to an executor, *a fortiori*, it is true as to a guardian, as to whom there is no provision like section 6190.

The case of Lindsey v. Lindsey, 28 Ohio St., 157, which was cited upon this subject, in our judgment, sheds no light upon the matter. All that is there decided by the majority of the court is, that a promise by a guardian, on making final settlements with his ward, to pay her the balance due, may be enforced, although he has filed a final account showing payment in full, which has been confirmed. This certainly is not inconsistent with what we have asserted above.

The question, as to what items should properly be embraced within the account of a guardian, was not discussed.

We have also been referred to Revised Statutes, section 6195, as amended in 78 O. L., 76, and sections 6196 to 6201, both inclusive, as conferring jurisdiction on the probate court and the court of common pleas to entertain actions upon guardian's bonds, and hence implying a denial of jurisdiction to this court; and to the case of Chatfield v. Faran, 1 Disney, 488, as sustaining that position.

But it has been decided by the supreme court, that the above sections of the statute, in so far as they relate to executor's bonds, do not grant an exclusive remedy, but only one additional to others then in existence; Dawson v. Dawson, 25 Ohio St., 443, and if this be true as to executors, it is equally true as to guardians. Nor is there anything in the case of Chatfield v. Faran, contrary to this view. That case was an action by an administrator *de bonis non* upon his predecessor's bond. The right to maintain such an action, rests altogether upon statute, and from the other provisions of the statutes then in force the court gathered that the power to determine such action was vested solely in the common pleas; the provision of the statutes relied on for this conclusion, are to be found in 1 S. & C. pp. 601, 604, sections 182, 192, and so far as they have been reenacted, are entertained in Revised Statutes, sections 6210 to 6216, inclusive. An examination of them shows, that they relate solely to executors' and administrators' bonds, and have nothing to do with those of guardians. Moreover, the argument which the court drew in that case, from these sections, is no longer applicable, for now, by Revised Statutes, section 6215, jurisdiction to entertain such an action is expressly given to superior courts.

We see no reason why this action is not within the jurisdiction of this court.

2. It is claimed that the petition does not state a cause of action, in that it does not show that there has been a settlement of the guardian's accounts, and a balance found in his hands. It may be doubted whether

such allegation is necessary in this case; State v. Humphreys, 7 Ohio, 1st part, 223. But be this as it may, the answers of the defendants allege that an account was filed by the guardian in the probate court after his ward became of age, which was afterwards allowed and confirmed by that court; and that this account showed there was due the ward from her guardian on her becoming of age, the amount claimed in the petition; and the evidence establishes these facts. The objection to the petition was made for the first time on the argument before us. Under these circumstances, we think that if the petition is defective in this particular, it is a defect which, under the requirements of Revised Statutes, section 5114, we are obliged to disregard at this state of the case. Erwin v. Shaefer, 9 Ohio St., 43; Gebhart v. Sorrels, *Ib.*, 61; Dayton Ins. Co. v. Kelley, 24 Ohio St.. 345.

3. The next matter to be considered, is an objection to the competency of a witness. The action was brought by the former ward against her guardian, Klotter, his surviving surety, Bultman, and the executrix of the deceased surety Herancourt. When the latter died does not appear. In this state of the record the plaintiff offered herself as a witness on her own behalf, "to which" as appears by the bill of evidence, "the defendant, Barbara Herancourt, executrix, objected, on the ground that, she being the plaintiff, she is an incompetent witness against Barbara Herancourt, executrix defendant, which objection the court reserved and heard the testimony thereto, and said defendant, Barbara Herancourt, executrix, then and there excepted; thereupon said plaintiff was duly sworn and testified."

It will be observed that the objection is not made to the plaintiff's testifying as to any particular matters, but to the plaintiff's testifying at all, to her being sworn. Such an objection is too broad. Parties are permitted to testify except as to certain matters. Revised Statutes, sections 5240, 5242. Hence they may always be sworn, for *non constat* but what they will offer only in so far as the law allows them to speak. The objection must therefore be overruled.

4. The court of its own motion, in reserving this objection for decision at general term, heard the testimony subject to objection to such of it as might be incompetent. Must we now exclude any of his testimony from our consideration?

The plaintiff was incompetent to testify only about matters which occurred before the death of Herancourt, the surety; and this only as against his executrix; Revised Statutes, section 4252, (1); Hubbell v. Hubbell, 22 Ohio St., 208. That the matters about which she testified, did so occur does not appear. Whether or no the burden was upon her to make this appear, as against a motion to strike out the testimony on this ground, we do not find it necessary to decide. The executrix made no such motion; she took no objection to the testimony after its delivery; on the contrary, without making any suggestion as to the incompetency of the witness as to these matters, she offered contradictory proof upon the same subject. She knew the date of her testator's death, and whether or not it was before the events testified to by the plaintiff. By her conduct she has, we think, admitted that if the plaintiff was competent to testify at all, she could give the testimony she did give. We have, therefore, considered the testimony.

5. The only question left for consideration is, for whom should judgment be rendered.

It is established by the evidence, that at the arriving of age of the ward, the guardian, after crediting himself with all proper charges against his ward, had in his hands the sum named in the petition; that shortly after the ward became of age, an account was drawn up by the attorney of the guardian, which was balanced by a credit of this amount as paid to the ward since she became of age; that a receipt for this sum was given by the ward to the guardian, and filed with the account in the probate court, and that this account was afterward allowed and confirmed by that court; all of which happened about five years before this suit was brought. No money was in fact paid to the ward, and the receipt was without consideration. It is claimed by the sureties that the guardian's note was given to the ward for the balance due; to establish this claim, the sureties must have a preponderance of the evidence; there were two witnesses on the subject, the guardian, supporting the claim, and the ward opposing; the testimony being at best equally balanced, we think the giving of the note is not proved. No information as to what did occur is shown to have come to the sureties, as a matter of fact, from what we have already said, it is apparent that the including this sum in the final account as having been paid, and the allowance of that account by the probate court, do not defeat this action. For the entry should not have been included in the account being a payment to the ward after she became of age; and the probate court had no jurisdiction to pass upon it. The effect of the confirmation of the account by that court was simply to liquidate the amount of money chargeable to the guardian when the ward became of age, and to show that this sum was the balance due.

The case then is reduced to this: The guardian has an admitted sum in his hands which he has refused to pay ———; is this a breach of his bond? If it is, are the sureties released by the other facts just stated?

As to the breach, the condition of the bond is: "If the said guardian shall and do well and truly perform and discharge with fidelity all and singular the duties of a guardian to said minor * * * and act in all things as required by law." One of the duties required by law of a guardian at the time this bond was given, and ever since, has been, "at the expiration of his trust fully to account for and pay over to the proper person, all of the estate of his ward remaining in his hands." 69 O. L., 55, section 14; 74 O. L., 918, section 16; Revised Statutes, section 6269; 77 O. L., 77. This guardian has failed so to pay over; and therefore the bond is broken.

Can the sureties take any benefit from the receipt that was given, and the lapse of time since? As we have said, it does not appear that the sureties knew any such receipt was given, and consequently that they were in any way influenced by it. The fact that it was filed in the probate court does not help them, for there was no requiring or authorizing it to be filed there, from which they could draw a presumption of knowledge in their favor. This case is very different from Goodin v. Ohio, 18 Ohio, 6. There an extension of time was given to the principal on his own note and mortgage; and a receipt in full given him which he at once exhibited to his sureties. Here there was no extension of time, no taking of other security, and no knowledge on the part of the sureties as to the transaction which did take place. They have been in no way misled by the plaintiff and can invoke no estoppel

against her; the statute of limitation has no turn in their favor; and we see no reason why they should not do what they agreed to do—be responsible for the default of their principal.

Judgment will be entered for the plaintiff against all the defendants as prayed in the petition.

FORCE and HARMON, JJ., concur.

Lindeman & Lindeman, for Plaintiff.

Goebel & Bettinger, for Defendant.

47

*STATUTE OF FRAUDS.

[Superior Court of Cincinnati, General Term.]

Force, Harmon and Worthington, JJ.

CAROLINE SCHWICK v. C. FULTON.

Where the agreement sued on is within the statute of frauds, unless it can fairly be inferred from the petition that the agreement is not in writing, the defense of the statute is not available on demurrer.

WORTHINGTON, J.

In this case, which was reserved upon a demurrer to the petition, the defendant claims that the action was based upon a contract required to be in writing by the statute of frauds, and that the petition shows the contract was verbal.

48 *We do not question that where the contract sued on is within the statute—and it is fairly to be inferred from the petition that the contract is not in writing—the petition is demurrable; Howard v. Brower, 37 O. S., 402. But such inference must be fairly drawn. It must not be strained. Here the petition, after stating the consideration, alleges that the defendant "then and there promised and agreed," etc. Language of this kind has always been sufficient in a petition, as it imports a written agreement just as fairly as it does a verbal one. Reinheimer v. Carter, 31 O. S., 586. Being of the opinion that the petition is sufficient even if the contract is within the statute of frauds, we have not thought it necessary to determine that question.

The demurrer must be overruled and the cause remanded for further proceedings.

MUTUAL BENEFIT SOCIETIES.

[Superior Court of Cincinnati, General Term.]

Force, Harmon and Worthington, JJ.

MARY A. WILLIAMS v. THE YOUNG MEN'S MUTUAL LIFE ASSOCIATION.

Where a certificate of membership in a mutual life association provides that membership shall be terminated by the nonpayment of assessments within thirty days from date of notice, the notice to consist of mailing or delivering to his address: *Held*, that the thirty days begins to run from the mailing or delivering and not from the date of the notice.

FORCE, J.

This case was reserved to general term on a motion for a new trial. (Judge HARMON being a member of the defendant association, did not sit in the case.) The judgment below was for the plaintiff. The question is whether or not the husband of the plaintiff was at the time of his death a member of the association, and that depending upon the question whether or not he tendered in time an assessment made upon the death of another member, or was one day too late, and this again depending upon the proper meaning of the words "date of notice" as used in the certificate of membership.

The paper notifying him of the death was delivered to him one day after the date printed on the paper. He tendered the assessment within thirty days after such delivery, but only within thirty-one days after the date of the paper.

The provision in dispute is a "printed or written notice directed to the address of this member, as it appears upon the books of the association, and deposited in the postoffice or otherwise delivered, shall be deemed legal notice of assessments, and if any assessments are not paid within fifteen days after the sending of such notice, a fine of ten cents shall be added to and paid with the assessment; and if the fine and assessment are not paid within thirty days from the date of notice, *then this certificate shall be null and void, and all payments made 49
to the association forfeited."

It is true the paper to be sent is called "a notice," and "such notice;" but the clause distinctly declares that "legal notice" consists in the mailing or otherwise delivering such paper. The date of notice is the date of legal notice, and not the date that happens to be printed on the paper by means of which notice is given.

The clauses contemplate two stages of delinquency, the first to be visited by a fine of ten cents, the second by a loss of membership. Under the interpretation claimed by defendant, a member might lose his membership before becoming liable to a fine. That is, he might commit his second delinquency before committing his first. Motion overruled.

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*BANKS AND BANKING. 156

[Cuyahoga Common Pleas Court, July, 1882.]

A. L. MCCURDY V. THE SOCIETY OF SAVINGS.

The holder of a check made payable to the order of the maker and by him endorsed in blank, cannot be required to endorse it when he presents it to the bank for payment.

The custom has prevailed for some time among the banks and bankers, requiring persons presenting checks for payment, to endorse the checks, both when originally made payable to order and endorsed in blank. The right of the banks to impose this condition has been much questioned. No adjudication has ever hitherto been made on this subject. The question is an important one in commercial law, the banks on the one side insisting on it as a precaution necessary in their business while customers insisted that it unduly and unnecessarily infringed on

the commercial law, interfered with the negotiability of commercial paper, gave improper information as to the person through whose hands the paper passed, and exposed the holders to danger of a suit in case of dishonest reissue of the check, a danger which experience has shown to be real in case of notes and bills of exchange. Under these circumstances a suit was brought in the court of common pleas to test the question. The opinion of Judge J. M. JONES will be found below. It is of much interest to banks and all doing business with them, and to the members of the bar.

JONES, J.

In this case suit is brought by the plaintiff, A. L. McCurdy, against the Society for Savings on a check drawn by it on the National City Bank of Cleveland for the sum of $2,000 in favor of Killian Slosser or order, and duly endorsed in blank by him. This check was duly presented by an agent of the holder for payment to said City Bank, which then and there had funds of the drawer in its hands, and the bank refused to pay the same unless the person who presented it for payment would endorse it. This the holder refused to do, and at once caused the check to be protested for nonpayment, and therefore the plaintiff brought this suit against the Savings Bank as drawer of the check to test the question involved.

As the holder of a check has no recourse against the drawer of the same until it has been duly and properly presented for payment to the bank upon which it is drawn, and by it dishonored, the question is presented, was there such a refusal to pay, as amounted in law to a dishonor of the check, or in other words, had the bank a right by law or usage to require the signature of the holder of such a check, or his agent, on its back as a condition of payment? We think there can be no room for doubt that when a promissory note, bill, or check is drawn payable to any named person or order, and it is endorsed in blank with the genuine endorsement of the payee of the bill that the title of the note, bill, or check passes by delivery, it is payable to whomsoever becomes the holder of it, that he may bring suit thereon, that payment to such holder on such blank endorsement is authorized, and that such payment will exonerate the bank when made in good faith; neither is there any good reason to doubt that according to the law merchant, the rights of the holder of such a note, bill, or check so indorsed in blank, by the payee, is substantially the same, so far as the rights of the holder is concerned, as if it had been drawn payable to bearer. Says Mr. Parsons in his third volume on notes and bills, page 17, "such a note endorsed in blank is equivalent to a note payable to bearer." In each case the paper passes by delivery, in each case possession is evidence of ownership, and in each the liability of the bank to pay does not depend at all on who is the owner or holder of it; its only concern is to satisfy itself that the check is genuine, that the signature of the drawer in the one case, and the indorser in the other, is the genuine signature of each. A bank is ordinarily presumed to know the signatures of its own customers and depositors; but it will not be seriously doubted that when a check is drawn on a bank, which is a stranger to the payee and his signature, that the bank is entitled to a reasonable time in which to ascertain the genuineness of the endorsement, before paying a check payable to his order, and, indeed, some of the authorities seem to justify a bank or a

banker in calling on the holder of such a bill or check when it is reasonable to do so, to furnish proof that the endorsement is the genuine one of the payee; but in this case neither of these things was required or asked; there was no demand by the bank for proof of the signature, nor for a reasonable delay to satisfy itself of the genuineness of the endorsement, but there was simply an absolute refusal to pay, unless the person who presented the check would endorse it. That this refusal to pay without such endorsement is not justified by commercial law, is, we think, perfectly clear; it is an attempt to limit the negotiability of such paper, and to fix terms and conditions for its payment not warranted by the law or by the drawer of the check, and to which neither he nor the holder is obliged to submit. The implicit contract of a bank with its customers is to pay their checks according to the law merchant.

In 20 O. S. R., 284, it is said, "The duty of the banker is to pay the bills and checks of his customers drawn payable to order to the person who becomes holder to a genuine endorsement." This was affirmed in 30 O. S. 1, and the court therein says: "We do not think that the right of the absolute owner of a fund to direct to whom a check drawn upon it shall be paid can be questioned;" and it necessarily follows that any person holding a genuine check with a genuine endorsement of the payee, is entitled to receive his money thereon without becoming an endorser thereof; and a refusal by the bank to pay without such endorsement is such a dishonor of the check as entitles the holder to bring suit against the drawer thereof, unless there is something in the usage hereinafter mentioned to modify the ancient law on this subject.

For it was alleged in this case on the part of the bank, and substantially proved in the trial, that there is now, and for many years last past has been, a local usage among banks and bankers, in all cases where the genuine signature of the payee endorsing the check is not known to the bank, to require the person presenting it if not known, to be identified, and to endorse it before paying the check or bill to him; and it is probable from the evidence furnished in this case that the usage is broader even than this with many banks, requiring the endorsement whether the signature is known or not. To render a usage of a particular trade or business or particular place valid and binding on the parties, it must be certain, established, uniform, reasonable, and not contrary to law.

And in harmony with these requirements we think it has been substantially settled by a strong line of decisions, that a local or general usage, at a particular place, the effect of which is to abrogate or control the settled general rules of commercial law, is inadmissible to vary the rights of the parties to a contract. In a recent case in the supreme court of the United States, 10 Wallace, 391, it is said "It is well settled that usage cannot be allowed to subvert the settled rules of law; whatever tends to unsettle the law, and make it different in the different communities into which the state is divided, leads to mischievous consequences, embarrasses trade, and is against public policy. In Woodruff v. Merchants' Bank, 25 Wendell, 673, when it was sought to vary the commercial rule of three days' grace, by proof of the usage of the city of New York, Judge Nelson held it inadmissible, and said, "The effect of the proof of this usage, if sanctioned, would overturn the whole law on the subject of bills of exchange in the city of New York," and he added "If the usage prevailed there, it cannot be allowed to control the settled

and acknowledged law of the state in respect to this description of paper."

This decision, and one similar to it in Bowen v. Newell, 4 Seldon, 190, was expressly approved by our own supreme court in Morrison v. Bailey, in 5th O. S. R., page 18, in which Judge Bartley says: "It is also settled in Woodruff v. Merchants' Bank, and Bowen v. Newell, that any supposed usage of banks in any particular place to regard drafts upon them payable at a day certain after date, as checks, and not entitled to days of grace, is inadmissible to control the rules of law in relation to such paper."

If the commercial law in regard to days of grace cannot be varied by proof of such usage, is it not quite as clear that the right of the drawer of a check to have it paid according to his order, or the right of a holder of it to be paid according to its terms without any new contract in regard to its negotiability or payment, cannot be affected or destroyed by such usage? Neither do I think it is clear that the usage is a reasonable one.

What good reason is there why a holder of such a note, bill, or check shall be required to endorse a paper as a condition to getting his money when he is lawfully entitled to it without such endorsement?

It does not make the person's endorsement genuine, if it was in fact forged, it does not increase his liability to the bank in such a case; it may cause the holder who is frequently a person who has no actual interest in the paper, to wit: an agent's attorney, trustee, etc., to run the risk of a liability by a fraudulent or improper reissue of the note and bill with his endorsement on it; neither can it be fairly justified on the ground that the signature is in effect a receipt of the holder, that he has received money. *First*—For the reason that the possession of the bill or check is evidence of its payment.

Second—Because a party having the obligation of paying money cannot insist on a receipt as a condition precedent to payment. In Longworth v. Handy, 1 Disney, 75, superior court of Cincinnati, held "It is no excuse for the refusal of attorneys to pay over money that his client refuses to give a receipt on settlement; the duty is absolute to pay on demand, and the law imposes no obligation on a party receiving money to give an acquittance."

Third—If it were reasonable to call for a receipt in all instances, it would not follow that there was a right to call for a blank endorsement.

I hold therefore that in this case there was a dishonor of the check, and that the drawer thereof is liable.

You may take a judgment against the Savings Bank for $2,000, and interest from that time.

Mix, Noble & White, for Plaintiff.

I. E. Ingersoll, for Defendant.

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*BILLS AND NOTES—WITNESSES. 649

[Superior Court of Cincinnati, General Term, April, 1883.]

Force, Harmon and Worthington, JJ.

†A. P. C. BONTE'S ADMINISTRATOR v. B. P. HINMAN ET AL.

The maker of a promissory note and the payee and indorser thereof, who became such before delivery for the maker's accommodation only, set up by separate answers the same defense to an action on the note by the administrator of the holder: *Held*, whether in this state of the record the maker would be a competent witness for the payee and indorser as to facts occurring before the holder's death or not, he becomes such upon his setting up by supplemental answer his discharge in bankruptcy which is admitted by the reply, the averments of which that the debt sued on was one of those excepted from the operation of the discharge not being proven.

HARMON, J.

To the petition herein, in which judgment is prayed upon two promissory notes made by Hinman to the order of Grotenkemper, and by him indorsed, each of them files an answer setting up substantially the same defense, viz.: That Grotenkemper became payee and indorser of both notes without consideration, merely for the accommodation of Hinman, Grotenkemper never having held them and they having had life only upon their delivery by Hinman to a third person; that Hinman delivered them to Bonte without consideration, merely loaning them to him upon his promise to return them before they should fall due.

By supplemental answer Hinman sets up his discharge in bankruptcy, which plaintiff admits, but avers that the debt upon which this action was founded "was created by fraud or embezzlement of *defendant, Hinman, and while said Hinman was acting in a fiduciary character, viz.: as agent of said Bonte." 650

The bill of evidence, however, upon which the case was reserved, discloses no proof of the alleged fraud or embezzlement, nor of the averment that the debt had any fiduciary character. Certainly there could have been nothing fiduciary about it within the meaning of the bankrupt law. Kieler v. Snodgrass, superior court, general term, 8 W. L. B., 219. Hinman is, therefore, entitled to judgment upon his supplemental answer.

Grotenkemper, to maintain his defense, offered Hinman as a witness by deposition concerning the facts connected with the making of the notes and their delivery to Bonte, and objection was made, that he was not a competent witness thereto under the Revised Statutes, section 5242.

It is thought by part of the court, upon the authority of Hubbell v. Hubbell, 22 O. S., 208, because that the objection is not valid the defendants are sued as severally liable and the action is one in which separate judgments might be rendered. But the court is unanimous in holding that Hinman's discharge being a valid defense he is no longer a party within the meaning of section 5242, to the issue upon which Grotenkemper relies, and is, therefore, a competent witness for him upon the analogy of Bell v. Wilson, 17 O. S., 640, and Baker v. Kellogg, 19 O. S., 663, in each of which the maker of a note, who was in default, was held competent to testify for his codefendant, a party to the same note. The question, therefore, is does the testimony establish the defense as to Grotenkemper. Hinman's testimony that Grotenkemper's relation to the notes was for accommodation only, is not disputed, and we think the testimony of Bissell, Bonte's attorney in the matter, is [not] necessarily in conflict with that of Hinman's, that the purpose of the transfer of the notes to Bonte was merely the accommodation of the latter and that he engaged to return them before their maturity.

There being no other evidence Grotenkemper may have judgment.

FORCE and WORTHINGTON, JJ., concurred.

S. T. Crawford, for Plaintiff.

D. W. Strickland and B. Ehrman, Contra.

†This case was reversed by the Supreme Court. No report. See 14 Bull., 369.

651 *COURTS.

[Superior Court of Cincinnati, General Term.]

Force, Harmon and Worthington, JJ.

IN RE APPOINTMENT OF HEALTH COMMISSIONER.

Courts should not be constituted boards for the appointment to political offices, and therefore where the legislature authorizes the court to make such appointments and if it fails, then the city council can do so: *Held*, that it is not obligatory on the court to appoint, and that in view of the inadvisability of the court so acting, it will refuse to appoint.

The question as to the appointment of a health commissioner was disposed of at the general term of the superior court.

FORCE, J.

A certified copy of the act passed by the legislature, which authorizes and directs this court to appoint a health commissioner, has been presented to this court, and we are advised, and examination of the act bears it out, that the commissioner so appointed is authorized and will be required to appoint a large body of subordinate officers, nearly two hundred in number, receiving salaries and pay. The act, therefore, puts upon this court the duty of appointing and constituting a large and important part of the ordinary and regular government of the city. The statute also provides, while the present health board and health officers are abolished, the city council can create new ones in case this court fails to appoint a commissioner. Hence we are not confronted with the alternative that we shall appoint, or the city shall have no health officer. The alternative is: Shall the health officer be appointed by this court or by the city council?

Quite a number of names of persons to fill this office have been handed to us—excellent men—highly recommended by persons most competent to judge. We have not agreed in the selection of any one of these. Perhaps it would not be an easy task, or a speedy one, to agree in making such selection. Meanwhile we have considered what we shall do from another point of view. A number of statutes have been passed at different times authorizing and directing this court and other courts to appoint public officers. In almost every case these statutes require the appointment of such officers as directors or trustees of public institutions, trustees or managers of public property or public funds. The courts have acted in this state under these statutes, and when the question of the constitutionality of such action was taken to the supreme court, as it has been several times, the supreme court said we
652 may act under such authority *if we choose to do so, but carefully guarded against saying we must so act, or are bound so to act.

Statutes have also been passed authorizing and directing the courts to make other appointments, as auctioneers, inspectors of oil and spirits, etc. In this county at least, these statutes have been disregarded and allowed to remain a dead letter.

The statute now under consideration requiring this court to appoint a large portion of the ordinary government of the city is very greatly in advance of any statute which has heretofore been passed in this state. In other states legislatures have passed laws requiring courts to make appointments; not, indeed, of the character of the one we are now considering, and congress passed an act requiring circuit courts to appoint commissioners for pension purposes. In those states, other than Ohio courts have declined to exercise such authority imposed by legislature, and the circuit courts have refused to act under such authority conferred by congress.

Most persons are apt to overestimate their own surroundings. Judges probably value too highly the importance of their office. But that portion of government which we are specially intrusted to uphold is the judiciary, and if courts should be constituted boards for the appointment to political offices, we should not long, especially under our system of elective judiciary, with short terms, have anything that could be properly called a judiciary.

We recognized the fact that the legislature in passing this law desired to do something for the welfare of Cincinnati, and we heartily acknowledged the confidence in this court implied by their action. But even if our acting under this law would result in a present advantage to the city, it would surely inflict a lasting injury upon the state. We respectfully decline to exercise the authority conferred by the legislature, and it will be so entered upon the journal. In this we all agree.

*PARTNERSHIP—ESTOPPEL. 736

[Hamilton District Court.]

†J. W. SOHN v. FREIBERG AND FREIBERG.

The estoppel arising out of an admission of partnership is binding, in favor of whomsoever it may be found to have been intended to influence; the question is one of fact. Where the admission is in answer to an inquiry from a mercantile agency, the estoppel is not, as a matter of law, to be limited to the subscribers of the agency.

ERROR to the Court of Common Pleas.

The case came up on a separate finding of law and facts, with a bill of exceptions containing all the evidence. The action was against Henry and Julius Freiberg, as doing businesss by the name of H. Freiberg, upon certain promissory notes to the amount in all of about $8,000, signed Henry Freiberg, and given by him to the plaintift for leather purchased. In a previous transaction between them the plaintiff had taken similar notes, which he had discounted in November, 1877, at the First National Bank ot Hamilton, in this state, where he resided and did business, the Freibergs residing and doing business in this city. Upon that occasion, the cashier of the bank, at his suggestion, inquired by letter of the Bradstreet Commercial Agency, of this city, as to the standing of "Henry Freiberg, Tanner," and whether Julius Frieberg was a special partner. The answer returned, and handed by the cashier to plaintiff was, "Julius Freiberg (of Freiberg & Workum) states that he is a full partner in the business." Upon the faith of this, the plaintiff during the following April sold the leather and took the notes in question.

There was a conflict of testimony whether Julius Freiberg had made the statement, that he was a partner in the business of H. Freiberg. He denied that he had. But a reporter of the agency testified to calling upon him in August, 1877, and being told, in answer to an inquiry as to the rating of the firm of H. Freiburg, which by the reports of the agency had been from $300,000 to $350,000, that he was a partner. Another reporter of the agency testified to asking him again, in the latter part of 1877, or beginning of 1878, whether the rating was correct, and whether he *was still a partner, to which he answered he was, 737
that all the agencies knew it before, and the reporter knew what he was worth. There was the testimony besides, of a reporter of Dun & Co.'s Agency, that, in March, 1875, he had criticised their rating of H. Freiberg, at about $10,000, as too low, and said he was in the business and virtually a partner, and that it would be proper to rate Henry Freiberg the same as they would him.

The finding of the fact by the court was, that he had made the alleged statement, knowing that it was to a reporter of the Bradstreet Agency, and was for information of the agency; but that he was not a partner and never had been. The further fact found was, that the agency had communicated the information to the cashier of the bank, under the terms of the contract between such agency and its subscribers, whereby it had undertaken to procure for them information required, concerning the responsibility and character of mercantile persons, to be

†For Common Pleas decision, see 9 Bull, 183.

held in strict confidence by the subscribers, and not asked for or permitted to be used by other parties; and that the bank was one of the subscribers, but that the plaintiff in his individual business was not, although one of the firm in other business at Hamilton which was a subscriber, and although himself a stockholder and officer of the bank.

"As to its conclusions of law," the court found, "that the said Julius Freiberg made the said statement, as to his being a partner with his brother, Henry Freiberg, to the said agency, intending that it should be communicated to the subscribers of the agency, and none others, and that the communication thereof by said bank to the plaintiff was unauthorized, and that the said Julius Freiberg is not liable to the plaintiff on account thereof."

AVERY, J.

Whether a person holds himself out as a partner is not a question of law, but of fact. There may be acts in themselves decisive, such as permitting his name to be in the firm; but where the representation is not of itself public, and may or may not be intended for third persons, the inquiry must be into the intention.

Declarations made to one man can seldom be conclusive in favor of another. Only those whom the representation is made *to, or 738 intended to influence, may take advantage of the estoppel. Bigelow on Estoppel, 508. But whom a representation is intended to influence, is a question of fact. When an admission or declaration is so general in its terms or made under such circumstances, as to indicate it was intended to reach and influence third persons, or the community at large, the estoppel may be carried sufficiently far to protect every one who shall have innocently acted upon or been governed by it. See 2 Smith Leading Cases, 7th American Edition, 717–719–741; Mitchell v. Reed, 9 California, 204; Quirk v. Thomas, 6 Michigan, 120, Christiancy, J.; Martin v. Gray, 14 C. B. N. S., 824.

In Parsons on Partnership (3d edition, 143,) the question is discussed, and is considered by the learned author to depend, in each case, upon the circumstances and manner of the original declaration or admission, and the intention of the parties therein. The opinion is further expressed, that, however it may have been intended to limit the representation, if there was no limitation in fact, the person will be bound to all whom the matter, to which he gives circulation, is afterward communicated. The view taken is, that the burden should rather be on him than on an innocent person.

In Easton Cole & Burnham Co., v. Avery, 83 New York, 31, the principle that it is not essential a false representation should be addressed directly to the party who seeks a remedy therefor, is held peculiarly applicable to statements made to a mercantile agency. A person furnishing information to such an agency, it is said, can have no other motive in so doing than to enable the agency to communicate such information to persons who may be interested in obtaining it for their guidance in giving credit, and there is no reason why the liability should not be the same as if it were made directly to the party. The case was an action of deceit, against a member of a firm, for a false representation of the amount of his capital in the firm, and the holding was, "that by making such statement of the financial condition of his firm to the agency, he virtually instructed it what to say if inquired of, and that the

jury might legitimately draw the inference, that it was made for the purpose of giving to the concern a credit to which it was not entitled, and of *defrauding any person who might inquire of the agency or consult its lists." 739

Whether the statement found to have been made by the defendant, was made under such circumstances as to bind him when communicated to the plaintiff, was a question of fact. The court found as conclusion of law, that his intention was it should be communicated to subscribers of the agency only, but intention is not matter of law. There is no conclusion of fact as to his intention, and the special findings are, therefore, defective in an essential particular. Special findings, like special verdicts, must find facts, not evidence; and facts found, from which other facts necessary to the determination of a cause are left to inference, is not a finding of facts, but of evidence. Blake v. Davis, 20 Ohio, 231-249; Langley v. Warner, 3 Comst., 327; 3 Wait's Pr. 196.

A special verdict, not finding either way upon a fact essential to the determination of a cause, has been held to require a new trial. Blake v. Davis, *supra;* Eiseman v. Swan, 6 Bosw., 668; Gould's Pl., 489. In Oxford Township v. Columbia, 38 O. S., 87, however, where there was a refusal to make any findings of fact, and it was held the judgment should be reversed, unless it appeared from the record the party was not prejudiced by the refusal, it is said, "the record contains all the testimony offered at the trial, and objection is made that the judgment below is opposed to the weight of the evidence; in deciding the case, therefore, we necessarily ascertain the facts."

That case differs from this, in that no facts whatsoever had been found. But if, taking the facts found here, the evidence presented by the bill of exceptions be examined, to supply the defect in the finding, our opinion still is that a new trial should be awarded. Neither the statement found to have been made by the defendant, nor the circumstances, were such as to have put a limitation upon it. If made, it was to a mercantile agency, and the very object was to create mercantile standing and credit; to limit it would have defeated the object. The principal question, indeed, was whether it was made; and that was the only question contested by the defendant. In Cook v. Slate Company, 36 O. S., 135, cited by counsel, the party sought to be charged *had not authorized the reports or been in any way connected with them. 740

As to the relations of the agency towards its subscribers, these did not create relations of confidence toward the defendant. The agency might communicate the information to whom they pleased, and might be expected to be ready to do so to whomsoever would pay for it. But whether paid for, or not, or according to their rules or not, would be their own business.

There was nothing in the manner of obtaining the information by the plaintiff which disentitled him to use it. He might have made the inquiry in his own name, as an officer of the bank, or in the name of the firm of which he was a member. The testimony of the manager of the agency was, that he would have been recognized in either capacity. The inquiry by the cashier was merely for convenience, the bank having a common interest.

Judgment reversed and remanded for new trial.

Follett, Hyman & Dawson, for Plaintiff in Error.

Long, Kramer & Kramer, Contra.

163 *BILLS OF EXCHANGE—EVIDENCE.

[Hamilton District Court, April Term, 1883.]

Smith, Moore and Avery, JJ.

†E. CUMMINGS v. BELA C. KENT.

In an action against the drawer of a bill of exchange by the payee, the defendant cannot offer evidence of a parol agreement made at the time the bill was drawn and delivered, that he was not liable thereon.

ERROR to the Court of Common Pleas.

The action below was by Kent against Cummings as the drawer of two several bills of exchange of like tenor. The following is a copy of one:

"$1,565. NEW ALBANY, IND., Nov. 15, '72.

"Ninety days after the date of this bill of exchange, pay to the order of B. C. Kent fifteen hundred and sixty-five dollars without relief from valuation or appraisement laws. Value received and charge to account of

"E. CUMMINGS.

"To Messrs. Chamberlain, Mathers & Co.

"New Albany, Ind."

"Accepted.

"Payable at First National Bank, New Albany, Ind.

"Chamberlain, Mathers & Co."

The petition alleges that these bills were duly presented for payment when due, not paid by the acceptor, protested for nonpayment, and defendant duly notified, and prays judgment against him as the drawer.

The defense set up in the answer is, that the defendant being indebted to the plaintiff for goods and merchandise, and the *said Chamberlain, Mathers & Co., being indebted to defendant a much larger amount, the plaintiff agrees to receive the acceptance of said Chamberlain, Mathers & Co. in payment of defendant's debt to him, and in pursuance of this agreement said bills of exchange were drawn by the defendant on said Chamberlain, Mathers & Co. in favor of the plaintiff for the purpose of transferring to him so much of defendant's account against said Chamberlain, Mathers & Co. and for no other purpose; that said bills of exchange were intended for said transfer of so much of said account, and for no other purpose.

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On the trial before the court and jury the plaintiff presented the two bills of exchange, and other evidence, showing that they were not paid by the acceptor, duly protested and the defendant notified.

The defendant offered to prove in defense that Chamberlain, Mathers & Co. were railroad contractors, and Cummings a subcontractor; that Cummings was owing the plaintiff a sum equal to the amount of these two bills, and Chamberlain, Mathers & Co., were owing him a much larger amount, and it was then agreed by and between all these parties that Cummings should assign to Kent so much of the indebtedness of Chamberlain, Mathers & Co. to him, as would pay his debt to Kent, and Kent agreed to receive it as payment, and in pursuance of this agreement the bills were drawn up and signed by the parties, so that when paid they would be vouchers in the hands of Chamberlain, Mathers & Co. But it was also agreed that the defendant was not to be liable on these bills as drawer. This testimony was excluded and the defendant excepted. This ruling is now assigned as error.

J. W. Herron and Healy, Brannan & Desmond, for the Plaintiff in Error.

Jordan & Bettman, for the Defendant in Error.

SMITH, J.

The instruments sued on are in form regular bills of exchange, and the question now presented is whether between the drawer of a bill of exchange and his immediate payee, parol testimony can be received to vary or discharge the contract the law implies by the drawing of the same. This implied contract is well under-

†The judgment in this case has been affirmed by the Supreme Court. See opinion 44 O. S., 92. The latter is cited in 44 O. S., 441, 449; 45 O. S., 333, 339, and 46 O. S.; 265, 267, 269.

stood. If the paper is not paid at maturity by the *acceptor, and the bill is protested and the drawer is notified, he agrees to pay it. The contract is not written out at length, but is none the less explicit and distinct. 165

The question raised in this record has been differently decided in this country. In an early case, Susquehanna Bridge Company v. Evans, 4 Washington C. C. R. 480; in numerous cases in the state of Pennsylvania, commencing with Hill v. Ely, 5 Serg. & Rawle, 363, down to Ross v. Espy, 66 Pennsylvania St. 481; also in Harrison v. McKinn. 18 Iowa, 485, and other decisions in that state; also in Johnson v. Martinas, 4 Halstead (New Jersey), 144, it has been held that as between the indorser and his endorsee (and the same rule holds between the drawer and his payee) of commercial paper the blank indorsement is only *prima facie* evidence of the contract the law presumes, and oral testimony will be received as between themselves to prove any contemporaneous contract made at that time different from what the law implies.

On the other hand we find that by the supreme court of the United States, and the supreme courts of Maine, Massachusetts, Connecticut, New York, Alabama, Georgia, Indiana, Minnesota, Virginia and some other states, it is held that this contract which the law implies is as conclusive and certain as if full, and parol evidence is not admissible to vary or contradict it. In 2 Wharton on Evidence, section 1059, it is called a contract at short hand.

Martin v. Cole, 104 United States, 30; Bigelow v. Colton, 13 Gray, 309; Davis' Receiver v. Randall, 115 Massachusetts, 547; Dale v. Gear, 38 Connecticut, 15; Bartlett v. Lee, 33 Georgia, 491; Day v. Thompson, 65 Alabama, 269: Bernard v. Goslin, 23 Minnesota, 192; 23 Maine, 392; 8 Greenleaf, 213; 8 Alabama, 247; 4 Georgia, 106; Wilson v. Black, 6 Blackford, 509; Holton v. McCormick, 45 Indiana, 411; Stock v. Beach, 74 Indiana, 571; Woodward, Baldwin & Co. v. Foster, 18 Grattan, 200; 3 New Hampshire, 132; 7 Smedes & M. 244; 9 Wisconsin, 516. This is also the rule in England. Hoar v. Graham, 3 Campbell, 57; Abrey v. Crux, 5 Com. P. (L. R.) 37; Bell v. Lord Ingestere, 12 Queen's Bench, 317.

The case of Johnson v. Martinas, 4 Halstead, 144, above cited as holding that parol testimony is admissible, has since *been disapproved in the same court in Chaddock v. Varners, 35 New Jersy (Law), 517; the early case in 4 Washington C. C. Reports has been frequently overruled by the United States supreme court. See Martin v. Cole, 104 United States supreme court, already cited, recently decided by that court, the opinion being by Mr. Justice Matthews and the authorities collected. In Stock v. Beach, 74 Indiana, 573, the Court says: 166

"When the legal import of a contract is clear and definite, the intention of the parties is for all substantial purposes as distinctly and as fully expressed as if they had written out in words what the law implies. It is immaterial how much or how little is expressed in words, if he law attaches to what is expressed a clear and definite import.

"Though the writing consists only of a signature as in the case of an indorsement in blank, yet where the law attaches to it a clear, unequivocal and definite import, the contract imported by it can no more be varied or contradicted by evidence of a contemporaneous parol agreement, than if the whole contract had been fully written out in words. The mischiefs of admitting parol evidence would be the same in such cases as if the terms implied by law had been expressed."

Bigelow on Bills, on page 170, note includes Ohio among the states that reject parol testimony to qualify a bank indorsement, citing Morris v. Faurot et al., 21 Ohio St., 155, in which this language is used by Judge McIlvaine:

"That parol testimony is inadmissible to contradict or vary the terms of written instruments, and that the contract of an indorser of a promissory note, whether the indorsement be in blank or otherwise, is within the meaning of that rule as general propositions of law are true may be admitted for the purposes of this case."

This, however, was a mere *dictum* not necessary for the decision of that case.

Parol testimony was permitted, but the indorsement was made upon a note when it was past due and had been paid for the makers.

This case was cited by counsel in the case of Dye v. Scott, 35 Ohio St. 194, where it was held that "Oral testimony is admissible to prove that the indorser, between himse'f and the indorsee *at the time of indorsing a note in blank, waived demand and notice. 167

In the opinion in that case, Judge Gilmore says generally, that as between the indorser and indorsee the blank indorsement is only *prima facie* evidence of the contract, and if there is any contemporaneous contract between the parties different from that implied by the law, it may be proven by oral testimony. This language

substantially adopts the rule in Pennsylvania and Iowa. But the language in the opinion is broader than the syllabus.

The evidence offered in that case, as stated in the opinion, was that at the time the note was indorsed, the indorser said: "I will guarantee this—will back it—they want a little time on it," and this was received as tending to show a waiver of demand and notice. This is all that is decided in this case, and to this extent only is it an authority, however much we may approve the reasoning.

To this extent Dye v. Scott is not inconsistent with the decisions of many of those states that ordinarily exclude parol testimony, but make an exception to prove waiver of demand and notice, though made contemporaneous with the indorsement. 1 Parsons on Notes and Bills; 4 Pick. 525; 20 Maine, 98; 8 Greenleaf, 213; Edwards on Notes and Bills, section 861; 2 Daniels on Negotiable Instruments, section 1093.

It is suggested in the note to the 1059th section of Wharton on Evidence, that the exception which permits parol testimony to be received to prove waiver of demand and notice does not rest upon very satisfactory reasoning. Nevertheless the exception has been made in many cases.

We do not think the supreme court of Ohio has decided this precise question. A bill of exchange is emphatically a commercial instrument, more so even than a promissory note.

As one of the great commercial states of the Union, it is desirable that our decisions on commercial questions conform to the decisions of our sister states, also in harmony with the decisions of the supreme court of the United States. As the great weight of authority sustains the ruling of the court of common pleas, we think the judgment ought to be affirmed.

168 *This decision does not touch that class of cases where a stranger to the instrument puts his name in blank on the back of it. The effect of such indorsement is just what the parties agree at the time, and parol testimony is received to show what the agreement is. Nor does it prevent a party to the instrument from showing a failure of consideration, fraud, or that the indorsement was without consideration, or that the relation of principal and agent existed between the indorser and indorsee.

These exceptions are noted even in those cases where the general rule is stringently enforced. Dale v. Gear, 38 Connecticut, 18; Stock v. Beach, 74 Indiana, 575; Weston v. Chamberlain, 7 Cushing, 504.

None of these exceptions, however, go to the extent of permitting the drawer of a bill of exchange, regularly drawn, to show by oral testimony that he was not liable as drawer.

Judgment affirmed.

SERVICE ON FOREIGN CORPORATIONS.

[Hamilton District Court, April Term, 1883.]

Smith, Moore and Avery, JJ.

MOHR DISTILLING CO. v. FIREMEN'S INSURANCE CO.

In an action upon a parol contract an insurance company of one state may be served with process addressed to its home office, deposited in the postoffice in another state, where the contract was executed, and by the laws of which consent to such mode of service is made a condition precedent to the company's doing business therein, though such consent be defectively executed.

ERROR to the Superior Court of Cincinnati.

The Mohr & Mohr Distilling Company, a corporation existing under the laws of Indiana, on the 19th day of May, 1882, filed its petition in the superior court against the Firemen's Insurance Company, a corporation existing by the laws of Maryland, alleging that on or about the 10th day of September, 1881, the said defendant, by its duly authorized agent, H. C. Schell, at Cincinnati, O., in consideration of a premium to be paid, agreed to insure and did insure it in the sum of $2,500, for one

*year, against loss by fire, on a certain distillery and stock situate 169
in the state of Indiana, and did then and there agree to issue and deliver within a reasonable time thereafter a policy of insurance of the usual form; that afterward and within the year, viz.: on the 24th day of September, 1881, the said insured property was destroyed by fire; that the plaintiff had made due proof of loss, and demanded a policy; that the defendant refused to deliver its policy or to acknowledge and pay the loss, and thereupon the plaintiff prayed for a judgment for the full amount of the policy and interest.

Upon the filing of this petition, a summons was issued, and the sheriff indorsed that he had served the said insurance company, May 25, 1882, by leaving a true copy of this writ in the usual business office of said company, and personally with H. C. Schell, its agent.

Also, that he had served the said insurance company on May 27, 1882, with a true copy of this writ, by mailing the same, postage prepaid, addressed to said company, at the place of its principal office in Baltimore, Md.

On the 23d of June, 1882, the defendant appearing for that purpose only, moved to set aside the sheriff's return on the ground that Schell had ceased to be the agent of the insurance company when summons was served upon him, and filed with said motion Schell's affidavit, also a certain agreement filed with the insurance department of the state, authorizing acknowledgment of the service of process by agents in Ohio. The plaintiff also filed another affidavit of Schell, also certain other papers from the insurance department of the state, tending to show that this insurance company, when the alleged contract of insurance was made, had complied in all respects with the laws of this state relating to fire insurance companies incorporated by other states of the United States.

The superior court granted this motion, and ordered the said action to be dismissed.

The plaintiff excepted and filed a bill of exceptions, containing these affidavits and other evidence upon which the court had acted.

To reverse this judgment of the superior court, this petition in error is filed in this court.

*The evidence in this case establishes that this insurance com- 170
pany is a corporation created by the laws of Maryland; that on the 14th of February, 1881, it had complied with all the laws of this state regulating foreign insurance companies, and appointed H. C. Schell its agent in Cincinnati; and afterward, on the 12th of November, the same year, it revoked said agency, and since that period has had no agent in this city or state, and that in September, 1881, while Schell was such agent aforesaid he made the contract of insurance sued on. It is also in evidence that after Schell's agency was revoked, he continued to act for said insurance company in indorsing consent on policies for removing property insured, receiving applications for cancelling policies and refunding the unearned premiums.

As required by one of the provisions to enable it to do business in Ohio, the said insurance company filed in the insurance department the following instrument authorizing the acknowledgment of service:

"Know all men by these presents: That the Firemen's Insurance Company, a fire insurance company, organized under the laws of Maryland, and which has its principal office at Baltimore, in the state of

Maryland, does hereby authorize any agent of said company in the state of Ohio to acknowledge service of process for and in behalf of said company in said state, and consents that service of process, *mesne* or final, upon any such agent shall be taken and held to be valid as if the same was served upon said company, according to the laws of the state of Ohio or of any other state or country, and waives all claim or right of error by reason of any such acknowledgment of service, and consents that suit may be brought upon any policy issued by it in the state of Ohio or upon property in the state of Ohio in the county where the property insured was situated, or where the same was injured, and that service of process made in any such action, either before or after said company had ceased to do business in said state of Ohio by the sheriff of said county by mailing a copy thereof addressed, postage prepaid, to the company at Baltimore, in the state of Maryland, at least thirty days prior to taking judgment in such suit, shall be as valid as if
171 personally made upon the said *Fireman's Insurance Company, according to the laws of the state of Ohio or any other state or county.

"Witness our hands and seal of the company, this 5th day of February, 1881.

[SEAL] "JAMES M. ANDERSON, President.
[SEAL] "R. EMORY WARFIELD, Secretary."

SMITH, J.

It will be observed from the return of the sheriff that a double service of the summons was attempted; one by serving it on the supposed agent. This was unavailing, because at the time the agency had been revoked. The other was by mailing a copy addressed, postage prepaid, to the company at Baltimore, Md., the place of its principal office.

This latter mode is provided for in section 3657 of the Revised Statutes, and claimed to be covered by the instrument authorizing the acknowledgment of service filed by the defendant in the Insurance Department.

It is claimed by the defendant that there can be no valid service by mail as provided by that statute, and that the legislature of the state cannot confer jurisdiction on her courts to extend their process beyond their own territorial limits. Bischoff v. Wethered, 9 Wallace, 812; D'Arcy v. Ketchum et al., 11 Howard, 161; Schebsby v. Westernholtz, 6 (L. R.) Q B. 155, are relied upon in support of that claim. These cases do not reach the point in controversy. In Bischoff v. Wethered, the original action was brought in the C. C. P. in England, and defendant served with summons in Baltimore; and the court held that whatever effect it might have in England by virtue of her statute law, it had no force here.

D'Arcy v. Ketchum et al., 11 Howard, 165, was an action upon a judgment recovered in New York, under a statute, that if one of two partners was served with process, and the other not served, the judgment should bind partnership property. Suit was brought against the other partner in Louisiana on this judgment, and it was held there was no service. In Schebsby v. Westernholtz, 6 (L. R.) Q. B. 155, the court refused to enforce a foreign judgment recovered in France; but the court intimate that if the defendant contracted the obligation in a foreign

*country, and left before suit was instituted, he would be bound by the laws of that country. To this extent it favors the views of the plaintiff; and numerous cases show that the state in determining her own policy, and how far she may permit corporations chartered by other states and countries to locate themselves within her territory for business, and to what extent her own citizens and others doing business ought to be protected, may annex conditions to such permit. The Firemen's Insurance Company not only had sent its agent into this state, and through him entered into the obligation sued on, but had consented that service be thus made. There was the implied consent by coming into the state and doing business, knowing that the state required the process to be thus served after the agency had been removed. It will not be presumed that the defendant intended to violate the laws of the state. 172

"A corporation cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be subscribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it do business there it will be presumed to have assented and will be bound accordingly." Railroad Company v. Harris, 12 Wallace, 65.

See also Lafayette Insurance Company v. French, 18 Howard, 405; *Ex parte* Schollenberger, 96 United States, 377; Doyle v. Continental Insurance Company, 94 United States, 535; The Mohr Distillery Company v. Insurance Company, United States Circuit Court, 7 Bulletin, 355; National Condensed Milk Company v. Broudebough, 40 New Jersey (Law), 112; Newsby v. The Colt Arms Company, 7 Queen's Bench (L. R.), 293.

There was also the express assent in this case signified by the agreement voluntarily entered into by the defendant and placed on file in the Insurance Department, that suit might be brought upon the policy in the county where the property was situate or the same was insured, and that service of process might be made in any such action after the company had ceased to do business in the state by mailing as was done in this case.

In Brownwell v. Troy & Boston Railroad Company, 18 Blatchford, 243, the statute of Vermont required that a foreign *corporation doing business in that state should appoint an agent upon whom service of process might be made, and it was held that service of process on such agent was good. 173

In Ehrman v. Teutonia Insurance Company, 1 McCreary, 123, under a statute of Arkansas similar in terms in many respects to the statute of Pennsylvania under which the Schollenberger case was decided, requiring that legal process affecting the company served on the auditor of the state should be an effectual service, it was held that a service thus made upon the auditor of the state was good, and a plea in abatement was overruled.

In Ben Franklin Insurance Company v. Gillett, 54 Maryland, 212, very similar to the case at bar, where there the statute required that upon a contract made in the state, through an agent located in the state, and the agent had been removed before suit was brought, process might be served upon the insurance commissioner of the state for the defendant, the service was held good. If it be valid to serve process upon an officer of the state for a foreign defendant, there is far more reason in giving it effect, where the notice is sent by mail to the home office, post-

age prepaid, and making it almost absolutely certain that notice will be in fact given, with ample time to prepare a defense. And it is a reasonable condition prescribed by the policy of the state, that when a corporation is permitted to locate a place of business in this state for its own profit, and makes contracts and incurs obligations, it shall submit to the jurisdiction of this state to have them enforced. Otherwise, as was said in Railroad Company v. Harris, 12 Wallace, 84, "in many cases the cost of the remedy would largely exceed the value of its fruits." Harte v. Lycoming Insurance Company, 26 Ohio St., 594, seems to imply that where the statute authorizes a service by mail against a foreign corporation upon contracts made in this state, after the agency had been withdrawn, such service is good. The court dismissed the service in that case because the plaintiff was not a resident which the statute then required. That is omitted in the present statute.

But it is urged by the defendant that the consent, filed with the insurance department, only authorized service by mail when the action is
174 brought upon a policy. In this case there was no *policy. It is true this consent has the word "policy," but there is no such word in the statute. The language in the statute is: "Consenting that suit may be brought against it in the county where the property insured was situate or where the same was insured."

The petition shows that the insurance was effected in Cincinnati by Schell, the agent, and, although it was verbal, such a contract is valid. Bailie v. The St. Joseph Fire & Marine Insurance Company, 73 Missouri, 371; Kelly v. Dayton Insurance Company, 24 Ohio St., 345.

And the instrument itself must be construed with reference to the statute. It is hardly to be expected that suits concerning insurance should be limited to those only where there was a policy, or that the defendant by unjustly refusing to issue a policy after it had agreed to insure, could thereby also exempt itself from process, because there was no policy. There are many analogous decisions, see: The United States v. Schooner Little Charles, by Judge Marshall, 1 Brockenbrough, 380; Secrest et al. v. Barbee & Royston, 17 Ohio St., 431; Helf v. Whittier, 31 Ohio St., 475, in all which cases it was held that an undertaking or contract must be construed in connection with the statutes relating to the same matter.

Again, it is urged by the defendants that this section 3657 merely contains a consent for being served, and how the corporation may be served, but there is no authority conferred upon the sheriff to make the service. This authority may be implied. This section says what the service shall be, and particularly declares how the return shall be made by the sheriff. It is not likely that the legislature would be so minute in defining how an act may be done, unless it intended to authorize the act itself. By defining how the sheriff shall make his return of service, it implies that it authorizes the service itself.

No such difficulty seems to have occurred to the court in Harte v. Lycoming Insurance Company, 26 Ohio St., 594; Ehrman v. Teutonia Insurance Company, 1 McCreary, 123: Ben Franklin Insurance Company v. Gillett, 24 Md. 212.

The last named case is very much like the present, and I cite it be-
175 cause it is a recent adjudication by the supreme court of *Maryland, where the defendant in this case has a corporate existence.

The Ben Franklin Insurance Company, chartered by the state of Pennsylvania, had an agent in Baltimore, Md., who insured for a citizen of Virginia property in the state of Virginia. The statute of Maryland contained similar provisions to our own, but provided service should be made on the insurance commissioner if the company ceased to maintain an agency in the state. The agency was removed and process was served on the commissioner, and the court held it good service in that case.

On the whole case, therefore, whether we consider the reasonableness of such a statutory provision, or adjudicated cases upon similar statutes in other states, we think the motion to set aside the service should have been overruled.

[ ]The judgment of the superior court is reversed, and the case remanded with instructions to overrule the said motion and for further proceedings in said court.

Moulton, Johnson & Levy, for Plaintiff in Error.

King, Thompson & Maxwell, Contra.

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*MISREPRESENTATION IN SALE. 231

[Hamilton District Court, April Term, 1883.]

Smith, Moore and Avery, JJ.

THOMAS FLOYD ET AL., ADMRS., v. EDLEY PAUL.

1. Whether the representations made by the vendor of personal property are merely expressions of opinion or the affirmation of a fact to be relied upon, is a matter to be left to the jury. But where the evidence shows that the consideration was worthless, the jury is justified in finding for the plaintiff.
2. In actions *ex delicto*, it is in the discretion of the jury to allow interest, and it is error for the court to charge the jury that the plaintiff is entitled to it as a matter of law.

ERROR to the Superior Court of Cincinnati.

MOORE, J.

Paul, the defendant in error, the plaintiff below, alleges that in the year 1875, Jeremiah C. Tullis purchased of him a large lot of land, situated in the state of Tennessee, for which, in part payment, Tullis gave him four bonds issued by the states of Tamaulipas and San Luis Potosi, Mexico, of the face value of $4,000. Paul further alleges that Tullis represented to him that the bonds were worth the sum of sixty-six and two-thirds cents on the dollar, and that it was afterward discovered that the bonds were worthless.

The administrators of Tullis answer and deny that the bonds were represented to be worth the sum of sixty-six and two-thirds cents on the dollar, or of any particular value, but that Paul took them for what they were worth; that Paul and Tullis made an exchange of certain land, and the bonds with other chattels were considered as an additional consideration. The issue presented by the pleadings were submitted to a jury, and it appears to have been a question with the jury whether in making the exchange of property, Paul relied upon the representations of Tullis as to the value of the bonds, and knowing at the time the bonds were worthless, Tullis, by his conduct and representations intended to deceive Paul.

232 *The jury apparently found that there was an intention to deceive and returned a verdict for the sum of $2,666.66 as claimed by the plaintiff.

Coming into court with their verdict, the jury informed the court that they had not considered the question of interest, that nothing had been said about it in the charge of the court and no reference made to it in the amended petition filed by the plaintiff, whereupon the court directed the jury to retire and return a verdict with interest at the rate of six per cent. per annum from January 1, 1876, up to the time of trial, which instruction the jury obeyed by returning a verdict for the sum of $3,624.67. Error is assigned in the action of the court in overruling a motion for a new trial on the ground that the verdict was against the law and evidence, and because of the erroneous instruction of the court in directing an assessment of interest on the verdict in the manner stated.

The defendant below filed a petition in error in this court asking a reversal of the judgment of the court below.

The evidence displayed by the record shows substantially that Paul was a resident of the state of Tennessee, that he came to this city in the year 1875 for the purpose of disposing of a lot of lands owned by him in the state of Tennessee. Almost immediately Paul met Jeremiah C. Tullis at his office on Third street. At that time Tullis claimed to own a large amount of lands in different parts of the United States, and he had in his possession about one thousand conveyances describing the land in as many parcels. It is admitted that the conveyances were signed, sealed and regularly acknowledged by Robinson and wife, but no grantee was named.

The negotiations between Tullis and Paul continued about three or four weeks, and finally resulted in the transaction complained of. The testimony of two witnesses, who claimed they were in the office of Tullis when the negotiations between Tullis and Paul were completed, is to the effect that Tullis represented to Paul that the four Mexican bonds to be given as part consideration in the trade, were worth sixty-six and two-thirds cents on the dollar. Two other witnesses, apparently having some
233 interest in the controversy, being heirs-at-law of the estate *of Tullis, claim that they were present during the negotiations, and assert that Tullis did not represent the bonds as having the value stated, but that Tullis stated to Paul that he did not know that they were worth anything; that Paul and Tullis were closely associated during Paul's stay in the city; that they met several times in the office of Tullis and at Tullis' farm in the country, and that when the trade was consummated Tullis, referring to a parcel of deeds with the bonds in question before them, said: "I will take your lands and you take these papers for what they are worth, or we will trade a pig in a poke."

The defendants claim that the representations or statements as to the value of the bonds, if representations were made, were mere assertions of opinion; that the statements of Tullis were not intended by him as statements of fact, that he did not intend that Paul should rely upon a warranty, for he had full knowledge of all the circumstances; and that statements of value are not a thing upon which an action of deceit can be founded.

The rule governing cases of this kind may be stated in the following words: "It is considered that a mere false affirmation, though knowingly and intentionally made, is not enough; the purchaser should show that some deceit was practiced for the purpose of putting him off his guard,

* * * but the proper question is, should it have that effect." Bigelow on Frauds, page 18.

One of the questions submitted to the jury was whether the statements and actions of Tullis had a tendency to put Paul off his guard, and there was testimony to the effect that after the trade Paul went into the office of Tullis, and said to him: "At what amount did you put these bonds in?" Tullis told him "sixty-six and two-thirds cents." Then Paul replied, "Didn't you know they were worthless?" Whereupon Tullis shrugged his shoulders, and said: "It is all right, and I will make it all right." Paul said: "If you don't arrange the matter satisfactorily I will commence suit for damages." Tullis said, "It will be all right; there is no use commencing suit."

The rule may be safely stated in another form in the following words: A mere assertion of value by the seller, when no warranty is intended, is no ground of relief in a purchaser, because *the assertion is a matter 234
of opinion and which does not imply knowledge and in which men differ. Every person reposes at his peril in the opinion of others when he has an opportunity of exercising his own judgment, and where the purchaser expressly relies upon the knowledge of the seller as to quality and value, the seller is bound to act honorably. 8 Allen, 207; 2 Sanders, 42; 35 Georgia, 193; 11 Michigan, 173; 10 Indiana, 10; 2 Parsons, 27.

Therefore, whether the representation as to value was merely an expression of opinion, or the affirmation of a fact to be relied upon, is a matter to be left to the decision of the jury.

But beyond this the record shows the bonds were worthless. The jury, therefore, were justified in their finding.

It is urged that the court erred in instructing the jury to return interest upon the verdict as it at first returned, increasing the amount from $2,666.66 (evidently the represented value of the bonds), to $3,624.67, the difference being the interest at the rate of six per cent. per annum on the first verdict, from January 1, 1876, to time of trial.

The question is whether the plaintiff was entitled as a matter of law to interest upon the amount of the verdict, or whether it was a matter to be left to the sound judgment of the jury in estimating damages. We take the following from Willard on Remedies for Torts, page 506:

"It is held that in actions for tort the jury may, in their discretion, calculate interest on the damages actually sustained and add it to their verdict. But when in an action for unliquidated damages, interest may be considered by the jury it is not recoverable as such in addition to the sum found due, but must enter into and form part of the estimated amount."

The case of Block v. Camden, 45 Barbour, 41, gives the following view of the decisions upon the subject in the state of New York: "It has for long time been a controverted question whether in actions of tort interest could be given as a matter of right, in addition to the damages." In that class of torts, where there was no property taken or converted and where the question was one of damages purely unliquidated, the rule has been to leave the question to the jury, not only as to the amount of damages, *but as to the question of interest. Walruth v. Redfield, 235
18 New York Reports, 462; Richmond v. Brousa, 5 Denio 55. In Wehrle v. Hairland, 42 Howard Pr. Rep. 399 it was held that in actions *ex delicto* it is in the discretion of the jury to allow interest or not, and it is error for the court to charge the jury that the plaintiff is entitled to it

as a matter of law. See 40 Vermont, page 410. We are of opinion the court erred in the instruction in that respect, and unless a remittitur is filed for the difference between the first verdict and the second we must order a reversal of judgment.

George Hoadly, Alexander Long, John A. Shank and C. W. Gerard, for Plaintiffs in Error.

C. W. Baker, Contra.

PUBLIC CONTRACTS—BIDS.

[Hamilton District Court, July, 1883.]

Smith, Moore and Avery, JJ.

†CITY OF CINCINNATI v. ANCHOR WHITE LEAD CO. ET AL.

SAME v. JOSEPH WEWELL ET AL.

SAME v. EGGLESTON, WILSON & CO.

1. The provisions of section 2303 of the Revised Statutes, that where a municipal corporation makes an improvement it shall advertise for bids for doing the work and furnishing the material, are peremptory. A failure to substantially comply with these provisions is "a substantial defect in the construction of said improvement" within the meaning of section 2289 of the Revised Statutes.
2. That the board of city commissioners of Cincinnati, under an ordinance duly passed, advertised under section 2303 of the Revised Statutes for proposals to construct a sewer as required by said ordinance. In the advertisement it was stated that "the sides of the trenches shall be supported by suitable sheeting, planking and shoring wherever necessary. All sheeting, planking or shoring which may be left in by direction of the engineer to secure pipes, buildings or other structures shall be paid for at the rate of not more than one dollar per lineal foot of sewer, including the braces and stringers required." It was known to the officers and agents of the city that some such sheeting would be necessary to be left in. After the bids were received and contract entered into, the commissioners agreed with the contractor to pay him one dollar per foot for all sheeting left in by order of the engineer. A large quantity was left in, which at the price agreed upon amounted to one-eighth of the cost of the entire work and was included in the assessment.

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Held: That the omission to submit to competitive bidding the cost of this board sheeting, as a part of the cost of the material to be furnished, was a substantial defect in the construction of said improvement, and said assessment was invalid.

Held, also: That under section 2289 of the Revised Statutes, before it was amended March 9, 1883, notwithstanding an expense had been incurred, some of which was properly chargeable against the defendants, the court could not render judgment for such amount in this action.

ERROR to the Superior Court of Cincinnati.

The three cases depend on the same question. The actions below were brought by the city of Cincinnati for the use of Kirchner & Ashman, contractors, against sundry persons, as defendants, to recover an assessment for $2 per front foot upon the property abutting thereon for the construction of sewers in Sewerage Division No. 8. The answers set up numerous objections to the validity of the assessment. One defense is, that the item for board sheeting included in the contract, amounting

† This case was reversed by the Supreme Court. See opinion 44 O. S., 243.

in all to $10,173.34, was not submitted to competitive bidding, but arbitrarily fixed by the city officers. On trial the superior court found that, by reason of the cost of the board sheeting having been included in said assessment, that said assessment was invalid, and rendered judgment for the defendants. A motion for a new trial was made and overruled, and a bill of exceptions taken containing all the evidence, upon which the cases are submitted to this court.

Drausin Wulsin, for Plaintiff in Error.

J. H. Perkins, Paxton & Warrington, Goss & Peck, Taft & Lloyd, Huston & Holmes, A. J. Pruden, A. A. Clerke, Shay & Kary, Sayler & Sayler, Mannix & Cosgrove and Ramsey & Matthews, for Defendants in Error.

SMITH, J.

By section 2289 of the Revised Statutes, original section *550 of the Municipal Code, it is provided: "That in every such action 237
(viz.: to enforce the lien for any assessment) the court shall disregard any technical irregularity or defect, whether in the proceedings of the board of improvement or of the council, or of any officer of the corporation, or in the plans or estimates, and the acceptance of the work by the council on the certificate of the engineer, shall be presumptive evidence that the contract has been complied with, but a substantial defect in the construction of the improvement shall be a complete defense."

This section was in force when the resolution to improve was passed, the contract made, assessment ordered, and case tried by the superior court.

By an agreed statement of facts, it appears that prior to November 20, 1879, the city council had duly declared it necessary to provide a system of sewerage and drainage, and the city had been divided into sewerage districts, including Division No. 8; that a plan for sewering Division No. 8 had been adopted and approved by the board of city commissioners, and placed on file in their office, with a letter of the engineer explanatory of the same, and the said board of city commissioners had recommended to the city council a resolution that it was necessary to improve certain streets in said division, by constructing sewers and drains, according to the plan of said Division No. 8 on file, the expense to be assessed per front foot on the property abutting thereon, said assesements to be certified to the contractor in payment for the work. The resolution was regularly adopted, and in accordance with said resolution an ordinance to improve was duly passed October 3, 1879.

It also appears that afterwards advertisements for proposals to furnish work and materials were made, that the specifications were bound together with printed blanks for proposals containing a statement of the kinds of work and materials needed; the estimated quantities of each, made by the engineer, on the basis of which the contractor should bid, also a blank form of the contract; that the said advertisement asked for proposals according to the plans and specifications on file, and required the contractor bid on the printed forms above mentioned, which had been furnished by the city commissioners; that the proposals *were on 238
these printed forms, and on the items therein set out, and said statement contained no item for board sheeting, or planking or shoring; no bid for such was made nor asked for by the advertisement, though it was then known to the officers and agents of the city that some such sheeting

would be necessary to be left in, but the specifications on file in the office of the board of city commissioners, and referred to in the advertisement, contained this clause:

"The sides of the trenches shall be supported by suitable sheeting, planking and shoring whenever necessary. All sheeting, planking or shoring which may be left in by direction of the engineer, to secure pipes, buildings or other structures, shall be paid for at the rate of not more than one dollar per lineal foot of sewer, including the braces and stringers required."

There was no invitation or request for bidders to bid upon the board sheeting necessary, nor was there any bid in fact made upon its cost in any of the bids submitted, but a large amount of board sheeting was left in said trenches by direction of the engineer, and its price was fixed by the board of city commissioners after the contract with Kirchner & Ashman had been entered into at one dollar per lineal foot; that 10,173.34 lineal feet of said sheeting was left in by direction of the engineer, for which the contractors were allowed at the rate of one dollar per foot, $10,173.34, which amount was included in the assessment sued on, that the whole cost of the work, including the sheeting, was $79,468.84, including also in said assessment $1,872.78 for inspectors, and $145 for sundry advertising.

In the letter of the engineer explanatory of the general plan of sewerage, Division No. 8, the total length of the proposed sewerage was estimated at five miles and four-tenths, and total cost about $80,000.

It will be seen from the foregoing statement, that the price of the board sheeting ordered by the engineer, and entering into the assessment was $10,173.34, about one-eighth of the entire assessment. Under this contract, if the engineer had so ordered, there might have been 5 4-10 miles (or some 28,000 feet) of board sheeting left in at the price of one dollar ($1) per foot, fixed by the commissioners, for which no bid was
239 given or *asked. This was one of the possibilities of the contract as let. The agreed statement finds that it was known by the officers of the city that some board sheeting was to be left in. The specifications called the attention of the contractors to the fact that so much of the sheeting must be left in as the engineer required, and for sheeting thus furnished they made no bid.

The Revised Statutes, section 2303, requires that when the estimated cost of the work exceeds $5,000, the city shall advertise four weeks for bids in two newspapers, and if the work bid for embraces labor and materials they shall be separately stated with the prices thereof. The object of this requirement is to secure competition. In Uppington v. Oviatt, Treasurer, 24 Ohio St., 232, it was held that an omission to advertise for bids for the construction of a proposed improvement for four weeks, when the statute required it, was a substantial defect. The judge, giving the opinion of the court, says on page 245: "This provision was evidently intended for the protection of the taxpayer, and must be regarded as peremptory. It was designed to secure competition among contractors and prevent favoritism and frauds; not having been complied with the defect is substantial. It goes to the legality of the contract and of the subsequent assessment."

Similar language has been used by the courts of other states in giving effect to similar statutory provisions.

In Brady v. The Mayor of New York, 20 New York, 312, where the work included a certain quantity of rock excavation, for which no bid was received, Denio, J., in his opinion said:

"The act requiring that work to be performed for the city should be submitted to competition was based upon motives of public economy, and originated, perhaps, in some degree of distrust of the officers to whom the duty of making contracts was committed. If executed according to its intention it will preclude favoritism and jobbing, and such was its obvious purpose."

This language was repeated in the matter of Mahan, 20 Hun., 301, which case was affirmed by the court of appeals, and reported in 81 New York, 621. The same doctrine was again announced in the matter of the Manhattan Savings Institute, 82 *New York, 142, and again in the matter of Merriam, 84 New York, 596, these preceding cases were 240
reviewed and reaffirmed, and it was there held that the assessment for constructing a sewer was invalid, because, in the contract for the work, the items of rock excavation, foundation plank and sewer pipe were not submitted to competition. So rigid has been the rule, that every important item in a contemplated public work should be included in the bids. There was no intrinsic difficulty in requiring bids for board sheeting. Contractors must be supposed to know something of the nature of the ground where the sewer was to be located. Its dimensions and depth were known and the price of lumber could be ascertained. The elements for a bid were there. Leaving the quantity and price of the board sheeting to be determined, after the contract was entered into, held out a temptation to favoritism the statute is intended to avoid.

The same doctrine has been rigorously upheld in Wisconsin. See Kneel v. The City of Milwaukee, 18 Wisconsin, 411; Massing v. Brown, Treasurer, 37 Wisconsin, 645; Wells v. Burnham, 20 Wisconsin, 112. In the last named case it was stated that an omission the law had required, that tended to prevent competition in bidding, was a substantial omission, and contracts made in violation of it rightly held void.

This matter was somewhat considered in Stone v. Viele, 38 Ohio St., 814, but the opinion throws no light upon this question, because the court in that case purposely abstained from laying down any rule to determine what is a substantial defect within the meaning of the section 2289 of the statute. It seems to us, however, not only on the authority of the cases already cited, but also from the language of the statute and the object of the legislature in requiring competition for furnishing materials for public works, that the statute was violated in making this contract; that this was a substantial defect in the construction of said improvement, and a good defense.

It is urged, however, by the plaintiff, that inasmuch as the cost of the board sheeting can be separated from the cost of the whole work, the assessment ought to be good for the residue and the judgment should be so modified and so rendered.

*As section 550 originally stood in the Municipal Code, this could, perhaps, be done, as it was done in Jaeger v. Burr, 36 O. S. 241
165; Griswold v. Pelton, 34 O. S. 482, and other cases.

That section originally provided that "if the assessment was not properly made, the court might, on satisfactory proof that expense had been incurred which was a proper charge against such defendants, or the

lot or parcel in question, render a judgment properly chargeable against such defendants or on such lot of land."

But this portion of the section I have just read was repealed in 1878, and ceased to be the law of Ohio till March 9, 1883, a few days after this case was decided by the superior court, when the original section was substantially reenacted and section 2289, as it now appears in the Revised Statutes, repealed. The plaintiffs are, therefore, properly excluded from the benefits of this curative statute in this case.

Whether, under section 2290 of the Revised Statutes, the city council can grant relief, by ordering a reassessment, we give no opinion. We have not thought it necessary to consider the other questions argued.

Judgment in all the cases affirmed.

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301 ***DEDICATION OF STREETS.**

[Hamilton District Court, July 31, 1883.]

Smith, Moore and Avery, JJ.

HENRY HUELSMAN v. MILLS & KLINE.

The purchaser of a lot bounded on an unopened street is "entitled to a right of way over it, if it is of the lands of his vendor, to its full extent and dimensions only, until it reaches some other street or public way. To this extent will the vendor be held by the implied covenant of his deed, and no further."

APPEAL from the Court of Common Pleas.

The petition alleges in substance that the plaintiff is the owner of lot No. 93, in Mills & Kline's subdivision, on the southeast corner of Sherman and Dalton avenues; that he has erected thereon a three-story brick building, fronting on both streets, and to the rear of which he has access only by Dalton avenue, and that defendants are obstructing this avenue, tearing up his sidewalk, and propose to cut off all access to the rear of this building by way of Dalton avenue.

The answer denies that Dalton avenue is a street or was ever dedicated as a street, and asserts that the land in fact belongs to the defendants, and that they are about to improve, and have the right to improve it as their own property. The action came on for trial in this court upon the evidence, and it appears that some time prior to 1870, Mills & Kline were the owners of a tract of land bounded on the north by Poplar, on the south by Liberty street, on the east by Western avenue, and extending westwardly between Poplar and Liberty streets, some distance toward McLean avenue, and platted it at 150 or more lots. In this subdivision they had laid out Sherman avenue parallel to Liberty street, extending from Western avenue westwardly to the western boundary of the sub-
302 division, and laid out the lots, *some abutting on Sherman avenue, some on Liberty street, and some on Poplar street.

In April, 1870, they had a public sale, and sold a few lots near Western avenue. Afterward for the 16th of May, 1870, they advertised another sale as follows:

"By Hemmelgarn & Co., 448 Main street, Real Estate Brokers and Auctioneers. Sixty splendid building lots, fronting on Poplar, Liberty

and Sherman streets, between Western avenue and Dalton avenue, for sale or lease, with the privilege of purchase at auction.

"On Monday afternoon, May 16th, at 2 o'clock, will be sold or leased, with the privilege of purchase at auction, on the premises, 60 beautiful building lots fronting on Liberty, Sherman and Poplar streets, between Western avenue and Dalton avenue, ranging as follows: Each lot is 25 feet front, and 94 to 99 feet in depth. These lots are but two squares from Freeman street. The title is perfect, sale positive, terms as follows: If sold, one-third cash, balance in one and two years, with six per cent. interest. If leased, $100 cash on each lot, and the remainder in five years, with the privilege of purchase at any time, by paying one-third cash, and the balance in one and two years, making seven years for the lot, with interest at six per cent., payable quarterly. Plats can be procured at the offices of George H. Shotwell & Co. and Hemmelgarn & Co. Refreshments will be furnished on the grounds."

In these plats referred to, Dalton avenue is an avenue running north and south, at right angles to Sherman avenue, and connecting apparently with Dalton avenue in the subdivision laid out by Starbuck on the north of the plat, and Dalton avenue in the subdivision laid out by Carson & Bell, south of this plat. It is apparently a continuous street running through this subdivision. This plat, showing Dalton avenue thus laid out, was extensively distributed at the May sale. On the 16th of May, 1870, as advertised, there was a public sale, at which a good many lots were sold, and one or two were sold fronting on Dalton avenue. The next public sale was held on the 20th day of June, 1870. The advertisement for this sale, like that for the May sale, advertised lots between Western avenue and Dalton avenue, and gave notice that plats would be found at the office *of Hemmelgarn & Co., auctioneers. At this sale, also, plats were distributed, showing Dalton avenue, as I have described it. 303
But between the sale of May 16th and June the 20th there had been a more accurate survey of Dalton avenue, and a different plat was used at the June sale.

In the plat exhibited at the May sale, Dalton avenue as i d out in the subdivision of Mills & Kline, did not exactly coincide with Dalton avenue in the subdivisions north and south of it, and an engineer was employed to run the line accurately. The effect of this was to cut off a small strip from lot 93, making it somewhat narrower than the other lots, and these new plats, showing Dalton avenue and the width of lot 93 with great exactness were the plats distributed and used at the June sale.

The June sale was very similar to the May sale. The plats were distributed, lots were sold, and lot 93, on the southeast corner of Dalton avenue and Sherman avenue, was bid off by S. W. Bard. He also bought two other lots on Sherman avenue, quite near, on the same day. This lot was announced by the auctioneer and sold as a corner lot, and bid off at $50.75 per front foot; Bard's other lots on Sherman avenue were bought at $48 per front foot.

As these successive sales were made by Mills & Kline from the plat as exhibited on the ground, certain portions of this plat were cut off and entered of record. There were Mills & Kline's first subdivision, Mills & Kline's second subdivision and Mills & Kline's third and fourth subdivisions. The third subdivision included the lots sold at the June sale. But in the recorded plat the subdivision ended at the east side of Dalton avenue and Dalton avenue does not appear at all.

These lots were sold with privilege of leasing, the purchaser to pay one hundred dollars in cash and take a lease for five years, with the privilege of purchase at the end of five years, and then to pay one-third cash, the balance to be secured by mortgage. Most of those purchasers received leases on these terms. When Mr. Bard took a lease of this lot, Mr. Kline, who was his own scrivener and drew up the lease, made this
304 description of lot 93: "Lot 93 being the contemplated corner of *Dalton and Sherman avenues." That was the lease which was delivered to Mr. Bard and by him placed on record. The other copy of the lease retained by Mills & Kline was a little different, though perhaps not in legal effect, viz.: "Lot 93 being the southeast corner of Sherman avenue, and contemplated Dalton avenue." Mr. Bard having received the lease conveyed it to a man named Myers, and Myers conveyed with the privilege of purchase to Huelsman, the plaintiff.

The remaining facts are stated in the opinion.

Healy, Brannan & Desmond, for Plaintiff.

Stallo & Kittredge, Cowan & Ferris, and Wm. Norwood, for Defendants.

SMITH, J.

It appears in evidence that after Huelsman had become the purchaser of this lease, he received a deed from the defendants pursuant to this lease and subject to its terms, and he also bought the adjoining lot 94, so that he became the owner of two lots, the corner lot 93 and the adjoining lot 94. Such is the documentary evidence. There is parol evidence which is somewhat contradictory. Mr. Bard testified that he was present at the May sale and purchased some lots, but no corner ones; that when lot 93 was announced for sale, at the June sale, it was sold as a corner lot, and so announced by the auctioneer, and so sold to him, and he bid upon it, and bought it as a corner. This testimony is somewhat corroborated by Dunterman, who bought some corner lots at the May sale; by Kassen, who bought also one or two lots on Dalton avenue at the September sale following, and to some extent by the auctioneers, Hemmelgarn and Oswald. On the other hand there is considerable testimony offered by defendants tending to show that when the sale took place it was publicly announced that Dalton avenue was not a dedicated street. It is so testified by Messrs. Mills and Kline, the owners, who were present at the various sales. Their testimony is to some extent corroborated by C. Shotwell, one of the auctioneers, Mr. Young and Mr. Campbell, real estate agents, who were present at the sale. Mr. Mills says in explanation of these plats, that when he was on the ground, at the May sale, he was surprised to see that these plats had Dalton avenue upon them
305 *as one of the streets of the subdivision, and felt disposed to stop the sale and have the plat changed; but upon the suggestion of the auctioneers and Mr. Kline that it could be announced that this was not a public street, he concluded to proceed with the sale, and it was announced in German and English that Dalton avenue was not a dedicated street. But, notwithstanding his alleged reluctance to proceed with that plat at the May sale, he and his partner caused a new plat in part to be prepared for the June sale, containing Dalton avenue laid out with greater exactness, and this new plat was distributed and used at the June and September sales. Mr. Kline also states that he

made the announcement that Dalton avenue was not dedicated as a public street, that this strip of ground would not be sold or leased, but held by them so that it might become a street whenever the city saw fit to make it such. Mr. Bard, the purchaser of that lot, denies that he heard any such statement made. Mr. Dunterman, Mr. Kassen and Mr. Hemmelgarn deny that such statement was made. Their testimony was not very positive, but tends to show that no such announcement was made in their hearing. Considering the lapse of time since this took place—thirteen years—parol testimony of what then took place must naturally be uncertain and unreliable. The advertisements and the plats which were scattered about (as one man says, by the bushelfull) over the grounds, were a continual distinct declaration by the owners that Dalton avenue was as much an avenue in that subdivision as Sherman avenue.

To what extent was this contradicted by parol? Mr. Kline says it was announced in English and German at the beginning of the May sale; in English though not in German at the June sale; but when the September sale took place no such announcement was made, because it was generally understood that Dalton avenue was not dedicated. The language which Mr. Kline says he used in making the announcement was not calculated to negative the existence of that street. It did not tend to convey the impression, which he now claims to be the legal effect of what he said, viz.: That this sixty feet strip was private property and might be sold or improved by the owners whenever they wished, and could only become a street by an appropriation by the city to be paid the owners and the cost thereof *assessed *pro rata* against the adjoining lots. It 306
seems to us the parol testimony, so uncertain and contradictory, should be controlled by the indisputed acts of the parties manifested by the advertisements of the sale, the plats distributed, especially in the lease made in pursuance of the sale which referred to Dalton avenue as a "contemplated" avenue to be laid out by somebody, and if anyone, by those who owned the property, and had the power and right to lay it out. Mr. Bard, when he took the lease and saw the expression "contemplated avenue," remarked to Mr. Kline that he bought that as a "corner lot," with Dalton avenue as a public street like other streets. Mr. Kline said, we expect to make it a public street, but we hope to get the city to condemn it and pay us for it, but it will never cost the lot-owners anything.

Mr. Huelsman testified that when he took the deed of lot 93 from Mr. Kline after he had bought the lease of Mr. Bard, Mr. Kline urged him to buy the adjoining lot, telling him how he could improve the two lots together; that by being the owner of the two lots he could construct a building fronting on Dalton avenue, and as a fact he bought the adjoining lot and did construct a building with a partial front on Dalton avenue. Mr. Kline denied that any such conversation took place between him and Mr. Huelsman.

Upon a review of the evidence, we find that this lot was sold and bought as a corner lot on the corner of Sherman and Dalton avenues. Such being the fact the question arises, is it a dedicated street?

There is no statutory dedication; all the plats recorded by Mills & Kline omit this strip as a public street. Their fourth recorded subdivision, which includes land west of Dalton avenue, does not lay out Dalton avenue as a street, but as a sixty-foot strip, extending from the north to

the southern boundary of the subdivision. Is this a dedication at common law? The case of The Lessee of the Incorporated Village of Fulton v Mehrenfeld, 8 Ohio St., 440, perhaps defines as well as can be found anywhere, what is a dedication at common law.

"To constitute a valid dedication of a street or highway at common
307 law, there must be an intention to dedicate, and a dedication *in fact by the owner, and also an acceptance of such dedication by the public."

The evidence in this case does not satisfy us that Mills & Kline intended to dedicate this as a public street. The plats upon which the sale was made indicate a dedication as a public street, but this is contradicted by the recorded plat, which does not include the street. It was left open as a public street and used by the public, but much of the land in Millcreek bottom was left open and could be traveled over by any person who saw fit. There was more or less filling as if to prepare it for a street. It is explained, on the other hand, that this filling was done at the request of other parties.

This land was also subject to taxation, and the testimony of the parties themselves that they never intended to dedicate this as a public street ought to have weight. The evidence does not satisfy us they intended to make the dedication. But a different consideration applies in determining the rights of the purchaser at that sale and his grantees claiming under this lease.

This rule is stated in the case of Smith v. Leek, 18 Michigan, 56. The purchase of a lot described as bounded on "a street estops the grantor from shutting it up so as to prevent the grantee from making use of it for his own accommodation in the enjoyment of his purchase. It is a matter of private right, and in no way depends whether the public have acquired the right of way or not." This is approved in Bigelow on Estoppel, 306.

In Parker v. Smith, 17 Mass. 415, it is said: "Where land is bounded southerly and westerly on a street, the grantor is estopped from denying that there is a street to the extent of these two sides. It is not merely a description, but an implied covenant."

But it is claimed by the defendants that here is not a covenant for an existing street, but a "contemplated" street. The language used is to be taken most strongly against the grantor. It is the "contemplated corner of Dalton and Sherman avenues." Sherman avenue, it is admitted, is a dedicated street. Dalton avenue is united in the same connection, and the corner is the contemplated corner of those two streets.

Several cases were cited by counsel for plaintiff to show that
308 *where the words "expected," "intended," or "contemplated" street were used by a party in a grant, it had the same legal intendment as an existing street.

In O'Linda v. Lathrop, 21 Pickering, 297, where the word "intended" street was used, it was said by the court: "We consider this not merely a description, but an implied covenant that there is such a street."

In Smiles v. Hastings, 22 New York, 217, where the word "contemplated" road was used, it was held to be equivalent to a declaration that such a road was an existing road.

In Tuffs v. Charlestown, 2 Gray, 272, the language used was a "contemplated passageway," and the court said: The description of the way

in this deed as a "contemplated passageway" shows the agreement of the parties that there should be such a passageway as distinctly as if it had been already laid out, and has the like effect by way of covenant and estoppel as the description of a way already laid out.

To the same effect is the case in 36 Indiana, 330, where the expression "Walnut street extended," is used, and in Pope v. Town of Union, 3 C. Green, 283.

In Mayor of Baymore v. Ford, 43 New Jersey Law, 292, "R. Graves platted a tract of land as building lots, selling some of them by reference to such plat." On this plat was a small section marked "Arnette Park," now belonging to R. Graves. Held, that such section thereof became a public park by dedication.

In that case as in this, there was more or less parol testimony tending to show that this alleged dedication was subject to a condition that the purchasers would improve it, and the grantors or persons claiming under them said there had been a breach of said condition by the purchaser.

The court said: "As the practice of selling city lots by reference, and in conformity to maps of this description is very prevalent in this state, public policy seems to require that the legal consequences of sales under such condition should be neither uncertain nor obscure; and such beneficial result can be secured only by maintaining that the rule established by the case just cited is not to be frittered away by frivolous circumstances, *or other vague indications of an intention inconsistent 309
with the presumption from the specified acts of a dedicatory design."

The reasonable inference from the existence on a map of this description of a tract marked off as a park or other public improvement, is that such easement is intended to give value to the adjacent lots, and after such inference has been drawn and sales effected on that footing, the burden should be thrown on the vendor to show, by the clearest proofs, that the inference thus made was unwarranted. In the case in hand it seems to me that the proof designed for that end is of the slenderest and most inconclusive character.

In Hawley et al. v. The Mayor of Baltimore, reported in 33 Maryland, 280, it is said: "The doctrine of implied covenant will not be held to create a right of way over all the lands of a vendor which may lie, however remote, in the bed of a street. The lands must be contiguous to the lot sold, and there must be some point of limitation. The true doctrine is, as we understand it, that the purchaser of a lot calling to bind on a street, not yet opened by the public authorities, is entitled to a right of way over it, if it is of the lands of his vendor, to its full extent and dimensions only, until it reaches some other street or public way. To this extent will the vendor be held by the implied covenant of his deed, and no further.

It seems to us this doctrine is applicable to the present case, and that under the conveyance the plaintiff is entitled to the right of way of Dalton avenue to its full width between Sherman avenue on the one side and Liberty street on the other. And, therefore, to that extent we think the injunction ought to be granted.

A question arose about the damages sustained by plaintiff. The testimony was very meager in that respect. There was testimony of the plaintiff as to the injury to his sidewalk and to his cellar and cellar steps,

and the obstruction of the street. But there is very little testimony as to the cost.

We are, therefore,unable to render damages to a very great extent. We will allow him twenty-five dollars damages and grant an injunction to the extent before indicated.

310

*MARSHALING LIENS.

[Hamilton District Court, July 31,1883.]

Smith, Moore and Avery, JJ.

CINCINNATI SAVINGS SOCIETY v. JOHN L. THOMPSON ET AL.

Where the undivided interest of a tenant in common in one of the parcels of the common property is incumbered by her with a mortgage duly recorded, and afterward by mutual deeds between her and her cotenant, for the purpose of partition, but not reciting that fact, and also duly recorded a specific part of the parcel by metes and bounds is quitclaimed to her and she in return quitclaims the remaining part of the parcel and all her interest in the rest of the property, and the specific part so quitclaimed to her is afterward mortgaged by her to a third party, who had no notice of the fact of the partition or that she had quitclaimed her interest in the remaining part of the parcel, and the mortgage upon her undivided interest is then foreclosed and conveyance made to the purchaser, as of an undivided interest, and he brings proceedings for partition:

Held: That partition should be so made as to set off such undivided interest out of the specific part quitclaimed to the mortgagor, notwithstanding the subsequent mortgage of that part, for the reason that upon the mortgage of her undivided interest in the whole and the quitclaim afterward made by her the equity arising in favor of the grantee under the quitclaim was to marshal the lien of the mortgage upon the part she retained; and that of this, the subsequent mortgagee of that part had constructive notice from the record of the mortgage upon the whole and the quitclaim.

ERROR to the Court of Common Pleas.

By the last will and testament of Abraham Knicely his estate was devised, two-thirds to his widow, and one-third to his adopted daughter, Mrs. Thompson. Among the parcels of land was a lot 156 feet in front and of uniform depth, known as lot "E."

The undivided one-third of Mrs. Thompson in this lot was mortgaged by her and her husband to the Schiller Lodge, Knights of Pythias,
311 which mortgage was duly recorded; *and afterward by mutual deeds of quitclaim, for the purposes of partition, the north 88 feet of the lot, in value equal to one-third of the whole estate, was conveyed to her by the widow, and she and her husband in return conveyed to the widow the south 68 feet, together with all her interest in the other parcels. These mutual deeds were likewise recorded, but were upon their face mere deeds of quitclaim for one dollar and other considerations, containing no recitals of the real object. Afterward, without notice in fact that her interest in the south 68 feet had been so conveyed, the Cincinnati Savings Society took a mortgage from her and her husband, to secure an indebtedness of his, upon the north 88 feet.

In subsequent proceedings by the Schiller Lodge, in the court of common pleas, to foreclose, there was a sale and conveyance to it of the undivided one-third covered by its mortgage, but by the decree of cou-

firmation the matters in controversy upon the answer and cross petition of the widow, who set up the partition, and upon the answer and cross petition of the Cincinnati Savings Society setting up its mortgage, were continued for further adjudication. This action in the court of common pleas was then brought by the Schiller Lodge as owner of an undivided one-third by the purchase in foreclosure for the partition of the lot; and by agreement of the parties was heard together with the undisposed portion of the foreclosure case. The error alleged is, that the undivided one-third interest mortgaged to the lodge was allotted to the north 88 feet, and by the order or partition was set apart out of that portion; while the title of the widow under the quitclaim to the remaining portion was quieted.

Storer & Harrison, for Plaintiff in Error.

J. F. Baldwin, for Defendant in Error.

AVERY, J.

Upon partition among tenants in common it has been held that a lien upon the undivided interest of one will follow and attach to the share set apart to him. Jackson v. Pierce, 10 Johnston, 413; Crosby v. Allyn, 5 Greenleaf, 453; Williams College v. Mallett, 12 Maine, 398; Thurston v. Menke, 32 Maryland, 571; Williard v. Williard, 56 Pennsylvania St., 571–4. The reason *given is, that the right of partition 312
is an incident to the estate, and whoever takes an incumbrance upon the undivided interest of one takes it subject to the right of the others to hold their shares in severalty. Wright v. Vickers, 81 Pennsylvania St., 122, 138; Hall v. Morris, 13 Bush, 322; Potter v. Wheeler, 13 Massachusetts, 503. The same rule has been applied to partitions by the voluntary act of the parties. Webb v. Rowe, 35 Michigan, 58; Wade v. Devay, 50 California, 376; Bavington v. Clarke, 2 Pennsylvania, 215.

The applicability of the rule to voluntary partition is denied in Emson v. Polhemus, 28 New Jersey Equity, 439. But that was where a voluntary partition among tenants in common was sought to be made the ground for enjoining proceedings in partition, by a purchaser under a prior lien of the undivided interest of one of them. The case presented in the court below was different, being itself a proceeding for partition by the purchaser under the lien; and the question being whether, he not objecting, the equities of the tenants in common as between themselves might be preserved.

The general principle of equity, in making partition, is to assign to each that part which, with reference to the respective situations of the parties in relation to the property will best accommodate him. Story on Equity, 6,566; Adams on Equity, 231. Separate interests acquired under a partition void in itself for omitting a necessary party, will be protected so far as it can be done consistently with the preservation of the rights of such party. Dawson v. Lawrence, 13 Ohio, 544. Even Emson v. Polhemus, in the subsequent progress of the case (30 New Jersey Equity, 405; 32 New Jersey Equity, 827), sustains the proposition that the equities, under a voluntary partition, although the partition itself be disregarded, will control in reassigning the shares of the cotenants or of third parties deriving from them.

The equity under the partition, as between the parties themselves, that the Schiller Lodge should resort to the north 88 feet of the lot is

not questioned; but the Cincinnati Savings Society insists that its mortgage was taken without notice of such equity, and that as against it the undivided interest of the lodge in the whole should be apportioned.

313 *The argument is, that constructive notice from the records in the county recorder's office was confined to the chain of title, including only the quitclaim by which the north 88 feet was vested in the mortgagor and not extending, there being nothing in the instrument itself to give notice of it, to the mutual quitclaim by which all interest in the remaining 68 feet was divested.

The marshaling of liens affecting the whole, upon successive portions in the inverse order of alienation, is a recognized rule in this state as in most of the other states. Commercial Bank of Lake Erie v. Western Reserve Bank, 11 Ohio, 445; Cary v. Folsom, 14 Ohio, 365; Nellons v. Truax, 6 Ohio, 97, 104. From this equity of successive purchasers, each is put upon inquiry. The conveyance of a part, the whole of which has been incumbered by the owner, constitutes in equity a primary charge on what remains for the satisfaction of the incumbrance; and the conveyance being recorded is notice of the equity.

In Brown v. Simons, 44 New Hampshire, 475, 479, it is considered the same as a counter security given by the owner on what remains, by way of indemnity to the purchaser against the incumbrance, and record of the conveyance was held to be constructive notice.

In Iglehart v. Crane, 42 Illinois, 261, 269, it was held that each purchaser from a mortgagor is bound by the constructive notice furnished by registry of prior conveyances of any portion of the mortgaged premises.

In Manly v. Pettie, 38 Illinois, 128, upon mutual conveyances between tenants in common one of the conveyances not being recorded, it was held, for this reason alone, that the interest of that tenant as an undivided interest in the entire property remained subject to levy.

In Chase v. Woodbury, 6 Cushing, 143, upon the conveyance of an incumbered parcel by a father to his two sons in equal shares, and the question of contribution to the payment of the incumbrance arising between one of the sons and a purchaser from the other, it was held that it stood the same as if the father had given to each of the sons a mortgage upon the part conveyed to the other for security against the common incumbrance.

314 In Chapman v. West, 17 New York, 125, 128, upon the *question whether a suit pending for specific performance of an agreement to sell a part of an entire tract incumbered by a mortgage would be notice to subsequent purchasers of other parts of the tract, it is said that it would be as much the duty of a purchaser in investigating the title of a parcel he was about to purchase, to look for a notice of *lis pendens* affecting another parcel covered by the mortgage as to look for the record of a deed of the latter parcel.

In the note to Aldrich v. Cooper, by the American editors of the leading cases of equity, fourth edition, 298, 299, it is said, adopting the language of Hunt v. Mansfield, 31 Connecticut, 488: "It results from these decisions that where the record discloses an incumbrance on property of which a party is taking a conveyance, and also discloses the further fact that the incumbrance rests on other property, and on an examination directed to such other property, it becomes apparent that a conveyance of the latter has been made which creates an equitable right to

throw the burden of the incumbrance on the first property, the purchaser will be presumed to have made such examination and will be regarded as constructively notified of such equity."

No principle is better settled than that a purchaser must look to every part of the title essential to its validity. Brush v. Ware, 15 Peters, 93, 113; Reeder v. Barr, 4 Ohio, 447, 458. The considerations suggested in Brown v. Simons, apply with peculiar force: "In the examination of the title of the part which he proposes to buy, he is led directly to the original mortgage and finds that his is but part of an entire tract in which his grantor has only the right of redemption, and which was originally subject to the common burden but liable to be affected by a prior sale of another part of the entire tract. Under such circumstances, the different parcels of the tract mortgaged cannot, we think, be regarded as separate and distinct so as to relieve him of the duty of inquiring into the title of the other part; but we think in examining the title of the part he proposes to buy he is led directly to a deed that puts him on inquiry as to the remaining part of the land."

The common source of title of the parties was in Abraham Knicely. His last will and testament was in the chain of title. The undivided interest of Mrs. Thompson under the devise *extended to every part of the lot, and her mortgage of such undivided interest was likewise in the chain of title. The Cincinnati Savings Society took with notice of this common incumbrance, and taking her interest in a specific parcel of the lot was put upon inquiry whether her interest in the other parcel had been conveyed. The records in the county recorder's office disclosed that upon the quitclaim which united the interest devised to the widow to the interest of the mortgagor in this specific parcel, she had by simultaneous deed quitclaimed to the widow her interest in the other parcel. The equity arising was to cast the burden of the incumbrance altogether upon the parcel left in the mortgagor. The conveyances themselves were notice of this equity, and the mortgage to the savings society was subject to it. Affirmed. 315

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*WARRANT OF ATTORNEY—JUDGMENT. 476

[Hamilton District Court, 1883.]

Avery, Connor and Buchwalter, JJ.

WM. J. FITZGERALD v. LAURA WIGGINS ET AL.

1. A warrant of attorney to confess judgment must be strictly pursued by the party in whose favor given, and the court will construe the warrant strictly, so that no authority be conferred thereby, beyond the limits expressed in the instrument.
2. The power given by lessee in a warrant of attorney, embodied in a lease, to waive summons, enter appearance and confess judgment for possession of real estate, in an action therefor by lessor, in case of a breach of any covenant of the lease working a forfeiture thereof, is not broad enough to authorize the attorney to waive summons, enter appearance and confess the breach of any covenant or the forfeiture.
3. Nor is such breach or forfeiture a collateral fact which the court can summarily hear and determine under such warrant of attorney, but is a substantive fact or cause of action which the warrant does not cover and in which the lessee is entitled to summons to make issue and have trial by jury.

BUCHWALTER, J.

477 This cause is here for hearing upon proceedings in error to *reverse the judgment of the superior court, as entered at the last November term.

The plaintiffs in the superior court filed their petition against Fitzgerald, defendant therein, to recover the possession of a part of certain improved premises situated at southeast corner of Broadway and Third streets, this city, and averred that by their deed, dated October 31, 1883, they demised and leased the said premises to said Fitzgerald for a term of one year; that the lease was conditioned, substantially, that if the lessee, Fitzgerald, should underlet said premises or any part of them without the lessor's written consent, that the lease should become void, that all obligations on the part of lessors should cease, and that the lessors should have the right to reenter and repossess the same.

That the lessee, Fitzgerald, having entered into possession under said lease, did, without lessor's consent, underlet a part of said premises.

That by reason thereof, the lessors having the legal estate therein, are entitled to reenter and repossess the same, that the lessee unlawfully keeps them out of possession, wherefore they ask the judgment of the court for possession and costs.

The petition was filed November 22, 1883.

The following indorsement was made on the back of the petition:

"CINCINNATI, November 22, 1883. By virtue of the powers to me granted in the lease referred to in the within petition, I hereby enter the appearance of the defendant in the within action, and consent that the same be heard upon an application for judgment by confession in Room No. 1, on Friday, November 23, 1883, at 9:45 A. M., or as soon thereafter as said cause can be heard. Jury waived. DRAUSIN WULSIN,

"Attorney for William J. Fitzgerald."

On November 24th the lease referred to was filed by leave of court.

Among other covenants and agreements it contained the aforesaid against under-letting, and "that in case any installment of rent shall not be paid when due, or in case of any violation, nonperformance or breach
478 of any covenant in the lease working *a forfeiture or resulting in damages to the lessors, * * * then in such case, or in any or either of said cases, the said William J. Fitzgerald doth hereby authorize and fully empower Drausin Wulsin, or any other attorney-at-law, to appear for him, in any court of record, in any action commenced by said lessors, for the recovery of rent due, for the possession of said premises, and damages for withholding the same, or for any breach, or nonperformance, or violation of any covenant of said lease * * * and in his name accept service of process or waive issuing and service thereof and to confess judgment for the possession of said premises, with damage therein, or for rents, or for damages for the breach * * * of any of said covenants, with costs, and to release all errors and waive any appeal or other trial, and to consent to the allowance and issuing of all writs needful to carry said judgment into execution."

On November 24th the cause was called for trial. No summons was issued for defendant below.

Lessors insisted on a hearing and demanded judgment upon the appearance, the waiver and the confession by Drausin Wulsin, attorney.

The lessee, Fitzgerald, appeared in court represented by Charles W. Baker as his attorney, and objected to the cause being heard for the

reason that he had not been served with summons, that said cause was not at issue, nor regularly set for hearing.

This objection was overruled, and the cause proceeding to hearing, the lessors claimed that Fitzgerald could not be heard through any other attorney than Drausin Wulsin, but the court overruled that objection and permitted Fitzgerald to be represented by his attorney, Charles W. Baker.

Lessors then proceeded to trial, offered said lease, and called witnesses, by them duly summoned, to prove that there had been a breach of the covenant by lessee, not to underlet any part of said premises, and that he had so underlet a part thereof. The court having heard testimony as to the lease and the breach of its covenant as to underletting found in favor of the lessors that the allegations in their petition were true; that Drausin Wulsin *was the duly authorized attorney of record in the premises at all time since the beginning of that 479
action; that defendant, Fitzgerald, had no power to revoke such power of attorney, and that said Wulsin did appear in court and confess judgment in favor of lessors, and that they recover possession of said premises, and their costs in that suit. Whereupon the court adjudged that the lessors recover of the lessee the possession of said premises and costs.

Thereupon said attorney, Wulsin, released all errors and waived all other trial and consented to all needful writs to carry out the judgment of the court.

To all of which Fitzgerald, by his attorney, Charles W. Baker, excepted, duly filed his motion for a new trial, had his bill of exceptions duly signed and allowed, and all steps taken to entitle him to a review by this court of the errors complained of.

Plaintiff in error claims various errors, but relies in this hearing upon what he claims was error in the court below in compelling trial of the cause, hearing testimony about and determining that there was a breach of a covenant of the lease without summons issued to him, without issue made, and before the cause was ripe for hearing, and that judgment was given on the confession of Drausin Wulsin, attorney.

It is claimed by the defendant in error that they strictly pursued their legal rights given by the lease and warrant of attorney; that the court was authorized in such proceeding, and did determine in this case that there was a power given in the warrant as claimed, and that the circumstances existed under which it was to be exercised.

And they claim further that the court was authorized and could summarily hear and determine whether such circumstances did exist, viz.: Whether there had been a breach of the covenant, "not to underlet," which worked a forfeiture; that such breach and forfeiture constitute a collateral fact to be summarily proven in the case.

It is a principle recognized by all the authorities on the subject, that a confession of judgment taken and recorded in the usual form, confesses or admits the law as well as the facts to be against the party confessing; to confess the facts only would *leave an issue undetermined to be 480
heard as upon demurrer or agreed case, where the facts are admitted and law contested.

The extent and power of the court in determining facts requiring proof outside the paper or warrant of attorney and its execution, is limited to making computation of the amount due, taking an account or proof

of a collateral fact for the purpose of enabling the court to render the judgment, to carry it into effect; as where by the paper or warrant of attorney the confession of judgment is conditioned and depends upon an election, or the exercise of feeling or opinion of the party in whose favor the warrant is given.

The power given must be strictly pursued by the party in whose favor it is given, and the court will construe the warrant strictly so that no authority be conferred thereby beyond the limits expressed in the instrument. 19 Ohio S., 536, Cushman et al. v. Welsh; 8 Durnf. & East. 257, Cowie v. Allaway; Story on Agency, section 68.

We are of the opinion that this warrant of attorney was merely a power to waive summons and enter the appearance of Fitzgerald and confess judgment for possession and costs after it had been established that the lessee had made a breach of the covenant not to underlet without lessors' consent, that such a breach had worked a forfeiture of his rights under the lease and that such breach working a forfeiture was not a collateral fact determinable either at the option of lessors or summarily by the court, but was a substantive fact, or cause of action, on which the lessee, Fitzgerald, was entitled to summons, to make an issue, and have his trial by jury.

The warrant does not authorize the attorney, Drausin Wulsin, to confess a breach of the covenant "not to underlet," nor to confess forfeiture, nor to waive summons and enter appearance in such cause of action.

If it did, it would then become necessary to consider whether our Code in this regard was broad enough to cover a confession of such cause of action.

In this regard it is sufficient to say that this warrant of attorney is a novelty. In no case cited by counsel or examined in an extended research by the members of this court have we found a cause of action for
481 the recovery of the possession of *real estate sought by the summary process of a warrant of attorney, with power like the one in question.

We are of opinion that this warrant of attorney is not broad enough to cover the confession of judgment made in this case, nor to authorize the summary hearing of the issue sought to be made, of whether there had been a breach of the covenant "not to underlet," working thereby a forfeiture of the lease.

We have not, therefore, considered the other issues discussed by counsel.

The judgment of the superior court is reversed at costs of the defendants in error and the cause remanded for further proceedings.

*FINAL ORDER OR DECREE. 534

[Hamilton District Court.]

Avery, Buchwalter and Maxwell, JJ.

THOMAS F. CLARK v. BENTEL, MARGEDANT & CO.

1. A final order or judgment is one which disposes of or determines the merits, either of the whole case or some branch of it, except so far as it may be necessary for the court to approve or confirm the action of a ministerial office in giving the judgment or order force or effect.
2. A decree finding that the plaintiff is entitled to an account from defendant and ordering a reference to a special master to state the same, is *interlocutory* only, and an appeal taken upon the confirmation of, and judgment upon, the report of the master, though several terms have intervened between the same and the first decree, brings the merits of the whole case before the appellate court.

MAXWELL, J.

The plaintiff, as administrator of one Riley, brought an action in the court of common pleas against the defendants, who are manufacturers of wood-working machinery, to recover the royalties alleged to be due, under a written agreement, for the use of a certain patented attachment. In his petition the plaintiff set out by name the machines on which he claimed the patented attachment had been used.

The defendants admitted the making of the agreement, but claimed that they had fully accounted to the former administrators of Riley for all the machines manufactured on which the attachment had been used, and in particular set up a receipt purporting to have been given by a former administrator in full settlement of all claims.

The plaintiff in reply claimed that this receipt had been obtained by misrepresentation.

The case was heard at the May term, 1881, and the court then found "on the issues joined for plaintiff that defendants have not fully accounted to plaintiff for all the machines manufactured and sold by them under said agreement," and ordered *that the case be referred to a special 535
master "to state an account between the parties, * * * to take testimony and report to this court the number of * * * machines made and sold by defendants," of the kind named.

From this order no appeal was taken. The case went to a special master, who took testimony and filed his report December 19, 1882. At the January term, 1883, a motion to confirm the report was heard, and the court ordered that the report be confirmed, and, upon the report and testimony, found that the defendants had sold sixty-four machines of the kind described in the former order of the court, and rendered judgment for the royalties thereon for $1,214.78 with costs. The defendants then appealed, and perfected their appeal.

The question now before this court is, whether the appeal, in the manner in which it was taken, opens up the whole case, as the defendants claim, or whether it only opens up the order confirming the master's report, as the plaintiff claims, in other words, whether the first order was a final order or only an interlocutory order.

The statute, so far as it is applicable to this case, provides, section 5226, that an appeal may be taken "from a judgment, or final order rendered by the court of common pleas."

Originally, the statute, 65 O. L., 211, read "from final judgments, orders and decrees," making the word final qualify both the words "judgment" and "order," and we may presume that section 5226 is to be construed in the same way.

The questions then to be determined are: 1st. What is a final judgment or order? 2d. Was the order first entered in this case a final one, for if it was not, then the second order was a final one, and an appeal taken from it opens the merits of the whole case to a rehearing.

It is not easy to give a clear and concise definition of a final judgment or order, that will apply to all cases; but it may answer our purpose to say that a final judgment, or order, is one which disposes of or determines the merits, either of the whole case, or some branch of the case, as presented by the pleadings and puts an end to it, except so far as it may be necessary for the court to approve or confirm the action of a
536 ministerial officer *in giving the judgment or order force or effect. In Baker v. Lehman, Wright's Report, 522, the court say: "We hold a decree or order final and within the legislative provision allowing an appeal which is conclusive as to the subject, or object of it, which determines the right of the parties as to that matter." In Hey v. Schooley, 7 Ohio St. 2, 48, the court say: "We find the practice well settled that the final decree, which upon appeal, presents the whole matter to the action of the appellate court, is the decree by which the rights of the parties are defined and settled." In Kelley v. Stanbery, 13 Ohio, 429, the court say: "A decree is final which disposes of the whole merits of the case, and leaves nothing for further consideration of the court. A decree is interlocutory which finds the general equities, and the cause is retained for reference, feigned issue, or consideration, to ascertain some matter of fact or law, when, again, it comes under the consideration of the court for final disposition. When no further action of the court is required, it is final; when the cause is retained for further action, it is interlocutory. The confusion has sprung up from failing to observe the distinction between facts and things, to be ascertained preparatory to final decree, and facts and things to be ascertained in execution of final decree. Because a final decree might direct that certain facts should be ascertained in execution of such decree it will not make it interlocutory nor, on the other hand, because a decree finds the general equities of the cause, and reference is had to a master to ascertain facts preparatory to final disposition will be regarded as final."

In Teaff v. Hewitt, 1 Ohio St., 520, the court say: "A final decree is one which determines and disposes of the whole merits of the cause before the court, or a branch of the cause which is separate and distinct from the other parts of the case, reserving no further questions or directions for future determination; so that it will not be necessary to bring the cause or that separate branch of the cause again before the court for further decision. An interlocutory decree is one which leaves the equity of the case, or some material question connected with it, for further determination."

537 In Evans v. Dunn, 126 Ohio St., 444, the court follow and *approve the above definitions, and say: "To be final the decree must dispose of the merits of the whole cause, or completely and finally dispose of some branch or part of the cause which is separate and distinct from other parts of the case."

Assuming that the cases cited make the meaning of the term "final judgment or order" sufficiently clear, was the first decree entered in this case a final one? The issue made in the pleadings was whether or not the defendants had correctly accounted for the machines manufactured and sold under the agreement, and if they had not, in what respect they had failed to account, and for what sum, if anything, the plaintiff was entitled to a judgment, the element of amount being quite as important as any other, for it appeared that the defendants had accounted in part. The court heard the case far enough to determine that the defendants had not fully accounted, and then referred the case to a special master to determine how many machines had been made and not accounted for. It is to be observed that the special master was not only a master, but a referee, to the extent of determining upon the testimony submitted to him how many machines had been made. He reported all the testimony taken, but he first found as a matter of fact the number of machines sold, and then reported the testimony upon which he based his conclusion, and the court approved and confirmed his conclusion of fact, adopting his finding as the finding and judgment of the court. In taking the testimony, and making his finding, the master was not acting as a ministerial officer of the court, in doing some act to give the complete and final judgment of the court effect. For the time being he stood in the place and stead of the court; he was doing precisely what the court would have had to do, if the cause had not been referred to a master, in this respect making a clear distinction between a judicial and a ministerial act. The court simply suspended its consideration of the case at a certain point, put upon record the conclusions it had so far arrived at, turned the case over to a referee, to be proceeded with under the direction of the court, and when the report of the referee came in, resumed the consideration of the case.

If the foregoing be a correct statement of the facts, then it follows that the first decree is not a final one, but an interlocutory *one, and 538
that the appeal taken after the entry of the second decree opens up the whole case for a rehearing. As the court say in the case of Kelley v. Stanbery, 13 Ohio, 422: It seldom happens that a first decree can be final to conclude the cause, and yet in all cases the general equity should be found, and the principles laid down for the government of the master before reference had. But under the practice of our courts a decree finding the general equities of the case for the purpose of reference has been held final to support an appeal, but for no other purpose. To the same effect is the case of Warner v. Webster, 13 Ohio, 505. See also: Caswell v. Comstock, 6 Michigan, 381; Williams v. Field, 2 Wisconsin, 421; Bondurant v. Appersen, 4 Met. (Kentucky) 30; Gray v. Palmer, 9 California, 616.

Our opinion is that the appeal as it now stands brings the merits of he whole case before the court.

CRIMINAL LAW.

[Hamilton District Court.]

Avery, Buchwalter and Maxwell, JJ.

†HENRY JOHNSON v. STATE OF OHIO.

1. Where a prisoner in jail at the time of his indictment made application at the second term thereafter for his discharge under section 7309, Revised Statutes, but, on motion of the prosecuting attorney, the cause was continued to the next term, as provided by section 7311, and at such next term was again continued by the court to the following term for want of time to try it; and at that term which was the fourth after the term of the indictment, it not appearing that even then the prosecuting attorney was ready for trial, the application of the prisoner again for his discharge was refused: *Held:* The refusal was error.
2. A petition in error in a criminal case will not lie before final judgment in the case.

ERROR to the Court of Common Pleas.

AVERY, J.

539 Plaintiff in error was indicted for grand larceny at the May *term, 1882, of the court of common pleas, and has been in jail ever since, without a trial. The Revised Statutes provide, section 7309: "No person shall be detained in jail, without a trial, on an indictment, for a continuous period embracing more than two terms after his arrest and commitment thereon, or, if he was in jail at the time the indictment was found, more than two terms after the term at which the indictment was presented; but he shall be discharged, unless a continuance be had on his motion, or the delay be caused by his act."

"Section 7311—If when application is made for the discharge of a defendant * * * the court is satisfied that there is material evidence for the state which can not then be had, that reasonable exertion has been made to procure the same, and that there is just ground to believe that such evidence can be had at the next term, the cause may be continued, and the prisoner remanded, or admitted to bail; and if he be not brought to trial at the next term, he shall then be discharged."

The first application for the discharge of the plaintiff in error was made at the January term, 1883, which was the second term after the indictment, and was the proper time at which to make the application (*ex parte* McGehan, 22 O. S., 442, 445); but at the request of the prosecuting attorney, upon the ground that there was material evidence for the state, which could not then be had, and it was reasonable to expect could be procured at the next term, the cause was continued by the court to the next term.

At that term, which was the May term, 1883, the cause was not set for trial until the day before the last day of the term, and then, as the journal entries show, was continued by the court upon the ground that there was no time to try it. At the following term, which was the November term, 1883, the motion of plaintiff in error for his discharge, again made, was overruled, and he was remanded to jail, where for all that appears he remains. Section 7311 is explicit, that when, upon an application for discharge the cause is continued to the next term, on the ground that there is material evidence for the state which cannot then be had, the prisoner, if not brought to trial at the next term, shall then be discharged.

540 *The object of such provision has been held to be the prevention of wrongful restraints of liberty, by willful and oppressive delays of trial, caused either by the malice or procrastination of the prosecutor. Commonwealth v. The Sheriff, 16 Serg. & R. 304; Commonwealth v. The Superintendent of County Prison, 97 Pennsylvania St. 211. At the same time strict rules of construction are applied.

Where the record is silent, the prisoner will be presumed to have consented to a continuance. *Ex parte* McGehan, 22 Ohio St. 442. Where the array of grand

†Leave to file a petition in error in this case was refused by the Supreme Court. See opinion 42 O. S., 207.

jurors, at two successive terms had been quashed for an informality in selecting and drawing them, it was held that the delay did not entitle the prisoner to his discharge. Clark v. Commonwealth, 29 Pennsylvania St. 129. There was the same ruling where the court was satisfied that the defense had kept away witnesses for the prosecution, whose attendance in consequence could not be procured. Respublica v. Arnold, 3 Yeates, 263, 266; and, again, where the prisoner had the smallpox, and could not be tried, although he insisted upon it, except at the risk of infecting the court and jury. Commonwealth v. The Jailer, 7 Watts, 366. It is also held, that where one trial is had, and a new one is granted on motion of prisoner, or the jury had disagreed, the provisions for discharge cease to be applicable. Commonwealth v. Superintendent of County Prison, 97 Pennsylvania St. 211; Glover's Case, 109 Massachusetts, 340.

In Commonwealth v. The Sheriff, 16 Serg. & R. 306, it is remarked with some reason, that terms of court are limited, and "if several prisoners are to be tried, or one prisoner upon several charges, and by one lingering trial the legislature have put it in the power of a defendant to smother a legal inquiry into his guilt, under the name of preventing wrongful imprisonment—who does not see the consequences?" But in Brooks v. The People, 88 Illinois, 327, by a divided court, the provisions of a statute, similar to our own, were held imperative; and a conviction of a prisoner at the fourth term after his indictment, although it was the first term at which he made application for his discharge, was reversed.

If, however, it be assumed that the court of common pleas *might 541
have had jurisdiction to try the plaintiff in error at the November term, he was certainly entitled then, either to be tried or discharged; and it not appearing that he was tried, and no reason being shown why he was not, the court, it would seem to us, should have granted his motion. But the material question is, whether this error in the proceedings may be reviewed while the cause itself is still pending in the court of common pleas.

Prior to the revision of the statutes, the only mode of reviewing the proceedings of the court of common pleas in a criminal case was upon writ of error allowed by the supreme court. S. & C., 1, 187; 66 Ohio Laws, 317, section 199. The Revised Statutes provide, section 7356 (as amended 80 Ohio Laws, 170): "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 court of common pleas, may be reviewed in the court of common pleas; a judgment or final order of any court or officer inferior to the district court, may be reviewed by the district court; and a judgment or final order of the district court or common pleas, in cases of conviction of a felony or misdemeanors * * * may be reviewed in the supreme court * * *" Section 7358 (as amended 80 Ohio Laws, 46): "The proceedings to review any such judgment shall be by petition in error," etc.

At common law a writ of error would not lie until final judgment. When once judgment was given, it was the only remedy for any defect in the proceedings; but it never could be obtained before judgment. 1 Chitty on Criminal Law, 747. The practice in this state has been in conformity with the rule. "A writ of error cannot be allowed before final judgment." Kinsley v. The State, 3 Ohio St., 508. Where, in a criminal prosecution, the case is continued on the defendant's application, at his costs, for which judgment is rendered and execution ordered, a writ of error will not reverse such judgment before a final determination of the case. Cochrane v. The State, 30 Ohio St. 61. The rule is uniform. Error can only be taken after final judgment has been rendered in trying *the case. The State v. 542
Ruthven, 19 Missouri, 362; The State v. Locke, 86 North Carolina, 647; The State v. Freeland, 16 Kansas, 9; Jenks v. The State, 16 Wisconsin, 332; People v. Merrill, 14 New York, 94; Tabor v. The People, 25 Hun., 638; Kearney v. The State, 46 Maryland, 422; Forwood v. The State, 49 Maryland, 538; Wharton on Criminal Pleading and Practice, section 775; 1 Bishop on Criminal Procedure, section 1196; Freemen on Judgments, section 21*a*.

Writs of error no longer exist, under the provisions of the Revised Statutes and the record is now brought before the reviewing court, by petition in error, as in civil cases. But the nature of the proceeding is not changed, in respect to whether error will lie, before final determination of the cause. It is a familiar rule, that where an act of the legislature has been revised, the same construction will be given to its provisions as before the revision, unless the language of the new act plainly requires a change of construction to conform to the manifest intention of legislature. Miller v. Oehler, 36 Ohio St., 627; The State ex rel, etc., v. The Commissioners of Shelby county, 36 Ohio St., 326.

The Revised Statutes, as first passed, provided: "In any criminal case * * * judgment of any court inferior to the district court may be reviewed in the district court. * * *" By the amendment (80 Ohio Laws, 170), the language is, "judgment or final order of any court or officer inferior to the district court." Precisely what is intended by the term "final order" in a criminal case, as distinguished from the judgment itself, is not clear If the definition of the Code of Civil Procedure apply, and it be an order affecting a substantial right in the case, when such order determines the case, it is difficult to see in what such order could consist, unless in the conviction or discharge of the prisoner.

The discharge of a prisoner, however, is not subject to review. Revised Statutes, 7308. But be this as it may, and whether, as distinguished from the judgment, meaning can be found for the term "final order," or not, the language still is "final order," and is not in any way the manifestation of legislative intent, requiring such change of construction that, pend ng *the case in the court of common pleas, a petition in error may be filed in the district court to review error in the proceedings.

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Counsel rely upon *ex parte* McGehan, 22 Ohio St., 442, 445, in which an order of this kind, refusing the discharge of a prisoner, is called a judgment. The language is as follows: "The discharge of the prisoner, provided for in these sections of the Code, is to be regarded, not as a mere temporary release for the crime or offense. It is in effect an acquittal, and the order granting it is a final judgment in the cause, and puts an end to all further proceedings therein. The real complaint is that the court erred in refusing to render such final order, and instead thereof remanded the prisoner and continued the case. To order the prisoner's discharge while that judgment of the court is still in force, would be in effect to reverse the judgment of the court, and to render a final judgment in the case while it is still pending in the court below." But this language does not, to our minds, convey the impression that it was intended to say a petition in error would lie. The contrary inference, from all that is said, seems to us to follow. Indeed, at that time, the statute itself left no doubt upon the question. 66 Ohio Laws, 377, section 199: "In criminal cases not punishable with death, after final judgment, writs of error may, on good cause shown, be allowed," etc.

In the sense, that it involves judicial action, the refusal to discharge a prisoner may be called a judgment; but we think a petition in error will no more lie to reverse it, than to reverse any other order made by the court of common pleas during the pendency of a criminal proceeding, whether upon the application of a prisoner to be admitted to bail, or upon his plea in bar, or in overruling his demurer to the indictment, or refusing to quash it, or whatever else might be done affecting the rights of the prisoner, but still leaving the cause itself pending in that court. See Inskeep v. The State, 35 Ohio St., 482.

The petition in error is, therefore, dismissed.

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*MANDAMUS—TAXES.

[Hamilton District Court.]

Avery, Buchwalter and Maxwell, JJ.

STATE OF OHIO EX REL. WERK v. BREWSTER, AUDITOR.

1. Taxes erroneously assessed by the auditor under sections 2781 and 2782, Revised Statutes, cannot be corrected by proceedings under section 1038, and mandamus will not lie to compel the refunding of taxes so assessed.
2. *Semble:* The remedy is by petition in error, or injunction.

ERROR to the Court of Common Pleas.

AVERY, J.

The error assigned is the refusal by the court of common pleas, of a mandamus to compel the refunding of taxes, under section 1038, R. S. The mandamus applied for was against the auditor, to compel him to call

the attention of the county commissioners to taxes alleged to have been erroneously charged, and collected from the relator; and against the county commissioners to compel them to order the refunder thereof.

The petition alleged that, on the 26th of February, 1881, the relator, upon citation for that purpose, was compelled to list, for taxation, 442 shares of the preferred stock of the Dayton and Michigan Railroad Company, at the par value of $22,100, which was thereupon assessed for taxation in that sum by the auditor, and the relator was compelled to pay to the treasurer the taxes assessed thereon, from the year 1876 to the year 1880, inclusive, making a total of $2,354.24; that said return for taxation and payment of taxes were made by the relator, under protest at the time; and that said stock was a part of the capital stock of the Dayton and Michigan Railroad Company, an Ohio corporation, whose capital stock was listed for taxation in its name.

The answer of the auditor denied that such preferred stock was a part of the capital stock of the Dayton and Michigan Railroad Company; and averred that it was in reality a bond, secured by mortgage upon the property of the road, and, therefore, *taxable to the relator. According to the agreed statement of facts, the proceedings of the auditor, in compelling the relator to list the stock, and in assessing the same for taxation, were under section 2781, and the following sections of the Revised Statutes. 545

Section 2781 provides: "If any person whose duty it is to list property or make a return thereof for taxation, either to the assessor or county auditor, shall make a false return or statement, or shall evade making a return or statement, the county auditor shall ascertain, as near as practicable, the true amount of personal property, moneys, credits and investments, that such person ought to have returned or listed, to which amount he shall add 50 per centum, and place the same on the tax list." * * *

Section 2782 provides: "The county auditor, if he shall have reason to believe, or be informed that any person has given to the assessor a false statement of the personal properties, moneys or credits, investments in bonds, stocks, joint stock companies, or otherwise, or that the assessor has not returned the full amount required to be listed in his ward or township, or has omitted or made an erroneous return of property, moneys or credits, investments in bonds, stocks, joint stock companies, or otherwise, which are by law subject to taxation, shall proceed at any time before the final settlement with the county treasurer to correct the return of the assessor, and to charge such persons on the duplicate with the proper amount of taxes." * * *

Under provisions, applicable to both sections, these inquiries and corrections may extend back four years; and provision is also made for compulsory process and examination of witnesses under oath, and for notice to the person.

Without considering whether the stock was taxable to the relator; but assuming that it was not, and that the auditor erred, the question is whether the error was one to which, under section 1038, he was required to call the attention of the county commissioners. The duty required of the auditor, under the section, is in brief as follows: The auditor shall, from time to time, correct all errors which he discovers in the *tax-list and duplicate, either in the name of the person charged with taxes or assessments, the description of lands or other property, or when 546

property exempt from taxation has been charged with tax, or in the amount of such taxes or assessments; * * * and if at any time the auditor discovers that any erroneous taxes or assessments have been charged and collected in previous years, he shall call the attention of the county commissioners thereto. * * *

In State v. Commissioners, 31 Ohio St. 271, the statute, as it stood at that time, was construed to refer to errors which the auditor himself would be required to correct upon the duplicate; being clerical errors merely. That was a case where taxes had been charged and collected upon real estate, which, as devoted to purposes of public charity, was under the law exempt; but it was, nevertheless, held that the commissioners were not authorized to make an order to refund.

By an amendment of the statute, subsequently made, the clause was added: "When property exempt from taxation has been charged with tax, or in the amount of such taxes or assessments." In Butler v. Commissioners of Hamilton County, 9 Law Bull., 284, it was held that the change in the statute was for the purpose of enabling the commissioners to order a repayment of taxes erroneously collected upon property embraced in section 2732, R. S., and similar provisions.

Section 2732 contains the exemptions specially provided by law, for example, public school houses, houses used exclusively for public worship, institutions of purely public charity, etc. No mention is made of shares of capital stock; and although, under section 2746, no person is required to list shares in any company, the capital stock of which is taxed in the name of the company, it may be open to question, perhaps, whether this could have been what is meant by "property exempt from taxation." But, assuming that it would fall under that description, the error, to which it was sought by mandamus to compel the auditor to call the attention of the county commissioners, was his own error in proceedings under sections 2781 and 2782—error, not in assessing the shares for taxation as stock, but in deciding they were not stock.

547 *In proceeding under these sections, the auditor exercises a judicial function. Notice and hearing are required. Champaign County Bank v. Smith, 7 Ohio St. 42. A petition in error, it seems, will lie to the proceedings. Genin's Executor v. Auditor and Treasurer of Belmont County, 18 Ohio St. 534.

Mandamus is not the remedy to correct errors of judgment. To issue the writ against the auditor would compel him to reconsider a fact which, in the exercise of his function as auditor, he has already ascertained. It would be compelling him first to reconsider, and then to find against his own deliberate judgment upon the question—for how else could it be, that he would discover that erroneous taxes had been collected. We are clear that the provisions of section 1038 do not apply to errors of judgment by the auditor, under sections 2781 and 2782. If for such errors, the remedy is not by petition in error, as in Genin's Executor v. Auditor of Belmont County, 18 Ohio St. 535, there was at least a remedy by injunction. Jones v. Davis, 35 Ohio St. 474.

The conclusion to which we have come is confirmed by what is said by the supreme court, in the case of Insurance Company v. Capellar, 38 Ohio St. 560, 574. Upon the question there, whether under section 1038 the auditor was authorized to correct the deduction of an item of reinsurance, in the returns for taxation of an insurance company, it was

said: "No fact is to be inquired about. Every necessary fact appears on the face of the return." And upon the question, whether like returns for previous years authorized inquiry and correction by the auditor, under sections 2781 and 2782, it was said: "We do not think that the remedy provided by sections 2781 and 2782 was intended to apply in cases where section 1038 is applicable." The converse of this proposition seems to us equally certain. In other words, facts having been determined by the auditor, not appearing upon the face of the returns, but ascertained under sections 2781 and 2782, by an investigation, we do not think the provisions of section 1038 apply. The error of the auditor would be in his conclusions of law and fact; and not error upon the face of the returns.

Affirmed.

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*SURETYSHIP FOR FIDELITY OF AGENTS. 744

Hamilton District Court, 1884.]

Avery, Buchwalter and Maxwell, JJ.

CITY INSURANCE CO. v. JOHN E. ROBERTS AND EDWIN STEVENS.

Appointment of agent not being for any fixed time—question of power of surety to discharge himself. But if, upon notice from him, the employer suspends agent, and next day recalls suspension and continues the agency, this, as to the surety, is a new employment and discharges him as to any subsequent default of the agent.

ERROR to the Superior Court of Cincinnati.

AVERY, J.

The action, in the superior court of Cincinnati, was upon a bond given by Roberts as principal and Stevens as surety in the penal sum of $2,000. The bond was dated May 15, 1879, with condition as follows: "That whereas the above-named John E. Roberts has been appointed agent of the City Insurance Company, in the city of Cincinnati, county of Hamilton and state of Ohio, and as such agent will receive money and property of and for said company, which he agrees to pay over and account for, as often as and whenever the company may require * * * and in all matters faithfully perform his duties as agent aforesaid * * * Now, therefore, if said John E. Roberts shall well and truly keep and comply with the foregoing requirements and save the company from loss or damage as aforesaid, this obligation shall be void, otherwise to remain in full force and virtue."

The petition alleged that the employment of Roberts as such agent continued until January 14, 1880, and that on the 15th of December, 1879, when notice from Stevens declining to be further bound as surety was received by the company, he had in his hands $393.15, for which the petition prayed judgment. The *answer of Roberts denied that he had the amount named, but admitted an indebtedness of $237.70, 745
with interest from January 31, 1880, which he alleged he had offered to pay, but the company refused. The answer of Stevens was a general denial, except that he had signed the bond; and, for further answer, that on the 6th day of December, 1879, he had notified the company of his withdrawal as surety, and that Roberts had offered to pay the amount then in

his hands, which the company refused. There was a reply denying these allegations, but none to the answer of Roberts.

The findings of the fact by the court were: That Roberts was appointed agent at the date of the bond and continuously acted in such employment up to the 10th of December, 1879, when he was suspended until he could furnish a new surety in consequence of a notice from Stevens declining to be further bound for him; that this notice was because he was drinking intoxicating liquor to excess, which fact was known to the company; that the requirements of the company of its said agent were that he should furnish monthly reports upon the 10th of each month, of the business done during the preceding month, and make payment of the amount shown on the following 25th of the month; and that at the date of said suspension he had in his hands, received since the 1st of the preceding month, $335.90; that upon the next day after said suspension the company wrote him as follows: "December 11, 1879. Mr. John E. Roberts * * * As far as your past business for the company and your settlement of accounts is concerned we certainly can have no complaint to make, and we assure you our requiring new bond is no lack of confidence in your integrity or ability * * * To avoid any unfavorable or unpleasant feeling upon your part, and perhaps for the best interests of the company, we have decided to recall your suspension and will allow you two weeks from this day to procure a new surety. So you will please go on with the business as usual until the 26th inst."

As conclusion of law the court found that there had been no breach of the bond, and entered judgment in favor of the defendants.

746 It is unnecessary to discuss under what circumstances a surety *in a continuing obligation may discharge himself by notice. The weight of authority appears to be, that irregularities of an agent, or person employed, for whose fidelity a guaranty has been given, though they be to the knowledge of the employer, do not discharge the surety unless of a nature to indicate some want of integrity. Telegraph Co. v. Barnes, 64 N. Y. 385; R. R. v. Kasey, 30 Gratt. 218; Insurance Co. v. Simmons, 131 Mass. 85. See Dinsmore v. Tidball, 34 O. S. 411. But the question is different, whether upon conduct such as would justify the employer in discharging the person employed, the surety may not call upon him to do so. Hunt v. Roberts, 45 N. Y. 691; Sanderson v. Aston, L. R. 8 Exch. 77, Kelly, C. B. Besides, the misconduct here, drinking intoxicating liquor to excess, was of a nature to affect business integrity.

Discussion of this, however, is unnecessary, for the reason that upon notice from Stevens that he would not be further bound after December 10th, the company recognized the justice of relieving him, and suspended their agent from that date. This put a period to the appointment for which Stevens had bound himself; it was final as to him. The appointment was for an indefinite time, the bond itself prescribed no limitation; he was bound, therefore, only for so long as the agency was continuously held by virtue of the appointment under which he had become surety. School Fund v. Dean, 130 Mass. 244, 245, Morton, J.; Commonwealth v. Bank, 129 Mass. 73; Sparks v. Bank, 3 Del. Ch. 274, 289; Addison on Contracts, 654. The letter, the next day, recalling the suspension and continuing the agency, was as to him a new appointment.

In continuing guaranties without limitation of time, and except as default of duty may furnish occasion, without power of the surety to

discharge himself, the construction of law is in his favor rather to narrow than enlarge his liability. Addison on Contracts, 654. The general rule as to the obligation of a surety is thus accurately expressed (42 Am. R. 406, note): "A surety is never to be implicated beyond his specific engagement, and his liability is always *strictissimi juris*, and must not be extended by construction. His contract must be construed by the same rules which are used in the construction of other contracts. The extent of his obligation must be determined from the language *used, read in the light of the circumstances surrounding 747
the transaction. But when the intention of the parties has thus been ascertained, then the courts carefully guard the rights of the surety and protect him against a liability not strictly within the precise terms of his contract. 2 Cai. Cas. 1; 62 Barb. 351; 11 N. Y. 593; 13 *Id.* 232; 21 *Id.* 88; 38 Eng. L. & Eq. 57."

Recalling the suspension and continuing the agent in employment left with him the money found in his hands. As to the surety, it was the same as if a different person had been appointed, and the money transferred. Bank v. Hunt, 72 Mo. 597, 620. The rules of the company were continued operative, by which the money was not demandable until the 25th of the month. Time was thus given for payment.

Except for the admission in the pleadings there is nothing to show default; there is no finding upon the subject. But whenever default was, it could not have been under the renewed relations, undertaken by the company, until after the period for which the surety was bound. Therefore, the judgment in his favor must be affirmed.

The same result would follow as to Roberts, but for his admission of indebtedness. The judgment in his favor is, therefore, reversed, and judgment against him entered here for the amount admitted by his answer.

VALIDITY OF POOLING AGREEMENTS.

[Superior Court of Cincinnati, General Term, April, 1884.]

Force, Harmon and Peck, JJ.

HERMAN H. HOFFMAN ET AL. v. LEE H. BROOKS ET AL.

An agreement for pooling part of the receipts by giving monthly certificates to pool trustees was made by all the tobacco warehousemen in a large city. It provided expressly against competition by forbidding certain methods of doing business, and fixed a complete schedule of prices. *It further provided for 748
the creation of a large guarantee fund from money so collected, each party being made liable to forfeit his interest therein, as well as to a heavy fine for breaking any of its stipulations. It was unlimited in duration, and withdrawal could take place only by unanimous consent.

Held, That although some of such stipulations might be upheld, others were void as against public policy, and, they not being separable in this action, that no recovery can be had on such certificates.

HARMON, J.

It appears by the pleadings, the case being reserved upon demurrer to the reply, that in June, 1881, the owners of all the werehouses in this city for the storage and sale at public auction of leaf tobacco, six in number, of which defendants owned one, entered into a written agreement,

whose object, according to its preamble, was to promote and protect the trade and harmonize the conflicting interests of all engaged in it in Cincinnati. It adopted a plan for pooling a portion of the receipts of the business, the president and secretary of the "association," as they styled themselves, being named as pool trustees. It was made the duty of the owners of each warehouse to make to such trustees, at the first of each month, a sworn statement of the number of hogsheads, casks and boxes of tobacco received therein during the month preceding, and to give to such trustees certificates of indebtedness at the rate of three dollars per hogshead, and one dollar for smaller packages. At the end of the year the funds so raised were to be divided as follows: An amount, supposed to be the amount of business ordinarily done per year by each warehouse, was fixed for the first year, and a method adopted for fixing such amount for other years, and it was to be credited upon its certificates for that amount, at the rate so paid in. After deducting 10 per cent., to be left in the hands of the trustees, or their successors, as a guarantee fund, the remainder was to be equally divided.

The guarantee fund was to be under the control of two-thirds of the warehouses, except in case of death, assignment or withdrawal from business. No warehouse could withdraw without unanimous consent, and any violation of the agreement was to forfeit all interest in such fund. Each was to pay into the pool five dollars for every hogshead it might fall short of the amount of business so fixed as the amount of its credit.

749 *The agreement was to go into effect December 1, 1881. On November 25th, however, the parties by another writing entered into what they styled "Articles of Agreement of the Cincinnati Tobacco Warehouse Association." The association was made to consist of "one member of each firm engaged in the sale of leaf tobacco in this city." The articles provided for the usual officers, and specified their duties; required two stated meetings each month and permitted call meetings besides; provided fines for every failure to attend and for every violation of the articles.

They then stipulated that no rebate or presents should be given to customers, except in a single district and to a limited amount; that no agents should be employed except in certain districts; that no effort should be made to change the consignment of any tobacco *en route* to any of the members, etc.

They then proceeded to fix the rates to be charged for drayage, storage, inspection, insurance, selling, interest on advances, and everything connected with the business down to the price of empty hogsheads; and in addition to the security of the guarantee fund and the power to impose fines as high as $500, the articles provide the association with inquisitorial power over the employees of all the warehouses and all other persons.

Defendants furnished their sworn statement and gave their certificates of indebtedness at the first of each month up to August, 1882, when they refused to do so longer. Plaintiffs, who are the pool trustees, sue upon the seven certificates of indebtedness so given, and also for an account of the business done by defendants, during the remaining five months, and for the amount so found due the pool under said agreement.

The right of plaintiffs to sue upon this last clause of action is open to grave doubt, but their right to sue upon the certificates is unquestionable. Their right to recover upon them depends upon the question

whether the agreement above set forth is valid or not. We say agreement, because while plaintiffs set out only the first writing in their petition and deny in their reply that the second, which defendants set out in their answer and allege to have been executed before the other was in fact so executed, the two writings are undoubtedly parts of the same plan. The second in date purports on its face to be "made cooperative with and for the purpose of carrying out" the first, *and the first refers to an "association" though none appears to have been formally organized until it was done by the second. Although it is alleged in the answer and denied by the reply that the object, intention and effect of the agreement were to establish and maintain high rates of interest and charges, and to restrain the several parties thereto from carrying on their business according to their own discretion, to stifle competition and create a perpetual monopoly, we think these are questions of construction, not of allegation and proof, otherwise than by the terms of the agreement itself, Kellogg v. Larkin, 3 Chand. 133, and the circumstances under which it was made. 750

It is not necessary to review the many authorities cited by counsel. The principles of law are settled with reasonable certainty. The difficulty arises in their application to the varying character presented by contracts.

The cases upon this subject seem to naturally separate into two classes.

In one the question is whether the contracting party has to a greater extent than fairly required for the protection of his private interests, disabled himself from carrying on his trade or business, and so not only deprived society of a useful member, but created a strong probability of adding to its burdens by reason of idleness or crime. The public in this class of cases is affected only indirectly through the individual contracting. See Lange v. Werk, 2 O. S., 519; Thomas v. Wiley, 3 O. S., 225, and cases cited in note to Mitchell v. Reynolds, 1 S. L. C.

In the other class, the question arising upon agreements creating combinations of persons engaged or interested in the same kind of business is whether their object and effect are to directly affect the public "by preventing competition and enhance prices," or "by exposing it to the evils of monopoly." Alger v. Thacker, 19 Pick. 51. The law, as well said by Jessel, M. R., in Printing Company v. Lamson, L. R. 19 Eq. 405, will not likely interfere with the citizen's liberty to contract as he will, but the interests of the public have led to unquestionable limitations of such liberty.

In the first class of cases just named the interests of the public and those of the party are to a great extent the same. Both forbid any restriction of his earning power without an equivalent, *and this is the reason why only a partial restriction is permitted, and that only for a valuable consideration. 751

In the second class of cases the immediate interests of the public and those of the contracting parties are in conflict. The former desire lower, the latter higher prices. Any prevention of competition injures the public in this regard. But when competition becomes so great that those engaged in a business cannot carry it on without loss, the public becomes exposed to the same danger as in the first class. The law, therefore, applies an analogous rule. Those engaged in any trade or business may, to such limited extent as may be fairly necessary to protect their

interests, enter into agreement which will result in diminishing competition and so increasing prices. Just the extent to which this may be done courts have been careful not to define, just as they have refused to set monuments along the line between fairness and fraud.

The presumption is always against the validity of such agreements, and certainly where they include all those engaged in any business in a large city or district, are unlimited in duration, and are manifestly intended by the surrender of individual discretion, by the arbitrary fixing of prices, or by any of the methods of which the hope of gain makes human ingenuity so fruitful to strangle competition outright and breed monopolies, the law, while it may not punish will not enforce them. Salt Company v. Guthrie, 35 O. S., 666; Grosselli v. Louden, 11 O. S., 349; Crawford v. Wick, 18 O. S., 190; McBirnie v. White Lead Company, 9 W. L. B., 310; Coal Company v. Same, 68 Pa. St., 173; Arnot v. Coal Company, 68 N. Y., 558; Croft v. McConoghy, 79 Ill., 346; Hilton v. Eckersley, 6 E. & B. 47; Stanton v. Allen, 5 Denio, 434.

And we notice in the newspapers of April 25th a brief notice of a decision by the superior court of Indianapolis refusing to enforce an agreement among insurance companies fixing rates, etc. Although, as said in Raymond v. Leavitt, 46 Mich., 447, courts may be inclined to apply this rule more strictly in cases involving the necessaries of life or services of a *quasi* public nature, there is no authority for excepting from its operation any legitimate trade or business. Alger v. Thacker, supra.

752 *Judged by this rule we think the agreement upon which this action is based must be condemned. Parts of it are perhaps not objectionable, such as those providing against the employment of agents, the payment of bounties, attempts to change consignments, and for notice to each other of advancements to common customers, etc. But by its term it purports, and by its pleadings is admitted to embrace all the persons engaged in a business shown by the pleadings to be of very great magnitude in a city admitted to be the largest market for such business in the United States. It is unlimited in duration and manifestly intended to be perpetual. None can withdraw without unanimous consent, and the guaranty fund is artfully contrived to operate as a constantly strengthening chain to hold the association together. It is not averred that the prices fixed are extortionate, but it is enough that they are absolutely removed beyond the operations of every natural cause of fluctuation. Though fixed at first for only a year, there is no telling how they might be fixed in succeeding years when the guaranty fund becomes sufficient of itself to force obedience to the mandates of the managers.

In short, either this rule does not apply to persons engaged in this business at all, or this contract violates it. It is hard to imagine how it could go further than it does. Nor is it one of those agreements in which, for the purposes of our judgment here, the good can be separated from the bad. Judgment for the plaintiffs would merely place money in the fund which is held as a guaranty for compliances with all and singular the stipulations of the agreement. We are not asked nor have we power to control its application. We are requested to confer a scepter to be wielded by an absolute monarch.

The cases upon which plaintiffs rely do not conflict with our decision. Schaainka v. Schomunghauser, 8 Mo. App., 622, is expressly put upon the ground that the agreement was reasonable, being limited to six months and to a part only of a city, and it affirmatively appearing that

competition was so great as to entail actual loss upon all engaged in the business, which does not appear here. And the court remarks very truly that while the evils to be apprehended from contracts by individuals not to engage in business have diminished with the development of *civilization those to be feared from combinations of wealth and 753
power have increased.

Kellogg v. Larkin, 3 Chand., 133, is decided upon the same ground.

In Collins v. Lucke, S. R., 4 App. Co., 674, the part of the agreement held valid went to no such length as this. It was merely an agreement among persons engaged in stevedoring to assign to each the business of certain shipping houses, whether it included all the stevedoring firms in the place, and whether it was limited in time, do not very plainly appear. These, however, were not to be taken as absolute tests. But, although the court say one of the results of the agreement would probably be to raise or keep up prices, there was no attempt to fix or regulate them. Each was left to bargain for himself. Though not expressly stated in the report, this is clearly shown by the stipulation for arbitration of the amount to be paid in case any one should be called to work for the customer of another.

The distinction between the other case cited for plaintiffs and this are too manifest to require mention. We need not notice the other questions raised.

Demurrer sustained and judgment for defendant.

FORCE and PECK, JJ., concur.

*DEVISE WITH POWER OF SALE. 33

[Hamilton District Court, 1884.]

Avery, Buchwalter and Maxwell, JJ.

EDWARD SARGENT, EXECUTOR, ETC., v. JAMES W. SIBLEY.

A devise in trust "to invest, manage and control," in such manner as may, in judgment of trustee, be best calculated to combine safety with productiveness, confers upon the trustee power of sale at his discretion. Specific performance is a matter of equitable consideration, and where the premises are under an outstanding lease of which the purchaser is not informed at time of the contract, but afterward becoming informed proposes to take subject to the lease, upon a certain condition, the vendor is not entitled to enforce the contract without the conditions. The condition being that the title should be satisfactory to the purchaser's attorney, the contract is not binding if upon examination by the purchaser's attorney he in good faith disapproves of the title.

APPEAL from Court of Common Pleas.

AVERY, J.

This is an action to enforce the specific performance of a contract to purchase real estate. The contract was negotiated between the parties by a third person, to whom the plaintiff had first offered the property without success, and then agreed to give him fifty dollars if he would find a purchaser. He obtained an offer of $6,000 from the defendant and communicated it to the plaintiff, who thereupon wrote the following proposition, which the defendant accepted:

"CINCINNATI, MARCH 18, 1882.

"MR. JAMES W. SIBLEY—Dear Sir:—I will sell you the Cist tract of land belonging to the estate of D. B. Sargent, say about thirty-one acres in College Hill, for $6,000, one-third cash, balance in one, two, three and four years, payable semi-annually, secured by mortgage on the premises, to be paid for when possession is given. If you agree to the above, please accept across the face.

"EDWARD SARGENT, Exr. D. B. Sargent.

"I accept the within proposition, March 18, 1882.

"JAMES W. SIBLEY."

At this time there was an outstanding lease on the premises held by one Cist, which had three years to run, but was subject to the condition that, in the event of a sale, the lessee would surrender upon three months' notice. This, the defendant had no knowledge of at the time of his acceptance; but the person *employed in the negotiation, and 34
who had brought the proposition to him, coming back afterwards to communicate the information, he said he would take the property subject to the lease, if the plaintiff would throw off ninety dollars, and make a title that would be satisfactory to his attorney.

W. C. Huntington, the person in question, and who was called by the plaintiff as a witness, testifies that the plaintiff agreed to this, and that he, the witness, thereupon went to the defendant's office, and, not finding him in, left the following note:

"CINCINNATI, MARCH 24, 1882.

"MR. SIBLEY—Dear Sir:—I have seen Mr. Sargent, and he accepts your proposition to deduct ninety dollars from the amount of the purchase and date the deed from April 1st, you to take the property subject to the lease to Cist, S. to give you a title to the property that will be satisfactory to your attorney. The June taxes to be paid by Sargent, and you to pay the taxes in December.

"Yours truly,

"W. C. HUNTINGTON."

The testimony of the plaintiff is, that the written proposition and acceptance were never modified, except by agreement of defendant to take the property subject to the lease if he would throw off ninety dollars, and he denies that he was to make a title that would be satisactory to defendant's attorney. At the same time, he says he may have spoken of the title being satisfactory, meaning that it was good in D. B. Sargent; and he admits writing the following:

"CINCINNATI, MARCH 25, 1882.

"MR. JAMES W. SIBLEY—My Dear Sir:—As soon as your attorney is through with the examination of the title and satisfied, please send me the deed, and I will have a deed made out and submit to you to show to your attorney before execution. * * *

"Yours respectfully,

"EDWARD SARGENT, Exr."

The title of the plaintiff was in him, in trust under the will of his brother, D. B. Sargent; and the attorney employed by the defendant was of opinion that as executor he could not convey without a suit bringing in the parties to the trust. This being communicated to the plain-

tiff, he at once obtained an *ex parte* *order from the probate court for the conveyance and tendered a deed which was refused; and this action was then brought. 35

The clause of the will relied upon as conferring power of sale, after devising all property, real and personal, in trust for the payment of debts and funeral expenses and costs of administration, is as follows: "The residue of my estate to be invested, managed and controlled by my said trustee in such manner as may in his judgment be best calculated to combine safety with productiveness."

Livingston v. Murry, 39 How., 102, cited for the plaintiff, is in point, and sufficiently demonstrates that this clause conferred power of converting realty into personalty and, therefore, the power of sale. But the question is as to the agreement, to make a title satisfactory to the defendant's attorney.

The weight of the evidence is that the plaintiff agreed to this. The witness who testifies to it, is disinterested and was called by the plaintiff himself. The letter—"March 25th, 1882, Mr. James W. Sibley. My Dear Sir: As soon as your attorney is through with the examination of title and satisfied"—is in the nature of an admission. Let it be assumed for the moment, however, that the plaintiff did not agree.

Upon discovering the outstanding lease, which at the time was not disclosed to him by the plaintiff, the defendant was in equity entitled to withdraw from the contract. His obligation for the price, and, upon the other hand, the delivery of possession, were by the terms of the contract mutual and dependent. Specific performance, it is true, may be decreed, although title is not capable of being made before final hearing. But the rule is not universal; there are exceptions to it. Brashier v. Gratz, 6 Wheat., 528; Garnett v. Macon, 2 Brook, 246; Richmond v. Gray, 3 All., 25, 30; Christain v. Cabell, 22 Gratt., 82; 2 Daniell Ch. Pr. (5th Ed.) 990, note. Whether or not the time was of the essence of the contract, the defendant by prompt action might have made it so. Kirby v. Harrison, 2 O. S., 326. 332; Remmington v. Kelley, 7 O. pt. 2. 97; Higby v. Whittaker, 8 O., 201; Hoggart v. Scott, 1 Russ. & M., 293.

It was only upon condition, that the plaintiff would throw off $90 and make him a title satisfactory to his attorney, *that the defendant proposed to go on. The person to whom he submitted the proposition, had been employed by the plaintiff in the negotiation, and it was natural to suppose was still acting for the plaintiff. Notwithstanding, therefore, it were to be assumed that the plaintiff did not assent, specific performance would be against equity, except upon the condition by the terms of which alone the defendant agreed to go on with the contract. Specific performance is addressed to the equitable consideration of a court. The proposition, to take subject to the lease, and that title should be made to the satisfaction of the attorney, were coupled together—one was the consideration for the other. If not accepted by the plaintiff, the plaintiff himself was in default when the deed was tendered and this action commenced; the obligation of defendant, by the contract, being dependent upon putting him into possession—and the plaintiff being out of possession and by no possibility capable of performance on his part before the expiration of three months. 36

Accordingly the condition, that the title should be satisfactory, is to be considered. As a general rule where it is stipulated in a contract, that what is to be done by one party shall be to the satisfaction of the

other, or of third person, the decision of such other party or person is final. Brown v. Foster, 113 Mass., 136; Gibson v. Cranage, 39 Mich., 49; Zaleski v. Clark, 44 Conn., 218; Gray v. R. R., 11 Hun., 70; Wharton on Contracts, section 593. It is but an exemplification of this principle, that, in a suit for specific performance, where it has been agreed to give the defendant a title satisfactory to his attorney, he will not be compelled to take a different title.

In Hudson v. Buck, 7 Ch. D., 683, the contract was subject to approval of the title by the purchaser's solicitor. Held, in the absence of *mala fides* or unreasonableness on the part of the purchaser or his solicitor, the vendor could not enforce specific performance if the purchaser's solicitor disapproved of the title.

In Hussey v. Horne—Payne, 8 Ch. D., 670, an offer to sell was accepted, with this addition, "subject to the title being approved by our solicitors." The question was whether this was an additional term, which not itself being accepted left the contract incomplete. Jessel, M.
37 R. The expression "subject to the *title being approved by our solicitors," appears to me to be plainly an additional term. The law does not give a right to the purchaser to say that the title shall be approved by any one, either by his solicitor, conveyancing counsel, or anyone else. All that he is entitled to require is what is called a marketable title, or, as it is sometimes called, a good title. Therefore, when he puts in, subject to the title being approved by our solicitors, he must be taken to mean what he says—that is, to make it a condition that solicitors of his own selection shall approve of the title. The matter has been recently and fully discussed by Mr. Justice Fry, in Hudson v. Buck, and I entirely agree with his observations on the nature of the condition. Cotton, L. J.: "This stipulation would make the solicitor, provided he acted reasonably and *bona fide*, the sole and absolute judge as to whether there was or was not a good title. If he acted reasonably and *bona fide* the court (assuming that the term had been assented to and made part of the contract) would not inquire whether his objections were well founded in law."

In the House of Lords, upon the appeal of the case, the Lord Chancellor differed in opinion as to the construction of the words, having great difficulty in thinking that any person could have intended, by a term of that kind, to reduce the agreement to something wholly illusory, and being disposed rather to look upon it as meaning nothing more than a guard against it being supposed that the title was to be accepted without investigation. The case itself was affirmed upon another ground. Hussey v. Horne—Payne, 4 App. Cas. 311, 322. But the words here are that the title shall be "satisfactory," and little room is left for supposing them to have meant, merely that an opportunity should be given for investigation.

In Taylor v. Williams, 45 Mo., 80, 81, it was stipulated, "the title on investigation to be satisfactory and a warranty deed given." Said the court: "The proposed conveyance was to be made, only in case Taylor on investigation should be satisfied with the title. The title on investigation was to be satisfactory to him, or there was no sale. The power was vested in him to determine whether the trade should go on, or be
38 *abandoned, so that he did not object to the title captiously or unreasonably."

In Averett v. Lipscomb, 76 Va., 404, upon a sale at auction, it was announced that the purchaser, if not satisfied with the title, would not be required to take the property. The purchaser, upon an examination of the title by his counsel, who advised him against taking it, declined to complete the purchase. The question was whether, under the terms of a devise to the separate use of a married woman, there was a restraint upon alienation. The court was clearly of opinion there was not, but refused to enforce specific performance against the purchaser—holding, that the contract left it to him "to determine for himself the matter of title. If on examination he was not in good faith satisfied with the title, he was not to be bound. The bargain was at an end."

Whether the attorney of defendant ought to have been satisfied with the title tendered by the plaintiff is not the question. When a contract permits the party himself to decide whether the thing is to his satisfaction, it is not for anyone else to determine the matter by deciding that it would be unreasonable not to be satisfied (113 Mass., 139; 39 Mich., 50). The objection taken was upon the power under a trust, "to invest, manage and control," of selling and conveying at the discretion of the trustee without the supervising control of a court. Although, in our opinion, the power existed, the objection itself was not so unreasonable as to suggest bad faith, or collusion to defeat the contract, between counsel and client.

Petition dismissed.

J. D. Macneale, for Plaintiff.

W. Austin Goodman, for Defendant.

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*HUSBAND AND WIFE—MORTGAGE. 215

[Superior Court of Cincinnati, August, 1884.]

HENRY D. ALLEN ET AL. v. CHAS. H. ALLEN, JR., ET AL.

A mortgage directly from husband to wife, securing to her a provision by way of lien upon real estate, will in the absence of opposing equities be enforced against his heirs.

HARMON, J.

Certain real estate of Alfred S. Allen, who died intestate, having been sold in partition, the question of the validity of a mortgage given by him to his wife thereon, shortly before his death, arises upon distribution. The contestants are the wife and the heirs.

While the consideration expressed in the granting clause of the mortgage is $20,000 and love and affection, it was admitted at the hearing that the recitals of the defeasance clause are true and that there was no other consideration than that stated therein. Those recitals are that she had some days before joined her husband in a mortgage to one Taylor upon the same property to secure a loan of $25,000; that the husband, intending to continue in business with his usual risks, desired "to secure and give to her absolutely, over and above her dower therein, an interest in said premises equal to the consideration named, to-wit, $20,000, and to make said sum secure to her in said premises prior to any and all

liens, rights, interests and claims, except said mortgage for $25,000, and to make the said sum a charge upon his estate in the event of his death before hers."

The mortgage was conditioned to be void "if the said Alfred F. Allen shall pay, or in the event of his death before that of his wife his representative shall pay to her out of said premises and as a charge thereon, in addition to her dower therein, the said sum of $20,000 without interest."

It is not contended that she joined in the Taylor mortgage upon any agreement, or in the expectation of any reward, nor that said mortgage or her husband's continuance in business resulted in any diminution of her dower or other share of his estate. There was clearly no valuable con-
216 sideration for the mortgage, *and it must stand or fall by the rules applying to conveyances upon meritorious consideration only.

It is well settled that provision for a wife is a meritorious consideration, and that not only will executed conveyances for that purpose be upheld, but defective ones will, in the absence of opposing equities, be perfected. Adams' Equity, pages 97–101; Crooks v. Crooks, 34 O. S., 610. No opposing equities, either of creditors or children, are pleaded or proved, nor is it averred that the provision sought to be made is unreasonable in amount, and the presumption is in its favor. Crooks v. Crooks, *supra.*

It is contended that it is testamentary in its nature and, therefore, invalid, because not executed or proved according to the laws relating to wills. It is clear, however, that the intention was merely to make the instrument invalid in case of the husband surviving the wife. It was not intended to be revokable or to take effect as a lien only at the grantor's death. And there is nothing in those laws restricting the right to convey or forbidding the death of the grantor being made the event upon which conveyances may be made to take or lose effect. If the instrument in question were a simple deed, it would unquestionably be upheld here, though void at law, because made directly from husband to wife. Crooks v. Crooks, *supra.* But it is contended that a different rule is to be applied to a mortgage, because, being regarded in equity as a mere security, it is executory in its nature, and that this mortgage, being to secure not even a promise but merely the performance of an intention which is not enforceable, must fail with what it was given to secure.

A mortgage, however, is regarded in equity for certain purposes only, such as enforcing the right to redeem and making the security follow the debt. For other purposes equity follows the law in regarding it as a conveyance of the title with all its incidents. In other words, it is not considered as an instrument of mere executionary effect, and foreclosure is a proceeding, not to enforce a right but to cut off one, viz: the right to redeem. So that a gift may be made by way of mortgage. Jones on Mortgages, sections 613–4, and cases cited, especially Bucklin v. Bucklin, 1
217 Abb. App. Cas. 242; Campbell v. Tompkin, 32 N. J. Eq. 170. *See also the Roll cases followed in Williams v. Engelbrecht, 37 O. S. 383.

This being so, it is difficult to imagine why if one may by way of material provision convey to his wife an absolute fee, he may not so convey a conditional one, or what difference it can make that the condition is the payment of money.

This answers the argument that the instrument in question is not a mortgage, because there was no promise of debt. There was a convey-

ance of a conditional fee as valid in equity as though made through a trustee, and this action is an equitable one.

Decree for the widow.

Ferris & Wilder and Ramsey & Matthews, Attorneys for the Widow.

Reuben Tyler, Attorney for the Heirs.

*TRUSTS AND TRUSTEES—JUDGMENTS. 419

[Superior Court of Cincinnati, General Term.]

Peck, Harmon and Force, JJ.

†JAS. P. KILBREATH, TRUSTEE OF THE OHIO LIFE INSURANCE AND TRUST COMPANY, v. SAMUEL FOSDICK.

Where the trustees, appointed by the probate court, of the estate of an insolvent, brings an action against a defendant to correct an account between the defendant and the insolvent, and for judgment for the balance due, and upon trial a balance is found due to the defendant, and judgment rendered in his favor "against the plaintiff as trustee:"

Held, The litigation is by and against the plaintiff in his representative capacity and execution will not issue for more than the amount of the dividends allowed by the probate court.

FORCE, J.

The plaintiff filed a petition averring that the Ohio Life Insurance and Trust Company failed in August, 1857, and shortly after made an assignment under the laws of Ohio; that on the 31st of August, 1857, defendant wrongfully and fraudulently *induced the assignees to credit him on the books of said Trust Company with the sum of 420
$8,000, when he was not entitled to such credit, whereby defendant appeared on the books of the company to be a creditor, when in fact he was a debtor to the company in $5,953.41; that plaintiff was afterwards appointed trustee in place of the assignees; that he subsequently discovered the fraud, and demanded payment from the defendant, which being refused, plaintiff prays that the books of said company be corrected, the aforesaid entry erased, and that he have judgment against the defendant for the balance which shall then be found due, with interest, and such other and further relief as he may be entitled to.

The defendant, answering, denies that he wrongfully and fraudently induced the assignees to credit him on the books of said company with $8,000, when he was not entitled to such credit. and says the allegation is wholly untrue, and avers the plaintiff was and is indebted in fact to the defendant as appears by the books of the company in the sum of $2,553.86, for which sum with interest he prays for judgment against the plaintiff, as trustee.

The entry of judgment states that "the court finds upon the issue joined for the defendant, whereupon it is considered by the court that the defendant recover of the plaintiff, as trustee, the sum of $7,007.34, etc."

†Motion to file petition in error was overruled by Supreme Court, 12 B., 298.

Upon this judgment, execution was issued for the full amount and levy made upon real estate, the individual property of Kilbreath. The plaintiff moved to squash the execution. The case is reserved on that motion.

The defendant contends that the words "as trustee" in the judgment entry are surplusage and the judgment is against Kilbreath, personally.

It is true that in an action at law against a trustee upon his contract made concerning his trust, the words "as trustee" are mere words of description, and have no more effect than the addition "esquire" and the judgment goes against him personally. But a court of equity recognizes the trust, enforces the trust, and lays hands on the trust property.

This is an action to correct an account and for judgment upon the account as corrected. The defense is that the account is correct and the
421 judgment should be upon the account as it *stands upon the books. This is a proceeding in equity. The plaintiff is the statutory trustee of an insolvent debtor. The subject-matter of the action is the account between the insolvent debtor and the defendant upon the books of the insolvent debtor. The object of the action is to determine the indebtedness between the insolvent debtor and the defendant. The finding being that the insolvent debtor was in debt to the defendant, the judgment was necessarily for the amount of the balance; but of that judgment the defendant can collect only the dividend which shall be declared by the probate court.

But it must be admitted that the limits of equity jurisdiction in Ohio in the matter of accounts, are not precisely defined. And the contention of the defendant goes farther. It is admitted that in some cases in an action against a person who stands in a representative capacity, judgment may be rendered against him which shall be collected from the property which he holds in his representative capacity. But it is contended that the judgment cannot have that effect unless the entry states that it shall be so collected. And, as is this case, the judgment is in form a common law judgment, and does not state that it is to be levied on the goods of the insolvent, though it may be erroneous, yet as it stands it must be levied on the individual property of Kilbreath.

The most familiar example of such representative capacity is an executor or administrator. And to determine the effect of such judgment in the absence of statute, we must consult the decisions as to the effect of such judgments before they were regulated by statute. Formerly it was not an absolute rule that debts of a testator of the same class should be paid *pro rata* out of the assets applicable to such debts. A creditor who sued and obtained judgment was entitled to have his judgment paid in preference to a creditor of the same class whose claim was not reduced to judgment. Sometimes, the entry provided that the judgment should be levied on the individual property of the executor; sometimes, upon the property of the testator if it could be found, otherwise upon the executor's own property. The question arises, was this portion of the entry a part of the judgment of the court, or was it a direction inserted by a clerk for the information of the sheriff.

422 *This question was determined by the King's Bench, in Short v. Coffin, 5 Burrow, 2730. Judgment was rendered in King's Bench against an executor *de bonis propriis*. The case was taken on an error of the Exchequer Chamber. After issue joined and argument,

and the case had been taken under advisement in Exchequer Chamber a motion was made in King's Bench to change the judgment entry there so as to make it *de bonis testatoris si*, etc.; *et de bonis propriis si non*, etc. The motion was granted, Lord Mansfield delivering it as the opinion of the court, "that this is not an error in the judgment of the court in point of law; but a mere mistake of the clerk."

Our statute is in accord with this ruling. Section 6107, Revised Statutes, provides that executions against executors and administrators shall run against the goods and estate of the deceased in their hands. Section 6105, provides, that no execution shall issue unless by order of court, or unless after the time allowed by law or by further order of court for collection of assets; and, after settlement of the estate, execution shall not issue for a greater amount than a just proportion of the assets. It is common practice to insert the first direction, that in section 6107, in the judgment entry. It is not the practice to insert the others. But all the provisions are consequences annexed by the statute to the judgment; and their validity is not affected by their insertion in, or omission from, or their imperfect or erroneous entry in, the judgment. And so it has been held by the Supreme Court Commission in Curtis v. National Bank, 39 Ohio State, 579.

Freeman on Judgments says in section 45: "If the entry of a judgment be so obscure as not to express the final determination with sufficient accuracy, reference may be had to the pleading and to the entire record. If, with the light thrown upon it by them, its obscurity is dispelled, and its intended signification made apparent it will be upheld and carried into effect."

And in section 71: "The entry may be amended to show that the recovery was for or against him in some representative capacity; and, if against him in such capacity to relieve him from personal liability and subject him to the liability attaching to him in his representative character only."

The pleadings in this case show that the plaintiff appears only *in his representative capacity. The litigation is only concerning 423
the estate of the Ohio Life Insurance and Trust Co., which the probate court is now administering through the instrumentality of the plaintiff, and the judgment being against him as "trustee" is against him in his representative capacity. The execution and all proceedings under it will be set aside and it will be ordered that no further execution issue until the probate court shall have determined the amount of the dividend to which the defendant is entitled.

HARMON and PECK, JJ., concur.

Hoadly, Johnson & Colston, for Kilbreath.

Matthews & Shoemaker and Stallo, Kittredge & Wilby, Contra.

487 *NONRESIDENT SUITORS—PRIVILEGE FROM ARREST.

[Superior Court of Cincinnati, General Term.]

Peck, Harmon and Force, JJ.

CHARLES F. BASSETT v. JOHN G. GUNSOLUS.

Nonresident suitors are, by the rule of the common law, while attending court, privileged from being served with summons in civil actions, and it is not the intention or effect of R. S. § 5459, to deprive them of such privilege.

HARMON, J.

Defendant, a resident of Michigan, while here for the sole purpose of attending the trial of a case in this court, in which he was both a party and a witness, and in which plaintiff, a resident of this city, was also a party, was served with summons herein during one of the intermissions of the court. His motion to set aside the service was reserved.

There can be no question that at common law nonresident suitors and witnesses are privileged from being served with summons during the time necessarily occupied in going to, attending, and returning from trial. Of the numerous cases upon the point we mention: Matthews v. Tufts, 87 N. Y., 568; Dungan v. Miller, 8 Vroome, 182; Huddison v. Priger, 9 Phila., 65, which fully set out the reason and scope of the rule.

488 *While we know of no decisions upon the subject in Ohio, except at *nisi prius*, the same reasons of policy, which lead to the adoption of the rule elsewhere, should impel us to enforce it here if there is no statute to the contrary.

The only one which can be seriously claimed to be so is one of the clauses of that relating to privilege from arrest, Revised Statutes, sections 5457–9. After enumerating the persons so privileged, it is provided that nothing therein contained "shall be construed to privilege any person herein specified from being served at any time with a summons or notice to appear." And it is argued that the intention and effect of this is to abolish all privilege from being served with summons as to the persons so specified, among whom are "all suitors, jurors and witnesses while going to, attending, or returning from court."

This language appears at first glance to bear that construction, but the consequences of so holding seem so serious, that if any other reasonable construction is open to us, we feel inclined to adopt it.

To give this clause the meaning so contended for, it must be held to be affirmative legislation to the effect that any of the persons named may be served with summons at any of the times when they are privileged from arrest. A judge may therefore be served while holding his court, and persons may be served in the court room during the sitting of the court or in the hall of either house of the general assembly during the sitting thereof.

But while we are bound by a well known rule of statutory construction to give effect to all the language used, we are also at liberty to consider the subject of which the legislature is treating, the connection in which the language is found, and its form.

The clause under consideration is negative in form, that is, it is worded as a mere limitation, it is found at the end of specific grants of privilege from arrest, and while it may be said that no privilege from being summoned could be inferred from the grant of immunity from arrest,

it is also to be said that such clauses are often inserted in statutes out of abundant caution, and that while the enumeration of persons privileged from arrest may not include all so privileged at common law, it does include * some not so privileged, *i. e.* officers and soldiers of the revolution, females, and Israelites on the last day of the week, as to whom some such limitation may have been thought necessary. 489

It is not provided that the persons named shall be entitled to no privilege from being summoned, but merely that " nothing in this subdivision contained " shall have that effect, and we are prepared to believe that the intention was to sweep away, in this indirect manner, all existing rules relating to privilege from being summoned, founded as they are upon principles of fairness and sound policy in the administration of justice.

It is quite possible, too, that the distinction sometimes made in the application of the common law rule between resident and nonresident suitors and witnesses, (see Jenkins v. Smith, 57 How. Pr., 171,) may apply here, so that even if merely as suitors persons are by the statute deprived of privilege from summons, they may be, if nonresidents coming into the jurisdiction of the court to facilitate the administration of justice, entirely outside of the operation of the statute, even giving it the construction for which counsel for plaintiff contends.

Motion to set aside service granted.

FORCE and PECK, JJ., concur.

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*BANKING—COMMERCIAL PAPER—GUARANTY. 748

[Superior Court of Cincinnati, General Term.]

Peck, Harmon and Force, JJ.

†FIRST NATIONAL BANK v. UNION NATIONAL BANK.

The words, "We know them to be good," referring to commercial paper, held to be a guaranty and not a mere expression of opinion.

RESERVED on motion for new trial.

On the 23d day of January, 1883, the cashier of the First National Bank at Delaware, O., mailed to the cashier of the First National Bank at Cincinnati, the following letter:

"FIRST NATIONAL BANK,

"DELAWARE, O., January 23, 1883.

'O. H. TUDOR, Cashier:

"Dear Sir: Some time since you wrote us that you could furnish us with some good paper. At present we have about $15,000 or $20,000 we should like to invest in some good six or seven per cent. paper, either on four or five months' time, or on demand, with good collateral. If you can find anything of this kind for us, we can leave a balance of about $15,000 in your hands to be used in the regular course of business, but we shall try to keep it unimpaired as long as possible. If you can favor us as above please send us one piece over $10,000, as that is ten per cent. of our capital, and we have always made it a point to keep on the safe side of the law.

"Respectfully,

"J. E. GOULD, Cashier."

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†This case was affirmed by the Supreme Court. See opinion 45 O. S., 236.

The letter was received at the Union National Bank on the day after its date, and was immediately answered by the following telegram:

"CINCINNATI, January 24, 1883.

749 "To First National Bank:

"Have just bought three five thousand pieces paper six per cent. Do you want them? We know them to be good. Answer.

"UNION NATIONAL BANK"

And thereupon the First National Bank forthwith responded as follows:

"DELAWARE, O., January 24, 1883.

"Will take the fifteen thousand. Have remitted draft.

"FIRST NATIONAL BANK."

On the same day, after the receipt of the telegram, the cashier of the Union National Bank wrote the Delaware Bank a letter giving a detailed statement as to the notes, with names of makers and indorsers, face value, amount of discount, and net value after deducting discount, $14,666.67, saying: "We charge your account to-day, and hold the notes subject to your order. We had bought these notes for ourselves but let you have them."

The makers and indorsers of one of the notes were insolvent when it became due, some four months afterward, and it was not paid for that reason.

The plaintiff brings this action against the defendant to recover the amount of the note, claiming that the telegram sent by defendant January 24, 1883, on the faith of which the notes were purchased constituted a guaranty that would be collectable when due.

PECK, J.

This case was brought before us on demurrer to the petition at a former general term, and we were all then of the opinion that it did not differ materially from Sturges v. Bank of Circleville, 11 O. S., 153, where the words used in a similar transaction, "It is perfectly safe," were held to constitute a guaranty. We were unable to find any substantial difference between those words and the words, "We know them to be good," used in this telegram. The petition set forth only the dispatch with the other necessary allegations as to the purchase of the note, its nonpayment, the insolvency of makers and indorsers, etc., but it contained none of the previous or subsequent correspondence of the parties, all of which is now before us in the bill of evidence.

750 *The principal question we are now called upon to decide is whether there is anything in the testimony, consisting mainly of the correspondence, to vary the interpretation we have heretofore given the dispatch. Several letters are in evidence, in which the words "good paper" are used in various connections, the one dated January 23d above set forth being a fair sample of them. This letter plainly contemplated that the defendant should act as the agent of the plaintiff, and, as such, defendant is requested to buy for the plaintiff "some good six or seven per cent. paper." If defendant had complied with the request and as the agent of the plaintiff had gone out into the market to buy, it could only have been held to the exercise of good faith, and it might be true as contended, that the words of the dispatch would be interpreted only as an expression of opinion. But the defendant took a different position. Instead of an agent to purchase for plaintiff, defendant forthwith offered to sell notes of which it was then the owner, and plaintiff accepted the offer. The relation was that of vendor and vendee, as it was in Sturges v. Bank of Circleville.

It is further to be observed that defendant in the dispatch offering the notes and asserting that defendant's officers knew them to be good, requested and received an answer by telegraph accepting the offer, and on the same day the plaintiff was charged on the books of defendant with the value of the notes. These circumstances are significant as showing that the Delaware Bank bought solely on the faith of the dispatch. At the time the transaction was closed plaintiff's officers did not know by whom the notes were made or indorsed, and defendant's officers must have known that they had no other information than that contained in the dispatch, and were relying entirely upon the statement contained in it. The request for an answer, under the circumstances meant an answer by telegraph, and that could only mean that plaintiff was requested to act at once upon the statement of defendant, without waiting for further information, or having any opportunity to exercise judgment in the matter. It was in the nature of an invitation to rely upon

the statement in defendant's dispatch. While this circumstance is not conclusive, it appears to point toward the conclusion that the words of the dispatch were intended as something more than a mere expression of opinion.

*The majority of the court have come to the conclusion that the case as now presented does not differ materially from the case as it stood on demurrer, 751
and that now as then we should follow Sturges v. The Bank of Circleville. Some exceptions were taken to the rulings of the court upon the trial, but we find no error in them prejudicial to defendant.

The motion for a new trial will be overruled, and a judgment entered upon the verdict for plaintiff.

FORCE, J., concurs.

HARMON, J., dissenting opinion.

Although I concurred in overruling a demurrer to the petition, I am unable to concur in the judgment for plaintiff just rendered. The petition having set out defendant's telegram of January 24, 1883, and averred that it thereby guaranteed payment of the note referred to, the only question on demurrer was whether the language of the telegram was capable of such construction. Following Sturges v. Bank, 11 O. S., 163, we held, and I still think rightly, that it was.

The question now is, was the language in fact understood by the parties to import such guaranty? For I do not understand it to be contended that the language used has any such fixed or technical meaning as to cut off by conclusive presumption inquiry into its actual meaning as used by them.

It was held in Sturges v. Bank, that those parties, as matter of fact, so understood the language they used, which was in form an absolute assertion of quality. Under the same circumstances it would be more difficult to believe that these parties so understood the language they used, it being in form rather a mere statement of opinion upon information. But consider the circumstances of this case as disclosed by the evidence. Plaintiff wrote defendant to buy it some paper which defendant might "know to be good." It is conceded that here this language referred to nothing but the exercise by defendant of its best judgment. Defendant at once answered that it had just bought and would let plaintiff have, if it wanted them, the note in question with others, and that it did "know them to be good." Plaintiff simply replied that it would take them.

My mind reels at the sudden turn and tremendous leap required *to reach the conclusion that here defendant understood that it was giving and 752
plaintiff that it was receiving a guaranty of payment.

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*RECEIVER — INSOLVENT CORPORATION — SUBROGATION. 56

[Superior Court of Cincinnati, General Term, June, 1885.]

Peck, Harmon and Force, JJ.

J. H. PUTNAM v. NEWS PUBLISHING CO.

1. Where a receiver of the property of an insolvent corporation, appointed by consent at the suit of a mere creditor, has in his hands for distribution the proceeds of the sale of its property, the same should be distributed according to the laws relating to estates of insolvent debtors.
2. One who carried on the business of such corporation, under an agreement whereby the directors and himself were to contribute money for that purpose, which they failed to perform, and who, relying upon their assurances of performance, payed the employees out of his own funds, will be subrogated to the right of such employees to preference in such distribution.

HARMON, J.

Defendant, a corporation, was publishing a newspaper. C. M. Steele agreed with its directors to become manager of such business, he and they contributing in certain proportions to raise a fund of $20,000

to carry it on. The directors entirely failed to raise their portion, but he, taking charge of the business, carried it on for six weeks, advancing large sums upon their continued assurances of performance upon their part. Part of the money so advanced by Steele was in payment of the wages of the employees during such period, at the end of which, the corporation being insolvent, an action was brought against it by a mere creditor praying for the appointment of a receiver and the winding up of its business. A receiver was appointed by consent, who, under the orders of the court, and by consent of all parties in interest, proceeded to sell its property and convert its assets into money. After payment of liens, a balance remains in his hands for distribution.

Steele now claims by cross petition to be subrogated to the rights of such employees to a preference in such distribution under Revised Statutes, section 6355, and that question is reserved upon bill of evidence showing said facts.

For reasons we will not stop to discuss, we think that whether the case be considered an equitable proceeding, or one in substance though not in form, an assignment for the benefit of creditors, we should follow the law in the distribution. The employees would therefore be entitled to a preference if they were here claiming their wages. Has Steele the same right?

The exact limits of the right of subrogation are not very clearly defined. It is a mere equity, and therefore not to be enforced to the prejudice of rights having equal claims to protection, and while it may under some circumstances be asserted by a stranger, it does not arise in favor of a mere volnuteer. Sheldon on Sub., sections 1 and 240. In both these regards Steele is in a position to claim the right. Though a stranger to the obligation, he is not a mere volunteer, having paid at the implied request of the debtor and upon the faith of unfulfilled promises of the debtor's agents, and to protect the interest he had already obtained *in the continuance of the business by services and other advances made in carrying it on. And the only persons to be affected are general creditors who would be in no worse position than if he had not paid the wages.

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The right is sometimes said to depend upon the intention of the parties as in Trademan's Bldg. Assn. v. Thompson, 32 N. J. Eq., 133; this alone is not enough, N. T. Co. v. M. & P. J. R. R., 63 N. Y., 18, sometimes upon principles of equity and benevolence, as in Cottrell's Appeal, 23 Pa. St., 294. That it depends upon actual intention or expectation at the time of payment, to be subrogated to the rights of the creditor we find nowhere decided. On the contrary see Robinson v. Leavitt, 7 N. H., 100; Starr v. Ellis, 6 Johns Ch., 395. That having been the fact in many of the cases in which the right has apparently been made to depend upon it, will, we think, account for some of the expressions used by judges. All that is meant is that it must appear in some way that the payer did not intend to make simple payment to be absolute at all events, as where it was a mere loan entirely upon the debtor's credit. This must be made affirmatively to appear as the presumption is otherwise, Brice's Appeal, 95 Pa. St., 145. It is certain that subrogation has been decreed in many cases where there was not only no showing that the prayer had actually in mind any succession to the creditor's rights, but where the contrary was undoubtedly true, as in Hoover v. Eppler, 52 Pa. St., 522, where a groom who had paid a farrier's bill was subro-

gated to his lien, and Abbott v. Steam Packet Co., 4 Md. Ch., 310, where a clerk of a boat who had paid the wages of the crew was subrogated to their rights.

And it is held that anyone who is compelled to pay to protect his own interests has the right of subrogation, Cole v. Malcolm, 66 N. Y., 363; Hough v. Ins. Co., 57 Ill., 318. Even where he pays under mistake, Copelan v. Dehoon, 5 Jones Eq., (N. C.)178.

The true rule in cases of payment by strangers seems to be that, while the claim is extinguished at law by payment, it will be kept alive in equity, where upon any of the grounds of equitable relief it is required for the protection of the payer; and the life so given the claim extends to all its incidents in the nature *of securities, whether they be executed or executory, absolute or contingent. 58

In this case it is clear that while Steele did not actually have in mind succession to the rights of the employees, he did not intend to make a payment absolute at all events. He paid on the faith of promises which he then expected to be fulfilled, not promises to repay him, for it was not a loan nor an advance on the general credit of the company, and when the implied conditions on which he paid were broken, it seems to us he became entitled to avail himself of such conditions of his payment and resort to the principle in question.

It appears that when the receiver was appointed, Steele at once procured from the employees formal assignments of the claims he had so paid. This was not necessary in the view we have taken, unless for some reason their assent were necessary, and we need not pass upon the very able and ingenious argument as to its effect apart from the doctrine of subrogation.

The amount of wages so paid by Steele will be first paid him, and the remainder distributed to the general creditors.

FORCE, J., concurred; PECK, J., did not sit.

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*STREET IMPROVEMENTS. 111

[Superior Court of Cincinnati, General Term, June, 1885.]

Force, Harmon and Peck, JJ.

ALICE D. SHEER v. CITY OF CINCINNATI ET AL.

1. The act of April 25, 1885 (82 O. L., 156), authorizing the improvement by paving with granite blocks, etc., streets in cities of the first grade, first class, is not involved by reason of section 1, article XIII, or section 26, article II, of the constitution of Ohio.
2. The authority conferred by the act is to be exercised by the board of public works alone. The only proceedings necessary are those specified or referred to in the act, and provisions in other laws not so referred to, relative to improvements in general, have no application to improvements under this act.

HARMON, J.

Plaintiff, as a taxpayer and owner of property on Fourth street, which has already been graded and paved in front of her property, and for her portion of the expense, of which she has paid an assessement, sues to enjoin action by the board of public works under the act of April

25, 1885, (82 O. L., p. 156), first, because the same is unconstitutional; second, because said board is about to proceed without necessary action by council and the mayor.

The case is reserved on demurrer to the petition. This act, which is entitled "An act suppementary to section 2293, Revised Statutes," provides that in cities of the first grade of the first class the board of public works shall have authority to cause any of the streets, etc., to be improved with granite block pavement, etc., the city to pay one-half the cost, and the other to be assessed on abutting property. In order to provide a fund for the city's share of such expense, the board is authorized to issue bonds in the name of such city to the amount of $2,000,000.

It is contended that the act is void, because it is a special act, conferring corporate powers (Constitution, section 1, article XIII), and because it is a law of a general nature which has not a uniform operation throughout the state. (Section 26, article II).

112 *We have so recently spoken on the subject of the former provision of the constitution in Simpkinson v. Cincinnati, 13 W. L. B., that we need only to say that what we then said concerning the part of the acts in question in that case, which we held to be valid, applies *a fortiori* to the acts now before us. It is in no sense a special act, either by title or terms, nor is it limited in time. So any city which may at any time hereafter come into the class named may avail itself of the provisions of the act, and it is no objection that at present there is but one city in the class.

The principle of classification applies even more fitly to legislation of this character than to that which merely confers corporate powers, because large cities naturally require better and therefor costlier pavements than small ones; and even if laws like this be of a general nature, the operation of this act will and must be uniform throughout the state where it operates at all. The proceedings, the appointment of cost, the limitation of loan, everything must be the same wherever a city determines by its board of public works to exercise the authority conferred by the act. So we think it too plain for argument that article II, section 26, of the constitution, is not violated by this act. We will not stop to review the decisions, but simply refer to State v. Brewster, 39 Ohio St., 653; State v. Powers, 38 Ohio St., 54; *ex parte* Falk, 13 W. L. B., 302, which fully sustains what we have said.

Laws restricting the power of cities to contract debts, etc., so as to prevent the abuse of the same, which the general assembly is required to pass (Constitution, article XIII, section 6) may also come within the principles of classification, because, what might be an abuse of such power in a small city would not, perhaps, be so in a large one.

And the board of public works being one of the regularly elected authorities of the city, invested to a very large extent with its legislative as well as its executive powers, the Chicago Pork Cases cited for plaintiff, 51 Ill. 17, 37, are not in point, even if they were otherwise applicable. To maintain their position counsel must contend that no new or different authority can be conferred upon any of the regular boards or officers of a city, and that no legislative authority can be conferred upon any but the council.

113 *The only remaining question is one of construction. Is action by the council and the mayor contemplated by the act, or

are the proceedings to be taken by the board of public works the only ones necessary to the exercise of the power conferred? The answer depends on the intention of the legislature, to ascertain which we must examine the provisions of the act somewhat in detail.

Section 2293, Revised Statutes, to which this act is by its title declared to be supplementary, authorizes the council to divide the expense of repairing streets, etc., without change of grade between the city at large and abutting property, in cases where the latter has been assessed for the original improvement.

The act first gives the board "authority to cause any of the streets, etc., of said city to be improved with granite-block, etc.," and provides that "the method of procedure shall be as follows." Then follow nine subdivisions, which recite such method of procedure.

The natural inference would be that the steps here pointed out are the only ones necessary to be taken in the exercise of the authority given, unless such inference is prevented by some expression or necessary inference.

The steps so specified are as follows: An estimate is to be made of the cost. The board is to declare by resolution the necessity of the improvement, and give notice as required of council, by section 2304, Revised Statutes, and is to carry out and be governed by all the provisions of said section (which relate simply to notice to persons to be assessed, and the keeping of plans, etc., open to inspection), the board being substituted for the council as the actor, and the board is given full and final authority to change grades and see that all proper pipe connections are made.

The board is required to take, with reference to claims for damages by reason of the improvemens to be made under this act, the place and authority of council under the provisions of law already existing as to like claims.

The board is forbidden to enter into any contract unless the money to pay the city's portion of the expense is already in the treasury. All the provisions of section 2303, Revised Statutes, which relate to advertising for and accepting proposals and making contracts *are made 114
applicable to improvements made under this act by the board, which "shall have and exercise all the powers and perform all the duties of council in the prosecution of said work or furnishing materials therefor, the making and levying of assessments therefor, the enforcement and collection thereof, the certificates of any unpaid assessment to the county auditor to be placed upon the tax-list, the issuing of any bonds therefor and sale thereof and payment to the contractor; said board shall have and exercise all the powers now vested in, and shall be subject to all the restrictions and regulations now imposed upon said board in cases where any improvement has been ordered by council, except as herein altered or amended, it being the intention and meaning hereof that in all such improvements it shall not be necessary to have the action or concurrence of council in any of said proceedings."

While it may be argued that shorter or more direct expressions might have been used, we cannot construe this language as meaning anything except that the board of public works alone is vested with the entire authority to act under this law. It is to decide upon the necessity of the work, the plans to be followed, the materials to be used, to raise the money,

make the contracts and pay for the work when done, assessing one-half the cost upon abutting property, and adjusting and paying all claims for damages. It certainly is difficult to think of any other power necessary for the accomplishment of the work or the protection of persons affected by it. The argument, however, is that, if in cases of improvements generally any action is required of other municipal authorities, and this act does not authorize the board to take it instead, it must be taken by such other municipal authority. Thus, by section 2267, Revised Statutes, no improvement, any part of which is to be assessed upon adjacent property, can be made without the concurrence of council, which must be by a two-thirds majority, unless a like majority of property owners to be assessed petition for the improvement. By section 2234, like action by council is required in cases requiring condemnation of private property. And by section 1666 and 2231 the mayor's approval is necessary to the validity of ordinances to improve. These sections are not repealed by the act in question.

115 *But we think it the plain intention of the legislature to especially provide by this act for improvements of this kind, to be paid in this way, and that the method of procedure pointed out in the act was intended to be what, as we have said, its form naturally indicates, a complete enumeration of the steps necessary to the valid execution of the power.

Not only is there nothing in the act to prevent this natural conclusion, but there is language which plainly requires it. The board has given all the powers it now has "in cases where any improvement has been ordered by council," which has no reasonable meaning, except that the council's action, by a majority or a two-thirds vote, as the case might be, which is necessary in other proceedings to improve, is dispensed with in other proceedings under this act. And when it is expressly enacted that "in all such improvements it shall not be necessary to have the action or concurrence of council in any of said proceedings," we think it would be charging the general assembly with trifling with language, or using it diplomatically, to hold that the meaning intended to be conveyed was. that in some of the proceedings necessary to the exercise of the authority conferred, the action or concurrence of council shall be necessary. And that, too, though none such are named or referred to, all possible, or at least, all usual steps, legislative as well as executive, are expressly provided for, and there is no requirement that the board shall notify council of its own action or wait for the action or concurrence of council, while the authority is in terms conferred on the board of public works alone. "Said proceedings," in the clause just quoted, plainly refers to the "method of procedure" spoken of and detailed as the way, and the only way, of doing the thing authorized to be done. The meaning is the same as though the language were: "In the proceedings required for the making of the improvements above named, the action or concurrence of council shall not be necessary." It is sticking in the very outermost bark to stick in the mere form of expression.

The other questions argued, such as the ownership of the material with which the street is now paved do not, we think, now arise. And as to the wisdom of the law which is so vigorously assailed, we can only re-

mind council that we have no *authority, except upon the grounds the people have plainly written in the constitution, to interfere between them and their own chosen representatives. 116

Demurrer sustained and petition dismissed.

FORCE and PECK, JJ., concur.

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*MORTGAGES—ASSIGNMENT FOR CREDITORS. 425

[Superior Court of Cincinnati, General Term, December, 1884.]

Force, Harmon and Peck, JJ.

†MERCHANTS' NATIONAL BANK v. NOTTINGHAM CO. AND GEORGE T. ROUSE.

A mortgage to secure a preferred creditor and an assignment for general creditors executed contemporaneously, will not be construed as an instrument so as to create a trust to be administered for the equal benefit of all creditors, when the mortgage was filed prior to the filing of the deed of assignment.

FORCE, J.

This action is reserved from special term on the pleadings and bill of evidence. The company being insolvent, resolved to give a mortgage to the plaintiff securing its debt, and also to make a general assignment for the benefit of creditors. Both instruments were executed at about the same time, but the morgage, a chattel mortgage, was filed with the recorder before the deed of assignment was filed with the probate judge. The defendant, Rouse, was subsequently appointed trustee in place of the original assignee. He sold the mortgaged property and holds the proceeds. The plaintiff presented his claim upon his mortgage for the proceeds, and the trustee disallowed the claim. This action is brought to establish the plaintiff's claim.

In three actions it has been held in special term by different members of this court that a mortgage given to a particular creditor on the same day that a debtor makes a general assignment. *is valid as against the assignment, if filed first. The last case was affirmed by the circuit court. The present case is so 426 extreme in its circumstances, it so probes the law, that it was reserved for the opinion of the full court.

One objection made is that the mortgage never had any validity, because it was not in fact executed. The property mortgaged is not set out in detail in the body of the mortgage, but is there described as being the property set out in the schedule annexed to and made part of the mortgage. The only signature is at the bottom of the schedule.

The statute prescribes no form or mode of executing a chattel mortgage. If the property is not delivered to the mortgagee, the statute requires the mortgage to be filed, and hence, in such case, it must be in writing. It may be held that if in writing, it must be signed. But the signature which authenticates a writing need not to be at the foot of the paper. It may be at the top. Penniman v. Hartshorne, 13 Mass., 90.

And where the obligor of a bond wrote his name, not at the bottom, opposite the seal, but in the middle between the penal clause and the condition, it was held a sufficient execution.

Argenbright v. Campbell, 3 Hen. & Mun., 144.

The rule given in the cases and text-books is, that a signature affixed to any part of the instrument with intent to authenticate it, is sufficient. And this rule is recognized by our supreme court in Anderson v. Harold, 10 Ohio, 402. The mortgage therefore is sufficiently executed.

The next contention is that the mortgage and assignment, being executed in effect contemporaneously in pursuance of a plan for the disposition of the property

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†This case was reversed by the Supreme Court in Rouse v. Bank. See opinion, 46 O. S., 493.

of an insolvent, constitute in law one instrument, and that instrument a trust, which must be administered for the equal benefit of all creditors.

It is this contention that demands an examination of the law of Ohio. In the absence of a statute, the right of a failing debtor over the disposition of his property in the payment of his debts, is absolute. His right to prefer particular creditors is complete. He may give the whole of his property to certain selected creditors, or to a single creditor, or may pay different creditors in any other proportion. And
427 he may do this by absolute *transfer, mortgage, pledge or assignment in trust. A failing firm may, by consent of all the members, use their assets in the payment of the individual creditors, to the exclusion of the creditors of the firm. This right has been restricted or cancelled in different states by various statutes. In Ohio the right remains unimpaired except in one particular. Section 6343, of Revised Statutes, which has been law since 1835, provides that all assignments in trust to a trustee, made in contemplation of insolvency, with the intent to prefer one or more creditors, shall inure to the equal benefit of all creditors in proportion to the amount of their respective claims. The supreme court has uniformly held that the right of preference is subject to no other restriction. Judge Lane in Hull v. Jeffrey, 8 O. R., 390, decided in 1838, said "Conveyances, other than those made to trustees, are not affected by either statute." [Statutes of 1835 and 1838]. In Wilcox *et al.* v. Kellogg *et al.*, 11 O. R, 394, the court said: "It is an absolute conveyance to pay Jacob Williams his debt, and is not therefore within the provision of the act." In Fassett v. Traber, 20 O. R., 540, the court said: "A creditor has a right to secure himself by obtaining a lien on the property of a failing debtor; and if done fairly, he may thus obtain a preference over other creditors."

There is nothing in the Ohio Statutes or reports which sustains the contention of the defendant; but cases are cited from other states. They all, however, depend upon the particular provisions of statute.

In Perry v. Holden, 22 Pick., 269, a particular mortgage and a general assignment were held to constitute a single instrument, under the statute of Massachusettes and the circumstances of the case. The court said, the great object and purpose of the statute was, to discourage preferences among creditors. It provided that every assignment must give every creditor an opportunity to become party to it; that all who become parties to it shall share ratably, and that the debtor should be discharged from all claims of such creditors as so become parties, unless the debtor shall have made, in contemplation of the assignment, any payment or conveyance with a view to prefer any creditor. The circumstances were, that instructions were given at the
428 same time for the preparation of the mortgage and the *assignment; the mortgagees were also the trustees under the assignment; one of the mortgagees accepted before the assignment was completed, the rest after completion of the assignment. The mortgage was recited in the deed of assignment. It was under such statute and such circumstances that the decision was made.

A similar ruling in Berry v. Cutts, 42 Me., 446, was made under a statute which provided that (Ch. 112, Laws of 1844): "All assignments made by debtors for the benefit of their creditors shall provide for an equal distribution of all their estate, real and personal, among such of their creditors as, after notice, become parties to their assignment."

Recently a similar ruling was made in Michigan, where the law at first discouraged and later prohibited preferences. Section 7211 of Compiled Laws of 1871 provided that "No insolvent can be discharged or have any benefit of the insolvent laws, who makes in contemplation of insolvency any preference by payment, mortgage," etc. And section 8749*d*, of Annotated Laws of 1882, enacts that "Conveyances and payments made and securities given by an insolvent, or a debtor in contemplation of insolvency, within four months of making an assignment, with view of giving preference, if given, etc., etc., shall be void."

A similar ruling was made in Coal v. Derlham, 13 Iowa, 551, and under a statute substantially the same as that of Ohio. The supreme court of Iowa had previously, in Burrows v. Lehndorf, 8 Iowa, 96, diverged from the line of Ohio decisions, especially from Justice v. Uhl, 10 O. S., 170. But those cases were overruled by the latter case; Sampson v. Arnold, 19 Iowa, 480.

There, an insolvent firm, having disposed of all their property between 7 P. M. and 2 A. M. of one night, giving a deed of certain property to one creditor, a transfer of negotiable paper and cash to another, and paid another creditor in full, and executed a general assignment of the remainder of their property, it was held competent for the debtor to give preferences by such means. Cole, J., said: "The fact that the two or more conveyances were made nearly at the same time, has no necessary influence upon determining their identity of transaction."

Finally it is contended that the assignment was complete by execution and delivery one, if not two days before the execution *of the mortgage. The 429
assignee was attorney for the corporation for the purpose of the assignment and mortgage, but had not been attorney for the corporation previously. The preponderance of the evidence is, that the instrument was delivered to him as an assignee, not merely instrusted to him as attorney. It is true, it was delivered to him with the express injunction that the mortgage to the plaintiff, the execution of which was not yet complete, should have priority. But a deed cannot be delivered to the grantee as an escrow. If delivered to him at all, the delivery is absolute, and such verbal condition is ineffective.

But the statute provides, section 63: 5, that an assignment for benefit of creditors shall take "effect only from the time of its delivery to the probate judge." Long before this provision of the statute was enacted, the meaning of its terms had been fixed and determined by the supreme court. The older statute for recording mortgages, provides, section 4133, that mortgages of land take "effect from the time the same are delivered to the recorder," etc. It has long been settled in Ohio that under these words, a subsequent mortgage, though given and received with full knowledge of a prior mortgage, has priority over it if first delivered to the recorder. The legislature enacted the provision in the act providing for the administration of the estates of insolvents with full knowledge of the interpretation given to the words in the mortgage act, and to prevent any possible misunderstanding of their intention, intensified the language by inserting the word "only"— to take effect only from the time of its delivery to the probate judge.

Counsel suggests that the supreme court held differently in Johnson v. Sharp, 31 O. S., 611. But that was the case of an assignment executed in Wisconsin, of property in Ohio, which was held to take effect from the time of its delivery to the postoffice in St. Louis. Judge McIlvaine, in pronouncing the opinion, says that the Ohio statute applies only to deeds of assignment executed in Ohio; and as the assignment in controversy in that case was not executed in Ohio, the validity of its execution and delivery must be determined, not by the statute of Ohio, but by the common law.

We are compelled, therefore, to find that the mortgage is a valid instrument, validly executed, and, as it was delivered to *the recorder before the assign- 430
ment was delivered to the probate judge, it has priority over the assignment.

HARMON and PECK, JJ., concur.

John W. Herron, for Plaintiff.

Lincoln, Stephens and Lincoln, Contra.

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*LANDLORD AND TENANT. 300

[Superior Court of Cincinnati, General Term, October, 1886.]

[Reserved from Special Term.]

Harmon, Force and Peck, JJ.

CORNELIA WERNER ET AL. v. PHILOMENA GLOSS ET AL.

The existence of an ordinary lease for years, under which the tenant is in possession, paying rent to the owners of the fee, is no obstacle to partition among such owners.

HARMON, J.

The parties are owners, as heirs of their father, of an improved city lot. To this action for partition thereof some *of them answer 301
that their father had leased the premises for a term of three years, which has not yet expired, with the privilege of a further term of two years at a monthly rental, under which lease the tenant is in possession.

Plaintiff demurs.

Our statute, Revised Statutes, 5764 *et seq.*, gives the right of partition in general to "all tenants in common and copartners of any estate

and lands," etc.; but it has been decided that the right does not exist where such an estate is a remainder or reversion after an estate for life. Tabler v. Wiseman, 2 Ohio St., 207. It is contended that the principle of that case is decisive of this. While some of the possible inconveniences or inequalities referred to by the court among other reasons for its conclusion, might exist in cases of property lease, especially for long terms, the principle of the decision was that as partition deals with possession only, it cannot be had unless the parties praying partition have the possession. It is conceded that actual possession is not necessary; an estate which gives the right to possession will suffice. It is evident, therefore, that the term possession is used as opposed to expectancy—as defining the nature of the estate rather than referring to its physical occupation. The estate of the parties here is not one in expectancy, but one in possession, because, from the days of the feudal system until now, the possession of a tenant has been considered the possession of the landlord, except so far as concerns rights dependent upon actual physical occupation such as the action of trespass.

"A tenant for years is never said to be seized of the lands leased, nor does the delivery of a lease thereof for years vest in him any estate therein. He thereby acquires a right of entry upon the land, and when he shall have entered he is said to be possessed, not of the land, but of a term for years, while the seizin of the freehold remains in the
302 lessor and lessee's possession is the possession *of him who has the freehold." 1 Washburn on Real Property (4th Ed.), pp. 72 and 442; 2 Washburn on Real Property, page 740; 4 Dane's Abridgment, 498; Tiedeman on Real Property, section 693.

The rights of the plaintiffs are exactly the same as their fathers. Blanton v. Whitaker, 11 Humphreys, 313. And the severance of the reversion having been by operation of law, the obligation to pay rent is also apportioned, and each heir becomes entitled to collect his aloquot part. 1 Washburn on Real Property, p. 519; Taylor on Landlord and Tenant, section 385.

Upon partition being made as prayed, therefore, each of the parties would have in present actual enjoyment in severalty his portion of the common estate, which results could not follow a decree for partition in case of an independant intervening estate, as in Tabler v. Wiseman, and in substance by reason of the reduction of rent at the lessor's death, in Burbeck v. Spollen, 10 A. L. R., 491.

The practice in Ohio has certainly been to decree partition in cases like this (see Bloch v. George, 26 Ohio St., 629), and the inconveniences to result are so great that we are loth to reverse it unless clearly convinced that it is wrong.

Honnewell v. Taylor, 6 Cushing, 474, is certainly adverse, but it was based upon the very different language of the Massachusetts statute, and is opposed to the weight of authority. Freeman on Cotenacy, section 446.

Demurrer sustained.

FORCE and PECK, JJ., concur.

W. B. Morrow, for Plaintiff.

Herman Mueller, Contra.

*[Adams Circuit Court, November, 1886.] 415

Charrington, Bradbury and Clark, JJ.

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2. Discharge in bankruptcy revokes a power of attorney to confess judgment. Dye v. Bertram, 6 Rec., 355. 508

3. Such power is not revived after bankruptcy by a new promise which revived the debt. *Ib.*

4. A suit in state court may be maintained against a debtor in bankruptcy upon a claim provable against his estate. Gardner v. Hengehold, 9 Rec., 414. 997

5. If debtor would avoid such action he should promptly apply to the state court and obtain a stay, until the question of his discharge is determined. *Ib.*

6. Neither the proceedings in bankruptcy nor the discharge extinguishes the debt. *Ib.*

7. Defense of, is not favored. Hengehold v. Gardner, 8 Rec., 352. 822

BASTARDY—

1. The putative father of a stillborn bastard is not liable to a prosecution by the mother under the bastardy act of 1878. Patterson v. Bucy, 7 Rec., 566. 723

2. Suit on a bond given in a bastardy proceeding. Hazzard v. State, 10 Rec., 307. 1081

BENEVOLENT INSTITUTIONS—

The trustees of the benevolent institutions of the state can only be appointed by the governor, by and with the advice and consent of the senate. State v. Chalfant, 9 Rec., 633. 1033

BIDS—

1. Bids for improvements may be advertised for in two sections. Cincinnati v. Goodman, 5 Rec., 153. 365

2. Advertising for bids in one English and one German, instead of two English papers. *Ib.*

3. Release of lowest bidder and higher one accepted. *Ib.*

BILL OF EXCEPTIONS—

1. Must state affirmatively that all the testimony in the case is set out in it. Meyer v. Shroeder, 10 Rec., 309. 1083

2. A bill of exceptions taken at a term of court, subsequent to the trial or thirty days thereafter, will not avail to bring on the record errors of the court at the trial in its rejection of testimony. Brock v. Becker, 9 Rec., 482. 1009

3. Objection to a decision of the court must be made at time the decision is made, with reasonable time to reduce the exception to writing, but not beyond the term. Tanner v. Brown, 2 Rec., 614. 112

4. Amendment of, when same is defective in substance. *Ib.*

5. Correction of clerical errors in a bill of exceptions. *Ib.*

6. A bill of exceptions before a magistrate must be spread upon the docket. Woolums v. Schott, 10 Rec., 183. 1070

7. A minute entry in the docket of the justice is not sufficient. *Ib.*

8. Taken before a justice must be entered at length upon his records, and signed and sealed before a reviewing court can act upon them. Schott v. Hunt, 10 Rec., 313. 1087

BILL OF LADING—

A bill of lading is not a chose in action or property, but the mere symbol of the property designated in it, which property can be bought and sold by the transfer of the bill of lading. Pomeroy, Mendenhall & Co. v. Will, 2 Rec., 1. 34

BILLS, NOTES AND CHECKS—

1. In an action upon promissory notes given for the consideration of a contract, which is not enforcible because not in writing, the defendant may set up such contract and its invalidity, to prove a failure of consideration. Gottschalk v. Witter, 3 Rec., 394. 180

2. Obtaining a note in payment of an antecedent debt, without notice of the fraud, is obtained in due course of trade. White v. Francis, 4 Rec., 501. 323

3. Execution of a promissory note by a purchaser at a partition sale, payable to order of sheriff. Rowekamp v. Holters, 9 Rec., 416. 998

4. Where blanks are left in a promissory note an implied authority to fill such blanks may be inferred. Dater v. Simon, 5 Rec., 257. 377

5. The holder of a note and mortgage with notice that payment had been assumed by a third person, not party to the paper may recover against the maker. McFarland v. Norton, 6 Rec., 760. 585

6. Promissory notes given as collateral to secure payment of a judgment must be held till due and then collected. Boake v. Bonte, 9 Rec., 487. 1013

7. An accepted order to pay money from a specified fund is an unconditional order for the payment of money. Ives v. Strickland, 8 Rec., 309. 810

8. Notice by mail to indorsers. Cottle v. Thomas, 1 Rec., 372. 18

9. Rights of a purchaser from a *bona fide* holder. Smith v. Bruggeman, 6 Rec., 38. 456

10. Indorsement for value and before due of acceptances, payment of which had been guaranteed. Block v. Espy, 8 Rec., 365 833

11. A material alteration of a note after execution and delivery renders it of no effect. Coleman v. Bank, 10 Rec., 49. 1063

12. The fact that a note was paid under duress, is immaterial if the note ought to have been paid by the maker. *Ib.*

13. A *bona fide* purchaser of a note before maturity is protected. Rowecamp v. Meyer, 10 Rec., 566. 1128

14. A reasonable effort on the part of the holder of a note to give notice of protest to the indorser is all the law requires. Burckhardt v. Bank, 9 Rec., 691. 1036

BILLS, NOTES AND CHECKS—Concluded.

15. An indorser is discharged unless payment is demanded at the maturity of the note, that is, when due and payable. Mallon v. Stevens, 9 Rec., 702. 1042

16. Holder of a check need not indorse, when. McCurdy v. Soc. of Sav., 11 Rec., 156. 1169

17. Renewal by surety alone. Hilpert v. Kinsinger, 8 Rec., 565. 876

18. Action upon notes given for furniture furnished a house of prostitution. Burns v. Seep, 8 Rec., 425. 847

19. Presentment of a post dated check Braun v. Kimberlin, 9 Rec., 405. 990

BONDS—

Action on the treasurer's bond of an incorporated society for not paying over funds of the society, received by him as treasurer. Juegling v. Arbeiter Bund, 8 Rec., 94. 777

BOUNDARY LINES—

1. A disputed or doubtful boundary may be agreed upon by parol. Burt v. Creppel, 4 Rec., 622. 330

2. If the parties make improvements upon the disputed grounds in accordance to such agreement, they will be estopped from denying the line so agreed upon. *Ib.*

BUILDING ASSOCIATIONS—

1. An action for money had and received will lie against a building association, when. Building Assn. v. Henderson, 6 Rec., 755. 581

2. Officers of, do not occupy the relation of trustees toward a purchaser with whom they deal for the sale of their individual stock. Cook v. Henderson, 8 Rec., 429. 851

3. For the purpose of loaning money by a building association, the parties have a right to stipulate the amount of the premiums. Home Bldg. Assn. v. Boning, 10 Rec., 626. 1149

4. A shareholder in a building association is estopped from denying the validity of an excess of stock above the twenty shares allowed by statute to be held by him. Bldg. Assn. v. Arbeiter Bund, 10 Rec., 485. 1108

5. Married woman borrower is estopped to resist her mortgage, when. Building Association v. Leyden, 4 Rec., 765. 345

6. Distribution under a building association mortgage. Bldg. Assn. v. O'Connor, 9 Rec., 486. 1012

CHARGE OF COURT—

1. To sustain, on error, an objection to the charge of the court, it must appear from the bill of exceptions. Woodward v. Stein, 3 Rec., 352. 171

2. General rules of law given in charge are presumed to have been understood with reference to the context and facts of the case. Holterhoff v. Insurance Co., 3 Rec., 272. 141

3. In actions *ex delicto*, it is in the discretion of the jury to allow interest, and it is error for the court to charge that plaintiff is entitled to it as a matter of law. Floyd v. Paul, 12 Rec., 231. 1185

4. If counsel dispute in argument what a witness said, the court can state it on his own recollection. Simmons v. Cin. Sav. Soc., 6 Rec., 441. 527

5. Return of jury for further instruction after having retired to consider their verdict. Insurance Co. v. Frick, 2 Rec., 336. 47

CHATTEL MORTGAGES—

1. If a sale and immediate lease back of personalty, is a mere mortgage, all the infirmities attending a failure to change possession attach. Henderson v. Thayer, 2 Rec., 670. 115

2. Application of foreign law to the validity of a chattel mortgage. *Ib.*

3. Omission to sign a statement of claim invalidates a chattel mortgage. Weber v. Gambrinus Stock Co., 10 Rec., 482. 1102

4. Chattel mortgage to have the amount endorsed on it. Droege v. Ipsharding, 6 Rec., 478. 543

5. Chattel mortgage on goods which the mortgagor has at all times the power to sell, is void against creditors. *Ib.*

6. A mortgage of chattels with actual notice of nonpayment, of a prior mortgage not refiled within a year, takes subject to the first mortgage. Welte v. Faller, 6 Rec., 766. 590

7. The levy of a judgment creditor is good, as against such mortgage, not refiled within the year. *Ib.*

8. The mere fact that the mortgagor had sold or disposed of any part of the chattels, even with the knowledge of the mortgagee, would not vitiate and render the mortgage void, if the same was free from fraud when made and valid as such. Clark v. Morris, 2 Rec., 364. 66

9. A chattel mortgage giving the mortgagor power to sell the property for the benefit of himself, is void. *Ib.*

10. Goods and chattels on which there is a chattel mortgage may be sold on execution. Kelly v. Purcell, 8 Rec., 705. 929

11. The mortgagee in such sale may assert his right to the goods by replevin against the purchaser. *Ib.*

12. Marshaling the assets in such case. *Ib.*

13. An assignee can make a valid sale of property covered by a chattel mortgage. Tully v. Nash, 8 Rec., 419. 841

CINCINNATI SOUTHERN R. R. ACT—

Decision regarding the legal status of the trustees, and effect of the laws of Kentucky and Tennessee, after the passage of the statute for the third issue of bonds. Thoms v. Greenwood, 7 Rec., 320. 639

COMMON CARRIERS—

1. Liability of a common carrier for a depreciation in the market value of the article carried. Devereaux v. Buckley, 6 Rec., 690. 573

2. The consignor has no lien on a corpse, for the price of the casket, and it would be against public policy to require the carrier to return it for nonpayment. Express Co. v. Epply, 4 Rec., 672. 337

3. A purchaser of a commutation ticket will not be entitled to ride upon such ticket during any month subsequent to that named therein. Powell v. Railway Co., 2 Rec., 403. 89

4. A passenger riding in a coach belonging to a sleeping car company, who is injured by a falling berth, may hold the railroad company liable for such injury. Railroad Co. v. Walwrath, 7 Rec., 555. 718

CONFLICT OF LAWS—

Application of a New York statute to a devise of Ohio lands. Craighead v. Pike, 4 Rec., 199. 273

CONSTITUTIONAL LAW—

1. Constitution of Ohio permits appropriate local special legislation. Thoms v. Greenwood, 7 Rec., 320. 639

2. Legality of the Cincinnati Southern R. R. bonds. *Ib.*

3. Corporate powers cannot be conferred unless conferred upon a corporation created by the act conferring the power or some other act. *Ib.*

4. A legislative enactment providing for an assessment to pay the costs of a local improvement, irrespective of benefits is unconstitutional and void. Bowles v. Turnpike Co., 8 Rec., 558. 871

5. Act of March 13, 1872 to establish boards of control and to prescribe their duties does not violate the constitution. State v. Brown, 7 Rec., 652. 740

6. The act does not confer corporate power. *Ib.*

7. It is not a law of a general nature. *Ib.*

8. Act of May 4, 1877, authorizing county commissioners to levy a tax for certain public purposes, though permission in terms is in fact peremptory. State v. Commissioners, 6 Rec., 106. 471

9. Such act does not violate the constitution. *Ib.*

10. The acts of 1869 and 1873 (66 O. L., 326-7; 70 O. L., 151-2) relating to issuing of summons on foreign insurance companies is unconstitutional and void. Heart v. Insurance Co., 2 Rec., 354. 61

11. Act of April 25, 1885, authorizing an improvement by paving with granite block etc., in cities of the first grade first class, is not unconstitutional. Sheer v. Cincinnati, 14 Rec., 111. 1233

12. The authority conferred by the act is to be exercised by the board of public works alone. *Ib.*

CONTRACTS—

1. Contract by telegraph company with a railroad company for the use of the latter's poles along its railway. W. U. T. Co., v. Railroad, 6 Rec., 117. 474

2. Construction of a contract given by a railroad for free transportation, in consideration of a grant of a right of way to the railroad. Mitchell v. Railroad, 6 Rec., 265. 488

3. A contract by which a railroad is to send all its traffic over a connecting road, the latter to reserve one-fourth the earnings to pay off a portion of its construction bonds is not *ultra vires*. O. & M. R. R. v. Short, 7 Rec., 474. 703

4. Effect of a contract executed with full knowledge of a custom existing in a certain trade. Pullan v. Cochran, 10 Rec., 184. 1070

5. Right of seller to rescind a contract of shipment. Tootle v. Rusk, 2 Rec., 553. 107

6. Validity of pooling agreements. Hoffman v. Brooks, 12 Rec., 747. 1215

7. Validity of a lunatic's contract. Beckroege v. Schmidt, 9 Rec., 410. 994

8. A contract with the state to "pay an attorney compensation contingent upon success," is a valid contract and not void for champerty. State v. Ampt, 7 Rec., 469. 699

9. A contract for the construction and operation of a telegraph line over the right of way of a railroad company, is not void as against public policy, but is valid. W. U. Tel. Co. v. A. & P. Tel. Co., 5 Rec., 429. 407

10. A promise of a commission on a loan, secured by conveyance and lease back instead of mortgage to evade taxation, is not void. Patrick v. Littell & Co., 5 Rec., 260. 379

CONVERSION—

1. A lot owner who pays for improvements in front of his property does not acquire an ownership in the materials used in making the improvement. Cincinnati v. Cook, 4 Rec., 668. 333

2. Land warrants being converted may be treated as personal property. Bayles v. Crossman, 5 Rec., 13. 354

CONVEYANCES –

A conveyance of property claimed by a stepson not granted. Nishtotz v. Ulmer, 8 Rec., 25. 770

CORPORATIONS—

1. Defects or irregularities in the organizations of corporations cannot be taken advantage of by a stockholder in a controversy with a creditor. Ryan v. Railroad, 10 Rec., 263. 1071

2. Agreement by the owners of a majority of the capital stock to elect a particular person secretary and treasurer is not illegal. Mullen v. Gaffey, 8 Rec., 101. 783

3. A corporation has an inherent right to expel a member. State v. Society, 8 Rec., 627. 899

4. Liability of a corporation for debt created by its promoters. Bldg. Assn. v. Zahner, 10 Rec., 181. 1068

5. Prohibited from loaning to partnerships when its charter, names only certain classes of corporations to whom it may loan. Insurance Co. v. McCoy, 6 Rec., 486. 549

6. The corporation cannot recover in an action if such prohibited loan be made. *Ib.*

7. In an action for libel it is held to the same accountability as a natural person. Life Ins. Co. v. Life Ins. Co., 6 Rec., 382. 521

8. One corporation cannot become the owner of stock in another corporation without clear statutory authority. Bank v. Bank, 4 Rec., 705. 339

9. Resorting to stockholder's liability when assets are not exhausted. Taylor v. Wheel Co., 9 Rec., 28. 947

10. Parties borrowing money to pay debts of the corporation are its creditors. *Ib.*

11. Renewal of a corporate note. *Ib.*

12. Extension by a creditor of the time of paying a corporate debt, does not release the individual liability of stockholder. *Ib.*

13. Assets of a corporation, how applied. *Ib.*

14. Stockholders do not stand in the relation of sureties for the corporation. *Ib.*

15. Assessment of stockholders of an insolvent corporation when subject to individual liability. *Ib.*

16. Liability of those who were stockholders when suit was begun may be enforced by creditors without waiting the adjustment of contingent liabilities of their assignors. Kilgour v. St. Ry. Co., 11 Rec., 38. 1157

17. Liability of stockholders to the creditors of a corporation. Porter v. Laws, 6 Rec., 756. 582

18. The subscribers for stock in a *facto* corporation are liable to credit whose rights accrued before *quo warra* proceedings were begun. Furniture Co. Rowland, 7 Rec., 2.

19. Service of process on fore corporations. Mohr Distilling Co. v. Co., 12 Rec., 168.

COSTS—

Plaintiff may recover costs. wh Snoddy v. Mason, 8 Rec., 415.

COUNTERCLAIM—

It is immaterial whether plaintiff misses his case so far as defendant's coun claim is concerned. Smith v. Minche Rec., 484.

COUNTY COMMISSIONERS—

1. The board of county commis ers is clothed with such powers only as conferred upon it by statute. Commis ers v. Noyes, 4 Rec., 216.

2. Right to sue for injury don county property.

3. Authority of county commissio to sue in their own designated name. missioners v. Noyes, 3 Rec., 745.

4. Right to bind the public b tract. Clements v. Commissioners, 729.

COURTS—

1. Courts should not be cons boards for the appointment to politi fices. *In re* Health Commissioner. 651.

2. *Stare decisis* governs the dec of the same question in the same actions between strangers to the Thoms v. Greenwood, 7 Rec., 320.

3. The circuit courts of the States are courts of record and of g jurisdiction. Kohl v. Hannaford, 372.

4. The jurisdiction of the fede cuit court over the subject-matter conclusively presumed on collateral

5. The probate court alone has nal jurisdiction to order the payme legacy. Smith v. Harker, 9 Rec.,

COVENANTS—

1. A covenant to submit to tion is not illegal, nor against rule o policy or contrary to public morals v. Reedy, 5 Rec. 367.

2. Covenants of seisin and of warranty are real and run with th Williams v. Holcomb, 8 Rec., 484.

3. An actual eviction from ranted is not necessary to enable the to maintain an action upon cove warranty. Matthews v. Rentz, 2 R

CREDITOR'S BILL—

Which merely avers that the judgment sought to be realized was recovered by plaintiff against defendant is insufficient to create a claim upon defendant, and is demurrable. Carver v. Williams, 10 Rec., 310. 1084

CUSTOM AND USAGE—

Effect of custom and usage upon the meaning of a contract. Dewey v. Steel Works, 6 Rec., 364. 514

DAMAGES—

1. Damages for refusal to deliver certain bonds are the difference between the market and contract price on the day for delivery. Mowry v. Kirk, 5 Rec., 587. 431

2. To recover damages under the Adair law, plaintiff must aver and prove the unlawfulness of the sales. Mason v. Shay, 3 Rec., 435. 194

3. The damages recoverable in an action on an express contract for the lien of a chattel, with warranty of quality, at a stipulated price for use, is such stipulated price. Woodward v. Stein, 3 Rec., 352. 171

4. The hirer may counterclaim breach of the warranty in such action *Ib.*

DEATH BY WRONGFUL ACT—

The Ohio statute relating to death by wrongful act does not apply where the act causing the death occurred outside the state. Van Camp v. Aldrich & Co., 2 Rec., 454. 92

DECEIT—

A mere false affirmation, though knowingly made, is not enough, the purchaser should show that some deceit was practiced for the purpose of putting him off his guard. Floyd v. Paul, 12 Rec., 231. 1185

DECREES AND ORDERS—

1. A decree is final which disposes of the whole merits of the case, and leaves nothing for further consideration of the court. Clark v. Bentel, 12 Rec., 534. 1205

2. A decree is interlocutory which finds the general equities, and the cause is retained for reference. *Ib.*

3. A decree finding the general equities of the case for the purpose of reference has been held final to support an appeal, but for no other purpose. *Ib.*

DEED—

1. Execution of a deed to the trustees of a church to erect a church on the land described in the deed. Miller v. Milligan, 9 Rec, 419. 1000

2. Reformation of such deed. *Ib.*

3. Effect of deed made in name of husband, where the wife furnishes the purchase money. Domeier v. Wagner, 8 Rec., 427. 849

4 Effect of a deed made by a husband of his wife's land, without her joining. Cracraft v. Roach, 6 Rec., 83. 467

5. A conveyance preferring a creditor may be sustained by parol evidence of a different consideration from that named in the deed. Grote v. Meyer, 9 Rec., 623. 1025

6. Transfer of a dower estate is a good consideration for a deed. McLaughlin v. Graves, 8 Rec., 561. 873

7. Possibilities in the nature of contingent estates may be released to a party in interest or possession. Dye v. Giou, 7 Rec., 144. 623

8. To enable a breach of warranty to be made available by the grantee in a deed against the assignee of the grantor such breach and right of action therefor must have existed at the time the grantor assigned. Heister v. Ins. Co., 6 Rec., 238. 479

9. Reformation of deeds. Piatt v. Sinton, 6 Rec., 483. 547

DEPOSITION—

1. Testimony taken before a referee may be used as a deposition taken in the case. Zimmerman v. Grotenkemper, 8 Rec., 364. 832

2. A deposition may be read in any other action or proceeding upon the same matter between the same parties. *Ib.*

DEVISE—

1. Constucrtion of a devise in trust which confers upon the trustee the power of sale at his discretion. Sargent v. Sibley, 13 Rec., 33. 1219

2. All who are embraced in the class at the time the bequest takes effect will be allowed to take. Peterson v. Beach, 6 Rec., 513. 553

3. A debt due to a legatee for services is not extinguished by a legacy, and such legatee need not elect, but is entitled to both. Swing v. Gatch, 7 Rec., 5. 599

4. Where the testator devises an absolute estate in fee simple, and prohibits the sale by such devisee of the lands, such prohibition is a nullity. Bates v. Zinsmeister, 4 Rec., 321. 297

5. The power and right of disposition are necessary incidents of absolute ownership. *Ib.*

DIVORCE AND ALIMONY—

1. After death of husband leaving installment of alimony unpaid, the decree may be revived against the administrator. McCoun v. Weiskettle, 8 Rec., 303. 805

2. Such revivor will be limited to one year's arrears. *Ib.*

3. A divorce will not be granted for a breach of matrimonial duty where the petitioner is likewise guilty. Mayer v. Mayer, 5 Rec., 674. 444

DIVORCE AND ALIMONY—Concluded—

4. Alimony previously awarded to her on the ground of his abandonment, may be forfeited when she has property of her own, sufficient for maintenance. *Ib.*

DURESS—

1. To avoid a contract, must amount to a threatening of personal harm, or a deprivation of liberty or of property. Coleman v. Bank, 10 Rec., 49. 1063

2. A mere threat of injury to one's credit cannot be held to be duress in law. *Ib.*

EASEMENTS—

1. An unsealed written agreement may be sufficient, in equity, to grant an easement to use a brick wall as a party wall. Pendleton v. Fosdick, 8 Rec., 148. 795

2. The use of the word "assigns" not necessary to make the easement run with the land. *Ib.*

3. Privity of estate between the parties to it. *Ib.*

4. The purchaser of a lot bounded on an unopened street is entitled to a right of way over it, if it is of the lands of his vendors, to its full extent and dimensions only, until it reaches some other street or public way. Huelsman v. Mills, 12 Rec., 301. 1192

EJECTMENT—

In ejectment, plaintiff, if he recover, must do so on the strength of his own title. Maddux v. West, 9 Rec., 484. 1010

ELECTIONS AND ELECTORS—

1. Duty of county canvassers to correct clerical errors on the face of the returns. Esker v. McCoy, 6 Rec., 694. 573

2. Confusion in boundaries of two adjoining precincts. *Ib.*

3. Voting in a precinct is equivalent or a declaration of residence. *Ib.*

4. Right to vote in a certain precinct, how determined. *Ib.*

5. Residence within the meaning of the statute regulating elections has refer- to a fixed place of abode. *Ib.*

6. Right to vote cannot be presumed from the fact of voting. *Ib.*

7. Residence and age must both concur to make a valid voter. *Ib.*

8. Disfranchisement of ex-convicts will be presumed to continue. *Ib.*

9. A residence in a state includes some particular place therein. *Ib.*

10. An offer to register will not dispense with the necessity therefor. *Ib.*

11. No judgment for costs can be rendered in favor of contestant where he prevails. *Ib.*

12. The time fixed for the election of county officers does not require the same day to be fixed for the election of *all* county officers. State v. Brown, 7 Rec., 652. 750

EMINENT DOMAIN—

1. Condemnation of a turnpike road situated within the limits of a municipal corporation. Cincinnati v. Scarborough, 5 Rec., 562. 874

2. Determining the value of the part taken. *Ib.*

3. The power of eminent domain of the United States government is a legislative power. Kohl v. Hannaford, 4 Rec., 372. 306

4. Purchase by condemnation is a purchase through the medium of a judicial proceeding. *Ib.*

5. A federal officer cannot exercise the power of eminent domain unless authorized by congress. *Ib.*

EQUITY—

1. Equity looks at things as they are and not as they seem. Utter v. Hudnell, 7 Rec., 118. 621

2. A court of equity will not interpret the organic laws of a benevolent organization, to compel the officers of the subordinate lodges to conform thereto. Stadler v. B'nai B'rith, 3 Rec., 589. 221

3. Equity will protect all the rights in the funds of a mutual benefit society. *Ib.*

4. Equity will correct a mistake in the attempted description of the mortgaged premises. Adams v. Stutzman, 7 Rec., 76. 612

5. Equity will not relieve a party against the consequences of his own neglect. Voight v. Voight, 10 Rec., 564. 1127

ERROR—

1. Allowance of a writ of error by a judge in vacation. Snyder v. Cincinnati, 4 Rec., 667. 332

2. Petition in error to a higher reviewing court will not lie, when. Hahner v. Kaufman, 5 Rec., 439. 412

3. No petition in error will lie to an order fixing the compensation of a master. Mitchell v. Rammelsberg, 8 Rec., 22. 768

4. A petition in error in a criminal case will not lie before final judgment in the case. Johnson v. State, 12 Rec., 538. 1209

5. Refusal to discharge a prisoner when made by application under section 7309. *Ib.*

6. Will lie to the overruling of a motion made by defendants who had been arrested on an attachment proceeding. Payton v. Mullins, 8 Rec., 428. 859

7. The weight of erroneously excluded evidence will not be considered. Gates v. Insurance Co., 4 Rec., 395. 317

8. Sustaining a demurrer to a petition is not reviewable on error unless followed by final judgment. Levy v. B'nai B'rith, 5 Rec., 410. 401

STOPPEL—

1. The estoppel arising out of an admission of partnership is binding in favor of whomsoever it may be found to have been intended to influence. Sohn v. Freiberg, 11 Rec., 736. 1175

2. Estoppel against a married woman who transfers her property to her husband, allowing it to remain that way for several years. Rawson v. Bogen, 9 Rec., 553. 1022

3. A property owner is estopped to resist the assessment for a street improvement, when. Cincinnati v. Longworth, 4 Rec., 528. 326

4. Where P. and W. owners of stock in a corporation, to prevent its sacrifice, agree that P. should buy up its bonds, and afterwards W. was to take half; W. would be estopped from denying the validity of the bonds in P.'s hands. Post v. Wilson, 5 Rec., 235. 368

EVIDENCE—

1. In an action against drawer of a bill of exchange by payee, defendant cannot offer evidence of a parol agreement made at time the bill was drawn and delivered, that he was not liable thereon. Cummings v. Kent, 12 Rec., 163. 1178

2. Testimony, if objected to, of what the property cost the insured to build it, is incompetent, as it would raise collateral issues. Insurance Co. v. Frick, 2 Rec., 336. 47

3. Evidence taken at a coroner's inquest not admissible to establish the cause of death of the deceased. Mutual Life Ins. Co. v. Schmidt, 8 Rec., 629. 901

4. The fact of death may be established by the inquest. *Ib.*

5. When evidence has been adduced tending to make out plaintiff's case, its sufficiency is to be left to the jury. Ruffner v. Railroad, 6 Rec., 685. 569

6. But when plaintiff fails to introduce evidence tending to prove all the facts, the court may direct the jury to bring in a verdict for defendant. *Ib.*

7. Extraneous evidence will be received to establish a cotemporaneous oral agreement. DeHaven v. Coup, 6 Rec., 593. 562

8. Evidence to prove the existence of an invention. Gaylord v. Case, 5 Rec., 494. 413

9. The evidence at the trial to make it admissible must conduce to prove the truth. Railroad v. Ward, 5 Rec., 372. 391

10. Where record of a judgment shows that defendant was not served with process but appeared by attorney, is only *prima facie* evidence of appearance. Fordyce v. Marks, 1 Rec., 257. 12

11. Production of books and papers. Kelly v. Ingersoll, 7 Rec., 189. 630

12. Evidence to show whether there was any consideration for accepting certain drafts is competent. Alberts v. Moller, 8 Rec., 488. 864

13. Parol testimony is admissible to show that at the time of delivery of a note, it was not considered as delivered till signed by the parties. Brick Co. v. Foundry Works, 7 Rec., 548. 713

14. Evidence of prior conversations and negotiations regarding a certain contract are not admissible. Sinton v. Ezekiel, 8 Rec., 423. 845

EXECUTION—

1. Exemptions in a life insurance policy where the premiums exceed $150. Wagner v. Karman, 7 Rec., 670. 753

2. Ground purchased by a municipal corporation whereon to erect a public building is exempt from levy by a judgment creditor of the city. Cincinnati v. Cameron, 7 Rec., 592. 727

EXTRADITION—

1. Necessary facts to constitute a fugitive from justice. Johnson v. Ammons, 7 Rec., 662. 747

2. The judge before whom such fugitive is brought cannot determine the question of the prisoner's guilt or innocence. *Ex parte* Van Vleck, 7 Rec., 275. 636

3. Jurisdiction of governor upon whom requisition is made. *Ib.*

4. Jurisdiction of state courts to examine into such case, is no wider than that possessed by the governor. *Ib.*

5. The judge must determine whether the person in charge of the sheriff is the one described in the governor's warrant. *Ib.*

FACTORS AND BROKERS—

1. An auctioneer or factor who sells stolen goods is liable to the owner for their value. Miller Bros. v. Laws, 7 Rec., 606. 736

2. The first section of the act of March 12, 1844, known as the factors act, does not apply to consignments of stolen goods. *Ib.*

3. A commission merchant taking a note in his own name from a purchaser for his commission and a past balance due him from the owner, and remitting only the rest, is not legal and no custom to do so is valid. Rolling Mill Co. v. Addy, 6 Rec., 764. 588

FIXTURES—

1. Right of tenant to remove fixtures. Cook v. Scheid, 8 Rec., 493. 867

2. A lessee may lawfully remove improvements before the expiration of the lease. Bates v. Neski, 10 Rec., 50. 1064

FIXTURES—Concluded—

3. Reservation of a lien for rent on the lessee's interest in the term gives no lien on his improvements, though fixtures. *Ib.*

FRAUDULENT CONVEYANCES—

1. A preference of certain creditors in a conveyance by an insolvent debtor is valid under the Ohio insolvent law and does not constitute fraud. Sack v. Hemann, 10 Rec., 483. 1104

2. Debts assumed by vendee constitute a good consideration for a conveyance. *Ib.*

3. An inflated consideration in a bill of sale, inserted to defraud creditors will bind the buyer. Schroeder v. Kisselbach, 3 Rec., 295. 158

4. When a conveyance will be held to have been made for the purpose of hindering and defrauding creditors. Woodrow v. Sargent, 3 Rec., 522 209

5. Assignment for equal benefit of all the debtor's creditors. *Ib.*

6. Setting aside such conveyance and having the property administered according to statute. *Ib.*

7. Legal effect of such conveyance. *Ib.*

GAMBLING—

Party to a debt, many sue the stakeholder to recover back the amount contributed by him, but demand and refusal is first necessary. Ward v. Ritt, 10 Rec., 567. 1129

GOOD WILL—

1. The seller of a good will cannot apply to any person who was a customer of the old firm, privately, or in any other way, asking such customer to deal with him, or not to deal with the successor of the old firm. Burkhardt v. Burkhardt, 3 Rec., 418. 185

2. Purchase of, by one partner from his copartner. *Ib.*

3. Value of good will established by court, when. *Ib*

4. Rights of purchaser of a good will. Richardson v. Westjohn, 9 Rec., 723. 1043

GUARANTY—

1. A pledge of a married woman of her real estate to the extent of $1,000 is not a continuing guaranty. Arnold v. Wilder, 8 Rec., 348. 819

2. The liability on such guaranty is only for the payment of not exceeding that sum. *Ib.*

3. The words, "We know them to be good," referring to commercial paper, is a guaranty, and not a mere expression of opinion. Bank v. Bank, 13 Rec., 748. 1229

GUARDIAN AND WARD—

1. A guardian is not chargeable in law or equity for the board of his ward under a contract with a former guardian. Weigand v. Kylius, 8 Rec., 100. 781

2. A guardian *ad litem* has no authority or control over the person or property the infant for whom he acts. Marsh v. Ma 4 Rec., 257.

3. He may purchase and hold property of the infant sold under an order the court.

4. Sale of lands of an infant *covert.* Cracraft v. Roach, 6 Rec., 83.

5. Jurisdiction of court in an ac for alleged breach of duty by a guar Meier v. Herancourt, 11 Rec., 46.

HOMESTEAD—

1. A claim for exemption not in time. Green v. Fischer, 10 Rec., 570.

2. A homestead awarded to a lif in indivisible property, he to pay ren rent begins from the issuance of the of sale. Powell v. Hambleton, 7 Rec

3. Wife entitled to homeste premises mortgaged by the husband. M dock v. Welch, 8 Rec., 411.

4. As against a vendor's lien there be no claim for a homestead, neither debtor not his wife. Sutton v. Kautz Rec., 657.

5. A debtor forfeits his homestea removing from it, settling in another with no intention to return. Stewar Boyd, 9 Rec., 364.

6. Tenant in common, in possess cannot claim such land as a homestea exempt from sale under partition p ings. Rinehart v. Rinehart, 8 Rec.,

7. The minor children cannot in a case claim a homestead.

HUSBAND AND WIFE—

1. Effect of a postnuptial agree between husband and wife. Sielmeier meier, 9 Rec., 551.

2. A mortgage directly from h to wife, will in absence of opposing be enforced against his heirs. Allen 13 Rec., 215.

3. A wife is bound by her agreement to charge her separate e guarantor for her husband. Arnold 8 Rec., 348.

4. Making a married woman rate property liable. Plumb v. Dec 413.

5. To charge the separate pr the wife it is not necessary to desc the petition. Patrick v. Littell & Co. 260.

6. The separate estate of the w be held liable for the payment of dorsed by her, in which she cha separate estate with its payment v. Goebel, 6 Rec., 282.

7. A wife can sign a note as surety for her husband without intending to charge her separate estate. Hershizer v. Florence, 6 Rec., 500. 551

8. Recovery against a married woman upon her promissory note. Cook v. Spencer, 4 Rec., 665. 331

INDICTMENT—

Indictment for sending a telegram in the name of another with intent to defraud. Jacoby v. State, 7 Rec., 477. 705

INJUNCTION—

1. Cannot be allowed upon the petition alone, unless the petition be sworn to positively. Ett v. Snyder, 6 Rec., 415. 523

2. Private person cannot maintain an action to restrain the erection of a nuisance, unless his damages are peculiar to himself. *Ib.*

3. Enjoining the execution as a judgment. Hildebrand v. Windisch, 8 Rec., 103. 784

4. Will not lie against levy of execution on account of misnomer in judgment. Perin v. Egger, 8 Rec., 477. 855

5. In an action on an injunction bond, plaintiff must prove that he has sustained damages in consequence of the order. Tyler v. Ryan, 4 Rec., 670. 336

6. Refusal to enjoin an appurtenant to a highway affirmed. Baldwin v. Goodhue, 8 Rec., 308. 809

7. Abutting lot owner is entitled to an injunction against the laying of a steam railroad track in the street. Taphorn v. Railroad, 8 Rec., 489. 865

8. Refused against a street railway for laying their track and operating their road, when. Taphorn v. Railroad, 8 Rec., 420. 842

INSANE ASYLUMS—

1. Insane persons are the wards of the state. Bunker v. Ficke, 9 Rec., 371. 978

2. It is the duty of the state to foster and support institutions for their benefit. *Ib.*

3. Payment of salary of superintendent of Longview Asylum. *Ib.*

INSPECTION LAWS—

Neither the Ohio nor Indiana acts required inspection of gasoline unless it was to be sold for illuminating purposes. Van Camp v. Aldrich & Co., 2 Rec., 454. 92

INSURANCE, CASUALTY—

1. Drowning while swimming is an accidental death through outward force and accidental means. Knickerbocker Casualty Ins. Co. v. Jordan, 10 Rec., 625. 1145

2. Assignment of such policy. *Ib.*

INSURANCE, FIRE—

1. Adjustment of a claim against an insurance company is binding upon all parties in interest. Untersinger v. Insurance Co., 9 Rec., 401. 986

2. The mere fact of a note for an insurance premium not being paid at maturity does not of itself avoid the policy. Wilson v. Home Ins. Co., 7 Rec., 480. 708

3. Proof of loss not necessary, when. *Ib.*

4. Proof of payment to an agent under mistaken idea that the policy had been renewed, does not tend to show contract of renewal. Friend v. Brown, 8 Rec., 308. 809

5. Description of property in an application for insurance does not amount to a warranty. Insurance Co v. Frick, 2 Rec., 336. 47

6. Construction of clause providing for the use of the premises in an extra or specially hazardous business. *Ib.*

7. Where an insurance company relies upon failure to give notice or proof of loss as a defense, it must rely on that alone, if it depends upon other grounds, it waives such defense. *Ib.*

8. The amount which an insured party can recover, is the value of the interest in the property destroyed. *Ib.*

9. Insurance of mortgaged premises by the mortgagor. Little v. Insurance Co., 4 Rec., 228. 285

10. Construction of a clause reserving to the insurer the power to terminate the insurance, in giving proper notice. *Ib.*

11. Forfeiture of policy by executing a transfer of title in the property. *Ib.*

12. Attachment of goods before loss does not avoid the policy. Ins. Co. v. Stanhope, 9 Rec., 378. 983

INSURANCE, LIFE—

1. Agent's knowledge of error in the application. Cheever v. Insurance Co., 4 Rec., 155. 268

2. Defense that certain material representations contained in the written application were untrue. *Ib.*

3. Warranties are part of the contract of insurance and their truth is a condition precedent to recover upon the policy. *Ib.*

4. A warranty in a policy must be strictly and literally true, while a representation need only be true in substance. *Ib.*

5. The insurer ordinarily contracts to insure during the whole period of life in consideration of a stipulated premium. Life Insurance Co. v. Poettker, 4 Rec., 109. 263

6. Insured has the right to compel the insurer to receive each premium as it becomes due. *Ib.*

7. Rights of the insured against the insurer when the latter wrongfully refuses to continue its risk taken upon the insured's life. *Ib.*

INSURANCE, LIFE—Concluded—

8. Forfeiture of policy for the nonpayment of the annual premiums when due. Gates v. Insurance Co., 4 Rec., 395. 313

9. Policy need not be sealed. *Ib.*

10. Policy under seal may be modified by endorsement not under seal. *Ib.*

11. A gift or payment of money as premiums for insurance on his life, by a husband for the benefit of his wife, when in fact indebted beyond his means of payment, is constructively fraudulent as against creditors. Life Ins. Co. v. Eckert, 6 Rec., 452. 528

12. Age is only material as affecting amount of premium. Insurance Co. v. Goodall, 3 Rec., 338. 160

13. Knowledge of the agent is knowledge of the company. *Ib.*

14. Failure of company to procure proper agents. *Ib.*

15. Misrepresentation of age, although not wilfully made, is material and renders the policy void. Low v. Life Ins. Co., 10 Rec., 313. 1088

16. Such representation is simply for the benefit of the company, and can only be taken advantage of by it. *Ib.*

17. Effect of a policy of insurance containing a warranty clause against the use of intoxicating drinks. Life Ins. Co. v. La Boiteaux, 4 Rec., 1. 242

18. When insured makes warranties which are untrue he is not entitled to recover. Penniston v. Union Cent. Life Ins. Co., 8 Rec., 361. 830

19. Proof of death. Mutual Life Ins. Co. v. Schmidt, 8 Rec., 629. 901

20. Policy rendered void where the death is the natural and proximate result of intemperance. Hilterhoff v. Insurance Co., 3 Rec., 272. 141

21. Declarations in policy held as warranties. *Ib.*

22. Policies of, construed the same as all writings. *Ib.*

23. Answers to questions, if amounting only to representations, must be material as well as untrue to avoid the policy. *Ib.*

24. Suicide as a defense. Schultz v. Home Life Ins. Co., 8 Rec., 306. 808

25. Company is not estopped from proving the nondelivery of the policy and nonpayment of premiums. Life Ins. Co. v. Smith, 7 Rec., 147. 625

26. Delivery of policy by special agent. *Ib.*

27. Construction of a clause giving a right to a paid-up policy. Bussing v. Insurance Co., 7 Rec., 52. 607

INSURANCE, MARINE—

1. Construction of a policy of insurance on a steamboat. Insurance Co. v. Packet Co., 5 Rec., 499.

2. Forfeiture of a policy of marine insurance before loss. Fry v. Insurance Co., 4 Rec., 533.

INTEREST AND USURY—

1. A note bearing 5 per cent. interest will bear 6 per cent. after maturity. Smith v. Kautzman, 8 Rec., 657.

2. A judgment on such note will bear the same rate.

3. The interest payable on a note will be governed by the laws of the state where the note is dated. Scott v. Perlee, 8 Rec., 737.

4. Right of an Ohio railroad organized prior to 1851 to borrow money at not exceeding 7 per cent. Railroad v. Cincinnati, 4 Rec., 724.

5. Making the interest payable in New York does not invalidate it.

6. Interest is not allowed in condemnation proceedings unless possession is taken. Cincinnati v. English, 9 Rec.

7. Interest on the double liability of stockholders begins only from the time of beginning suit. Taylor v. Wheel Co., 9 Rec., 28.

8. Where a corporation empowered only to loan at 7 per cent. takes a note bearing for 10 after maturity, this is usury and it alone, but not the note apart from it is void. Kilbreth v. Wright, 4 Rec.,

9. Avoiding a claim for usury. Bank v. Huff, 8 Rec., 27.

10. Agreement to pay a usurious rate of interest, the note stipulating a rate within the statute, cannot be recovered. Bank Co. v. Shotts, 8 Rec., 321.

11. Waiver of by mortgagor. Hall v. Mansfield, 4 Rec., 619.

12. The defense of usury may be waived, and it is waived unless pleaded. Bank v. Bank, 4 Rec., 705.

13. Usury is the exaction of illegal interest for a money loan. Mossman v. Potter, 5 Rec., 425.

INTOXICATING LIQUORS—

1. In an action under section 6 of liquor law of 1870, plaintiff must prove material facts in the case beyond a reasonable doubt. Mason v. Shay, 1 Rec.

2. The wife may maintain her action against the seller, even after death of husband.

3. Amount recoverable by wife when her husband dies in consequence of such intoxication.

4. In such action the minor children must sue for themselves.

JUDGMENTS—

1. A judgment lien is not defeated by a misnomer in the judgment. Mack v. Schlotman, 7 Rec., 665. 749

2. Affirmation of a judgment. Dreyer v. McGill, 8 Rec., 305. 807

3. Compulsory assignment of a judgment may be ordered, when. Leighton v. Durrell, 8 Rec., 632. 903

4. Record of, in another state, made by appearance of attorneys, same effect not given it in Ohio. Fordyce v. Marks, 1 Rec., 257 12

5. In an action upon the transcript of a judgment rendered by a sister state, defendant may demand a copy of the same, and if not furnished such transcript may still be admitted as evidence on the trial. Marks v. Fordyce, 2 Rec., 392. 81

6. Motion to set aside the judgment and verdict may be granted after the lapse of three days from the rendition of the verdict. Parker v. Robinson, 5 Rec., 189. 367

7. In an action for money—and to establish security as a mechanic's lien, a personal judgment, in addition to establishing the lien, becomes a lien on other real estate than that on which the security was, and before sale under the order of foreclosure of security. Knauber v. Fritz, 5 Rec., 432. 410

8. If parties by consent submit all original issues for trial at the hearing of petition to vacate, they give the court jurisdiction and are bound by the judgment. Badgely v. Badgely, 6 Rec., 286. 495

9. Where defendant admits amount of his indebtedness and pleads a set-off and the court gives judgment for the amount admitted less the set-off, is erroneous. Stein v. Crosley, 6 Rec., 340. 505

10. Pendency of proceedings in error to reverse the judgment of reversal does not operate as *lis pendens*. Bldg. Assn. v. Hooker, 10 Rec., 559. 1123

11. A reviewing court will not, in every case when incompetent evidence has been introduced, reverse the judgment of the lower court. Schiff v. Sentker, 10 Rec., 568. 1137

12. A judgment, though general in form, will not be enforced against the judgment debtor personally when acting in a representative capacity. Kilbreath v. Fosdick, 13 Rec. 419. 1225

13. A warrant of attorney to confess judgment must be strictly pursued by the party in whose favor given. Fitzgerald v. Wiggins, 12 Rec., 476. 1201

14. Judgment by confession admits the law as well as the facts to be against the party confessing. *Ib.*

15. Revivor of dormant judgment. Taylor v. Bonte, 3 Rec., 220. 137

16. A judgment will not be reversed when on error it appears from the record that the law was correctly stated to the jury. Little v. Insurance Co., 4 Rec. 228. 285

17. Proceedings in error to reverse a judgment *in rem* accompanied by a *supersedeas*, operate only to stay execution. Kohl v. Hannaford, 4 Rec., 372. 306

18. A personal judgment cannot be rendered against a married woman in an action before a justice having no chancery jurisdiction. Schultz v. Myer, 10 Rec., 312. 1086

19. A cross petition unpaid, cannot after waiting fifteen years, take judgment without notice to the defendant therein. Bukheimer v. Ashcraft, 6 Rec., 440. 526

JUDICIAL SALES—

1. An order that the sheriff pay taxes out of proceeds of sale, imposes no extra official duties, and if he fails to pay them he is liable to the purchaser. Springmeier v. Blackwell, 7 Rec., 476. 705

2. Appraisement will be set aside, when. Mills v. Life Assn. of America. 8 Rec., 358. 827

3. To defeat the title of a *lis pendens* purchaser there must be not only *lites pendentia*, but also *lites contestatis*. Fox v. Reeder, 1 Rec., 22. 9

4. Penalty fixed at time of delinquent tax sale cannot be altered as to the purchase by a subsequent statute. State v. Capaeller, 7 Rec., 473. 702

JURISDICTION—

1. A mayor has no jurisdiction in an action where the statute imposes a penalty and provides for its recovery before a justice. Railroad v. State, 6 Rec., 501. 552

2. After a case had been twice tried on the theory that the court had jurisdiction, and judgment rendered, it is then too late to insist on want of jurisdiction. Meyer v. Meyer, 8 Rec., 426. 847

3. Effect of pleading want of jurisdiction by the defendant in his first defense. Knight v. Buser, 8 Rec., 28. 772

JURY—

1. Empaneling a jury in a justice's court. Harmonia Lodge v. Schaffer, 4 Rec., 670. 335

2. If a party desired to challenge the jury he should have them sworn on the *voir dire* and examine them. Woodward v. Stein, 3 Rec., 352. 171

3. Right to trial by. Clarke v. Huff, 8 Rec., 26. 771

JUSTICE OF THE PEACE—

1. A copy of the proceedings without the certificate of the justice is not a valid transcript. Berne v. Britton, 6 Rec., 263. 487

JUSTICE OF THE PEACE—Concluded—

2. Has no jurisdiction in an action for damages for breach of contract to sell real estate. Blackburn v. Sewell, 9 Rec., 303. 967

LANDLORD AND TENANT—

1. Where a tenancy from year to year is terminated by a written agreement and the tenant holds over without a new agreement, he is a tenant by sufferance. Worthington v. Rolling Mill, 9 Rec., 693. 1038

2. Mortgagee of a leasehold not in actual possession, is not liable as an assignee after condition broken for rent and taxes. Worthington v. Ballauf, 10 Rec., 505. 1121

3. An order for the payment of rent sustained. Parvin v. Gilmore, 8 Rec., 431. 853

4. Action to recover rent payable in monthly installments. Althof v. Fox, 9 Rec., 380. 985

5. Forfeiture of lease for nonpayment of rent. Baldwin v. Rees, 8 Rec., 556. 869

6. Lease of land to a building association. Tressel v. Executors, 10 Rec., 480. 1100

7. An option conferred upon the lessee to purchase the inheritance within the term is binding upon the lessor and his representatives. Buckwalter v. Klein, 2 Rec., 847. 55

8. After assignment of a lease, the original lessee remains liable for the rent. Despatch Co. v. Harmony Lodge, 7 Rec., 12. 603

LIBEL AND SLANDER—

1. Charges published concerning the conduct of a public officer, are not privileged, and if an action of libel is brought upon them, it is no defense that they were published in good faith, in an honest and reasonable belief in their truth. Wahle v. Gazette Co., 7 Rec., 541. 709

2. In an action to recover damages for slander, the truth of the charge and offers of apology may be proved under a general denial. Mack v. McGary, 10 Rec., 49. 1062

3. An action for libel can be maintained against a corporation. Life Ins. Co. v. Life Ins. Co., 6 Rec., 382. 521

4. Unjust criticism of a public officer is actionable. Cincinnati Gazette Co. v. Bishop, 10 Rec., 488. 1113

5. Plaintiff may read more libelous articles than were embodied in the petition in order to show malice. *Ib.*

6. Plaintiff is entitled to open and close in a libel suit. *Ib.*

LIEN—

A lien is an encumbrance upon, not an interest in property. Insurance Co. v. Frick, 2 Rec., 336. 47

LIMITATION OF ACTIONS—

1. Saving the running of a statute of limitations against defendants not served with process. Taylor v. Bonte, 3 Rec., 220. 137

2. Limitation for enforcing a lien for street assessments. *Ib.*

3. Avoiding the effect of the statute by fraudulently concealing evidence. Kilbreath v. Fosdick, 7 Rec., 153. 629

4. In an action to recover real estate, the jury may presume a grant from plaintiffs whose title has been such that the statute of limitations does not run against it. Fitzpatrick v. Forsythe, 7 Rec., 411. 682

5. In an action to set aside a fraudulent conveyance. Evans v. Alberts, 8 Rec., 350. 820

6. Lapse of time equal to the statute raises a presumption of grant from the owners to the possessors. Morrison v. Balkins, 8 Rec., 577. 882

7. The right to enforce a vendor's lien is not affected by the six years' statute. Smith v. O'Connor, 8 Rec., 742. 934

8. Where plaintiffs' are united in interest and a right of actions is saved to one, it is saved to all. Roll v. Riddle, 3 Rec., 648. 232

9. In actions for the wrongful conversion of land warrants. Bayles v. Crossman, 5 Rec., 13. 354

10. In an action upon an item of accounts. Schock v. Frazer, 10 Rec., 305. 1078

MALICIOUS PROSECUTIONS—

Dismissal of the prosecution on finding the articles stolen, does not show want of probable cause, merely by showing plaintiff's innocence. Dugan v. O'Neil, 6 Rec., 58. 459

MANDAMUS—

1. Mandamus can only be issued commanding the performance of act which the law especially enjoins, as a duty resulting from an office. State v. Board of Public Works, 8 Rec., 24. 769

2. It cannot control discretion. *Ib.*

3. Mandamus is not the proper remedy to adjust the claims of lienholders. State v. Cappeller, 8 Rec., 487. 863

MASTER AND SERVANT—

1. A railroad company is not liable for injury caused by the negligence of a fellow servant. Love v. Railroad, 8 Rec., 417. 839

2. The degree of diligence required by a railroad company in regard to the safety of its employees is simply ordinary diligence. *Ib.*

MARSHALING LIENS—

Where a "blanket" mortgage covers several pieces of property, and each is afterwards mortgaged, the lots shall contribute in the reverse order from that in which the mortgages are given. Long v. Harbers, 10 Rec., 52. 1066

MECHANIC'S LIEN—

1. Filing of sub-contractor's account with county recorder. Kennett v. Rebholz, 8 Rec., 354. 824

2. Subsequent claimants need only file their accounts with the owner. *Ib.*

3. The act of May 4, 1877, does not create a lien upon a railroad in favor of the contractor who builds the road. Rutherford v. Railroad, 6 Rec., 758. 584

4. The mechanic's lien law as amended March 30, 1875, does not protect material men employed by a sub-contractor. Stephens v. Stockyard Co., 4 Rec., 669. 334

5. The words, "paid in advance, by collusion or otherwise," does not refer to payments before due. Foeller v. Voight, 5 Rec., 1. 349

6. Payment in advance within the meaning of section six of the mechanic's lien law. Fitzgibbon v. Green, 5 Rec. 2. 350

7. Assignment of principal contractor before the completion of the building. Crist v. Langhorst, 5 Rec., 4. 352

MORTGAGES—

1. Construction of a mortgage given to secure a preferred creditor. Bank v. Nottingham, 14 Rec., 425. 1237

2. Before the law authorizing a personal action on a note to be joined with a suit to foreclose a mortgage, a personal judgment would have been void. Bukheimer v. Ashcraft, 6 Rec., 440. 526

3. A mortgage securing the debt of another is released by a contract extending the debt. Jones v. Turner, 10 Rec., 31. 1059

4. The security falls with the debt. *Ib.*

5. Correction of mistake in the description of the mortgaged premises. Adams v. Stutzman, 7 Rec., 76. 612

6. In foreclosure of a mortgage given by a residuary legatee or heir before the estate is settled, the sale must be subject to debts and legacies. Shillito v. McMahon, 10 Rec., 560. 1126

7. Foreclosure of mortgage upon real estate, after a decree was rendered and an order of sale issued, but returned "not sold." Sibley v. Elliott, 8 Rec., 301. 804

MUNICIPAL CORPORATIONS—

1. Powers of a city to grant the right to lay pipes through the streets to supply steam for heating and power purposes. Kumler v. Cincinnati, 9 Rec., 547. 1018

2. Grant of a franchise for longer than the statutory period is valid for the legal time. Sommers v. Cincinnati, 8 Rec., 612. 887

3. Discretion of council to designate the street over which an extension of an existing street railroad should be made. *Ib.*

4. Passage of an ordinance providing for the extension of a street. Cincinnati v. Mathers, 7 Rec., 734. 755

5. Extension of city limits does not extinguish the rights of a turnpike company without appropriation. Turnpike Co. v. Cincinnati, 4 Rec., 325. 299

6. A city is not liable for damages caused by fire resulting from its failure to enforce an ordinance against storing of inflamable oils. Roberts & Co. v. Cincinnati, 5 Rec., 73. 361

7. Liability of a city for the uncollectable balance of an assessment for street improvements. Ryan & Co. v. Cincinnati, 6 Rec., 279. 489

8. Filing claim for damages before suing. Miller v. Cincinnati, 6 Rec., 107. 472

9. Damages caused to lateral support not recovered against the corporation. Cincinnati v. Keating, 7 Rec., 15. 605

10 Corporations not bound to furnish lateral support. *Ib.*

11. Regulation of beer saloons by ordinance. Bauer v. Avondale, 7 Rec., 478. 706

12. Removal of police commissioners for official misconduct. Hogan v. Carbery, 7 Rec., 595. 729

13. Under the municipal code of 1878, a patrolman can be removed at the pleasure of the board of police commissioners. State v. Police Commissioners, 8 Rec., 21. 767

MUTUAL BENEFIT SOCIETIES—

1. The trustees of an association incorporated under the act of 1872, (69 O. L., 82), are not individually liable for the debt contracted by them for such association. Strobridge v. Winchell, 7 Rec., 743. 761

2. Rights of a member in a mutual benefit society who had failed to pay his assessment at the proper time. Mutual Relief Society v. Billau, 3 Rec. 546. 217

3. The fund contributed by members for their relief is not a charity to be controlled by equity. Stadler v. B'nai B'rith, 3 Rec., 589. 221

4. Construction of a certificate of membership in a mutual life association. Williams v. Association, 11 Rec., 48. 1168

NEGLIGENCE—

1. Negligence may be inferred from the happening of an accident. Railroad Co. v. Walwrath, 7 Rec., 555. 718

NEGLIGENCE—Concluded—

2. If plaintiff, by want of ordinary care, contributing to his injury, the defendant would only be liable for the neglect of its servants to use ordinary care to avoid the injury. O. & M. R. R. v. Hunt, 7 Rec., 739. 758

3. In a suit for injury, the proof of negligence must be affirmative. Ruffner v. Railroad, 6 Rec., 685. 569

NEW TRIAL—

Motion for new trial should be heard and disposed of before motion for judgment *non obstante veredicto*. Harker v. Smith, 6 Rec., 564. 560

NON-SUIT—

The right of the court to grant a nonsuit is taken away by the 372d section of the Code. Powell v. Railway Co., 2 Rec., 403. 89

OFFICE—

1. Governor has no power to suspend from office during the pendency of a charge. State v. Sutton, 8 Rec., 135. 786

2. Power to suspend pending a hearing of charges is not incident to the power to hear and remove. *Ib.*

PARTIES

1. One to whom the legal title in a note and mortgage has been transferred for collection may sue in his own name, as trustee of an express trust. Wayne v. Minor, 7 Rec., 9. 602

2. Necessary parties in an action for the removal of a building erected across a private alley. Mazza v. Heister, 5 Rec., 526. 430

3. The *cestui que* trust is a necessary party in an action affecting his interest. Hamilton v. Jacobs, 10 Rec., 445. 1094

4. City not a necessary party in an action brought by a contractor for improvements made under a private contract with the property owners. Schneider v. Buckley, 8 Rec., 357. 826

5. Where the mortgagor dies pending suit, it is error to take a decree without making the heirs and administrators parties. Cin. Sav. Soc. v. Jones, 8 Rec., 96. 778

6. Misjoinder of parties is not a ground of demurrer under the Code, provided the necessary parties are before the court. Hepworth v. Pendleton, 5 Rec., 285. 386

7. Defect of parties and misjoinder of causes of action are grounds of demurrer. *Ib.*

PARTITION—

1. By executor, when remaindermen are not ascertained. Craighead v. Pike, 4 Rec., 199. 273

2. The revisioners of an estate are not entitled to ask for partition proceedings. Burbeck v. Spollen, 10 Rec., 491. 1118

3. Upon partition among tenants in common, a lien upon the undivided interest of one will follow and attach to the share set apart to him. Cincinnati S. v. Soc. v. Tay[illegible] son, 12 Rec., 310. [illegible]

4. The existence of an ordinary lease for years, under which the tenant is in possession, paying rent to the owners of the fee, is no obstacle to partition among the owners. Werner v. Gloss, 15 Rec., 300.

5. Partition of lands in the Virginia Military District of Ohio. Morrison v. Hawkins, 8 Rec., 577.

6. Husband uniting with his wife in signing a partition deed, effect. Bauer v. Lohr, 8 Rec., 426.

PARTNERS AND PARTNERSHIPS—

1. Non-resident partners not served with process and who do not appear and defend are not personally bound by a judgment in such action. Fordyce v. Marks, 1 Rec., 257.

2. If resident partners in behalf of all file a set-off asking for relief, all the partners will be personally bound by any judgment rendered.

3. Liability of retiring partner who leaves his name in the firm style. Speer v. Bishop, 3 Rec., 91

4. A copartner may in the firm name or in his own name release a claim for damages. DeHaven v. Coup, 6 Rec., 59[illegible]

5. Liability of partners on a note against a partnership which is surrendered on one partner retiring and a new note given, and when a new member is admitted the latter note surrendered and a note of the new firm taken. Crowley v. Chamberlain, [illegible] 376.

6. Individual property of a partner cannot be levied on, to satisfy a judgment against the firm sued in the firm's name. Fritche v. Liddell, 9 Rec., 309.

7. Partner not entitled to compensation for services in closing up affairs of firm after dissolution. Hellman v. Mendel, [illegible] 360.

8. In an action against a partnership the resident partners are the agents of non-resident, and have implied authority to employ an attorney on behalf of all, to enter appearance for them and judgment rendered against them, will be conclusively binding upon them all. Marks v. Fordyce, [illegible] 392.

9. Winding up a partnership. Ellis v. Oberhelman, 10 Rec., 686.

10. Settlement of partnerships. Danby v. Vail, 9 Rec., 550.

PARTY WALLS—

Privity of estate is not necessary to make a benefit run with the land. Hamilton v. Fosdick, 8 Rec., 486.

PATENTS—

1. Worthlessness of patent is no defense against payment of agreed royalties. Gaylord v. Case, 5 Rec., 494. 413

2. Licensee may claim a reissue of the patent. *Ib*

PAUPERS—

1. Discharge of a harmless pauper, an inmate of Lonview Asylum, in Hamilton county. State v. Ritt, 8 Rec., 750. 940

2. Maintenance of such pauper. *Ib*

PAYMENTS—

1. Application of payments made upon a running account. Utter v. Hudnell, 7 Rec., 118. 621

2. By person desiring to file a petition in bankruptcy to an attorney for services will be upheld if reasonable and in good faith. Williams v. Pultze, 6 Rec., 337. 503

3. A double payment by inadvertance is recoverable. Crofton v. Bd. of Education, 4 Rec., 769. 348

PLEADINGS—

1. The common law rule that a pleading is to be construed strictly against the pleader has no application to Code pleadings. Insurance Co. v. Hart, 3 Rec., 657. 237

2. A petition on an appeal bond which merely states that the bond was executed and approved by the justice, and that judgment was rendered in favor of appellee, is demurrable. Marks v. Harris, 10 Rec., 481. 1101

3. Fraudulent representations to a common carrier must be pleaded or they cannot be proven. Despatch Co. v. Glenny, 10 Rec., 572. 1142

4. Pleading in an action for damages for causing death. Hartzell v. Shannon, 10 Rec., 444. 1093

5. Pleading in a suit upon a note. Ives v. Strickland, 8 Rec , 309. 810

6. In an action brought upon the record of a judgment of a sister state. Fordyce v. Marks, 1 Rec., 257 12

7. In an action upon an account for money due. Knauber v. Wunder, 6 Rec., 366. 516

8. Petition to recover damages for sale of intoxicating liquors to an habitual drunkard, must aver that defendant knew plaintiff's husband was an habitual drunkard. Markert v. Hoffner, 4 Rec., 670. 335

9. An allegation in a pleading that a contract was made is an allegation that a valid contract was made. Hepworth v. Pendleton, 5 Rec., 285. 386

10. In an action by road supervisor to recover for the amount of work defendant was required to perform on the road district where he resided. Lanter v. Lathrop, 10 Rec., 569. 1137

11. Filing an amended petition making different parties defendant, is an abandonment of the case against original defendants, when. Levy v. B'nai B'rith., 5 Rec., 410. 401

12. New matter consists of facts, which if true, are in law a defense to the action. Railroad v. Ward, 5 Rec., 372. 391

13. Denials which only deny conclusions of law, constitute no defense and are bad on demurrer. Baldwin v. Rees, 8 Rec., 556. 869

14. An allegation in an answer, which is merely an argumentative denial of allegations contained in the petition, requires no reply. Singer Mfg. Co. v. Brill, 9 Rec., 43. 958

15. When it is inferred from the petition that the contract sued on is not in writing, the petition is demurrable. Schwick v. Fulton, 11 Rec., 47. 1168

16. A demurrer having been filed out of time, the court is not bound to consider it. Carver v. Williams, 10 Rec., 310. 1084

PRACTICE—

1. Granting of motions to confirm sales made under orders of sale in a case. Campbell v. Corry, 8 Rec., 427. 848

2. It is competent for the court after default to refuse leave to answer. Hengehold v. Gardner, 8 Rec., 352. 822

3. It is incumbent upon the parties to an action to state in writing the facts constituting the cause of action and grounds of defense. Railroad v. Ward, 5 Rec., 372. 391

PRISON BOUNDS—

1. The prison bounds are coextensive with the county. Kirkup v. Stickney, 6 Rec., 300. 499

2. A judgment debtor, who has given bond to remain in prison bounds, is entitled to be fed and lodged at the jail. *Ib.*

3. Such debtor is entitled to claim such subsistence as is by law provided for other prisoners. *Ib.*

4. Refusal of judgment creditor to pay the prison fees in advance. *Ib.*

PROCEEDINGS IN AID OF EXECUTION—

Effect of the insanity of a judgment debtor, where a proceeding in aid of execution has been commenced. Pomeroy v. Pearce, 6 Rec., 379. 518

QUO WARRANTO—

1. Removal of a member of the board of police commissioners of Cincinnati. State v. Sutton, 8 Rec., 135. 786

2. Relator having ceased to be an officer since the *quo warranto* was begun, the judgment cannot go in his favor, except for costs to the time of answer. *Ib*

QUO WARRANTO—Concluded—

3. *Quo warrauto* for usurping the franchise to be a corporation, must be against the persons guilty, by their individual names or a name that comprehends them. State v. College, 8 Rec., 422. 844

RAILROADS—

1. No action will lie against a railroad company for any alleged breach of contract made with the receivers. Ellis v. Railway, 6 Rec., 288. 497

2. Right of a railroad to lease and give possession of its road to another railroad corporation or person. Railway Co. v. Sleeper, 3 Rec., 464. 196

3. Such lessor company will be held liable for the acts of the lessee. *Ib.*

4. In Ohio a railroad cannot discriminate between ticket and car rates for passenger fare. Skillman v. Railroad, 8 Rec., 650. 904

5. A ticket rate having been fixed, no higher rate can be demanded. *Ib.*

RECEIVERS—

1. No party to a case or person interested can act as a receiver. Turpin v. McGill, 8 Rec., 23. 768

2. A receiver appointed by the court of another state of property in this state cannot sue in his own name in the courts of this state to recover such property. Parkinson v. Bank, 4 Rec., 401. 317

3. Confirming a sale made by a receiver, when the same is made in variance of the court's order. Ghiradelli v. Leverone, 6 Rec., 255. 486

4. Distribution by a receiver will be the same as in assignments. Putnam v. Pub. Co., 14 Rec., 56. 1231

5. Labor claims will have the same preferences in distribution as in assignment for creditor. *Ib.*

RECORDING ACT—

Rights of a buyer who has given securities for the balance of purchase money without notice of a prior unrecorded deed to another part of the property, but has notice before payment. Moulton v. Bassett, 4 Rec., 101. 257

REFERENCE—

1. The reference of a case to a master is not a matter of right, it is a matter of discretion. Manning v. Ludington, 7 Rec., 117 620

2. Referee is authorized to take testimony and certify it to the court. Zimmerman v. Grotenkemper, 8 Rec., 364. 832

3. Such testimony may be used as a deposition taken in the case. *Ib.*

RELIGIOUS SOCIETIES—

1. No action at law between members. Catholic Church v. Kaus, 9 Rec., 627. 1028.

2. The remedy is in equity against the property of the society. *Ib.*

REPLEVIN—

1. Action of replevin against the assignee in insolvency of the buyer. Coffee v. Pleasants, 8 Rec., 312. 812

2. Defendants pleading to get damages on default for petition. Striker v. Beatty, 8 Rec., 366. 834

3. Defendant may make a defense invoking the exercise of equity jurisdiction. Kelly v. Purcell, 8 Rec., 705. 920

4. Under denial of plaintiff's right of possession defendant may show an agreement by which plaintiff waived such right. Timberlake v. McArthur, 8 Rec., 713. 925

RES JUDICATA—

Res judicata binds parties and privies. Thoms v. Greenwood, 7 Rec., 320. 639

REVIVOR—

Refusal to permit revivor of an action after a year has passed is discretionary with the court and not reviewable unless abuse is shown. Dungin v. Brashears, 10 Rec., 58. 1067

SALES—

1. To complete a sale it is necessary that the purchaser should select the goods and appropriate them to the contract. Newhall v. Langdon, 6 Rec., 681. 566

2. A contract to sell a certain amount of railroad bonds, precise amount not known, the matter to be closed up next day, is executory and passes no title. Mowry v. Kirk, 5 Rec., 587. 431

3. Sale of stock in a corporation will be set aside when fraudulently made. Zeverink v. Lappert, 9 Rec., 546. 1017

4. Set aside on the ground of fraudulent concealments. Goodale v. Hunt, 8 Rec., 624. 897

5. Payment is a condition precedent before the title in property vests in the buyer, when. Keber v. Sanders, 1 Rec., 374. 20

SCHOOLS—

1. Creation of sub-school districts. State v. Clark, 8 Rec., 362. 831

2. Alleged conspiracy in ousting a member of a school board. State v. Goodale, 8 Rec., 432. 854

3. The board of education is liable on bonds delivered for cancellation, but which were negotiated by its treasurer to an innocent purchaser. Bd. of Ed. v. Sinton, 8 Rec., 567. 878

4. Liability of city for negligence of school trustees. Diehn v. Cincinnati, 3 Rec., 542. 215

SEALS—

Any character or mark intended as a seal to an instrument requiring a seal is sufficient. Bobe v. Bldg. Assn., 9 Rec., 632. 1032

SERVICES—

1. Express words are not necessary to create a hiring for a year. Bascom v. Shillito, 6 Rec., 359. 511

2. Summary dismissal of an agent. McCammon v. Sewing Machine Co., 10 Rec., 688. 1155

SET-OFF—

1. In an action against a partnership, only one of the firm is sued, he cannot set off a claim held by him individually against plaintiff. Williams v. Pultze, 6 Rec., 337. 503

2. The rule that equity will allow a joint claim to be set off against a separate claim is not absolute. *Ib.*

3. Not allowed when not growing out of a transaction set forth in the petition, and being counted on as a tort. Broch v. Becher, 6 Rec., 380. 519

4. An unliquidated demand for damages is a proper subject for set-off, provided it arises out of some contract. Doppler v. Cox, 10 Rec., 306. 1080

5. A claim for unliquidated damages, though arising upon contract, is not subject of set-off under the Code. Cleveland Rubber Co. v. Bradford, 11 Rec., 44. 1160

SHERIFF—

1. A sheriff has no authority to accept part in full satisfaction of an execution, though the judgment be void for want of service. Runyan v. Vandyke, 7 Rec., 8. 601

2. Disposition of securities received on a sale of lands under proceedings in partition. Compton v. Bruen, 4 Rec., 12. 250

SPECIFIC PERFORMANCE—

1. An agreement to deliver government bonds will not, in general, be enforced. Mossman v. Schulter, 5 Rec. 425. 404

2. In a civil action to enforce such agreement, a money judgment for compensation may be rendered. *Ib.*

3. In a suit for specific performance of a contract, neither party is entitled to a trial by jury as a matter of right. Moore v. Moulton, 6 Rec., 466. 534

4. The money must be offered by vendee and if refused, must be brought into court before he can have a decree. *Ib.*

5. Party retaining possession after making a contract to convey, and who has refused to receive the consideration, is not entitled to interest. *Ib.*

STATUTES, CONSTRUCTION OF—

1. Construction of section 59 of the act relating to exemptions from execution, (75 O. L. 692). Dulgar v. Hartmeyer, 8 Rec., 15. 763

2. A "buggy" is not included in the term wagon as employed in section 59. *Ib.*

3. Construction of section 6722 Revised Statutes. Going v. Schnell, 8 Rec., 739. 932

4. A lessee under a perpetual lease with privilege of purchase is an owner within the meaning of section 543 of the Municipal Code. Laird v. Cincinnati, 9 Rec., 479. 1006

5. Construction of the Homestead Act. Kelly v. Hines, 9 Rec., 404. 988

6. Provisions of section 2303, that where a municipal corporation makes an improvement, it shall advertise for bids, are peremptory. Cincinnati v. Anchor White Lead Co., 12 Rec., 235. 1188

STATUTE OF FRAUDS—

1. A verbal contract not to carry on a certain business in a certain neighborhood, for five years, is within the statute of frauds and cannot be enforced. Witter v. Gottschalk, 2 Rec., 378. 77

2. The statute of frauds is a statute of evidence and not of pleading. Hepworth v. Pendleton, 5 Rec., 285. 386

3. A yearly hiring by parol, not to be completed within a year from the time of its being made, is within the statute of frauds. McCammon v. Sewing Machine Co., 10 Rec., 688. 1155

STREET RAILROADS—

1. Extension of existing street railroad routes. Sommers v. Cincinnati, 8 Rec., 612. 887

2. Written consent of abutting owners necessary as a condition precedent to granting such extension. *Ib.*

3. Only an abutting property owner can have injunction for want of consents—a taxpayer as such cannot. *Ib.*

STREETS AND ROADS—

1. Obstructions by change of grade as a cause of action do not include obstructions of streets not adjoining plaintiff's property. Railway Co. v. Hambleton, 7 Rec., 562. 721

2. Failure to keep a road open to its full width for 18 years does not vacate the unused part. Dodson v. Cincinnati, 4 Rec., 312. 295

3. The streets of a city are under the control of the public authorities whose duty it is to keep them open and in repair. Taphorn v. Railroad, 8 Rec., 420. 842

SUMMONS—

1. A summons to appear and answer in a civil action may be served on Sunday. Stapleton v. Reynolds, 5 Rec., 242. 374

2. Service of summons by one who induces another into the jurisdiction cannot be made until after a reasonable time for departure. Powder Co. v. Griswold, 6 Rec., 464. 532

SUMMONS--Concluded—

3. Service of summons on nonresident suitors, while attending court. Bassett v. Gunsolus, 13 Rec., 487. 1228

4. An extradited prisoner here from another state cannot be served with summons in a civil action. Compton v. Wilder, 7 Rec., 212. 630

5. Service of, in another county. Knight v. Buser, 8 Rec., 28. 772

SURETIES—

1. On official bond cannot be held, when. State v. Robinson, 8 Rec., 723. 930

2. Discharge of a surety on a bond for the fidelity of an agent. City Ins. Co. v. Roberts, 12 Rec., 744. 1213

3. A bond regular upon its face, cannot be avoided by the sureties who signed it, when. Dalton v. Miami Tribe, 2 Rec., 329. 42

4. Liability on bonds of officers of benevolent organizations. *Ib.*

5. Release of sureties on a guardian's bond where the bond is broken by an alleged breach of duty by the guardian. Meier v. Herancourt, 11 Rec., 46. 1164

6. Release of surety on a guardian's bond without notice to his cosurety, releases the latter from any default thereafter of the guardian. Dowell v. Guiou, 7 Rec., 273. 634

7. Payment of usurious interest by a surety, cannot be recovered if he might have avoided its payment. Davis v. Kelley, 1 Rec., 479. 30

8. The sureties on the bond of an administrator *de bonis non* are liable for assets collected by the administrator, he having died without accounting for such money. Buckwalter v. Klein, 2 Rec., 347. 55

9. Liability of sureties on additional bonds for the fiduciary conduct of the trustee provided for therein. Thorne v. Megrue, 3 Rec., 140. 131

10. A guarantor is equally within the rule of release by extension of time as a surety. Jones v. Turner, 10 Rec., 31. 1059

11. The principle that delay releases him only to the extent he is injured does not apply *Ib.*

12. Liability of surety for costs of nonresident plaintiffs. Standard Pub Co. v. Bartlett, 9 Rec., 58. 965

13. Surety can be saved from future liability only by dismissal of action. *Ib.*

14. Moving for new security for costs, not a waiver of right to object to discharge of surety. *Ib.*

15. Subrogation of a surety to the rights of the judgment creditor against his cosureties. Wagner v. Olds, 7 Rec., 611. 739

TAXES AND TAXATION—

1. A judgment in favor of a party becomes a taxable credit when it becomes a liquidated demand by the judgment rendered by the court. Cameron v. Cappeller, 10 Rec., 443. 1089

2. The board of equalization cannot delegate its powers to a subcommittee less than a majority of the whole board. Hirschman v. Fratz, 10 Rec., 486. 1109

3. Authority of a board of equalization to add or deduct from the value of personal property returned for taxation. Muller v. Fratz, 8 Rec., 310. 811

4. Correction of error in valuation under the law of 1859, should be made by the board of equalization. Humphreys v. Safe Deposit Co., 6 Rec., 79. 464

5. Authority of county commissioners under the act, 70 O. L., 10, to order the refunding of taxes. Ridderman v. Commissioners, 8 Rec., 749. 939

6. By county commissioners for bridge purposes. State v. Commissioners, 6 Rec., 106. 471

7. Legacy taxes are payable out of the legacies. Guiou v. Guiou, 3 Rec., 475. 205

8. Taxation of notes belonging to a citizen of Ohio, secured by mortgages on lands in Indiana. Conner v. Wilson, 9 Rec., 1. 941

9. Such taxation violates no provision of the Ohio or federal constitution. *Ib.*

10. Correction by the auditor of false returns. *Ib.*

11. Taxation of subdistricts for school purposes. State v. Cappeller, 8 Rec, 481. 857

12. Taxation of perpetual leaseholds in name of lessee and sold for taxes, the purchaser only acquires such leasehold. Plant v. Murphy, 6 Rec., 479. 544

13. Recovery of taxes p id by such purchaser is barred in six years. *Ib.*

14. A merely clerical error may be corrected by the auditor. Hulbert v. Wise, 10 Rec., 182. 1069

15. It is not necessary that all the members of a board of equalization be present when adding to or decreasing the assessed value of property. *Ib.*

16. Under section 1038 the auditor is authorized to correct the valuation as well as description of property returned for taxation. Commissioners v. Brashears, 9 Rec., 625. 1027

17. Catholic property is free from all ordinary state, county or city taxation. Bishop Gilmour v. Pelton, 6 Rec., 26. 447

18. Such property is subject to special assessments for improvements made for its benefit. *Ib.*

19. Refunder of taxes erroneously paid. Dickson v. Commissioners, 10 Rec., 571. 1141

20. When taxes can be refunded. Perrin v. Commissioners, 10 Rec., 311. 1085

21. Party not entitled to a refunder when the error is such as the auditor would not be required to correct. Commissioners v. Eckstein, 8 Rec., 421. 843

22. Return of property not required by law to be returned, and payment of taxes on it cannot be recovered under section 1038. State v. Cappeller, 9 Rec., 543. 1015

23. Collection of taxes, where by a clerical error property is placed upon the tax duplicate for several years at much less than its valuation. Foster v. Fenton, 5 Rec., 523. 427

24. The errors for which a refunder of taxes may be had are clerical errors simply. Ives v. Commissioners, 10 Rec., 306. 1079

25. Taxes paid on land after appropriation by city. *Ib.*

26. Taxes erroneously assessed by auditor under sections 2781 and 2782 cannot be corrected by proceedings under section 1038. State v. Brewster, 12 Rec., 544. 1210

TELEGRAPH COMPANIES—

1. A telegraph company cannot by contract relieve itself from liability for negligence in the transmission of messages. Hord v. W. U. T. Co., 6 Rec., 529. 555

2. Damages recoverable in such case must be the direct and natural result of such negligence. *Ib.*

TRADE-MARKS—

1. A person is entitled to the exclusive use of his name as a trade name, when. Singer Mfg. Co. v. Brill, 9 Rec., 43. 958

2. Use of such name by other manufacturers will be enjoined. *Ib.*

3. Appropriation of another's trade name. *Ib.*

4. Infringement of a trade name. *Ib.*

5. A person's property in a trade name not affected by expiration of patent on the articles covered by the name. *Ib.*

6. Laches to deprive a person of ownership in a trade name. *Ib.*

7. The use of another's trade name or trade mark will be enjoined. Richardson v. Westjohn, 9 Rec., 723. 1043

TRIAL—

When the law casts the burden of proof in the trial of an issue, upon one of the parties, such burden does not shift from one party to another during the progress of the trial, or as the weight of evidence alternates. Life Ins. Co. v. La Boiteaux, 4 Rec., 1. 242

TRUSTS AND TRUSTEES—

1. A trust is not perfectly created where there is a mere intention or voluntary agreement to establish a trust. Foley v. Peters, 6 Rec., 377. 517

2. Purchase of property by a son in his mother's name, effect. Mullen v. Mullen, 2 Rec., 611. 111

3. A court may render judgment in the alternative that the executor shall execute the trust, and in default that execution shall issue against him personally. Guiou v. Guiou, 3 Rec., 475. 205

4. Effect of one taking title to property in his own name, giving note in payment, and afterwards goes into possession, making improvements without consent of person for whom it is alleged he purchased it. Sullivan v. Mannix, 9 Rec., 409. 992

5. A conveyance not amounting to a trust. O'Connor v. Ryan, 10 Rec., 477. 1095

VENDOR AND PURCHASER—

1. Assignment of purchase money notes by a vendor. Sutton v. Kautzman, 8 Rec., 657. 910

2. When a purchaser of land is indebted for purchase money and the title to a portion fails, he is entitled to an abatement in the price. *Ib.*

3. The abatement will be made against all persons seeking to enforce a vendor's lien. *Ib.*

VERDICT—

1. Party offering wholly documentary evidence is not, in law, entitled to a verdict. Kohl v. Hannaford, 4 Rec., 372. 306

2. Findings not amounting to a special verdict. Gottschalk v. Witter, 3 Rec., 394. 180

3. A verdict not giving the names of the parties or the court is sufficiently definite and certain. White v. Francis, 4 Rec., 501. 323

4. The verdict of the jury must respond to the issues formed by the denials. Railroad v. Ward, 5 Rec., 372. 391

5. Duty of courts to set aside, when. *Ib.*

VOLUNTARY CONVEYANCES—

1. A voluntary conveyance of property will be implied to be held in trust for the grantor. Bayles v. Crossman, 5 Rec., 13. 354

2. A voluntary conveyance, made by a parent to his child, will not be defeated by a subsequent conveyance, made by the parent to a purchaser for value, when the purchaser had notice of the prior conveyance, and the fact that the prior deed was regularly recorded is noticed. Mathews v. Rentz, 2 Rec., 371. 72

3. A voluntary conveyance is not fraudulent against a creditor amply secured by mortgage. Executors of Stephenson v. Donahue, 8 Rec., 358. 828

WAIVER—

The question whether there has been a waiver of evidence, is for the court to determine upon the *voir dire*, when such evidence is offered. Marks v. Fordyce, 2 Rec., 392. 81

WATER AND WATER COURSE—

1. If the building of a village necessarily diverts the flow of surface water so as to increase it on plaintiff's farm, no liability attaches in consequence of such act. Ruffner v. Bldg. Assn., 10 Rec., 51. 1065

2. Merely increasing the flow of water in a natural water course does not, like increasing the flow of surface water, give a right of action. Kemper v. Widow's Home, 9 Rec., 731. 1049

3. No right of riparian owners is invaded when the flow is increased, if not beyond the stream's capacity. *Ib.*

WATER WORKS—

Removal of officers and employees by the board of trustees. Lawrence v. Cincinnati, 3 Rec., 597. 228

WILLS—

1. The income specified in a will after the payment of debts, can only be what arises on the remainder. McLaughlin v. Graves, 8 Rec., 561. 873

2. A provision to the wife and minor child of all that is allowed by the laws of Ohio in such case made and provided, means a year's support. Guiou v. Guiou, 3 Rec., 475. 205

3. Notice to admit a spoliated will must be given by publication. Miller v. Bangard, 4 Rec., 767. 347

4. A pending of an action to set aside a will does not effect the title of the devisee under it. Murray v. Murray, 5 Rec., 2[illegible]

5. The validity of a will executed without the statutory formalities and admitted to probate, is established by the probate. Elder v. Taylor, 6 Rec., 73.

6. Construction of a will in which the testator leaves all his property to his wife with provision that she provide for an [illegible]ted daughter. Elder v. Taylor, 6 Rec., 641.

WITNESSES—

1. In a suit between administrators and the heirs, grantees or devisees are not disqualified from testifying. Rowland v. Griffiths, 7 Rec., 115.

2. Party in interest, but not party to the suit, not incompetent to testify under section 313 of the Code. Admr. of Clark v. Ruan, 8 Rec., 360.

3. A witness cannot be impeached on the ground of surprise by the party calling him. Mutual Life Ins. Co. v. Schmidt, 8 Rec., 629.

4. If a witness is competent to testify upon any subject, a general objection to his being sworn should be overruled. Mc[illegible] Herancourt, 11 Rec., 46.

5. Bankruptcy requalifies a person discharged of his debts. Bonte v. Hunt, 8 Rec., 649.

WORDS—

The term "restriction" used in the first section of the act of May 1, 1852 [illegible] mean penalties or liabilities. Strubbe v. Winchell, 7 Rec., 743.

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