REPRINT

OF

OHIO CASES PUBLISHED IN

FIFTEEN VOLUMES

American Law Record

1872–1887.

Volume I.

Reprinted for

The Ohio Decisions Series

Of Ohio Case Law Books.

NORWALK, OHIO.
THE LANING PRINTING COMPANY,
1897.

PREFACE.

These volumes are a reprint of the cases decided by the state courts of Ohio, found in the American Law Record, published at Cincinnati, from 1872 to 1887. The fifteen original volumes are compressed into two reprints, as all editorial, correspondence, cases decided in other states, and out-of-date matter, in the periodicals as first issued, have been omitted.

These volumes are the fifth and sixth of a series of reprints embracing the Western Law Journal, Western Law Monthly, Weekly Law Gazette, American Law Register, Cleveland Law Record, Cleveland Law Reporter, American Law Record, Weekly Law Bulletin, and Circuit Court Reports, the republication of which has been undertaken and carried on at large expense.

Without them no Ohio Library is complete, and as many of the original volumes have been out of print for a long time, and copies are scarcely obtainable at any price, and many of the cases acted upon by higher courts, it has been thought that an annotated reprint of these volumes was now called for.

As citations to these authorities are found in the different editions of the Walker and Bates, and Bates' Ohio Digest, and in Welch's Index Digest and come constantly under the eye of every judge and attorney who is looking up Ohio judicial precedents, it is believed the bar will consider our adventure a desirable one, and patronize it liberally.

The reprint cases for the series are a full and faithful transcript of the originals. No case of an Ohio state court has been omitted, or abridged in the least, and no note or comment has been left out.

Where no case titles were given in the original prints, we have prepared them, and they will be found herein, in black letters, at the beginning of the cases. Many of the opinions in the original periodicals had no *syllabi*, and where necessary we have supplied them. The foot notes herein showing cases affirmed, overruled, and considered, are valuable additions to the cases. The work has been carefully compared, proof read, and the decisions may be relied upon as being as authentic as the originals.

The volumes follow each other in the same manner, and the cases appear in the same order as printed originally.

The original paging is maintained, the volume number being at the head of the page, and the former page number given over the top of the pages, and also inserted in the margin, in bold type. By observing these bold face figures any desired citation can be as readily located as in the original book. The pagings of these volumes are placed at the bottom of the pages.

In these reprints a feature appears, not adopted in former volumes of the series. Cases which have been overruled are often valuable, as it is as important to know what the law is not, as what it is. Adverse decisions often aid in giving a right conception of legal principles, and in some instances points are decided in overruled cases, not covered by the decision of the higher courts. Cases which have been affirmed with report, although the decision of the upper tribunal becomes the law, often do not contain a full statement of facts. Hence, the decisions of the lower courts, though reversed or affirmed, remain valuable. For these reasons, no overruled case, or one superseded by an affirmative opinion of a higher court, has been omitted herein, but such cases are set in type different than the cases not affected by later decisions. In this way, when the eye falls on a case set in the small type, it will be a reminder that the case had been overruled or superseded.

By reference to the Table of Cases, the page of this book where a case is reprinted, can be located, from any citation to the original volume and page.

May 15, 1897. THE LANING PRINTING CO.

TABLE OF CASES

Giving Volume and Page of Original Publication, and of this Book.

	Orig. Vol.	Pg.	This Book
Adams v. Stutzman	7,	76	612
Alberts v. Moller	8,	488	864
Allen v. Allen	13,	215	1223
Althof v. Fox	9,	380	985
Am. Express Co. v. Epply	4,	672	337
Andes Ins. Co. v. McCoy	6,	486	549
Arnold & Co. v. Wilder	8,	348	819
Badgely v. Badgely	6,	286	495
Baldwin v. Goodhue	8,	308	809
——— v. Rees	8,	556	869
Bank v. Comm. Bank	4,	705	339
——— v. Mfg. Co	14,	425	1237
——— v. Moore	8,	97	779
——— v. Purcell	8,	745	936
——— v. Union Bank	13,	748	869
Banning v. Kirby	7,	601	732
Bascom v. Shillito	6,	359	511
Basset v. Giunsolus	13,	487	1228
Bates v. Neski	10,	50	1064
——— v. Zinsmeister	4,	321	297
Bauer v. Avondale	7,	478	706
——— v. Lohr	8,	426	848
Bayles v. Crossman	5,	13	354
Beckroege v. Schmidt	9,	410	994
Berne v. Britton	6,	263	487
Biedenger v. Goebel	6,	282	492
Blackburn v. Sewall	9,	303	967
Block v. Espy & Co	8,	365	833
Boake v. Bonte	9,	487	1013
Board of Ed. v. Sinton	8,	567	878
Bobe v. Bldg. Assn	9,	632	1032
Bonte v. Hinman	11,	649	1173
Bovey Brick Co. v. Found. Works	7,	548	713
Bowles v. Turnpike Co	8,	558	871
Braun v. Kimberlin	9,	405	990
Broch v. Becher	6,	380	519
Brock v. Becker	9,	482	1009
——— v. ———	6,	380	519
Buckwalter v. Klein	2,	347	55
Building Assn. v. Boning	10,	626	1149
——— v. O'Conner	8,	99	781

	Orig. Vol. Pg.	This Book
——— v. ———	9, 486	1012
——— v. Hooker	10, 559	1123
——— v. Henderson	6, 755	581
——— v. Leyden	4, 765	345
——— v. Zahner	10, 181	1068
Bukheimer v. Ashcraft	6, 440	526
Bunker v. Ficke	9, 371	978
Burbeck v. Spollen	10, 491	1118
Burckhardt v. Bank	9, 691	1036
Burkhardt v. Burkhardt	3, 418	185
Burt v. Creppel	4, 622	330
Burns v. Seep	8, 425	847
Bussing v. Life Insurance Co	7, 52	607
Caldwell v. High	9, 692	1037
Cameron v. Cappeller	10, 443	1089
Campbell v. Corry	8, 427	848
Carver v. Williams	10, 310	1084
Cent. Bldg. Assn. v. O'Conner	9, 486	1012
Charter Oak Ins. Co. v. Smith	7, 147	625
Chatfield & Wood v. Swing & Mellen	7, 326	666
Cheever v. Life Ins. Co	4, 155	268
Cincinnati v. Cameron	7, 592	727
——— v. Diekmeyer	6, 334	501
——— v. English	9, 310	972
——— v. Goodman	5, 153	365
——— v. Keating	7, 15	605
——— v. Leonard & Cook	4, 688	333
——— v. Longworth	4, 528	326
——— v. Mathers	7, 734	755
——— v. McDermot	6, 285	494
——— v. Montford	6, 762	587
——— v. Scarborough	8, 562	874
——— v. White Lead Co	12, 235	1188
——— v. Wilder	9, 727	1046
——— Ice Co. v. Pfau	9, 306	969
——— Gazette Co. v. Bishop	10, 488	1113
——— Sav. Soc. v. Jones	8, 96	778
——— v. Thompson	12, 310	1198
——— & S. Ry. Co. v. Sleeper	3, 464	196
——— v. Ward	5, 372	391
Cin. Wars. Tpk. Co. v. Cinti	4, 325	299
City Bldg. Assn. v. Zahner	10, 181	1068
City Ins. Co. v. Roberts	12, 744	1213
Clark v. Bentel & Co	12, 534	1205
——— v. Morris	2, 364	66
Clarke v. Huff	8, 26	771
——— v. Lane Sem	8, 488	863
Clarkson v. Ruan	8, 360	829
Clements v. Com. Ham. Co	2, 729	126
C., C., C. & I. Ry. v. Walwrath	7, 555	718
Clev. Rubber Co. v. Bradford	11, 44	1160
Clifton v. Cinti	6, 687	570
Coffee v. Pleasants	8, 312	812

	Orig. Vol. Pg.	This Book
Comrs. Ham. Co. v. Brashears	9, 625	1027
——— v. Eckstein & Co	8, 421	843
——— v. Noyes	3, 745	238
——— v. ———	4, 216	281
Coleman v. Bank	10, 49	1063
Compton v. Bruen	4, 12	250
——— v. Wilder	7, 212	630
Continental Life Ins. Co. v. Goodall	3, 338	160
Conner v. Wilson	9, 1	941
Conley v. Creighton	5, 421	402
Cook v. Henderson	8, 429	851
——— v. Lloyd	4, 667	333
——— v. Scheid	8, 493	867
——— v. Spencer	4, 665	331
Cottle v. Thomas	1, 372	18
Cracraft v. Roach	6, 83	467
Craighead v. Pike	4, 199	273
Crist v. Langhorst	5, 4	352
Crofton v. Bd. of Ed	4, 768	348
Crowley v. Chamberlain	9, 376	982
Cummins v. Kent	12, 163	1178
Dalton v. Miami Tribe	2, 329	42
Danby v. Vail	9, 550	1020
Dater v. Simon & Co	5, 257	377
Danks v. Phares	9, 554	1023
Davis v. Kelley	1, 479	30
De Haven v. Coup	6, 593	562
Devereaux v. Buckley	6, 690	573
Devinney v. Smith & McAlpin	5, 6	353
Dickinson v. Kautzman	8, 658	910
Dewry, Vance & Co. v. Iron Wks	6, 364	514
Dickson v. Com. of Ham. Co	10, 571	1141
Diehm v. Cinti	3, 542	215
Dodson v. Cinti	4, 312	295
Domeier v. Wagner	8, 427	849
Doppler v. Cox	10, 306	1080
Dowell v. Guiou	7, 273	634
Dreyer v. McGill	8, 306	807
Droege v. Ispharding	6, 478	543
Dugan v. O'Neil	6, 58	459
Duegar v. Hartmeyer	8, 15	763
Dungin v. Brashears	10, 50	1067
Dunn v. Life Assn	8, 569	879
Dye v. Bertram	6, 355	508
——— v. Giou	7, 144	623
Elder v. Taylor	6, 73; 6, 641	461, 565
Ellis v. Ry. Co	6, 288	497
Esker v. McCoy	6, 694	573
Ett v. Snyder	6, 415	523
Evans v. Alberts	8, 350	820

	Orig. Vol. Pg.	This Book
Farrell v. Finch	9, 412	995
First Nat. Bank v. Un. Nat. Bank	13, 748	1229
——— v. Moore	8, 97	779
Fitzgerald v. Wiggins	12, 476	1201
Fitzgibbon v. Green & Co	5, 2	350
Fitzpatrick v. Forsythe	7, 411	682
Floyd v. Paul	12, 2 1	1185
Foeller v. Voight	4, 671; 5, 1	336, 349
Foley v. Peters	6, 377	517
Fordyce v. Marks	1, 257	12
Foster v. Fenton	5, 523	427
Fox v. Reeder	1, 22	9
Franklin Bank v. Com. Bank	4, 705	339
Friend v. Brown	8, 308	809
Fritche v. Liddell	9, 309	971
Fry v. Franklin Ins. Co	6, 533	558
Fulton Bldg Assn. v. Hooker	10, 559	1123
Gates v. Ins. Co	4, 395	313
Gardner v. Hengehold	9, 414	997
Gaylord v. Case	5, 494	413
German Catholic Church v. Kaus	9, 627	1028
Ghiradelli v. Leverone	6, 255	486
Gilmour v. Pelton	6, 26	447
Goepper v. Heckle	6, 284	493
Going v. Schnell	8, 739	932
Goodale v. Hunt	8, 624	897
Gottschalk v. Witter	3, 394	180
Gt. Western Despatch Co. v. Glenny	10, 572	1142
——— v. Harmony Lodge	7, 12	603
Green v. Fisher	10, 570	1138
Grote v. Myer	9, 623	1025
Guiou v. Guiou	3, 475	205
Hahner v. Kaufman & Co	5, 439	412
Hamilton v. Jacobs	10, 445	1094
Harker v. Smith	6, 564	560
Harmonia Lodge v. Schaffer	4, 670	335
Harrison v. Commissioners	10, 311	1085
Hartzell v. Shannon	10, 444	1093
Hazzard v. State	10, 307	1081
Health Commissioners *in re*	11, 651	1174
Heart v. Insurance Co	2, 355	61
Heck v. Heck	7, 13	604
Heister v. Insurance Co	6, 238	479
Hellman v. Mendel	8, 360	829
Henderson v. White & Thayer	2, 670	115
Hengehold v. Gardner	8, 352	822
Hepworth v. Pendleton	5, 285	386
Hershizer & Co. v. Florence	6, 500	551
Hildebrand v. Windisch	8, 103	784
Hillsborough & Cinti. Ry. Co. v. Cincinnati	2, 724	122
Hilpert v. Kinsinger	8, 565	876
Hirschman v. Fratz	10, 486	1109

	Orig. Vol.	Pg.	This Book
Hoffman v. Brooks	12,	747	1215
Hogan v. Carbery	7,	595	729
Holterhoff v. Insurance Co.	3,	272	141
Home Building Assn. v. Boning	10,	626	1149
Hord & Co. v. W. U. Tel. Co.	6	529	555
Hubbell v. Mansfield	4,	619	329
Huelsman v. Mills & Kline	12,	301	1192
Hulbert v. Nolte	6,	246	485
——— v. Wise	10,	182	1069
Humphreys v. Safe Deposit Co.	6,	79	464
Indianapolis Rolling Mill Co. v. Addy	6,	764	588
Insurance Co. v. Frick	2,	336	47
——— v. Goodall	3,	338	160
——— v. Hart	3,	657	237
——— v. Jordan	10,	625	1149
——— v. La Boiteaux	4,	1	242
——— v. McCoy	6,	486	549
——— v. Packet Co.	5,	499	417
——— v. Roberts	12,	744	1213
——— v. Schmidt	8	629	901
——— v. Shotts	8,	321	813
——— v. Smith	7,	147	625
——— v. Stanhope	9,	378	983
Ives v. Commissioners	10,	306	1079
——— v. Strickland	8,	309	810
Jacob v. Bank of Cincinnati	6,	689	572
Jacoby v. State	7,	477	705
Jefferson Nat. Bank v. Purcell	8,	744	936
Johnson v. Ammons	7,	662	747
——— v. Miller & Jessup	1,	637	33
——— v. State	12,	538	1208
Jones v. Turner, *et al.*	10,	31	1059
Juegling v. Bund	8,	94	777
Keber & Miller v. Sanders	1,	374	20
Kelly v. Hines	9,	404	988
——— v. Ingersoll	7,	189	630
——— v. Purcell	8,	705	920
Kemper v. Widows' Home	9,	731	1049
Kennett v. Rebholz	8,	354	824
Kilbreth v. Wright	4,	449	320
Kilbreath v. Fosdick	7,	153	629
——— v. ———	13,	419	1225
Kilgour v. Street Ry. Co.	11,	38	1157
Kirkup v. Stickney	6,	300	499
Knauber v. Fritz	5,	432	410
——— v. Wunder	6,	367	516
Knickerbocker Ins. Co. v. Jordan	10,	625	1145
Knight v. Buser	8,	28	772
Kohl v. Hannaford	4,	372	306
Kuhn & Sons v. Frank	10,	622	1142
Kumler v. Cincinnati	9,	547	1018

	Orig Vol.	Pg.	This Book
Laird v. Cincinnati	9,	479	1006
Lanter v. Lathrop	10,	569	1137
Lawrence v. Cincinnati	3,	597	228
Lee v. Bank	1,	385	21
Leighton v. Durrell	8,	632	903
Leonard & Cook v. Cincinnati	4,	213	279
——— v. ———	4,	668	333
Levi v. Bnai Brith	5,	410	401
Little v. Insurance Co	4,	228	285
Lodge v. Schaffer	4,	670	335
Long v. Harbers	10,	52	1066
Longley v. Ludington	7,	117	620
Longworth v. Mack	10,	480	1100
Love v. O. & M. Railway Co	8,	417	839
Low v Life Insurance Co	10,	313	1088
McCammon v. Sewing Machine Co	10,	688	1155
McCoun v. Weiskettle Co	8,	303	805
McCurdy v. Soc. for Savings	11,	156	1169
McFarland v. Norton	6,	760	585
McLaughlin v. Graves	8,	561	873
Mack v. Fries	3,	385	174
——— v. McGary	10,	49	1062
——— v. Schlotman	7,	665	749
Maddux v. West	9,	484	1010
Mallon v. Stevens	9,	702	1042
Manning & Longley v. Ludington	7,	117	620
Marks v. Fordyce	3,	392	81
——— v. Harris	10,	481	1101
——— v. Goldmeyer	6,	758	583
Markert v. Hoffner	4,	670	335
Marsh v. Marsh	4,	257	290
Mason v. Shay	1,	553	31
——— v. ———	3,	435	194
Mathews v. Rentz	2,	371	72
Mayer v. Mayer	5,	674	444
Mazza v. Heister	5,	526	430
Meader Furniture Co. v. Rowland	1,	1	595
Meier v. Herancourt	11,	46	1164
Merchant's Nat. Bank v. Nottingham Co	14,	425	1237
Merchants' Ins. Co. v. Frick	2,	336	47
Metzger v. Meekers	8,	98	780
Meyer v. Meyer	8,	426	847
——— v. Shroeder	10,	309	1083
Meyer v. Oberhelman	10,	686	1151
Miami Powder Co. v. Griswold	6,	464	532
Miami Valley Ins. Co. v. Stanhope	9,	378	983
Miller v. Bangard	4,	767	347
——— v. Cincinnati	6,	107	472
——— v. Milligan	9,	419	1000
——— v. Sanders	1,	374	20
Miller Bros. v. Laws	7,	606	736
Mills v. Life Assn	8,	358	827
Mitchell v. Railway Co	6,	265	488

	Orig. Vol.	Pg.	This Book
——— v. Rammelsberg	8,	22	768
Mix v. Crego	6,	501	552
Mohn Distillery Co. v. Ins. Co	12,	168	1180
Moore v. Moulton	6,	466	534
Morgan v. Andres	8,	353	823
Morrison v. Balkins	8,	577	882
Mossman v. Schulter	5,	425	404
Moulton v. Bassett	4,	101	257
Mowry v. Kirk	5,	587	431
Muller v. Fratz	8,	310	811
Mullen v. Gaffey	8,	101	783
——— v. Mullen	2,	611	111
Murdock v. Welch	8,	411	835
Murray v. Murray	5,	266	382
Mutual Life Ins. Co. v. Schmidt	8,	629	901
Mutual Relief Soc. v. Billau	3,	546	217
Newhall, Gale & Co. v. Langdon	6,	681	566
N. C. Building Assn. v. Henderson	6,	755	581
N. Y. Life Ins. Co. v. La Boiteaux	4,	1	242
Nishtotz v. Ulmer	8,	25	770
O'Connor v. Ryan	10,	477	1095
Ohio Building Assn. v. Leyden	4,	765	345
Ohio Insurance Co. v. Shotts	8,	321	813
O. & M. Ry. Co. v. Hunt	7,	739	758
——— v. Short	7,	474	703
Orr v. Orr	9,	304	968
Parker v. Robinson	5,	189	376
Parkinson v. Bank	4,	401	317
Parvin v. Gilmore	8,	431	853
Patrick v. Littell & Co.	5,	260	379
Patterson v. Bucy	7,	566	723
Payton v. Mullins	8,	428	850
Peabody Ins. Co. v. Packet Co	5,	499	417
Pendleton v. Fosdick	8,	148	795
——— v. ———	8,	486	862
Penniston v. Insurance Co	8,	361	830
People's Ins. Co. v. Hart	3,	657	237
Perrin v. Commissioners	10,	311	1085
Perin v. Egger	8,	477	855
Peterson v. Beach	6,	513	553
Piatt v. Sinton	6,	483	547
P. C. & St. L. Ry. Co. v. Hambleton	7,	562	721
—— — v. State	6,	501	552
Plant v. Murphy	6,	479	544
Plumb v. Dee	9,	413	996
Pritz v. Drake & Co	10,	565	1127
Pomeroy & Co. v. Will	2,	1	34
Pomeroy v. Pearce	6,	379	518
Porter v. Laws	6,	756	582
Post v. Wilson	5,	235	368
Powell v. Hambleton	7,	605	735

	Orig. Vol.	Pg.	This Book
——— v. Railway Co	2,	403	89
Pullan v. Cochran	10,	184	1070
Putnam v. New Pub. Co	14,	56	1231
Railroad Co. v. Cincinnati	2,	724	122
——— v. Hambleton	7,	562	721
——— v. State	6,	501	552
——— v. Walrath	7,	555	718
Rawson v. Bogen	9,	553	1022
Redus v. Green	9,	634	1034
Richardson v. Westjohn	9,	723	1043
Riddeman v. Commissioners	8,	749	939
Rinehart v. Rinehart	8,	654	907
Roberts v. Cincinnati	5,	73	361
Robinson v. Baruff	10,	485	1107
Roll v. Riddle	3,	648	232
Rowecamp v. Myer	10,	566	1128
Rowekamp v. Holters	9,	416	998
Rowland v. Griffiths	7,	115	619
Ruffner v. C. H. & D. R. R. Co	6,	685	569
——— v. Cooperative Co	10,	51	1065
Runyan v. Vandyke	7,	8	601
Rutherford & Co. v. C. &. P. Ry. Co	6,	758	584
Ryan & Co. v. Cincinnati	6,	279	489
——— v. Railway Co	10,	263	1071
Sack v. Hermann	10,	483	1104
Sargent v. Sibley	13,	33	1219
Schneider v. Buckley	8,	357	826
Schock v. Frazer	10,	305	1078
Schott v. Hunt	10,	313	1087
Schroeder v. Kisselbach	3,	295	158
Scott v. Reedy	5,	367	388
——— v. Perlee	7,	737	757
Soutters v. Stoeckle	10,	23	1054
Speer v. Bishop & Co	3,	91	128
Springmeier v. Blackwell	7,	476	705
Stadler v. Bnai Brith	3,	589	221
Standard Pub. Co. v. Bartlett	9,	58	965
Stapleton v. Reynolds	5,	242	374
Schiff v. Sentker	10,	568	1137
Schultz v. Life Ins. Co	8,	306	808
——— v. Myer	10,	312	1086
Schwick v. Fulton	11,	47	1168
Sielmeier v. Sielmeier	9,	551	1021
Sheer v. City of Cincinnati	14,	111	1233
Shillito v. McMahon	10,	560	1126
Sibley v. Elliott	8,	301	804
Simmons v. Savings Society	6,	441	527
Singer Mfg. Co. v. Brill	9,	43	958
Sinton v. Ezekiel	8,	423	845
Skillman v. Railway Co	8,	650	904
Smith v. Bruggeman	6,	38	456
——— v. Harker	9,	488	1014

	Orig. Vol. Pg.	This Book
——— v. O'Conner	9, 742	934
——— v. Minchell	10, 484	1106
Snoddy v. Mason	8, 415	838
Snyder v. Cincinnati	4, 667	332
Sohn v. Freiberg	11, 736	1175
Sommers v. Cincinnati	8, 612	887
State v. Ampt	7, 469	699
—— v. Cappeller	8, 481	857
——— v. ———	7, 473	702
——— v. ———	8, 487	863
——— v. ———	9, 543	1015
——— v. Clark	8, 362	831
——— v. Chalfant	9, 633	1033
——— v. Comrs. Ham. Co	6, 106	471
——— v. Brewster	12, 544	1210
——— v. Brown	7, 652	740
——— v. Bd. Public Works	8, 24	769
——— v. Goodale	8, 432	854
——— v. Medical College	8, 422	844
——— v. Police Comrs	8, 21	767
——— v. Ritt	8, 750	940
——— v. Robinson	8, 723	930
——— v. Society for Support	8, 627	899
——— v. Sutton	8, 135	786
Stein v. Crosley	6, 340	505
Stephens v. Stockyards Co	4, 669	334
Stephenson v. Donahue	8, 358	828
Stewart v. Agricultural Society	7, 668	751
——— v. Boyd	9, 364	973
Street Railway Co. v. Barlage	8, 357	826
——— v. Sleeper	3, 464	196
——— v. Ward	5, 372	391
Striker v. Beatty	8, 366	834
Strobridge v. Winchell	7, 743	761
Sullivan v. Mannix	9, 409	992
Sutton v. Kautzman	8, 657	910
Swing v. Gatch	7, 5	599
Tanner v. Brown	2, 614	112
Taphorn v. M. & C. Ry. Co	8, 420	842
——— v. C. & M. Ry. Co	8, 489	865
Taylor v. Bonte	3, 220	137
——— v. Wheel Co	9, 28	947
Tressell v. Longworth	10, 480	1100
Timberlake v. McArthur	8, 713	925
Thoms v. Greenwood	7 after 320	639
Thorne v. Megrue	3, 140	131
Tootle v. Rusk	2, 553	107
Trustees O. S. U. v. Satterfield	15, 415	1241
Tully v. Nash	8, 419	841
Turnpike Co. v. Cincinnati	4, 325	299
Turpin v. McGill	8, 23	768
Tyler v. Ryan	4, 670	336

	Orig. Vol.	Pg.	This Book
Union Central Life Ins. Co. v Poettker	4,	109	263
——— v. Mutual Benefit Life Ins. Co	6,	382	521
——— v. Eckert	6,	452	528
Untersinger v. Niagara Ins. Co	9,	401	986
Utter v. Hudnell	7,	118	621
Van Camp v. Aldrich	2,	454	92
VanVleet *ex parte*	7,	275	636
Victoria Bld. Assn. v. Arbeiter Bund	10,	485	1108
Vine v. Munson	6,	240	480
Voight v. Voight	10,	564	1127
Wagner v. Olds	7,	611	739
——— v. Karman	7,	670	753
Wahle v. Cin. Gazette Co	7,	541	709
Ward v. Ritt	10,	567	1129
Wayne v. Minor	7,	9	602
Weber v. Gambrinus Co	10,	482	1102
Weigand v. Kylius	8,	100	781
Werner v. Gloss	15,	300	1239
Welte v. Faller	6,	766	590
West v. Gibson	9,	689	1034
——— v. Stoeckel	10,	308	1082
W. U. Tel. Co. v. A. & P. T. Co	5,	429	407
——— v. M. & C. Ry. Co	6,	117	474
White v. Francis	4,	501	323
Wilder v. Huff	8,	27	772
Williams v. Holcomb	8,	484	860
——— v. Life Association	11,	48	1168
——— v. Pultze	6,	337	503
Wilson v. Home Ins. Co	7,	480	708
Witter v. Gottschalk	2,	378	77
Woodrow v. Sargent	3,	522	209
Woodward v. Stein	4,	352	171
Woolums v. Schott	10,	183	1070
Worthington v. Ballauf	10,	505	1121
——— v. Globe Mills	9,	693	1038
Zimmerman v. Grotenkemper	8,	364	832
Zeverink v. Lappert	9,	546	1017

REPORTS

OF

CASES ARGUED AND DETERMINED

IN

OHIO COURTS OF RECORD

PUBLISHED ORIGINALLY IN

THE AMERICAN LAW RECORD.

JUDICIAL SALES. 22

[Hamilton County District Court, April Term, 1872.]

† FOX V. REEDER ET AL.

In order to defeat the title of a *lis pendens* purchaser there must be not only *lites pendentia*, but also *lites contestatio*. There must be not only a suit in existence, but a suit vigorously prosecuted.

(This is probably the oldest case remaining undisposed of on the legal records of Hamilton county. It was commenced * in the old superior court, taken by 23
appeal to the old supreme court, and finally arrived in this court by inheritance. Fox brought suit to foreclose a mortgage given by Reeder. It appears from the pleadings that he assigned his claims to Stevenson, who is made defendant, and that Stevenson held as security another note and mortgage held by Reeder, that at the April term, 1842, of the supreme court, sitting in this county, there was a decree finding the amount due in favor of Stevenson, and ordering a sale in sixty days if the money should not be paid, and also an order that upon payment Stevenson should surrender to Reeder the other note and mortgage which he held. At the expiration of sixty days an order of sale was issued, and was returned without sale by direction of the plaintiff's attorney. The case then slumbered for over twenty-one years, drifting along from term to term, without any step being taken in it. A few years ago it was ordered to be dismissed for want of prosecution, but was reinstated, and at the same time an order of sale issued and was recalled by order of cout. In 1868 a number of new parties were made on their own motion. From their answers and cross-petitions, and from the testimony at the hearing, it appears that in 1848, six

† The judgment in this case was affirmed by supreme court, see opinion Fox v. Reeder, 28 O. S. 181. The case has been cited 32 O. S., 49, 61; 35 O. S., 430, 432; 37 O. S., 113, 117; 40 O. S., 184, 186.

years after the decree, Reeder sold the mortgaged premises and lots at public sale, that the purchasers went into possession and improved, and there were subsequent sales. The present owners come in and ask that no order of sale be issued and that their titles should be quieted.)

FORCE, J:

In disposing of the case, only a single point will be considered. Stevenson moves for an order of sale. The supplemental parties pray that he shall be restrained and their title be quieted. It is claimed on the one hand, that these parties are *lis pendens* purchasers, and acquire no rights which Stevenson is bound to respect; that he has been so dilatory in the prosecution that he cannot claim the benefit of the rule of *lis pendens*.

The rule of *lis pendens* first appears in No. 12 of the ordinances of Lord Bacon for controlling the practice of the court of chancery in England, in which he uses the qualifying language: "*Pendente lite*, and while the suit is in full prosecution." The first decision involving the question now considered was made by Lord Clarendon, immediately after the civil war in England, and is cited by Lord Nottingham. In that case the bill was filed in 1640, the party died in 1648, the premises were purchased by a stranger in 1651. The suit was revived in 1662. Lord Clarendon held that the purchaser in 1651 took no title as against the parties to the suit. This case is criticized by Sugden in his book on Vendors. He says it depended on special circumstances, that the plaintiff was an infant, that owing to the civil war the courts
24 were interrupted, and finally that the purchaser was not the purchaser* by sale, but by devise, under a will, and he adds: "If that case should ever come to be considered again, it would probably turn on the question of laches." This seems to have been the opinion of Lord Nottingham, who decided the next case, Preston v. Tubbin, 1 Vernon, 286, decided in 1682. The case says: "Where a man is to be affected by *lis pendens* there ought to be a close and continued prosecution, and in that case it was held that as the suit was originally by a son against his father, and the father died, the son became both plaintiff and defendant, and therefore was not guilty of laches." In Winchester v. Parvin, 11 Vesey, 200, Sir William Grant comments on Lord Clarendon's case, and uses the language that *lis pendens* means a continued prosecution. In Kinsman v. Kinsman, 1 Russel & Mylne, 617, Lord Eldon talks about this rule. In that case the suit had been brought to subject to a trust two pieces of land, owned by different persons. One of the owners buried his title deeds in an iron pot in the garden, and there being no registration laws in England, his title could not be got at, and his land could not be sold. So the whole charge fell on the other lot. Subsequently, the other party dug up his title papers and sold his land, there being no further prosecution of the suit. After this a supplemental bill was filed, bringing in these purchasers to subject their land to one-half the charge. In disposing of the case Lord Eldon gave, as he often did, various reasons and qualifications, making it difficult to define sharply the precise principle upon which he disposed of the case; but in the course of the opinion he does say positively that in order to defeat the title of a *lis pendens* purchaser there must be not only *lites pendentia*, but also *lites contestatio*. There must be not only a suit in existence, but a suit vigorously prosecuted.

Coming to the United States we find that in Murray v. Vallou, 1 Johnson's Chancery Reports, 566, Chancellor Kent, in speaking of the doctrine of *lis pendens* says there must be a *lis pendens* duly prosecuted, and the supreme court of Pennsylvania in 37 Pa. State Reports uses the same language.

In a case in 1st Maryland Reports a bill was filed in 1817 to subject land to the payment of a trust, an answer was filed in 1819, and nothing else done until 1823, when a supplemental bill was filed making parties defendant persons who had purchased the land which was the subject matter of the suit. At the final hearing of this case the Chancellor said: "The rule of *lis pendens* cannot be allowed to operate against the purchaser where there has been such a dilatory prosecution of the suit," and the cause was disposed of on the ground that the testimony showed the purchase was made with actual knowledge of the trust.

25 So in a case decided in Virginia in 1834, reported in 5 Leigh, * although it was disposed of on several grounds, the judges held that *lis pendens*, to have the effect contended for, must be judiciously and diligently prosecuted. In Kentucky we find the case of Watson v. Wilson, 2 Dana, 406. The plaintiff in a chancery suit died, and in a little more than one year thereafter, a stranger bought the land in controversy. Two years after that the suit was revived, prosecuted to decree, and the plaintiff bought at the sale under the decree, in a suit growing up between him and the one who purchased during its pendency. The court went over very fully

the whole matter of the doctrine of *lis pendens*, and said: "We are bound to say there was not such a prosecution of Wilson's suit as entitled him to the protection of the rule, and his decree and purchase under it cannot be permitted to overreach and overrule the conveyance to Watson;" and so Watson, who purchased during the suit, was held to have a good title.

This ruling was followed in two cases reported in 6 B. Monroe, and was recognized as law as late as 1869, in a case reported in 6 Bush., 624. The question has also been considered in Ohio, in Trimble v. Boothby, 14 O., 116. There was a lull in the prosecution of the case for twelve years. During this time a person who already had some equitable claim to the land in controversy, acquired the legal title, which was in dispute. The court on final hearing said: "To authorize the doctrine of *lis pendens* as to Kern's heirs, the prosecution of the suit must have been close and continuous."

The text writers generally state as law the qualification of *lis pendens* means a full and vigorous prosecution of the suit. Although we find very few actual decisions we do find as far back as Lord Bacon, and continuously down from 1682, the use by judges of the language "*lis pendens*, or full and vigorous prosecution." This constant use of the qualification "full prosecution," or "continued prosecution" cannot be taken as a mere repetition, without purpose. It does fairly import that the qualification is an essential part of the rule, and that it is law; that in order to make effectual the rule of *lis pendens* there must not only be a suit in existence, but a suit actively and duly prosecuted. But the mere *ipse dixit* of any court, or of any number of judges, however eminent, is not very satisfactory unless we discover a reason for their *dictum*.

We have, therefore, tried to penetrate to the core of the matter, and find the seed, the principle out of which grows this rule of *lis pendens*. Story, in his *Equity Jurisprudence*, says that this rule is based on the fiction of law, "that inasmuch as courts are open everybody is supposed to be actually present, and to have actual notice of their proceedings." This is the reason also given by Lord Hardwick and others; but we think the better *reason is given by Chancellor Kent, and also by Lord Cranworth. They say it is a rule of public policy 26
that when a plaintiff brings a party into court to have his rights vindicated there he shall not be deprived of the benefit of the suit, and be compelled to bring other subsequent suits by any sale of the property in dispute made by the defendant while the suit is in progress. Otherwise all suits might be in vain.

Hence, the rule of *lis pendens* is an equitable rule for the protection of the plaintiff, but being an equitable rule for his benefit, it becomes at once subject to that other rule, that he who wants equity must do equity. Hence, while the rule for his benefit says, he shall not be harmed by what the defendant does while the suit is in prosecution, the qualification of the rule at the same time says he shall not harm *bona fide* purchasers by sleeping on his case. If it were true that a party might file a bill and then pigeon-hole his case and let it slumber for decades, and yet that innocent purchasers, for value without knowledge, should be defeated of their title, the rule of *lis pendens* instead of being an equitable protection would be only a trap and a snare.

In the case before us, a decree was entered in 1842, ordering a part of the premises to be sold if the debt were not paid within sixty days. The plaintiff issued an order of sale and returned it by his own direction, and then the case was allowed to sleep for nearly thirty years. Meanwhile the land was sold at public sale and has frequenly changed hands since.

We hold that the owner of that decree, Stevenson, having been so dilatory, cannot claim the benefit of the rule of *lis pendens*. The order of sale will not issue. The purchasers who are supplemental parties to this suit, will be quieted in their titles.

JUDICIAL SALES—PARTNERSHIPS.

257 *[Superior Court of Cincinnati, Special Term, June, 1872.]

†S. W. FORDYCE v. ISAAC MARKS.

1. If an action be brought upon the record of a judgment of a sister state, the petition must aver facts sufficient to enable the plaintiff to recover upon it, as such record cannot be made part of the petition under section 122 of the code; but it should be filed with or attached to the petition under section 117 of the code. If that be not done, the defendant cannot notify the plaintiff, under section 361 of the code, to furnish a copy, which, if not complied with, will authorize the latter to have it excluded as evidence at the trial; but he should file a motion requiring plaintiff to file such record, or in default thereof, that the petition be struck from the files.
2. Such records, where it affirmatively appears that the defendant was not served with process but appeared by attorney, is only *prima facie* evidence of such appearance; and the want of authority of such attorney so to appear may, following the rule as settled by the supreme court of the United Sates, be proved to defeat a recovery upon such judgment; but the evidence to disprove such authority should be clear and satisfactory.
3. If, in the state where rendered, such record be *conclusive* of the fact of appearance by attorney, so found or recited, the same effect will not be given to it in Ohio, the constitution of the United States and the law of congress passed in pursuance thereof, requiring it to be given the same credit as it would receive in the state where rendered, is limited to the credit such state ought to give it according to the general settled rules of law, and not exceptional, common or statute law peculiar to that state.
4. Where a partnership business is carried on in one state, by some of the members of the firm, who entirely manage the business, and the other members of the firm reside out of the state and do not actually engage in the firm affairs, if a suit be instituted in a court of record, in the state where the partnership is located, against all the individuals composing the firm, but the non-residents are not served with process, do not appear, or employ counsel to defend, or in any way personally defend against such action, they will not be personally bound by a judgment rendered in such action, though the other partners employ an agent to, and who does, nominally, defend for all the partners, such judgment will only bind the resident partners; and all the partnership interests which may be pursued under it according to law, anywhere and against all the partners, served or not served, so far as their partnership interests and property are concerned.
5. But such resident and managing partners have the right to institute and maintain suits involving the partnership interests and property in the name and on behalf of all the partners, who will be personally bound thereby; and if, in an action brought against all the members, the resident and managing partners, on behalf of all, file a counter claim, or set-off, or cross-petition, and demand therein a judgment, or relief for all, that is equivalent to bringing an original suit, and all will be personally bound by any judgment that may be rendered in the action, whether in favor of or against them.

YAPLE, J.

This suit is maintained by the plaintiff against Isaac Marks, to recover of him $10,031.89, with interest from December 10, 1870, on a decree of the circuit court, of Louisville, Ky., purporting to have been rendered on the 11th day of November, 1870, in his favor, against Bennett Marks, Nathan Bensinger, and the defendant Isaac Marks, for $7,341.28, with interest from July 1, 1865, $——, costs.

The action in the Louisville court was instituted by the plaintiff against the above named defendants on December 15, 1865. Isaac Marks was not served with process, the return of the sheriff as to him being that he was a resident of Cincinnati, Ohio; the other two defendants were duly served with process. The suit was brought to compel the defendants to account for the proceeds of some $16,617 of claims—quartermaster's vouchers—placed by plaintiff in defendant's hands for collection, a detailed list of which was set forth in the bill.

† This judgment was affirmed by the superior court in general term. See opinion, Marks v. Fordyce, 2 Rec., 392.

On January 12, 1866, O. F. Stirman, a regular practicing attorney and counselor at law in said court, assuming to represent and act for all the defendants, which he did throughout the whole progress of the cause, filed an answer in their behalf, styling them "partners; under the style of Marks & Company." *This answer 259
set up a counter claim in reference to two of the vouchers—one of $1,140, and another of $1,340, averring that, as to them, defendants were liable to the government on their guaranty of them, and praying that plaintiff be compelled to indemnify them against such their guaranty, and for all proper relief, etc., etc.

Afterward, on June 8, 1866, an amended answer was filed setting up a payment of $2,500, and on April 17, 1868, another amended answer was filed by the attorney on behalf of all the defendants, setting up a set-off in their favor against the plaintiff for $1,129.75, with interest from August 16, 1865, which answer was made a cross petition, and judgment thereon prayed over and against the plaintiff, as for money had and received.

All the affidavits to the pleadings on the part of the defendants seem to have been made by Bennett Marks, who is a son of the defendant, Isaac Marks.

Isaac Marks defends this suit on the ground that he never was served with process in the Louisville chancery suit, or appeared to that action in that court in person, or by attorney, or otherwise, and that such proceedings and decree were had and rendered without jurisdiction as to him, and are void.

In point of fact, Bennett Marks, the son, and Nathan Bensinger, the brother-in-law of Isaac Marks, and Isaac Marks, were, at the time the Fordyce claims arose, partners in business in Louisville, Ky., under the firm name of Marks & Co., Isaac furnishing $10,000 of the capital, but residing in Cincinnati, while the other two partners resided in Louisville and conducted the business of the partnership. They became partners February 2, 1864, to carry on the brokerage and United States claim agency business, and they employed Stirman as the attorney of the firm, by the year, and especially employed him to defend the Fordyce suit in the chancery court. But Isaac testifies that he was not aware of either fact, and his son swears that he did not advise him of them, though Isaac swears in the fall of 1866, or winter of 1867, he was informed by his partners that Marks & Co., had got into trouble —had a law suit in court. On February 12, 1866, the partners nominally dissolved their partnership; Isaac Marks took a note from his co-partners for $5,000, as his share of the profits and losses, and his son, Bennett, and *Bensinger assumed 260
the outstanding liabilities of the firm, and were to collect and receive all the debts and claims due it. The other firm effects were not disposed of, and the business seems not to have been fully closed up. The parties had another settlement, and provisions made for closing up their firm business in June, 1869. At this time, June 1, 1869, it was stipulated, among other things, that Bensinger should close out all the firm's property then on hand, as soon as practicable, for the benefit of the firm, except such as it "is or will be necessary to retain for the further continuance of the said firm's business." Provision was also made for paying out of the first moneys, depositors, etc., and then Isaac Marks $9,000, to liquidate the firm's indebtedness in Cincinnati, which amount he had borrowed in banks there for the firm.

Stirman, the defendants' attorney in the Louisville suit, died before his deposition could be taken in this action.

And, in considering the case, the testimony of Bensinger and his wife, and a witness who swears that he saw Isaac Marks at Stirman's law-office, when Bensinger states the first answer in the Fordyce case was read to him, will not be taken into consideration, as it may be doubtful, owing to the testimony in the case going to impeach Bensinger's veracity, and the fact that Isaac Marks was in Ohio at that time, though if true, or if it related to filing a subsequent answer, it would be decisive of the case. The case will be determined upon the law governing the admitted and unquestionably proven facts, though, I may properly say that, in view of the fact that Isaac Marks appears to be an intelligent and industrious business man; that he was frequently in Louisville; that he knew the firm had a suit in court; that the suit lasted from December 15, 1865, to November 11, 1870, nearly five years; that the sum claimed was large; that the action was most persistently defended by the Louisville partners; that one of them was his brother-in-law, and the other his own son, who is now so alive to his father's interests, that he came from Louisville here to testify for him in this case, and who seems to have verified all the papers at every step of the Louisville case, and who, it is claimed, never let that father, so deeply interested in the result, know a breath of the pendency of that suit, or what he had done, or whom he had employed *as attorney to defend it,—these 261
facts make the claim of this defendant, that he was not advised, did not know, and took no part in the defense of that suit, a tax upon credulity. Neither

he, nor his son, nor Bensinger, knew that if he was not served with process and should take no part in the defense, he would, though a partner, not be bound by any decree that might be rendered in the cause; for on this point the law is conflicting and may well be said to be unsettled. The fact may be as the defendant claims; and it may be that what he really knew and did about that suit, his feelings, in view of the great interest he has in this snit, may have caused him to forget. His son and Bensinger are bankrupt, and largely indebted to him.

At the trial, objections were made to the admission in evidence of the certified transcript of the Louisville proceedings and decree, but the same was admitted subject to such exceptions.

The defendant's counsel showed to the court, that they had duly served the plaintiff with notice to furnish them with a copy of such record and proceedings as provided for by the 361st section of the code, which plaintiff and his attorneys failed to comply with, but only permitted them to take the document itself for short periods at a time. I do not think this is such an instrument of writing as is contemplated by that section, of which a copy may be demanded; but that it should have been filed with the petition as required by the 117th section of the code; and, if not so filed, the defendant should have moved to require it to be so filed, or in default thereof, that the petition be struck from the files.

The 122d section of the code requires copies of certain instruments, etc., for the unconditional payment of money only upon which actions, etc., are brought, to be attached to and filed with petitions. Such copies are parts of the pleadings. The 117th section of the code requires certain written instruments, they being mere evidences of indebtedness, to be attached to or filed with the petition; such files become no part of the record. The pleadings must state facts sufficient to make a cause of action or defense independently of them.

The 361st section of the code relates to instruments of writing collateral to the
262 cause of action, but necessary as evidence *to sustain it, and are other than such instruments as are evidence of indebtedness, under the 117th section.

The 360th section of the code relates to the inspection and obtaining copies, etc., of books and writings containing evidence pertinent to the issue, and largely supplies the place of discovery as it existed under former chancery practice.

That such a record as the one here involved is governed by the 117th section of the code, and not the 122d, or the 361st section, see Memphis Med. Col. v. Newton, 2 Handy's Rep., 163, opinion by Gholson, J.; Judds v. Dean, 2 Disney's Rep., 210, opinion by Storer, J.

In the last case it was held that a *demurrer* would not lie for failure to file or attach such record, and that it could not be made part of the pleading.

The next question presented by the defendant is, that, while this decree is *prima facie* evidence to bind Isaac Marks, and while it appears that the court rendering it found that Isaac Marks appeared by his attorney Stirman, to the action, yet, as he was not served with process, and did not take, personally, any action in defending that suit, or personally employ or authorize the employment of the attorney, the whole proceedings are *coram non judice* and void as to him, though he may have known the fact that such suit was pending, it being claimed that his co-partners could not bind him *personally*, by anything they may have done or omitted to do in the premises; that they could not, without his knowledge or consent, authorize an attorney to appear and act for him, or enter his appearance to such action.

Here there is a conflict of authorities. That one partner may enter an appearance for all is decided in Harrison v. Jackson, (*arguendo*) 7 T. R., 208; Bennett v. Stickney, 17 Vt. R. 531; Taylor v Coryell, 12 Serg. & R., 243–250; Saunders v. Bentley, 8 Iowa R., 516; Gregory v. Harmon, 10 Id., 445; Clark v. Stoddard, 3 Ala. R. 366.

The contrary is held in Haslett v. Street, 2 McCord, 310; Loomis v. Pearson,
263 Harper (Law R., South Car.), 471; *Hills v. Ross, 3 Dal., 331, note; Bright v. Sampson, 20 Texas, 21; DeMoss v. Brewster, 4 Lane & Marsh, 261; Moredon v. Meyer, 6 Man. & Gray, 278, and note; Phelps v. Brewer, 9 Cush.. 390.

It has been decided in Kentucky, (Southard v. Steele, 3 Mon. R., 435) that where an action is pending against all the members of a co-partnership, one partner may submit the cause to arbitration and thereby bind the other partners. The same has been held in Ohio (Wilcox v. Singletary, Wright's Rep., 420), and Parsons, in his work on Partnerships, p. 178, says: "And we have some doubt whether any of our courts might not now be expected to sustain such a submission, if it were in itself unobjectionable."

But many authorities deciding the contrary exist. See 1 Gale R., 48; 10 Moore R., 389; 1 Pet. R., 222; 13 Barb., N. Y., 660; 15 Id., 224; 1 Wend. R., 326.

Though, in such cases, the partners being all in court, and, in fact, all jointly en-

gaged in defending the suit, one might well be held the agent of all for managing such suit, while no such agency could be implied where one seeks to bring the others into court without their consent, and thus bind them individually by a judgment. Upon the same ground, in Gilly v. Singleton, Litt., Ky. R., 250, it was held that one partner could bind his co-partner by acknowledging service of notice to take depositions in a suit pending against them both; that such deposition might be read against both. Upon a review of the cases, and after carefully considering them, I shall hold the law to be: that service of a summons upon one or more partners, in a suit instituted against them all, or the acknowledgment of service by one for all, or the entry of an appearance to an action by one for all, will only bind personally those actually served or appearing, and that those not served will not be bound as individuals, but their interests in the partnership and its property, and effects will be bound by any judgment rendered in pursuance of such proceedings.

*The case of Phelps v. Brewer, 9 Cush., 390, is the best reasoned and considered case upon this subject that I have been able to find decided either in 264
England or America, and such is the rule fairly deducible from it.

This will fully account for and sustain the practice that has prevailed in chancery, where, as in all cases at law and in equity, all the partners are necessary parties, plaintiff or defendant. They must sue or be sued individually; but in chancery, if one or more reside abroad and the resident members of the firm will not enter the appearance of the absent partner, service upon the absent may be made upon the resident partner. But the remedy is obtained only against the partnership effects. This remedy the nature of chancery proceeding readily affords.

See Carrington v. Cantillon, Bumbury, 107; Coles v. Gurney, 1 Madd. R., 187; Snider v. Forbes, 2 Bev., 503; 2 Daniel's Chy., Pr. (4th Ed.,) Add. vii; Lansing v. McKillup, 7 Cow., 416.

But see Young v. Goodson, 2 Russ., 255, *contra.*

Such judgment, then, as the one mentioned in the case from 9 Cush., would be enforcible, out of the state, against partnership property, by proceedings in chancery, but not individually, against the partner not served with process. Of course, it is not intended to be determined by me, what acts, accompanied with a knowledge of the pendency of a suit, will *estop* a party not served from denying the validity of a judgment rendered against him where he has not been served with process.

But it is insisted by the plaintiff's counsel that, under the Federal constitution and laws such judicial proceedings are to have the same force and effect and to receive the same credit that they would have or receive in the state where rendered; and that, by the law of Kentucky, it appearing from the record that the defendant appeared to the action by attorney, the record is *conclusive* that he did so appear.

"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of other states. (Const., Art. 4, Sec. 1.) And the said 265
records and judicial *proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken." Act of May 26, 1790, 1 Statute at Large, 122.

Under these provisions, it seems to be settled that nothing merely exceptional to the common law or peculiar to the statutes of a state, is entitled to such full faith and credit beyond the state. These enactments relate only to judgments, etc., rendered in accordance with the settled rules and usages of law, as commonly recognized. The decree in question can have, then, no greater effect here as evidence than if rendered in Massachusetts, New York, or any other state, when a different rule as to the conclusiveness of such judgments prevails.

Amer. 2 L. Cas. note to; Mills v. Duryee; M'Elmoyle v. Cohen; D'Arcey v. Ketchum, 11 How., 165; Cheever v. Wilson, 9 Wal., 123.

The question is, then, fairly presented, whether, in an action upon the record of a judgment rendered by a court of general jurisdiction of a sister state finding that the parties appeared by attorney, it is competent to prove that attorney had no authority in the premises. And here we shall find that, in some states, such proof is rejected when judgments rendered by their own courts are involved and admitted in reference to those rendered by other states. There is, in my judgment, no warrant for the distinction, either in law or reason. Such holding assumes that the proceedings of courts of other states are not entitled to equal credit. But the supreme court of the United States is the tribunal authoritatively to settle the construction of the federal constitution and the laws of Congress passed in pursuance thereof, while the state courts interpret their own laws in relation to the force and effect of their own judgments within their limits; and thus the two courts may hold differently, as to the right to impeach judgments collaterally for want of jurisdiction

of the person or the subject matter, or for fraud, and here lies the apparent contradiction between decisions relating to domestic judgments and those of other states, to be found in our reports.

266 *In Kentucky, such proof in relation to their own judgments is held inadmissible. Holbert v. Montgomery, 5 Dana R., 11; Whiting v. Johnson, Id., 390; Roberts v. Caldwell, Id., 514.

In Ohio the decisions have not been uniform, or consistent in their reasoning.

Thus, in Critchfield v. Porter, 3 O. R., 519, in chancery, it was held that it might be proved against the record, that the attorney appearing for the party had no authority to do so, but, as the party might appear, at a subsequent term, in the court rendering the judgment, and set the same aside upon motion, he had an adequate remedy at law, and relief was denied him. The action was upon a judgment rendered in this state.

The reasoning in Sheldon v. Newton, 3 O. S., 498-9, etc., establishes the same conclusions. The court, Ranney, J., however, quotes Voorhees v. U. S. Bank, 10 Pet., 473, as sustaining its broad language, when such language is used in the maintenance of a proposition directly to the contrary of that held by our court. In Anderson v. Anderson, 8 O. R., 108, it is held that in an action at law upon the judgment of a court of another state, such judgment cannot be impeached for fraud, except in chancery.

In Callen v. Edmiston, 13 O. S., 446, in an action relating to a judgment rendered in this state, our supreme court have held that where the record shows that a party appeared by attorney, such party will not be allowed to disprove the fact. This is the last decision of our supreme court upon the subject. It fails to notice the prior decisions; but we are bound by it as to all judgments rendered in Ohio, by courts of general jurisdiction, though the reasoning of the court may be open to grave criticism. To allow such proof, it is admitted, would comport with the principles of natural right and justice, but would violate public policy, as though public policy may require the denial of justice and natural right. But it well says, that the conflict of authority arises from different courts adopting the one or the other of these views.

Text-writers, too, seem to be influenced by the law as settled in their own states.

267 1 Greenleaf on Evidence, Sec. 548, makes such *evidence competent. 2 Phil. Ev, Cow. & Hill's notes, 199 and 338; Cooley's Const. Lims., 17, 406, and notes denies its admissibility.

The law is settled differently in different states. Phelps v. Brewer, 9 Cush. R., 390, before cited, and Warren v. Lusk, 16 Mo. R., 102, may be taken as representative cases upon the affirmative and negative of this question.

But, as the decision of such cases requires a court to construe the constitution of the United States and the act of Congress passed in pursuance thereof, the rule as settled by the supreme court of the United States must govern; and in Shelton v. Tiffin, 6 How, p. 186, it is expressly held, that such an appearance is the act of the attorney and not of the court, and may be explained by parol and his want of authority shown, it being different from the case of a record showing that the party came personally into court and waived process. This controverts the view taken by that eminent jurist, Chief Justice Robertson, of Kentucky, in Roberts v. Caldwell, before cited, in which he says: "But as the record recites that the parties appeared by their counsel, that fact, thus certified, must be accredited."

Now, it would seem that a party ought to be really in court to authorize it to find that he appears by attorney, otherwise such finding would be *coram non judice* and void. How can a court find such fact without actual jurisdiction of the person? It is logically what the attempt would be, physically, to lift one's self from the ground by the waistbands.

Many English decisions sustain the admissibility of such proof. Wright v. Castel, 3 Mer., 12; Lord v. Kellett, 2 My. & K., 1; Goodman v. DeBeauvoir, 12 Jur. O. S., 989.

Perhaps the safest rule, and one compatible with justice, would be to require parties in all such cases to go into the courts rendering judgments against them, and there have them set aside, and for every court to hear such applications on motion; but, in cases like this, where the record affirmatively shows that the party was not served with process, but appeared only by attorney, I shall follow the decision

268 of the supreme court of the United States in 6 How., and admit evidence upon the *question of the authority of the attorney assuming to appear for the party, while as to judgments rendered in this state, I shall feel bound to follow the rule laid down in 13 O. S.

It is much to be regretted that the decisions upon this whole subject are so conflicting and confused.

A question is also made by the defendants, whether it can be proved by parol that the defendants in the Louisville action were partners in the matter about which that suit was brought, as they claim the record does not affirmatively show such fact.

I think the record does show they were partners, and that the suit was instituted to enforce a claim for which they were liable as partners. By the rules of law all had to be sued individually. The answers are as answers of a partnership, and were taken by the court as regularly responsive to the petition. Had they been in a different right, they would have been stricken from the files.

But the record is full *prima facie* evidence of the fact that Isaac Marks appeared to the action by counsel, and its recitals and findings in this respect are entitled to great weight. He seeks to disprove the fact by parol, and his proof may be rebutted by parol, an important element of which is, that he was a co-partner of his co-defendants, and that they jointly defended the suit.

This leaves but one more question to consider, which is certainly of the greatest materiality. On January 12, 1866, in answer to the plaintiff's petition in that suit, an answer was filed, purporting to be on behalf of all the defendants, as partners, claiming that the firm was liable upon its guaranty of two of the vouchers, the amount of which plaintiff was seeking to recover from the defendants, and asking to compel the plaintiff to indemnify them against liability on account of such guaranty. This was a counter claim, or cross action.

Now, suppose the plaintiff had not sued, but that these defendants had sued him in that court upon the subject matter of that counter claim, and prayed for the relief therein prayed for—will it be contended that the partners resident in Louisville could not have instituted such action in behalf of all the partners? Isaac Marks, living in Cincinnati, and having intrusted the business of the firm, the collection of its claims, and the *enforcement of the firm rights to his copart- 269
ners, the firm, and each individual composing it, was liable on that guaranty, and the resident partner might sue for all, to protect all. Having done so, suppose Fordyce had set up his cause of action by way of counter claim—as he might under the Kentucky code—and obtained the decree now and here sued upon, would any lawyer contend that Isaac Marks would not be liable upon it, though he may never have had personal knowledge of the bringing of such suit for him and them by his copartners? If they could not have sued to recover the rights of the firm, then it will be impossible to carry on business successfully where any of the partners are non-residents and take no active part in the conduct of the firm affairs, but tacitly intrusts that to the other members. Fordyce suing first, and then the bringing of this cross suit against him, is the same, in effect, as if the defendants had sued him and he had set up his claim by way of cross petition and obtained this judgment. Again, on April 17, 1868, another counter claim was filed in behalf of all the defendants, claiming a cross judgment against the plaintiff for $1,129.75. In view of these facts, disclosed by the record of that case, and remembering that the record shows that Isaac Marks appeared by attorney and defended that action, which is *prima facie* evidence that he did so, and evidence, too, not lightly to be overcome or disregarded, but evidence, the truth of which should be satisfactorily disproved; and in view of the situation of the parties, that that attorney was hired by the year for the firm; the length of time the suit was pending; that Marks was frequently in Louisville during the time; that the other defendants were his own son and brother-in-law; that he had a deep interest in the affairs of the firm, having invested $10,000 in it, and was liable for it to the banks here for $9,000; that it is scarcely possible to suppose he was in ignorance of it and refrained from encouraging and advising his son in its defense for the benefit of all the parties; and that Stirman, the attorney, whose testimony would be of the greatest importance, is dead, while Marks and his son are vitally interested,—taken in connection with all the circumstances of the case, I am constrained to find that Isaac Marks is liable to the plaintiff upon the decree sued upon in this court.

*He appears to be an industrious, worthy man, and the judgment may bear 270
hard upon him; but it is the result of the management of his own son and brother-in-law, whom he trusted, and gave the opportunity to become indebted to the plaintiff; and we must further remember, that it may be as hard upon the plaintiff to lose the amount as for the defendant to pay it.

Judgment will therefore be rendered for the plaintiff.

372 *NOTICE BY MAIL TO INDORSER.

[Hamilton District Court, 1872.]

THOS. J. COTTLE AND R. H. COTTLE v. JOSEPH C. THOMAS.

In order to charge an indorser residing in the same city with the holder, by dropping a notice by mail, without definite address by street number or by designating the district, or village annexed, or without showing that it is the indorser's habit of receiving letters by carrier, so that the carrier knows the address, or proving that the address could not, with reasonable diligence, be ascertained by the holder, is not exercising due diligence on his part and is therefore insufficient.

FORCE, J.

Thomas Cottle and Richard Cottle were sued in the common pleas court as indorsers upon a note. They defended on the ground of want of due notice. Judgment was rendered against them, and the case comes before this court on a petition of error.

As to Thomas Cottle, we find he was not strictly an indorser, but was a guarantor, and liable as such. Richard Cottle was an indorser, residing in Cincinnati. The holder of the note also lived in Cincinnati, and attempted to notify Richard Cottle by addressing a notice of protest to him at Cincinnati without any other address, and dropping that note in the Cincinnati post-office. Was that notice sufficient to charge him? Parsons, in his work on Bills and Notes, says: "The true test would then seem to be only the fact, whether the holder, and the party to whom notice is to be sent, reside in the same town or not." We think this statement of the law was not precise when it was written, and is not accurate now.

Originally, of course, it was necessary, in order to charge an indorser, to serve the notice actually upon him. When the post-office was established, to transmit letters from one city to another, transmission by this public means was held to be sufficient; but when there was no delivery within the city, a letter put into the post-office by a resident of the city, addressed to another resident, was not transmitted by the mail, but was only received, and held on deposit until it should be called for. Such a deposit of a notice in the city post-office was not, therefore, sufficient to charge an indorser living in the same city. Some years ago we had, in the United States, a partial city delivery of letters. The post-office did not undertake to deliver letters to the public generally at their homes, but letter carriers were employed by the postmaster to carry letters to the residences of such persons as requested such delivery as a matter of convenience. Where other practices obtained, the letter carrier was substantially the agent of the person who received the letter from him; and there a notice dropped in the city post-office, addressed to a person who was in the habit of receiving letters by such carrier, was held to be delivered to him and held to be sufficient notice. The case of Walters v. Brown, 15 Md., 285, is a well considered case of that period. In London, however, the post-office undertakes, as a part of its regular business, to deliver letters to the public generally within the limits of the city, and there it has been held that a notice of protest dropped into the city post-office for a person living in London is a sufficient notice. This rule under the law of the London post-office as stated in the English books, is copied without qualification by Kent and Story; and in some American cases we find the statement that a notice dropped into the city mail, addressed

to a person who lives within the limits of a letter carrier's *delivery, 373
is sufficient notice. For example: Remington v. Harrington, 8 O., 507; Bank of Columbia v. Lawrence, 1 Peters, 582. But these statements were mere general talk by the judges, not having relation to the case in hand, nor applicable to the post-office system which then obtained.

Now, however, in the United States, the post-office undertakes as a part of its regular business to deliver letters to the public generally in the large cities. We have found no decisions as to the effect of this change upon the rule of diligence to charge indorsers. But the courts have taken occasion to qualify the old statement of the rule, and to intimate that when a case shall arise they will be ready to change the rule as to the effect of mailing notices of protest to an indorser living in the same city. The supreme courts of Massachusetts and Pennsylvania have always held strictly to the rule that the mailing of a notice to an indorser living in the same city was insufficient; but in Shelbourne Bank v. Townie, 102 Massachusetts, 177, the court now qualify the statement by saying, "in a city where there is not a general delivery at residence by the post-office;" and in Shoemaker v. Mechanics' Bank, 58, p, 79, the court says: "It seems that since the government has undertaken to deliver letters generally at residences in cities, that a mailing of a protest would be sufficient between two parties living in the same city." But we find no decision giving us a rule, and we must deduce the rule from principle.

In London, where there is a city delivery by mail, letters are never dropped into the post-office addressed simply "London." Some more definite address is always added; and in Cincinnati, now that sundry neighboring villages and thinly inhabited districts have been annexed to the city, the mere address of "Cincinnati" on a letter might, in many cases, be insufficient to secure a prompt delivery.

We hold, therefore, that a notary in Cincinnati, to charge an indorser living in the city by dropping his notice into the post-office, should give the letter some address sufficiently definite to secure a prompt delivery, whether by giving street and number, or a designation of the out-lying district wherein the indorser may live. If that is not done, it should be shown, in order to charge the indorser, that he is in the habit of receiving letters by the letter-carrier, and so that his residence or place of business is known to the carrier. If neither of these is done, it should be shown that the notary or holder could not, by the use of reasonable diligence, ascertain the residence or place of business of the indorser.

In the present case the notice was dropped into the city post-office, addressed "Cincinnati," without any more definite address. There was no proof that the indorser was in the habit of receiving by the carrier letters so addressed, nor was there any proof that his residence, or place of business in the city, could not have been ascertained by reasonable diligence. Hence, the record does not show that due diligence was used to charge the indorser, Richard Cottle, with notice, and the judgment as to him must be reversed.

William Disney, for plaintiff in error.

Archer & McNeale, Contra.

374 *SALES.

[Hamilton District Court, 1873.]

†KEBER & MILLER v. W. I SANDERS.

Where one delivers a chattel to another at an agreed price under an agreement that the latter is to hold the article for the former until payment, payment is a condition precedent, and until made the property does not vest in the buyer; and such an agreement would constitute a bailment, and one purchasing without notice from the bailee obtains no title as against the bailor.

BURNET, J.

This case was a proceeding in error to reverse a judgment of the common pleas, in an action of trover to recover the value of a mirror and pictures which the plaintiffs allege the defendant had converted to his own use, they being the owners of the property. The petition set out an agreement between Keber & Miller and one John Pierce, by which the latter was to hold for them, as their exclusive property, the articles in question, until he should have paid to them $135, which was to be paid in weekly installments, and that upon failure to perform the conditions for two weeks the property was to be delivered to Keber & Miller, and all money paid thereon was to be forfeited.

There were separate findings of fact and law by the court below, in which it is charged there was error.

The findings were that Pierce took the mirror to his home at an agreed price, that he subsequently abandoned his family and left the state, and that his wife, to obtain sustenance for her family, sold the mirror to the defendant; that the agreement between Pierce and the plaintiffs was never filed as a chattel mortgage; that their interest was that of a mortgagee.

The agreement purports to be a bailment, and agreement for a future sale, with a delivery of possession merely to the proposed purchaser, and until he should have complied with the conditions there was to be no vesting of title in him. The express language of the agreement cannot be misunderstood, and if construed strictly according to its terms, there can be no doubt the title remained in Keber & Miller. It was claimed, however, that the court was not bound to the letter of the agreement, that they must look to the entire transaction to ascertain its true nature, and that in that view this instrument was in the nature of a mortgage. The court could not regard it in that light. In ordinary language it would be termed a conditional sale, and strictly it was not to be considered even that; but it is a bailment of the property, and upon the performance of certain acts there was to be a sale.

The court would hold, therefore, that this was a bailment, with a stipulation that the bailee may become the purchaser on performing certain conditions; that it is not a chattle mortgage reserving a lien; that the bailee acquired no title, and that the defendant although purchasing from him without knowledge of the rights of the plaintiffs, takes no title as against them.

Judgment of the court below reversed.

H. M. Moos, for plaintiffs,

C. H. Blackburn, contra.

†Judgment affirmed by supreme court in Sanders v. Keber. See opinion 28, O. S., 630; Sanders v. Keber cited, 37 O. S. 356, 361; 40 O. S. 670, 673; 43 O. S. 284, 307; 45 O. S. 289, 298; 46 O. S. 450, 454.

*NATIONAL BANKING ASSOCIATIONS. 385

[Superior Court of Cincinnati, General Term, October, 1872.]

R. W. LEE v. THE CITIZENS' BANK ET AL.

A National Banking Association was organized under the Act of Congress of 1864. In its *articles of association*, it provided that the bank might make by-laws "to prohibit, if the directors should so determine, the transfer of stock owned by any stockholder who may be liable to it, either as principal debtor or otherwise, without the consent of the board." It subsequently adopted a by-law providing that "certificates of stock shall contain upon them *notice* of the provision that no transfer of stock shall be made without the consent of the board of directors, by any stockholder indebted to it." It then adopted another by-law providing that "certificates of stock signed by the president and cashier, may be issued to stockholders, and the certificate shall state upon the face thereof that the stock is transferable only on the books of the bank; and when stock is transferred, the certificates thereof shall be returned to the bank and cancelled, and new certificates issued."

It then issued certificates of stock, which did not state that they were not transferable by the holder while liable to the bank; but which stated that they were "transferable only on the books of the bank, in person or by attorney, on the surrender of such certificates," and, upon the backs thereof were printed blank forms of assignment and power of attorney, *under seal*, for the holders to assign their stock.

The cashier of such bank, who was also a director, became the owner of fifty shares of its stock, each share being for $100. He signed his name to the 386
*blank form of assignment and power of attorney, and delivered the same to a business firm, of which he was a member, to raise money upon for the use of such firm. The firm hypothecated it and delivered it to bankers, who loaned money upon the faith of it, they having no knowledge of the owner's liability to the bank, and no notice of the requirements of its articles of association or by-laws. At the time of such pledging, the party to whom the certificate of stock was issued, was liable to his bank for a large sum of money. He *afterward*, being cashier and custodian of the bank's transfer books, transferred such stock on the books to the president of the bank, individually, but really in trust to secure the bank for his liabilities to it. The certificate was not returned, it being in the hands of his pledgees, and the transfer was made on the books without the knowledge of any one except such cashier; and the bank thereupon transferred this stock to him upon its books, and has since paid him the dividends upon the same.

The bankers to whom the stock had been pledged, not being repaid their loan in full, sued the pledger, said cashier, and recovered a judgment against him for between $1,500 and $1,600, upon which they caused execution to issue, and, to make their money, let the sheriff levy on the stock in their hands; they delivered it to him for the purpose, when it was further levied upon on two other executions, in favor of the debtor's other general creditors. It was sold, like personal property, at sheriff's sale, without the pledger's consent to either levy or sale, and another firm, knowing the terms upon which the pledgees held it, purchased it for $1,600. it being worth about par, which money they paid to the sheriff, who paid it over to the original pledgees, who retained it in satisfaction of their debt, and, with their consent, the sheriff delivered the stock certificate, accompanied by a bill of sale, to the purchasers. They sold and delivered it to the plaintiff, who was one of their firm at the time of their purchase.

The certificate of stock was duly presented by the purchasers to the bank, and a transfer to the books duly demanded and refused, on the grounds aforesaid, and because the same stood transferred to the president of the bank as the owner, in person, thereof. The bank, being located in another county than that in which the suit was brought, voluntarily entered its appearance to the action in the county where suit was brought.

1. *Held:* That the act of Congress authorizing the organization of the bank and providing for its government, the articles of association, the rules and by-laws of the bank, and the act of issuing and *form* of the stock certificate must all be construed together; and while, in such cases, the bank's equity and rights are superior to those of the mere general creditors of the stockholder, a person who receives such certificate from the holder, so indorsed in blank, in the usual course of business, for value, and without actual notice of the owner's liability to his bank, or of

its rules and by-laws, acquires a right and property in such stock, paramount to the equities of the bank, and, upon return of the certificate, may compel such bank to transfer such stock to him. Such stock is not negotiable paper, in the legal sense of the term, but the assignee's right is derived from the fact that the bank itself has put it in the power of its stockholder to raise money upon it, and must bear the loss as between it and an innocent purchaser or pledgee.

2. In this case, this stock has never been transferred, the acts of the cashier and bank attempting to do so, are void, the certificate of stock not having been returned as required by the rules of the bank, and that was notice to the bank of other's rights in the stock.

3. The owner of a certificate of stock, in the form of that in this case, may assign it and appoint an attorney, *in blank*, though it be an instrument under seal.

387 *4. Such stock cannot be levied upon and sold on execution, and such attempted levy and sale are void, without the levy and sale were assented to by the owner of the certificate.

5. The holder of such stock in pledge, as collateral security for its owner's debts, is an agent for the latter, which agency is coupled with an interest in the pledge, and, like a trustee, he must account to his *cestui que trust* for the surplus remaining after the satisfaction of his interest, which imposes on him the duty of guarding the interests of all parties as far as possible. He can only sell with the consent of the pledger, or after due notice to him, and if he do so, he will be liable for the sacrifice of others' interests.

6. Upon the facts of this case, the bankers holding the pledge, have, in equity, *assigned* their debt and pledge to the plaintiff, who stands in their stead.

7. He can, therefore, not claim title to the entire stock, but only *a lien* upon it for $1,600, and interest upon that sum from the date of paying the money to the sheriff therefor. He cannot thus sacrifice $5,000 worth of stock for $1,600.

8. The 57th section of the national banking act, authorizing suits to be brought against such banks, in state courts, only in the counties of their location, is a mere personal privilege, which they may waive; and if they enter their appearance to suits brought in other counties, they give to the state courts full jurisdiction over them.

9. These legal questions arising, depend wholly upon the constitution of the United States, or acts of congress, and in no way involve any state constitution or legislation; the decisions of the supreme court of the United States, settling the construction of the same, will be followed by state courts, though they may have construed similar provisions in the constitution and statutes of their own states differently.

Opinion by YAPLE, J.

This case comes before us for decision upon the law and facts, by reservation from special term.

The plaintiff, in his petition, alleges that the Piqua bank is organized under what is known as the national banking act, passed June 3, 1864, and located at Piqua, Miami county, Ohio; that on May 2, 1867, one Robert B. Moores, then a director and the cashier of the bank, became the owner and holder of fifty shares of its capital stock of one hundred dollars each, authenticated by the signature of the defendant, G. Volney Dorsey, as president, and Moores as cashier, with a blank form of indorsement and power of attorney, under seal, printed on the back thereof; that Robert B. Moores, the owner and holder of each certificate, afterwards signed his name to such blank forms of indorsement and power of attorney, and before the 4th day of November, 1867, delivered the same to a trading firm, of which he was a member, composed of himself and one Henry A. Perkins, for hypothecation for the benefit of such firm; that on the 4th day of November, the firm hypothecated the certificate by delivering it, so indorsed, as collateral security, to A. G. Burt & Co., bankers in the city of Cincinnati, in the usual course of business, for a loan of $3,000 to the firm, such stock having been, before

that time, fully paid for to the bank by Moores; that part of such loan was repaid, and the *balance being due, Burt & Co., on the 27th day of November, 1869, brought suit in this court against such firm on its note given for such loan, and, at the February term, 1870, recovered a judgment against Robert B. Moores (Perkins having been discharged in bankruptcy) for $1,556.30, with interest from January 3, 1870, and $11.10 costs; that on April 21, 1870, Burt & Co. caused an execution to be issued on the judgment, which was levied upon such stock, together with two other executions in favor of general creditors of Moores, in their hands, by the sheriff, and which stock was, by that officer, sold at sheriff's sale, on May 5, 1870, to Adolph Wood & Co., for the sum of $1,600 (Moore's not assenting to such levy and sale), and the certificate, with a bill of sale, delivered to them, and the money, after deducting costs, handed over to Burt & Co., who received the same; that on May 24, 1870, Adolph Wood & Co., such owners and holders, presented the certificate of stock and bill of sale to the bank, and demanded a transfer of stock to them on the books of the bank, which demand the cashier refused to comply with, by order of the board of directors of the bank; that Wood & Co. then sold and transferred the certificate to the plaintiff, who is the holder and owner thereof, but that the bank refuses to recognize him as such, or to transfer the stock to him on its books, and that the defendant, G. Volney Dorsey, the president of the bank, claims to have some right or interest in the subject of the litigation. 388

The plaintiff then prays the court to establish, by judgment, his ownership of the stock, free from all claims or alleged liens upon the same by the defendants; that the bank be required to transfer the stock to him on its books, and to account to him for all dividends since May 5, 1870, and for alternative and general relief.

Upon the summons issued in the case, there is this indorsement:

"By virtue of express authority, we hereby enter the appearance of the defendants.

MATTHEWS & RAMSEY."

The bank has not answered, but is represented in court by its attorneys.

Dorsey filed an answer and cross-petition, alleging that he is the sole owner of the stock; that on the 16th day of January, 1868, he being the president of the bank, received from Robert B. Moores, then a director and the cashier of the bank, and to whom such certificate of stock had been issued, and in whose name it then stood upon the transfer books of the bank, a complete transfer of such stock, with certain other stock of Moores, to secure to the bank an indebtedness of said Moores *to it, amounting to $23,500; that he, Dorsey, continued to hold said stock, subject to a lien thereon of the bank for all Moores' indebtedness to it, until the 26th day of July, 1869, when he, Dorsey, gave his individual obligation to the bank for the then amount of Moores' indebtedness to it, amounting to $37,247.29, a large part of which he has since paid, and for the balance of which he is still bound to the bank; that on August 9, 1869, the bank consented to and did transfer to him all its rights in all such stock; that, by the rules and by-laws of the bank, such certificates of stock are transferable only on the books of the bank by the stockholder in person or by attorney, each certificate containing a printed notice to that effect, that it was provided by the 15th section of the by- 389

laws of the bank, before, on, and ever since November 4, 1867, among other things that the stock of the bank should be transferred only on the books of the company, and that no transfer should be made without the consent of the board of directors, by any stockholder who should be liable to the bank, either as principal, debtor, or otherwise, and that from May 9, 1867, until after November 4, 1867, when Moores' stock was pledged to Burt & Co., Moores was liable to the bank in the sum of $8,500, which remained unpaid and was part of the liability assumed by him, Dorsey. He then prays that the plaintiff may be compelled to deliver up the certificate of stock to him and that the same may be cancelled.

The following is a copy of the certificate of stock and the indorsement in blank by Moores:

"THE CITIZENS' NATIONAL BANK OF PIQUA,

STATE OF OHIO.

No. 47. 50 Shares.

This is to certify that Robert B. Moores is entitled to fifty shares, of one hundred dollars each, of the capital stock of the Citizens' National Bank of Piqua, transferable only on the books of the bank, in person or by attorney, on the surrender of this certificate, May 2, 1867, Piqua, O.

R. B. Moores, Cashier. {Stamp.} G. Volney Dorsey, President."

ON THE BACK.

"For value received.....hereby sell, transfer, and assign to .....
.....the shares of stock within mentioned, and authorize.....
.....to make the necessary transfer on the books of the bank.

Witness my hand and seal this .....day of..... .....186...

ROBERT B. MOORES.

Witnessed by.....[SEAL.]"

390 *The by-law, fifteen, referred to in the defendants' answer, provided *that certificates of stock shall contain upon them notice* of the provision that no transfer of the stock shall be made without the consent of the board of directors by any indebted stockholders. *This*, this certificate does not contain. It was issued under another by-law, sixteen, which provided that "certificates of stock, signed by the president and cashier, may be issued to stockholders, and the certificate shall state upon the face thereof, that the stock is transferable only upon the books of the bank; and when stock is transferred, *the certificates therof shall be returned to the bank* and cancelled, and new certificates issued."

Article 6, of *the Articles of Association* of this bank, also provided, that it might make by-laws to *prohibit, if the directors "shall so determine, the transfer of stock owned by any stockholder who may be liable to it, either as principal debtor or otherwise, without the consent of the board."*

From May till after November 4, 1867, Robert B. Moores was only liable to the bank in the sum of $6,500, with Dorsey, who is his father-in-law, as indorser, and in $2,000, for which he was indorser for a Mr. Moores, but during all that time he usually had a balance in his favor upon the books of between $6,000 and $7,000. He continued to be a director in and cashier of the bank for some time after January 16, 1868, when the transfer of this stock was made to Dorsey on the books of the

bank. Moores being cashier, on January 16, 1868, without Dorsey's knowledge, transferred on the bank's books, "*all his right, title, and interest* to G. Volney Dorsey," to this and other shares of stock. The word "trustee," after "Dorsey," was subsequently inserted on the advice of counsel, but whether in Moores' presence or with his consent does not expressly appear, though it is presumed it was. Of course, the certificate of stock was not present or returned; and it was, at the time, without the assent of the board of directors. Since August 9, 1870, when the bank transferred all its rights in the stock to him, Dorsey has received the dividends upon it, viz: 2½ per cent. semi-annually.

The evidence shows that, when this stock was sold by the sheriff to Wood & Co., May 5, 1870, such stock was worth par, or seventy-five per cent. of its face at forced sale. The bank having given up the stock and accepted Dorsey as its debtor, the question of right to be determined is between the plaintiff and Dorsey.

The 5th section of the act of 1864, providing for the organization of national banks, requires articles of association, which "shall specify in general terms the object for which the association is formed, and may contain *any other* provisions, not inconsistent with the provisions of *this* act, which the association * may see fit to adopt for the regulation of its business and the conduct of its affairs." And section 8 provides 391 that the "board of directors shall also have power to define and regulate by by-laws, not inconsistent with the provisions of *this* act, the manner in which its stock shall be transferred," etc.

Section 12 enacts that the capital stock of such banks shall be divided into shares of one hundred dollars each, be deemed personal property, and transferable on the book of the association "*in such manner as may be prescribed in the by-laws or articles of association.*" But the 35th section forbids such bank from making "*any loan or discount on the security of the shares of its own capital stock*," and from becoming the purchaser or holder thereof, unless to prevent loss on a debt previously contracted in good faith, and then it must dispose of the same within six months.

The thirty-seventh section of the act of 1863 (12 Stat. at L. 676) contained substantially the same provision as the present 35th section, 13 Stat. at L. 110, but the 36th section of the act of 1863, repealed and supplied by the 12th section of the act of 1864, above mentioned, expressly provided that "no shareholder, etc., shall have *power* to sell or transfer any share held in his own right so long as he shall be liable, either as principal, debtor, surety, or otherwise, to the association for any debt," etc. This restriction is repealed by the act of June 3, 1864, and entirely omitted from its provisions.

It will thus be observed, that under the act of 1863, such associations could not so draw their certificates of stock, or frame their articles of association or by-laws, as to permit a stockholder to vest a paramount equitable right of property in them, in innocent purchasers for value, while such stockholder should be indebted to the bank; but under the act of 1864 this may be done; so upon principle, the question in every case would be, whether the bank, in view of its articles of association, by-laws, and authorized form of certificates of stock, construed together, has or has not done so.

There have been adjudications upon these points under these acts. In the case of the Bank v. Lanier, 11 Wal. 369, the supreme court of the

United States have held, that where a stockholder in such a bank agrees with it that if it will, *in future*, deposit with him its funds at a bank of his in another city, it shall have a lien on his stocks to secure such deposits, so *thereafter* to be made, and he does not deposit such stock with the bank, but keeps it and assigns it for value, to an innocent purchaser, such purchaser can hold it as against such bank. This decision is clearly correct under the act of 1864, for a deposit is a loan, and the statute, section 35, forbids any loan upon the faith of, or pledge, or deposit of the stocks,
392 by, or with such bank; and if *the bank cannot receive, or hold its stock in pledge for future loans, it can acquire no lien therefor by mere agreement, not accompanied by delivery. This case carefully distinguishes between such cases and those in which such banks endeavor to secure themselves for the *previous* indebtedness of stockholders, incurred independently of the credit of their stock.

In Knight v. Old National Bank, etc., 4 Law Times Rep., a stockholder, *previously* indebted to the bank, made an assignment of his stock, for the benefit of his creditors, and his assignee claimed it for creditors generally, against the bank, which, in its *articles of association*, forbid the valid transfer of such stock, while the stockholder should be indebted to the bank, and the circuit court of the United States, CLIFFORD, Justice, held that such assignee could not recover against the bank. The vital facts of this case were wholly different from those in the Bank v. Lanier. The debt was one contracted in the past, and the plaintiff was the mere assignee for the benefit of creditors. No third person's rights intervened. An assignee in bankruptcy, or under insolvent laws, acquires only the rights of his assignor; any claim in his hands is subject to all the equities of everybody, that it would have been in the hands of the debtor; hence, it was as if the debtor, himself, had insisted that the bank should transfer his stock to his creditors, generally. This rule of law is settled by the uniform and unbroken course of decisions both in England and in the United States. Scott v. Surman, Willes' Rep. 400; Exparte Newhall, 2 Story's Rep. 360; Mitchell v. Winslow, id. 630; Ontario Bank v. Mumford 2 Barb. Chy. 596; Strong v. Clawson, 5 Gill (Ill. R.) 346; Warden, etc., v. Gaylord & Son 14 Wal.

The confusion produced by this decision, and its apparent conflict with the Bank v. Lanier, simply arises from the fact that a wrong reason was given for the decision, for it is not at all in conflict with that case. In the Bank of Utica v. Manufacturing Bank, 20 N. Y. 501, that court held, that a bank could not pass such by-laws, because the act of its incorporation provided that it might do so in its *articles of association*, from which Justice CLIFFORD inferred that a national bank may make such provision in its articles of association, but not by a mere independent by-law, though in the *Lanier* case, it was the illegality of the matter, covered by the by-law, that the court based the decision upon. In Conklin v. Second National Bank, of Oswego, 45 N. Y. 655, which was a case of the assignment by a stockholder of his stock, for the benefit of creditors, though previously indebted to his bank, his stock certificate stating on its face that the stock "is not transferable until all liabilities of the
393 stockholder to this bank are paid," the court held the transfer good, as *against the bank, on the assumed authority of the *Lanier* case, decided by the supreme court of the United States. With all due respect, we hold that the question in the *Lanier* case was a wholly different one, and that this New York case was wrongly decided.

The next inquiry is, what is the law where such a banking corporation has provided in its articles of association and by-laws, that no stockholder shall assign or transfer his stock while indebted to the bank, such liability having been created previously and not in any way upon the security of the stock itself, when the bank has adopted and issued to such stockholder a *form* of certificate entirely omitting reference to such restriction, and stating that no transfer is to be made on its books, except on *return of the certificate* in person or by attorney, with a blank form of assignment and power of attorney printed on the back of such certificate; and such stockholder shall have signed his name to the blank assignment and power of attorney, and delivered the certificate upon sale or pledge to a third party, for value, which party has no other knowledge than what the certificate contains? Does such stockholder acquire an equity paramount to that of the bank, created and reserved by its articles of association or by-laws? If so, it will add great value to such stock by enabling its original takers to avail themselves of it as a basis of credit in the business world, and prevent them from virtually sinking so much of their means in the bank, and will greatly add to the kinds and amount of property the commercial world may base business transactions upon. It would obviously facilitate the organization of such banks, for men would then take stock knowing that they did not withdraw so much of their property from furnishing them a basis of credit with the world. If this cannot be done, all moneys invested in national bank stock is rendered useless to the owners as a basis of credit, whether they are indebted to their banks or not. For this the world cannot know. The case of the Bank v. Lanier does decide that such a purchaser or pledgee from such stockholder of such certificate as was issued in this case, does acquire a paramount equity in the stock over the bank and as against its articles of association or by-laws. See 11 Wal. pp. 376, 377, 378.

But it is here contended that this case is not correctly decided, and we are asked to hold the law to be different. The national banking act has nothing to do with state constitutions or laws. It depends entirely upon an act of Congress, and we feel it our duty to follow the construction given to that act by the supreme court of the United States, as that and all federal courts do to the decisions of the highest state courts upon questions depending wholly upon state constitutions and laws. 394
*Were our state courts to hold this question differently, the supreme court of the United States would review and annul such decisions. This is not a case where states have construed their reserved powers one way and the United States another, and the question is presented which is the ultimate judge of such reserved powers. The argument of counsel for the defendant, Dorsey, could only be properly urged for consideration in that class of cases.

The symmetry of the law under so complex a system of government as we have, requires us to hold as we do in this class of cases.

But the decision of the supreme court of the United States but followed well considered decisions of the state courts made upon the very point, and the correctness of which it expressly affirmed. We allude to cases growing out of the celebrated Schuyler frauds. See N. Y. & N. H. R. Co. v. Schuyler, 34 N. Y. R. pp. 83-4-5; Bridgeport Bank v. Same, 30 Conn. R., 231. These cases decide that such a certificate can only be transferred on the books of the corporation by a return of the same, and if not so returned by the stockholders, that is *notice* to the company that

he has parted with it to somebody of the nature of whose rights it is bound to inquire before taking any action in the premises, and they clearly establish that, by such valid transfer, by the stockholder, without notice of his indebtedness to the bank, the stockholder's assignee acquires an equity paramount to the bank, also, that the stockholder's signature to the blank assignment and power of attorney, though under seal, is valid; and that such a certificate makes the stockholder *the agent* of the bank, and all whom it represents to sell or pledge and pass title to such stock certificates. N. Y. & N. H. R. Co., 30 Conn. R. These two cases gave the supreme court of the United States abundant authority for the decision in the *Lanier* case.

It is said that Conant v. Seneca County Bank, 1 O. S. R., 298, decides the very reverse. Not at all. The 46th section of the Ohio Banking Law, 43 O. L., 43, is almost word for word the provision contained in section 36, of the act of Congress of 1863, restricting the stockholder's *power* of transfer, which is not in the act of 1864, under which these transactions arose. See 1 O. S. R. p. 303. Pendergast v. Bank of Stockton, 4 Law T. Rep., 247, decided by the circuit court of the United States for California, is not in point. In that case the person taking the stock from the stockholder *had full knowledge of the rule adopted by the bank, and of the stockholder's indebtedness to it.* See p. 252.

So we are clearly of the opinion that Burt & Co. acquired a lien paramount to the rights of this bank, by the transfer of this stock to them by Moores, to secure the money loaned to his *firm. One of two
395 innocent parties must suffer, and the bank, by drawing the certificate in the form it did, put it in Moores' power to injure the public, and must bear the loss. The facts satisfy us that Moores intrusted it to his firm for that purpose, and took the benefit of the money raised upon its credit, and the New York and Connecticut cases above cited, as well as the case in 11 Wallace's Rep., establish that the bank could not transfer this stock on its books, to any body, without its return, and that its non-production was 'notice to it of Burt & Co.'s rights. In fact, Moores himself, the bank's cashier, and the man who had pledged it, undertook to transfer it without the consent of the board of directors of the bank. For these reasons, the stock has never been validly transferred to Dorsey. The attempts to do so are void. When transferred, new certificates must issue, and if that could be done without the surrender of the old, double issue of stock would be the result.

It is next contended that the plaintiff has no title to this stock, because Burt & Co. surrendered it to the sheriff, who levied their execution upon it, under which it was sold, and that this relinquished their lien arising from the pledge to them, and plaintiff through the sheriff's sale acquired no other right to the stock than that of Robert B. Moores', to which the bank's rights were paramount. We admit that such right of the bank, under its articles of association and its by-laws, was paramount to the rights of the general creditors of Moores. Whitaker & Sumner, 20 Pick., 399, decided by C. J. Shaw, is a leading case relied upon. But, before it can be considered as in point, we must determine whether the sheriff's levy and sale upon this execution were of any validity—whether they were not absolutely void, and the stock, therefore, never in the hands of the law at all.

The stock could not be levied upon and sold upon execution. Oystead v. Shed, 12 Mass., 510; Denton v. Livingston, 9 Johns., 96; Good-

now v. Duffield, Wright's O. R., 456; Haven v. Wentworth, 2 N. H. R., 93; McClelland v. Hubbard, 2 Blackford, 361; Johnson v. Crawford, 6 Id., 377; Buford v. Buford, 1 Bibb., 306; Thomas v. Thomas, 2 A. R. Marsh, 291; Cosby v. Ross, 3. J. J. Marsh, 291.

So the levy and sale upon execution are void, it not appearing that Robert B. Moores assented thereto. Burt & Co. could only have sold it through the law by proceedings on creditor's bill; or by proceedings in aid of execution, if no third party's rights intervened, or upon attachment, under our statute, against Moores. Now, upon the evidence, we are satisfied that *Burt & Co. gave the certificate to the sheriff to 396
make their money out of it by a sale; that when he had done so, they took the money from Wood & Co., who well knew the terms on which they held the stock, and assented to the transfer of the certificate to them, the sheriff being the agent of both parties, and this worked *an equitable assignment*—a thing well known to the law, and differing from subrogation, in the fact that the latter applies more properly to principal and surety—of all their interest in the stock, to wit, the amount of their judgment and costs, less the costs subsequent to the issuing of the execution to Wood & Co., who have transferred their right to plaintiff, a member of the firm of Wood & Co. The amount due Burt & Co. on the judgment, on May 5, 1870, when Wood &. Co. paid the money, was $1,599.38, or, we may say, $1,600, the amount paid for the stock.

Burt & Co's possession of the stock was, and the plaintiff's is, the possession of an agent coupled with an interest. The stock could not be sacrificed by them while in their hands. In a proper way they could have realized their money from it; for the balance they would have stood as trustees for other interested parties. They could not sacrifice the stock without rendering themselves liable for a breach of their trust. They did not sell it as the law requires in the case of a pledge or collateral security.

See Story on Agency, sections 313, 488, 489, 496, and cases there cited. The plaintiff can only claim $1,600, with interest from May 5, 1870.

We shall, therefore, adjudge and decree that the defendant, Dorsey, pay to the plaintiff the sum of $1,600, with interest from May 5, 1870, upon the payment of which the plaintiff shall surrender to him this certificate of stock; and that the bank shall issue no certificate of stock to Dorsey or his assigns, in lieu of this certificate, for the amount included in this judgment, before Dorsey shall pay the same to the plaintiff, or allow dividends to him or them upon such amount. It seems that the 57th section of the Banking Act of 1864, only authorizes national banks to be sued in the state courts in the counties or cities where located; but this, we hold, is a mere personal privilege which may be waived, as this bank has expressly done in this case.

Judgment will be entered accordingly, each party to pay his own costs.

Attorneys for the Plaintiff, *Huston & Shunk.*

Attorneys for the Defendants, *Matthews, Ramsey & Matthews.*

479 ***SURETY—USURY.**

[Logan Common Pleas Court, April Term, 1864.]

THOMAS DAVIS & JOHN M. HELMICK v. JEREMIAH M. KELLEY, ADMR.

A surety who pays a debt, including usurious interest, after notice by the principal debtor not to pay the usury, can not recover from the principal debtor the usurious interest so paid, if he might have avoided its payment.

Civil action. Petition filed March 7, 1864, avers that on the 1st of June, 1861, plaintiffs, as sureties for and with Olinger, drew bill of exchange at Urbana, Ohio, on The Importers' and Traders' Bank, of New York, to the order of J. B. Brown, for $2,000 at sixty days, acceptance waived, with warranty of attorney to confess judgment and waive all error against the makers or any of them in any court, if not paid at maturity; that Olinger died intestate about the time of the maturity of the bill; that on the 23d of February, 1863, Brown caused judgment to be entered by virtue of said warrant of attorney in the court of common pleas of Champaign county, against these plaintiffs, Davis & Helmick, for balance unpaid on the bill of $746.75, and costs, $3.40; that plaintiffs have been compelled to and have paid said judgment and costs; that defendant as administrator rejected plaintiff's claim.

Prayer for judgment.

Answer avers that the said bill was discounted by Brown at a greater rate than six per cent interest, by reserving $33.34 discount; that on 27th of May, 1862, his administrator paid Brown $1600; that on 25th of February, 1863, there was due to Brown, on said bill, $506 only, the sum of $240.75, balance of the judgment, being for usurious interest, which defendant asks may be deducted from the same; that plaintiffs were notified before said judgment of said payment, and of the usury, and were required not to pay the same. Defendant offers to confess judgment for said sum of $506 and costs and interest.

Demurrer—That answer does not state facts to make a defense.

Benjamin Stanton and *Charles W. B. Allison*, for plaintiff, cited Busby v. Finn, 1 Ohio St. R., 410; Raines v. Scott, 13 Ohio R., 107. Judgment cannot be collaterally impeached for usury. Equity not relieve against a judgment. The rule in Russell v. Failor, 1 Ohio St. R., 330, only applies to voluntary payments. This is compulsory on a judgment.

Walker & West, for defendant, cited Whitehead v. Peck, 1 Kelly 140, 1 U. S. Au. Dig., 477. Where the surety has knowledge of that which amounts to a valid defense for himself against the creditor, he is bound to avail himself of it, or give notice to the principal debtor so as to enable him to set up the defense, and in default of doing either he would be deprived of recourse against the principal. Burge on Suretyship, 367; Russell v. Failor, 1 Ohio St. R., 330.

480 *It makes no difference that this authority relates to a voluntary payment. If Kelly had been a party to the judgment, and neglected to make defense then he could not object here. A judgment is only evidence against parties and privies. 2 American Lead. Cases, 441–1; American L. C,, 442.

The case of Ford v. Keith, 1 Mass. R., 139, is repudiated in Russell v. Failor, 1 Ohio St. R., 330. But Ford v. Keith holds that *notice* of a defense to a surety deprives him of a right to pay.

Though judgment was entered on a warrant of attorney, yet this could be set aside to the extent of the usury. Civil Code, section 534.

CONKLIN AND LAWRENCE, JJ., *Held:*

That a surety who pays a debt, including usurious interest after notice by the principal debtor not to pay the usury, cannot recover from the principal debtor the usurious interest so paid, if he might have avoided its payment. Hays v. Ward 4 Johns. Ch., R. 122.

Demurrer overruled.

---

*ACTION UNDER ADAIR LIQUOR LAW. 553

[Cincinnati Superior Court, Special Term, 1872.]

†SARAH A. MASON v. THOMAS SHAY.

1. The liquor law of 1870, section 7, does not render any person who has legally sold such liquor liable to a civil action thereon, and the right of action in all such cases depends on the seller having sold criminally in violation of the act, and to recover, plaintiff must prove all the material facts in the case beyond a reasonable doubt.
2. When a wife is injured in her means of support resulting from her husband's intoxication which is caused by an illegal sale of liquor to him, she can maintain her action against the seller for such injury, and such action can be brought even after the death of her husband.
3. Where the husband dies in consequence of such intoxication, the wife will be entitled to recover for all injuries to her means of support on account of the loss of his labor during sickness and while he lived, and the expenses of such sickness and funeral.
4. Where the wife sues alone, she cannot recover for the support of her minor children, as they may sue for themselves.

This suit was brought to recover $10,000 damages for alleged injury to the plaintiff, in her "means of support," occasioned by alleged sales of intoxicating liquors, by defendant to the plaintiff's husband, Thomas H. Mason, who was a habitual drunkard, and known by defendant to be such; said Mason having died of *delirium tremens*, caused by the use of the liquors sold to him by defendant. He letf plaintiff, his widow, and he also left minor children, who did not unite in the action.

*YAPLE, J., announced the following rules of law in his charge to the jury. 554

1. That the seventh section of the act of 1870 (67 O. L., 102), amendatory of the seventh section of the act of 1854 (52 O. L., 153), by omitting the words "by selling intoxicating liquors contrary to this act," does not render any person who has legally sold such liquor liable to a civil action for any injury to any one resulting from the intoxication of the purchaser caused thereby; for if such words had not been in the law of 1854, such legal sellers would not have been liable.

2. The right of action in all such cases against the seller depends upon his having sold *criminally*, in violation of the provisions of that statute, and to recover against him, a plaintiff must prove all the material facts of his case, beyond a reasonable doubt. (Schaffner v. State, 8 O. S. R. 643; Strader v. Mullane, et al. 17 O. S. R. 626; Fuller v. State 12 O. S. R. 433.)

3. If death be caused by intoxication resulting from illegal sales in such cases, no recovery can be had for the wrongful causing of such death; a wife, child, &c., being only entitled to the labor of a husband or parent as a means of support *while he lives*, death (under the common law, which this statute has not changed), being considered as the act and visitation of God. The act providing for recovery of damages in cases of wrongfully causing death is a special act, independent of the Liquor Law,

---

†The judgment in this case was affirmed by the Superior Court in general term. See opinion 3 Rec. 435. See also note to same opinion.

and governed by rules peculiar to itself. Under it no recovery can be had unless the deceased, had he survived, could have maintained an action, and the damages are merely for pecuniary loss, and are limited in amount by statute; while, under the Liquor Law, damages are not limited and may be exemplary, and the intoxicated person can maintain no action; he violates the law himself by becoming intoxicated, and directly contributes to his injury.

4. Whenever the Legislature can constitutionally make the commission of an act criminal, it can authorize any person who has been injured by its commission to maintain a civil action to recover damages for such injury; and where a person has sold intoxicating liquors to a person in the habit of getting intoxicated, the seller, having knowledge of such habit, and the buyer's wife "is injured in her means of support," in consequence of the intoxication of her husband, resulting from such liquors, she can maintain an action, if brought within four years, against such seller for injury to her "means of support," even after the death of her husband; she has an interest in her husband's capacity to perform labor as a "means of support," and she may recover damages, though she does not show that she has been at any time, in whole or in part, without present means of support. It is enough that the means of future support have been cut off
555 *or diminished, and the jury to the "means of support" is not confined to cases of injury resulting from drunkenness immediately, and during its continuance, but extends as well to cases where the injury results from insanity, sickness, or inability induced by intoxication. Nor, where she sues one seller only, is she barred from recovering against him on account of any substantial injury he may have occasioned to her "means of support," if others have by selling during the same period, also injured her in this respect; and where the husband dies in consequence of such intoxication, she will be entitled to recover for all injuries to her means of support on account of the loss of his labor during his sickness, and while he lived, and the expenses of such sickness and funeral expenses; she can recover, where she alone sues, only for injury to her own means of support, not for the support of the deceased's and her minor children, as they may sue for themselves. Nor can she recover for the loss to the amount of her husband's estate, but the diminution, if any, thereby resulting to her means of present and future support. Nor can she recover for injuries to her property occasioned by such intoxication without alleging such property in her petition and proving injury to the same on the trial. (Duroy v. Blinn & Letcher, 11 O. S. R., 331; Schneider v. Hosier, 21 O. S. R., 98; Mulford v. Clewell, Id., 191).

5. As the foundation of such action is the criminal violation of the statute by the defendant, exemplary damages may be awarded by the jury, though no actual malice or other circumstances of aggravation be proven. The award of exemplary damages is authorized when the plaintiff is found to be entitled to actual legal damages, and may include a reasonable allowance for the time, trouble, expense (including reasonable counsel fees) of prosecuting and maintaining the action. The jury may even go further and allow damages by way of "smart money," exercising this power wisely, and without passion or prejudice, in the exercise of a sound discretion, in view of all the facts and circumstances in the case, remembering that in few cases should a defendant pay more than a plaintiff ought, in justice between themselves, to receive from him.

6. The statute, being in derogation of the common law, must be strictly construed by courts; but, in finding the facts, juries are to be governed by the same fairness and candor in an honest and diligent effort to ascertain the truth, that they should observe in any other case, which is governed by the rules of criminal evidence.

The jury returned a verdict for the defendant.

Reuben Tyler, for Plaintiff.

C. H. Blackburn and *Judge Okey*, for Defendant.

*ATTACHMENT. 637

[Cincinnati Superior Court, Special Term, 1873.]

GEO. W. JOHNSON v. ALFRED MILLER AND FIRMAN JESSUP.

Property in the hands of an assignee in bankruptcy, payable to the credit of the bankrupt, is not subject to attachment to such creditor from a state court for want of jurisdiction to make an order on the assignee; but the proper proceeding is to have a receiver appointed by the state court, to receive such effects and account to the court for them.

YAPLE, J.

Miller and Jessup were partners. Jackson sued them, individually, on certain firm promissory notes they made to him. Jessup had become a non-resident of the state, and the plaintiff caused an attachment to be issued against him. His copartner, Miller, owed him money; but Miller had been declared a bankrupt by the U. S. district court, and E. S. Throop was his assignee in bankruptcy. Jackson garnisheed him. Throop answers, setting up that he is such assignee, and has certain effects of Jessup in his hands, as such, which are coming to Jessup from Miller. He denies that this court can make any order upon him for want of jurisdiction, that being in the U. S. district court alone, and asks to be discharged.

I do not think that this court can make any order upon him. Plaintiff, Jackson, should have a receiver of Jessup's effects appointed by this court. He would represent Jessup in the bankruptcy distribution, and would receive from Miller's assignee all moneys coming to Jessup, and then account to this court in this case, for them.

Property in the hands of an assignee in bankruptcy that may be payable to any creditor is not subject to attachment against such creditor.

In re Bridgman, 2 B. R., 84 Bump, Bkr., 430.

Whether the plaintiff can have a receiver appointed or not—Jessup being a non-resident of the state, and none of his property in the jurisdiction of the court—will not be passed upon until a receiver shall be applied for.

1 # *BILL OF LADING.

[Superior Court of Cincinnati, General Term, April, 1873]

POMEROY, MENDENHALL & CO. v. D. WILL, ET ALS.

1. If the owner of merchandise deliver it to a common carrier to be carried and delivered to a named consignee, and take from the carrier a bill of lading, consigning such merchandise *absolutely* to such consignee, omitting all words of negotiability, as "or bearer," "or order," etc., but does not deliver, or send any bill of lading to the consignee, but retains the same himself, the carrier is his agent alone, and he may pledge or transfer the goods, by pledging or transferring the bill of lading, at any time before such goods come into the possession of the consignee, no matter what contract in relation to the goods may exist, or what the general state of accounts may be between the consignor and the consignee.
2. Until the owner of personal property voluntarily parts with the *possession* of it, he may sell or pledge it to any *bona-fide* purchaser, or pledgee, though he be under a *contract obligation* to sell and deliver, or pledge all his personal property to another, who may have advanced him money upon the faith of such contract to more than the value of all his property.
3. A bill of lading is unlike a bill of exchange or promissory note, in this; the latter are choses in action, credits being property, and having a value in and of themselves, and can be sold and delivered as property; while the 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 and delivered, just as if bodily present, by the transfer of the bill of lading by the owner of the property. Its office is to effect the delivery of the possession of property bought or taken in pledge, which is not present, but in transit to some place of consignment.

2 *4. In a case governed by the first and second propositions of this syllabus, a banker who discounts for full value and in good faith a bill of exchange attached to such bill of lading, for the consignor, and drawn by the consignor upon the consignee for acceptance, *before* the goods forwarded reach the consignee, can recover of the latter the amount of such bills of exchange, if not accepted and paid after the consignee shall receive and keep the goods, even if the consignee had an agreement with the consignor that all the latter's merchandise should be shipped to him to sell on commission, and to repay him for advances made under such agreement in excess of all the consignor's goods.

YAPLE, J.

The defendants in error, Will, *et als.*, recovered a judgment in special term against the plaintiffs in error, Pomeroy, Mendenhall & Co., for $1,042.52, and costs, because of the sale and appropriation by the latter of the proceeds of certain iron consigned by one Long & Smith to Pomeroy, Mendenhall & Co., as factors of Long & Smith, upon the bills of lading, for which iron Long & Smith obtained from the Vinton County Bank money by the discount of bills of exchange drawn by them in favor of the cashier of the bank upon Pomeroy, Mendenhall & Co., and which bills of exchange they refused to accept or pay.

The case was tried to the court—a jury being waived by the parties—and it is claimed here that the judgment is against law and the manifest weight of the evidence. The bill of exceptions contains all the evidence adduced upon the trial.

Long & Smith were the lessees from the Cincinnati Furnace Company, of the Cincinnati Furnace, situate on the line of the Marietta and Cincinnati Railroad, about one hundred and twenty-five miles east of Cincinnati, and were engaged in manufacturing pig-iron from the ore.

Pomeroy, Mendenhall & Co. were large dealers in iron, both upon their own account and as factors for others, in Cincinnati.

Will, and the other plaintiffs below, who were partners under the firm name of the Vinton County Bank, were engaged in the business of banking at the town of McArthur, in Vinton county, about nine miles by the common road, east of the Cincinnati Furnace, and some fourteen miles east by the railroad, which runs within four miles of McArthur.

There is a railroad station at Cincinnati Furnace, and one James McLandburgh was the railroad agent there; and he was also one of the Cincinnati Furnace Company, lessors of Long & Smith, and the father-in-law of Long. The office of Long & Smith, and of the railroad company, were kept in the same room, and one Ackber Mitchell was the book-keeper or clerk of Long & Smith, and also did the writing McLandburgh, the agent of the railroad company.

Pomeroy, Mendenhall & Co., and Long & Smith, entered into the following agreement:

*"CINCINNATI, *March 23, 1870.* 3

"We agree with Messrs. Long & Smith, of Cincinnati Furnace, to receive their iron upon commission, make time advances of paper on same, at rates to be agreed upon, from time to time, with the understanding that whenever such paper falling due any month shall exceed the amount of sales during such month, we have the authority to re-draw for such excess upon Messrs. Long & Smith, they agreeing to protect and pay them. Messrs. Long & Smith are to have the privilege of making return draft at four (4) months for amount of such draft of ours upon them.

"POMEROY, MENDENHALL & CO."

"CINCINNATI, *March 23, 1870.*

"We agree to make Pomeroy, Mendenhall & Co., of Cincinnati, Ohio, our sole agents in this market for the sale of our manufactured pig metal, to consign to them—*and to them only*—all the metal we send to the Cincinnati market for the duration of one year from this date, and to pay them ten (10) per cent. interest on all cash advances.

"LONG & SMITH."

The parties began dealing with each other under such agreement, Long & Smith shipping pig-iron, and Pomeroy, Mendenhall & Co. making them large advances—largely, in fact, in excess of iron shipped; but Pomeroy, Mendenhall & Co. treated all iron, including the iron out of which this suit grew, as received by them for sale on commission for Long & Smith. The latter were charged with all the expenses of shipment, including cost of railroad cars, paid by Pomeroy, Mendenhall & Co. on receiving the iron. If iron rose or fell in the market, Long & Smith received the gain or bore the loss, when the same was sold. Pomeroy, Mendenhall & Co. also charged them with interest on all advances made for commissions and storage.

Iron not coming to the factors as fast as they expected, or sufficient to cover all advances, about July 22, 1870, one of the firm of Pomeroy, Mendenhall & Co. went to the Furnace, and was there promised by Long & Smith that every pound of iron they should thereafter make should be consigned to Pomeroy, Mendenhall & Co., to cover drafts and cash advances already given, and that might be given; and that as fast as the iron was made they would take it to the depot, pile it up, and mark it for

Pomeroy, Mendenhall & Co., and subject to their order. Further advances were refused at that time until Long & Smith should ship enough iron to cover their account; and no iron was then manufactured, but was in the native ore.

Iron not being consigned as expected, one of the firm of Pomeroy, Mendenhall & Co., Mr. Joseph S. Kitchell, went to the Furnace on July 28, 1870, and was assured that Long & Smith were doing their *best to turn out iron, and that some was then made and should be forwarded just as soon as cars could be got. Kitchell asked them how much iron was made and they informed him they had about four car loads then ready, *or nearly ready*, and agreed to send what was made, and showed it to him. They said it, with what the "heat" on hand would yield, would make about four car loads. On Monday, August 1, Kitchell returned to Cincinnati, stopping at Chillicothe, about twenty-five miles west of the Furnace, and arranged with the car dispatcher to furnish Long & Smith cars to ship iron. The second day following, Kitchell was again at the Furnace and saw freight cars there—*four*, he thinks—among them those in dispute, and he saw them loading. But it nowhere appears that any iron was piled up and *marked* for Pomeroy, Mendenhall & Co. Long & Smith shipped to Pomeroy, Mendenhall & Co., commencing September 2 and ending September 5, 1870, seven (7) car loads of pig-iron, four of which cars, Nos. 941, 330, 371, and 149, shipped respectively, on September 2, 3, 4 and 5, 1870, contained the iron out of which this action arose.

Long & Smith did not deliver or forward to Pomeroy, Mendenhall & Co. any bill of lading for any of these four car loads of iron, but retained such bills themselves. Such bills of lading were as follows:

"CINCINNATI FURNACE, *August 2, 1870.*

"Shipped by Long & Smith, on the Marietta and Cincinnati railroad, the following property * * * marked and *consigned* as in the margin, which they agree to deliver * * * at Cincinnati, Ohio, * * * upon the payment of charges. * * * Rate from Cincinnati Furnace, Cincinnati, Ohio, $4 a ton.

MARKS.	PROPERTY.
Pomeroy, Mendenhall & Co., Cincinnati, Ohio.	One car pig-metal, Car 941, M. & C. R. R.

J. MCLANDBURGH.

MITCHELL, Agent."

All are alike in every particular, except the dates and numbers of the cars described in each. When at the station at the Furnace, after the iron had all been delivered to the railroad company for carriage, in the absence of Long & Smith, Kitchell asked Mitchell, the book-keeper, who was also acting clerk for McLandburgh, the railroad agent, for the bills of lading, and was told by him that Long had them in his possession to procure acceptances upon them; and Mitchell then made out and gave to Kitchell what he calls "duplicates," which Kitchell accepted. Whether Mitchell in doing this assumed to act for the railroad company, or for Long & Smith, it is clear, that he is not shown to have had any authority from the latter to do so, and such papers so given to the plaintiffs could, therefore, give them no right to the iron which they did not have before. On August 2, 1870, between the hours of twelve and three o'clock in the afternoon, Long

&*Smith procured from the Vinton County Bank the discount of a bill of exchange, drawn by them upon Pomeroy, Mendenhall & Co., for $300, to which bill of exchange the bill of lading of the iron shipped that day was attached; and on August 5, 1870, about one o'clock in the afternoon, they procured three other bills of exchange for $300 each, dated the 3d, 4th and 5th of the month, drawn as the first one, to be discounted by the bank, a bill of lading of even date being attached to each bill of exchange, covering the iron in question. 5

The bank discounted all this paper in good faith, paying full value for it, and without any actual notice of the rights or claims of Pomeroy, Mendenhall & Co., whose advances to Long & Smith exceeded the value of all the iron shipped to them, including these four cars. Pomeroy, Mendenhall & Co. acted throughout, and advanced their money, in the utmost good faith.

Long, in his deposition, testifies that, on the morning of the 5th of August, he advised Kitchell that he was going to draw acceptances upon Pomeroy, Mendenhall & Co. upon this iron. He does not state what reply, if any, Kitchell made. Mitchell, the book-keeper, also testifies that when Kitchell asked him for the bills of lading, he informed the latter that Long had them for the purpose of procuring acceptances upon them, and that Kitchell said he would write to the house to accept such bills, and asked for and procured pen and paper to write the house to that effect.

Kitchell admits in his testimony that he procured pen and paper of Mitchell, and wrote to the house. The letter the parties were unable to find and put in evidence. He also swore that, just as he got on the cars to come to Cincinnati from the Furnace, Long told him he was going over to McArthur to draw drafts, to which he made no reply. He does not undertake to state the contents of the letter he wrote at the Furnace office. In September, 1870, or earlier, Long & Smith became insolvent, and made an assignment for the benefit of their creditors.

The question then presented for our decision is, Which of these parties—the Vinton County Bank, or Pomeroy, Mendenhall & Co.—shall bear the loss of the money paid by the former for these bills of exchange?

The statement of a few settled rules of law may aid us in arriving at a correct conclusion. Where goods of a specific character are contracted to be purchased, but which have to be produced or manufactured, subsequently, no property in them can be acquired by the purchaser when they come into existence without a legal delivery of them to him by the seller. If the latter refuse to deliver, the only remedy of the contracting purchaser is an action for damages for breach of the contract. He can not tender the price and replevy.

And no property in goods contracted to be purchased, can pass to *or vest in the buyer until such goods are *individualized* or mutually identified between the parties, so that by the terms of the contract it may be known what particular goods they are, as distinguished from all other goods of a like kind in existence. 6

In this case, unless the same was effected by the shipment to them, we are satisfied that there was no legal delivery of this iron to Pomeroy, Mendenhall & Co., by Long & Smith, prior to such shipment for any purpose. Surely there was no delivery on July 22, 1870, when the agree-

ment was so modified as to require all iron thereafter to be made by them to be shipped by Long & Smith to Pomeroy, Mendenhall & Co., for the same was then in the native ore. It did not pass when Kitchell was at the Furnace on the 28th day of July, for then only a portion was in pig iron, and the residue was in the process of making, and which would be, and was, commingled with that already made.

Kitchell, on August 1, saw iron, and cars to convey it, and it was shown him by Smith; but the evidence satisfies us that this was done, not with any view to deliver the iron then and there, but simply to satisfy the parties that iron could and would be shipped to cover former advances. The court, at special term, must have so found, and as such finding is not manifestly contrary to the evidence, we can not, even if we differed as to the preponderance of the evidence on this point (and we do not), reverse the judgment on this ground.

As Pomeroy, Mendenhall & Co. had made advances *generally* on iron shipped and to be shipped to them by Long & Smith, to be sold on commission as *factors* of Long & Smith, in excess of all such iron, including that out of which this controversy grows, they could only acquire a lien upon such iron, for such advances as should come into their *legal possession.* From the moment of such possession they would hold it in pledge for such advances. Until then, their only remedy would have been an action against Long & Smith for breach of the contract between them. Now, what is *legal possession?* Here, we may say, that our law books are almost silent, as they are in defining what a *right* is. Both are *illustrated* by instances, not *defined*, in the books and cases dealing with *remedies* In such a case, upon such facts, there was or was not a legal possession or a legal right. The proper definition, the generalization has not been made.

Savigny published a work upon this subject (Possession) founded upon the Roman law, in 1803, which was republished in Vienna, in 1865, and translated by Sir Erskine Perry, that treats the subject more thoroughly than has been done elsewhere. From his work it is to be deduced that "possession, in a legal sense, is the determination to exercise physical control over a thing on one's own behalf, coupled with a capacity of doing so, and is, therefore, *of necessity exclusive.*" If two are jointly possessed, each is possessed of the whole and of his half. The existence of *intention* to exercise control is necessary. The
7 *law supplies it for minors, lunatics and married women, on whom it casts or forces property, until they are provided with a guardian or trustee to exercise it for them. Hence, property may be lost by intentional abandonment.

But "corporal contact is not the physical element which is involved in the conception of possession." This is illustrated by the supposed case of a traveling footman, who sits down upon a log of timber to rest by the wayside, and takes his bundle from his shoulder and lays it aside. He is not in possession of the log upon which he sits; he is of the bundle which he has laid aside. The real owner of the first may compel him to arise from it, but cannot take into his hands the latter.

Also, one may be in possession by a representative. "The representative must have the physical control over the thing; he must determine that this physical control shall be exercised on behalf of his principal, and the principal must assent to its being so exercised." We say goods are in the *possession* of a carrier, agent, or servant, when they

are simply in their *legal detention*. This is even so in the case of a mortgagor of personal property, who retains possession of the mortgaged chattel. It may be of value to him, is actual and legal in its character, and subject to execution. By the Roman law, and, I think, at common law, the same is the case with borrowed, or hired, or bailed goods. In the case of a *pledge* under both systems, the possession is considered as in the pledgee, and retainable by him until the conditions upon which the pledge was made have been fully complied with by the pledgor; hence, relinquishment of possession is abandonment of the lien attaching to the pledge.

Here, then, to acquire a lien upon this iron for their advances to Long & Smith, and to hold it valid against them and purchasers from them, Pomeroy, Mendenhall & Co. must have acquired possession of it.

As physical contact is not necessary to create possession, it may be acquired in the absence of the property, the possession of which is to be changed from one man to another. If the property is distinguished, identified, and capable of being physically controlled as individualized property, separate from all other property of a like kind, and this, and the terms upon which possession is to change, be mutually agreed upon and intended by the parties, possession can pass from the one to the other, though the thing be absent. To effect this in such a way as to facilitate the business of the world as property is bought and sold, though crossing the ocean by ship, or a continent by rail, the law has devised certain authorized modes of effecting such sales and changing possession while it is hundreds or thousands of miles away, and may not come to hand for days or weeks or months, during which time it may be sold and change possession a number of times.

*Possession always being more than a mere equitable—a *legal* property, such authorized modes are *legal* and not merely *equitable* 8
in their character. An equitable right to a specific piece of property can only give a right to specific performance of the contract, or an action for not performing it; while a legal title gives possession, or a right to enforce it. With lands, if one be a boarder in the family of another, he is not in possession of the house; but if the owner, with whom he lodges, conveys it to him by deed, he at once becomes invested with the possession, though the relations of the parties have not changed otherwise. Not so if he had simply purchased the house by contract, and paid in full for it; the seller would still be in possession. In commerce, one of the modes of selling and delivering possession of personal property while absent and in transit to some destination, is by *bill of lading*. It designates the identical property, and its possession is as the possession of the property itself, and may be passed from one to another, the same as the property, the idea being that it is the property which does pass. Bills of exchange and promissory notes are credits—valuable property in and of themselves. Not so the bill of lading: it merely represents the particular property which is described in it. The value is in that. The bill is its symbol, the transfer of which transfers the property. Its transfer is a legal mode of delivering the property itself to the transferee. The usual mode in shipping property is to have triplicate bills of lading issued. One the owner or forwarder of the property, the consignor, retains; one he sends to the consignee, and the other is retained by the carrier, so that he may know and take due care of the property while in his charge, carry it to its destination, deliver according to the forwarder's directions, and

collect his charges. When this is properly done he has no further liability. But grave questions may arise between consignor and consignee thereafter, or between their assignees of the property by their having assigned the bill of lading in their possession, respectively. If the goods shipped have been purchased by the consignee, they vest in him the moment they are shipped and consigned, subject to the seller's right of stoppage *in transitu*, in case of the purchaser's insolvency before the carrier delivers them to him. But this right of the seller may be defeated if he shall have sent to the consignee a bill of lading making the goods deliverable to him, or to bearer, order or assigns, and the latter shall have received it, and passed it away for value to a *bona fide* purchaser or pledgee; for the words "bearer," "order" or "assigns" amount to express written authority from the consignor to the consignee to sell, pledge or dispose of the goods.

If the bill consign the goods to some person for, or on account of, the consignor or bearer, etc., he, of course, can sell or pledge them by transfer of the bill, for it shows him to be the owner. If the bill contains a condition, as that the purchasing or factor consignee shall
9 *pay "A" a sum of money, the consignee must pay that sum before he can hold the goods discharged of, or free from such condition. And this rule extends to cases where the consignee has notice, when he receives the goods, of any such conditions not incorporated in the bill of lading, for he accepts the goods with the conditions imposed by the consignor. If the bill of lading be a "clear" one, that is, from consignor to consignee absolutely, as the bill in this case, the words "or bearer," &c., be omitted, showing in no way that the consignor has any interest in the property shipped, but that, *prima facia*, it belongs to the consignee, a purchaser or pledgee of the consignor would be put upon inquiry as to the legal rights of the consignor in the property, to the same extent as if consigned to the consignee, or his order, instead of on account of the consignor or his order. If the consignee be the purchaser, or if he has made an advancement upon the particular property covered by the bill of lading, he will take the property as against the consignor's purchaser or pledgee; for the making of the bill and delivery to the carrier as agent of both the parties, vests the *possession* in the consignee. And, in this case, as the bill of lading purports to consign the goods absolutely to the consignees, Pomeroy, Mendenhall & Co., disclosing no interest in the consignors, Long & Smith; and as Long & Smith were indebted to them for general advances, more than all the iron was worth, for which they had a promise from Long & Smith to ship all their iron, we would hold that the iron had actually been delivered to the consignees, per bill of lading, and they thus vested with the legal title thereto, which would be paramount to that of the bank (for it could acquire none from Long & Smith, if they had parted with it to Pomeroy, Mendenhall & Co.); but for one fact *Long & Smith had no bill of lading made out for, or sent to, the consignees.* They retained it themselves, merely shipping the goods to the address of Pomeroy, Mendenhall & Co. The carrier was their agent alone, not of both parties. This indicated a clear intention on their part, when they shipped the iron, to retain the title to it and its control and disposition until it should actually be received by Pomeroy, Mendenhall & Co., at which time their possession would commence, and they be enabled to hold it for all previous advances. So they as owners did not

part with the possession, and could pledge it as they did by giving it into the possession of the bank by means of the bill of lading.

The making out and delivery to Kitchell for Pomeroy, Mendenhall & Co., of what he calls "duplicates," by Mitchell, the book-keeper of Long & Smith, and clerk for the railroad agent, was wholly unauthorized by Long & Smith, it having been done without their knowledge or consent, and vested nothing in Pomeroy, Mendenhall & Co. He could not dispose of this property.

Upon the evidence there is great doubt whether the car-load shipped on August 3, had not reached the consignees before the *bank discounted the bill drawn upon it, on the afternoon of August 5. The 10
car reached Cincinnati, August 4, and the notice of the railroad company to the consignees is dated August 5, 1870, and there was evidence that it is the usual custom of the company to give consignees notice at once. When they did so—that is, gave due and reasonable notice to Pomeroy, Mendenhall & Co., so as to afford them a fair opportunity of providing suitable means to take care of, and carry off the iron—that was a delivery; and if this occurred before the discount of the bill by the bank, on the 5th, it could not recover on that car-load of iron from Pomeroy, Mendenhall & Co. But this evidence is not very definite, and the court may have found it insufficient to establish that the iron was delivered by the carrier to Pomeroy, Mendenhall & Co. before the bank received the bill of lading. The court may also have found properly enough upon the evidence, we think, that Kitchell, a member of the firm of Pomeroy, Mendenhall & Co., agreed with Long & Smith that they might so draw upon the iron, and that the firm would accept the drafts. If he did not, Long & Smith were guilty of a fraud, which the law will not presume, or they were mistaken as to Kitchell's agreeing that they might so draw.

This was a matter of fact for the judge who tried the case to determine and not for us, sitting to review his findings upon petition in error.

The Statute—1 S. & C., 420, &c., secs. 60, 61, 68, &c.—we do not think affects any question in this case. Long & Smith retained the bill of lading, and merely *forwarded*, but did not intend or assume to vest the consignees with possession. This statute is the same—copied from—that of New York, 3 Rev. Stats., 76

The judgment is affirmed.

King, Thompson & Longworth, for plaintiffs in error, cited: Lickbarrow v. Mason, 2 Dun. & E., 63. Coombs v. Bristol, &c., R., 3 Hurl. & Nov., 1. Brandt v. Browley, 2 B. & Ad., 932. Turner v. Trustees, &c., 6 Law & Eq., 507. Shepherd v. Harrison, 5 L. R. Eng. & Japp., 116. Benj. on Sales, 288. 2 Kent Com. 548 marg., 3 id. 208 marg. and notes. Ang. on Car., secs. 497, 503. Griffith v. Dugleden, 6 Serg. and R., 429. Arbuckle v. Thompson, 37 Pa. St., 170. Conrad v. Atlantic Ins. Co., 1 Pet., 386, 445. Allen v. Williams, 12 Pick., 297, 301. Sweet v. Barney, 23 N. Y. R., 335. Grove v. Brien, 8How., 429, 1 Id. 384. Jordan v. James, 5 O. R., 88, 100, 107. *Owen v. Johnson, 2 O. S., 142, 11
145–6; 1, S. & C., 420, Secs. 60, 61, 68. Mitchell v. Ryan, 3 O. S., 377. Bates v. Conklin, 10 Wend., 390. Langdon v. Higgins, 4 Hurl. & Nov., 402. Grove v. Brien, 4 How., 429. Stanton v. Eager, 16 Pick., 467. Pease v. Gloanes, 1 Priv. Counc., R. pp. 225, 6.

Dunham & Foraker, for defendant in error, cited: The Bank of

Rochester v. Jones, 4 Coms. 497. Allen v. Williams, 12 Pick, 300. 3 Pars. Cont., 271, &c. 1 Pars. Cont., 98. 2 Wash., C. C. R., 283, 287, 288. Marine Bank, &c., v. Wright. 46 Barb. 45; 3 C., 48 N. Y. R., 1. Cayuga, &c., Bank v. Daniels, 47 N. Y., 631. Blossom v. Champion, 28 Barb., 217. Irving Nat'l Bank v. Emery, 1 Cin. Sup. Ct. R., 76.

---

329 **BOND—BENEVOLENT ORGANIZATION.**

[Superior Court of Cincinnati, General Term, October, 1873.]

O'Connor, Tilden and Yaple, JJ.

JAMES DALTON, ET AL., v. MIAMI TRIBE, NO. 1, ETC.

1. A bond regular upon its face, apparently duly executed by all whose names appear therein, purporting to be signed and sealed by the several obligors, and actually delivered by the principal without stipulation, reservation, or condition, cannot be avoided by the sureties upon the ground that they signed it on the condition that it should not be delivered to the obligee unless it be also signed by another person, who did not sign it, when it appears that the obligee had no notice of such condition, and nothing to put him upon inquiry as to the manner of its execution, and also that he has been induced upon the faith of such bond to act to his own prejudice.
2. Where the by-laws of a benevolent organization provided that the bond of its treasurer should be signed by at least three sureties, and a bond was accepted with only two, the obligors who signed the bond are not discharged from liability, the by-laws being for the protection of the organization and not a contract between it and the obligors.

O'CONNOR, J.

This is a proceeding in error to reverse a judgment rendered at special term.

It appears by the petition of the defendant in error, that Miami Tribe, No. 1, is a corporation duly incorporated for benevolent purposes under the laws of the state of Ohio, for the care of their members during sickness, and the care of the widows and orphans of their members after the decease of a brother. That on the 31st day of August, 1871, Alfred Miller, who had been elected one of the trustees of the tribe, and who was to be intrusted with its moneys and securities, and James Dalton and Martin Weber as his sureties, executed and delivered to the tribe a bond in the sum of three thousand dollars, conditioned for the faithful performance of his duties, and the re-delivery to the tribe, at the end of his term, of the money and securities which the tribe was then entitled to receive. That upon the delivery of said bond the tribe intrusted said Miller, as trustee, with its money and securities, to the amount of $3,000,
330 and that said Miller became derelict and *appropriated said moneys and securities to his own use, and the tribe asks judgment.

To this petition, James Dalton, one of the plaintiffs in error, and defendant below, filed his separate answer, in which he says that the bond signed by him was signed with the understanding on his part that the same should be executed in conformity with the by-laws of said tribe, which by-laws require from its trustee a bond with *three* sureties before it shall be accepted or any money or property turned over to said trustee, and that he relied upon the plaintiff to cause the bond to be so

executed before it should be accepted and the funds of the plaintiff delivered to said Miller. That the plaintiff disregarded said by-laws, and took from said Miller a bond with only two sureties, without the knowledge or assent of said Dalton, and delivered to sa d Miller as trustee its funds. And therefore the said Dalton claims that he is not liable on said bond.

Martin Weber, the other plaintiff in error, and defendant below, also filed a separate answer, in which he says that when he signed the bond set out in the petition, he understood that there were to be at least three sureties, as said by-laws provided, and that he signed it upon that condition, but that the plaintiff, without his knowledge or consent, failed to get more than two sureties, and that, therefore, he is not liable on said bond. This answer was filed in October, 1872. Between four and five months thereafter, Weber filed an amended answer, in which he says that before he signed the said bond, he inquired as to the number of sureties, and was told that there were to be three; that he signed it upon that representation and would not have signed it otherwise; that after he signed said bond, he permitted said Miller to take the same for the purpose of procuring a third surety, and with the understanding, and upon the condition, that said bond was not to be delivered, nor to take effect, unless such additional surety should first be obtained. And that in violation of said condition and understanding, said Miller, without his knowledge or consent, did deliver said bond to said plaintiff without procuring said additional security. Wherefore he denies that the bond ever took effect as his bond.

The case was tried below without the intervention of a jury, and resulted in a judgment in favor of the plaintiff and against both the defendants, for the sum of $1,805.05.

On the trial Dalton testified that Miller brought the bond to his office and asked him to sign it. He said he was going to get Mr. Weber and Dr. Doherty, who had been on a previous bond with him, to sign it also. That he had a copy of plaintiff's by-laws, and would not have gone upon the bond unless * he had known them. That he belonged to other orders and sup- 331
posed he knew from them the construction of these by-laws. That he signed upon the assurance that there were to be three sureties, that Weber was to be one and Dr. Doherty the other. That he delivered the bond to Miller with that understanding. That he never had any dealing with Miller except that Miller owed him $2000.

Martin Weber, the other defendant, testified as follows: "I had been dealing with Miller in 1871, and in August, 1871, went to his office to render my monthly statement and receive Miller's note for the amount due me on it. Miller said to me, 'here is a bond and I want you to put your name on it.' I said I did not like to do it, and asked how many securities are there to be. He said three, and on that condition I finally signed it and handed it back to him. It was not to be delivered nor take effect until all three securities had signed it. I told Miller that when I handed it to him."

On cross-examination—"Dalton's name was on when I signed. I didn't know anything about him except from hear-say. He was said to be good."

Alfred Miller, the principal on the bond, testified that the tribe ac-

cepted the bond, and that he said nothing when he presented it, nor afterward.

A copy of the by-laws of the tribe was offered in evidence, showing that three sureties were required by said by-laws at the time said bond was accepted.

This is all the evidence that has any bearing upon the legal questions which have arisen in the case.

The defenses of Dalton and Weber are different. The answer of Dalton is, in substance, that the plaintiff accepted the bond with only two sureties, in violation of its by-laws, which required three, and that as he signed the bond with the expectation and understanding that the tribe would adhere to its by-laws, that he therefore is discharged.

The original answer of Weber is substantially the same as Dalton's, and each raises the question whether the tribe could legally accept a bond with a less number of sureties than its by-laws required, without the consent of those who had previously signed. But the amended answer of Weber sets up an entirely different defense, to wit: that after he signed said bond, he permitted said Miller to take the same for the purpose of procuring a third surety, and with the understanding and upon the condition that said bond *was not to be delivered* to said plaintiff, nor to take effect, unless such additional surety should be first obtained. In other words, that the bond was delivered to Miller *in escrow*, and as the condition was not performed, Miller never had authority from him to de-
332 liver the *bond to the tribe. By Weber's amended answer then, it is no longer a question whether the tribe could legally accept a bond with less than three sureties, but whether Weber ever delivered or caused to be delivered any bond to the tribe.

First as to the defense of Dalton. He testifies that he signed the bond upon the assurance from Miller that there were to be three sureties; that Weber was to be one and Dr. Doherty the other, besides himself. And that he delivered the bond to Miller with that understanding. But he does not testify, nor does he set up in his answer, that he instructed Miller not to deliver the bond to the tribe until it was signed by the third surety. Nor does he testify that the writing was not to take effect as his bond until the third surety had signed it. At most, his testimony is to the effect that he trusted to the assurances of Miller, his co-obligor, that Miller would not deliver the bond to the tribe until he had procured the third signature. If Miller deceived him in this, the case of Bigelow v. Comeggs, 5 Ohio St., 256, applies, where the court held: "That a replevin bond which the statute required to be executed by the party with two or more sureties, is not void because actually signed and delivered by the party with one surety only, the name of another person appearing on the bond as a surety, being a forgery. That the obligor of a bond can not avoid his liability, by showing that his signature to the bond was procured by the fraud of one of his co-obligors, without any participation on the part of the obligee." And the court places the decision "upon the settled rule, that where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence and commits the first oversight, must bear the loss." So in this case, if Dalton suffered himself to be deceived by Miller the loss must fall on him, and not upon the tribe, which was the innocent obligee.

But it is further claimed by Dalton, that the tribe could not legally accept the bond as against him, with less than three sureties, its by-laws

providing that every bond should have at least that number—in other words, that a bond with less than three sureties is, by the by-laws of the tribe, absolutely void as against the obligors, unless their consent is first had that the bond may be executed by a less number.

Now it is evident that the by-laws were made for the protection of the tribe and not for the protection of those who guarantee the faithfulness of its officers. And if the tribe choose to take a less number of sureties than the by-laws entitle it to require, it is simply a waiver of one of its own rights, but not a waiver of any right of an obligor on a bond. The by-laws can not be regarded as a contract between the tribe and the obligors upon the bond of its officers. As a matter *of fact it must frequently happen that the obligor is wholly 333
ignorant of the by-laws, not being a member of the tribe. It cannot be claimed that these by-laws have any greater force than a public statute, yet it is well settled that a bond signed by a less number of sureties than the statute requires, is nevertheless a good common-law bond. In the case last cited in 5th Ohio St., the court states as a general proposition, that "a replevin bond which the statute required to be given with two or more sureties, is not void because actually signed and delivered by one surety only."

We think, therefore, that Dalton has offered no valid defense to his liability on the bond.

Next as to the defense of Weber. Assuming in the first place that his unsupported testimony sustains his amended answer, in which he in effect sets up the delivery of the bond to Miller *in escrow*, and that the condition, before delivery to the tribe, was not complied with, does it constitute a valid defense to this action? The substance of his testimony is that he signed the bond and handed it back to Miller. That it was not to be delivered nor take effect until all three sureties had signed it. That he told Miller that when he handed the bond to him. That Dalton's name was on the bond when he signed it, and that Dalton was said to be good.

A number of authorities were cited by the plaintiff in error for the purpose of establishing the proposition that such conditional delivery of a bond could not bind the obligor unless the condition was observed. The authorities, however, are conflicting, but for convenience and brevity it is only necessary to refer to the case of The State v. Peck, 53 Maine, 284, a case decided in 1865, and in which all the principal cases bearing upon this question, as well as the cases relied on by the plaintiffs in error, are carefully reviewed.

The facts of that case were, "that Benjamin D. Peck, duly elected treasuror of state for the year 1858, before entering upon the duties of his office, in conformity with constitutional and statutory provisions, presented to the legislature the bond in suit as his official bond. It was, when thus presented, upon its face, a perfect instrument, drawn according to the requirements of law, and apparently duly executed by all whose names appear therein. It purported to be signed, sealed and delivered by the several obligors, and no question was made as to the genuineness of the several signatures. Peck, the principal, delivered it, without stipulation, reservation or condition, to the committee of the legislature. There was no suggestion from any quarter that the instrument was not in very deed what it purported to be, no indication of incompleteness to put the legislature upon inquiry as to the manner of its

334 execution. *The bond was found satisfactory, duly approved and filed, and upon the faith of it, Peck became treasurer of state. 'The intelligent and wealthy gentleman,' says the court, 'who had *signed* this instrument as Peck's sureties, made no inquiries as to the disposition which had been made of it, and knew that Peck was exercising the functions of the office throughout the year. He proved unfaithful to his trust and they now claim to be exonorated from liability as his sureties,' on the ground 'that some of them signed and delivered the bond only upon condition that certain other gentlemen, who had been co-sureties with them for Peck the previous year, should also execute this bond.' John B. Cummings, one of the sureties, testified that at the time he signed the bond he said to Haines, who had brought the bond to his house, and who was also one of the sureties, that he would sign it only upon the condition that all those persons who were on Peck's first bond should put their names on it. That he mentioned their names. That when he handed the paper to Haines he said to him, 'this goes for nothing unless those names are on; make no delivery of this except those names are all on.'" That he did not know until the defalcation that the others had not signed.

Upon this state of facts the court held: "That a bond perfect upon its face, apparently duly executed by all whose names appear therein, purporting to be signed, sealed and delivered by the several obligors, and actually delivered by the principal without stipulation, reservation or condition, cannot be avoided by the sureties upon the ground that they signed it on the condition that it should not be delivered unless it should be executed by other persons, who did not execute it, *when it appears* that the obligee had no notice of such condition, and nothing to put him upon inquiry as to the manner of its execution, *and also* that he has been induced upon the faith of such bond to act to his own prejudice."

The court says in the opinion that the defendants in that case were estopped to deny that it was their bond, because there was nothing upon its face to put the obligee upon inquiry, and because the obligee had been induced upon the faith of such bond to act to his own prejudice. But that the estoppel imposed by law in that case would not apply "in a case where there was anything upon the face of the paper, or in the circumstances attending the reception of it by the obligee or his agents, to put him upon inquiry, nor where the obligee has not been induced to act to his prejudice by the imprudent act of the obligor," and after a very full and careful review of the authorities the court concludes that "no well-considered case has ever gone further," and that the case "falls within the principle of that great array of cases, from Hern v. Nich-
335 ols, *1 Sal. K., 289, and Lickborrow v. Mason, 2 T. R., 63, 70, hitherto establishing and maintaining the doctrine that where one of two innocent persons must suffer by the acts of a third, he who has enabled such a third person to occasion the loss must sustain it."

We think that the case at bar falls within the principle of the case in 83 Maine, and that the doctrine there announced is the only true and safe one. In the case before us the bond was complete upon its face, and, upon the faith of it, the obligee, who was in no way put upon inquiry, parted with its funds to the principal obligor. And, as was said in the case in Maine, if the doctrine contended for by the plaintiffs in error here can prevail, "it is not easy to perceive why sureties who may hereafter find themselves in a similar unfortunate position may not with

equal propriety come into court and set up (and testify to) some purely mental reservation which should exclude the idea of an intention on their part to make an absolute delivery; for it is certainly true that the question of delivery depends upon an act done and the *intent* with which it is done," citing 30 Maine, 112, and cases there cited.

But there is another view of this case, as affecting Weber, which leads to the same result, that is, the affirmance of the judgment. It was a question of fact for the court below, whether the matters of defense set up in his amended answer were sustained by his testimony. His original answer was the same, substantially, as that of his co-obligor, Dalton. His amended answer, filed more than four months thereafter, sets up the defense which we have been considering. To sustain that amended answer he offered nothing but his own testimony. Miller, to whom he testifies he delivered the bond conditionally, was a witness in the case; was called by the plaintiffs in error; but Miller was not asked a question as to the delivery of the bond to him by Weber, nor does he state a word on the subject. It could not be expected that the defendant in error, the Miami tribe, would voluntarily take upon itself the risk of examining him. In view of all the circumstances of the case, therefore, the court might well be warranted in coming to the conclusion that implicit confidence could not be placed in the unsupported evidence of Weber, and that in fact his original answer was substantially true. Or, as was said in 53 Maine, without expressing the belief that Weber gave willfully false testimony in this matter, "the court may have thought that by one of those fantastic tricks which self-interest plays with memory, this bond was probably confounded in his mind with another not here in suit."

The judgment of the court below must therefore be affirmed as to both the plaintiffs in error.

*Since writing this opinion, our attention has been directed to the case of Dair, et al., v. The United States, decided at December 336
term, 1872, which is published in the Chicago *Legal News* of July 5, 1873, in which the same doctrine is announced as that in 53 Maine, the court citing with approval the case of McCarty, Auditor of State, v. Pepper, et al., 31 Ind., 76, decided in 1869.

Harmon & Throop, for Plaintiffs in Error.

Douglass & Douglass, for Defendant in Error.

FIRE INSURANCE.

[Superior Court of Cincinnati, General Term, 1873.]

O'Connor, Tilden and Yaple, JJ.

MERCHANTS' INSURANCE CO. v. JOSEPH K. FRICK.

1. When a lessee has erected buildings upon his leasehold, which are to be his at the expiration of his lease, with power to remove them, or with the privilege to purchase them reserved to the landlord, such lessee may insure them to their full cash value, as his own; and if asked by the insurance company, in the application for insurance, whether "any other party is interested in the property," he may with truth answer, "No." Nor will the reservation of a lien upon the

property by the landlord for unpaid rent give him an interest *in* the property. A lien is an *incumbrance* upon, not an interest *in*, property.

2. If property be mentioned in an application for insurance and be described in the policy as a hotel, boarding-house and bar-room, such designation is mere matter of *description*, relating only to the then use of the property, and is neither a warranty nor representation that it will be continued to such use in the future. Therefore, if property be insured by such description, the insured may recover for its loss, though it has stood unoccupied for a long time and up to the time of such loss.
3. If such insurance be renewed upon the original application while so vacant, and the agent of the company, taking such renewal, knew at the time that the property was then vacant, the company will be held to have waived such misdescription and be precluded from insisting upon it as a misrepresentation.
4. If a policy of insurance stipulates, that, during the time any business, designated in it as extra or specially hazardous, shall be carried on, the risk shall cease during such continuance, the fact that a carpenter, whose business is denominated specially hazardous, occupies and uses a part of the insured property for the purpose of making repairs to the same, will not affect the insured's right to recover for a loss happening by fire, when it does not appear that such user continued until the happening of the loss. Such clause of a policy must be held to forbid only the habitual or regular use of the property insured for such specially hazardous purpose, and not to the occasional use thereof for a temporary purpose connected with the preservation and proper general use of the insured premises.
5. Where the terms of a policy of insurance require that, upon the happening of a loss, the insured shall give to the insurer immediate notice thereof, and deliver, as soon as possible thereafter, a particular account of such loss, and, upon the happening of such loss, due notice be given, but no proof or account of such loss be furnished or delivered for five months thereafter; and the company, after inquiring into the loss, without waiting for such proof or account thereof, shall decide not to pay the same, or any part of it, upon other grounds than the non-furnishing of such proof, but do not communicate such decision to the insured, persisting thereafter in such claim of non-liability, and do contest, when sued, liability upon other grounds, such insurer will be held to have *waived* its right to require such proof of loss; and, in every case, where an insurance company relies upon failure to give notice or furnish proof of loss as a defense, it must rely upon that *alone;* if it shall defend against liability upon other grounds, it waives such defense.

338

6. The amount for which an insured party can recover, is the value of his interest in the property destroyed (if the amount named in his policy be large enough to cover it), and such value be the cash amount that would be required to replace the property in the same condition it was at the time of such loss. The *market* value of the property is not the true legal standard by which the amount of the loss is to be determined.
7. Testimony, if objected to, of what the property cost the insured to build it, is incompetent, as it would raise collateral issues. The proof of value on the part of the party seeking to recover, should be restricted to what the property *ought* to have cost, and to establishing how such reasonable cost compares with the intrinsic worth of the building, controlled by cost of materials and of construction, at the time of the loss. The cost to the party of the property, etc., can only be drawn out by the defendant upon cross-examination.
8. If, after the jury have retired to consider of the verdict, they return into court for further instructions, their difficulty being as to a question of fact, and they ask the court to consult its notes of evidence and advise them whether such a fact was not testified to by a certain witness, and the court, against the objection of the party against whom the verdict is finally rendered, does so, and answers in the affirmative, such action of the court, if the fact be one at all material, will be error for which the verdict should be set aside. But if such fact is wholly immaterial, the verdict will not be disturbed.

YAPLE, J.

Frick brought suit against the Merchants' Insurance Company of Cincinnati, upon a policy of insurance issued by it to him, insuring

against loss or damage by fire, among other property a three-story frame and a two and a half story brick and a one-story frame building, situated in Cairo, in the state of Illinois, in the sum of $1,666.67 in the aggregate, used by him at the time of insurance, as a hotel, and boarding house, and bar-room, and known by the name of the American Hotel. The insurance was effected with this company, and, in like sums, in three other companies, on October 1, 1867, at noon, for one year, and which insurances were duly renewed for another year, on October 1, 1868. The first two buildings having thus an insurance upon them to an amount of $6,000, were totally destroyed by fire on the 9th day of August, 1869. As the loss, if any should be recovered, is to be divided between the four companies, *pro rata*, it was agreed between the counsel of the parties on the trial, that the jury, if they found in favor of Frick, should simply assess the amount of the loss, that is, the value of the property destroyed. The jury found in favor of Frick and assessed the value of the property, at the time of its loss by fire, at $6,000. Upon this finding, after a motion for a new trial had been made by the company and overruled by the court, a judgment was rendered in favor of Frick. A bill of exceptions, embodying all the evidence and the proceedings of the jury and court was taken, to reverse which judgment, &c., a petition in error was filed here in general term.

*The case is too voluminous to state in detail; and we must, 339
therefore, confine ourselves to the statement of such portions of it as will enable us, intelligibly, to make known our decision of the various questions involved.

Frick held a lease of the lot upon which the three-story frame building stood, which, by its terms, was to expire in 1877, but the building itself was his. The landlord reserved a lien upon it for any rent that might not be paid, but it does not appear that Frick failed to pay the rent promptly, as it became due. The ground upon which the brick building stood was also leased to Frick, upon what terms did not very definitely appear from the testimony advanced at the trial, except that he had the privilege of re-leasing if he should so desire, and if he should not, his landlady was to purchase the building from him.

In his application for insurance, the renewal being made upon such original application, Frick is asked: "13. Is any other party interested in the property?" He answered, "No." It is claimed that this is a material representation and was false; that he should have stated that he only held a lease of the grounds upon which the buildings stood. We think not, unless he had been asked to state whether he owned the grounds upon which the buildings stood. He certainly did own the property insured, and no other person had any interest in *it*. The fact that the landlord might have a lien upon it for rent in case of non-payment, was a mere *possibility*, giving him no more interest *in* the property than the state had by virtue of its lien for taxes. And in a *lien*, other than that of a *conveyance* by mortgage, does not amount to an interest *in* property; it is a mere *incumbrance*. The insured was not asked if there was any incumbrance upon the property. He was asked only: "12. Is the property mortgaged, and to what amount?" He answered "No." His answer was true. It is said there was a mechanic's lien for a small sum for repairs when the policy was renewed. If so, it was not a mortgage, nor did it amount to an interest of another than the insured *in* the property. A lien *upon* property creates no title to or in it. The

rule in relation to putting upon the insured the burthen of communicating every material fact in relation to the property about to be insured, which obtains in marine insurance, does not apply in all its strictness to insurances of property upon land, about which everybody may obtain accurate information. What would be fraudulent concealment in the one class of cases, is not necessarily so in the other. The company, in the latter class of insurances, should frame all the questions it deems necessary to be answered, and give the applicant a fair chance to answer them; otherwise, he may well suppose other facts to be immaterial. This doctrine is well settled in Ohio.

340 *Protection Insurance Co., v. Harmer, 2 O. S., pp. 471, 472, per RANNEY, Judge.

Washington Mutual Insurance Co. v. Merchants' and Manufacturres' Insurance Co, 5 O. S., p. 479.

Lorillard Fire Insurance Co. v. McCulloch, 21 O. S., p. 176.

It is next claimed that the frame and brick buildings were insured as a hotel and boarding-house, and the one-story frame as a bar-room. Yet, that for one year before the loss, and at the time thereof, the insured ceased to occupy or use said buildings for such purposes, but suffered them to become and remain untenanted, whereby the risk was greatly increased. Upon this ground, it is insisted that the policy became void. We can not so hold. The use to which the buildings were put, at the time of the insurance, as mentioned in the application and the policy, was merely a matter of *description*, and in no sense a *warranty*, that they should continue to be so used during the time covered by the insurance. It simply applied to the then condition of the property. "A warranty is never created by construction. It must either appear in express terms, affirmative or promissory, or must, necessarily, result from the nature of the contract." 2 O. S., 468, 469.

We think the agent of the company stated the rule correctly to the insured, in a letter dated April 6, 1869, in answer to one written to him by the latter on March 31, 1869, informing the agent that the property was unoccupied, and that he found so many clauses of forfeiture in the policy, he wished to know if this fact affected its validity. The agent said: "We think you are in no danger from the exceptions and provisions in any of your policies on your hotel buildings. Most all insurance companies incorporate as many safeguards into their policies as they can, and you will find none that are less carefully written than those you have. The exceptions are not all good as a legal bar to payment after a loss has occurred, and have often been set aside by the courts. I think, however, that you should have some careful person sleep in and watch over the main building, which would obviate the necessity of referring to any of the exceptions in the policies. Do this, and no fears need be entertained of exceptions taken by the companies."

Notwithstanding this correspondence in the spring of 1869, it is insisted that the renewal of October 1, 1868, was made upon the original application of 1867, when in 1868 the premises were unoccupied. The agent knew this fact when he wrote the above letter, yet took no steps to cancel the policy, as the company reserved the right to do at any time, with or without cause; and thus prevented the plaintiff from insuring this vacant property, which he might have done with other

341 *insurers. Besides, this agent resided in Cairo, and knew the situation of the property when he renewed the insurance upon it. This

should estop the company. 2 O. S., 469. This constructive representation was as much the company's as that of the insured.

Miller v. Mutual Benefit Life Insurance Co., 31 Iowa R., 217, 224, etc.

Rowley v. Empire Insurance Co., 36 N. Y. R., 550.

It is next claimed as a defense, that for a period of five weeks during the time the premises were vacant, they were occupied "by a *person* who *claimed* to be a carpenter, making alterations, repairs, and improvements, under the orders of the plaintiff, and were unoccupied otherwise during the said space of one year, whereby the risk to the buildings was greatly increased," etc. Now, it is in evidence, that the insured, during this time, caused valuable and costly repairs to be made upon the buildings, but there is no evidence in the case tending to prove that the making of such repairs, or the repairs when made, increased the risk. Many insured buildings are repaired to a greater or less extent, and it does not follow, as matter of law, that any risk is thereby increased. The only inquiry then is—Did such use of the property render the policy void in law? It provides "that in case the above mentioned premises, or any part thereof, shall hereafter be . . used, etc., for the purpose of carrying on or exercising therein any . . business whatever, in any of the articles denominated extra or specially hazardous, etc., then, so long as the same shall be continued, these presents shall cease and be of no force or effect." Such uses of the premises, then, merely suspend the policy while they continue. It is then provided, "that if any addition to or alteration of said buildings or premises shall hereafter be made by the owner, etc., thereof, whereby the danger of loss or damage by fire to said property shall be increased, these presents shall thenceforth be null and void." Now, as we have said, there was no evidence that the additions and repairs or improvements increase the danger of this property. 'All trades and occupations . . where chips or shavings are made," are denominated by the policy specially hazardous, and, by its terms, would suspend the risk while so carried on, but would not wholly avoid the policy. It would again cover the property when such trade should cease. It is not averred in the answer that any such use of the property was made when the loss occurred. It does not even aver that any such use was made of the property, but only, that for the space of five weeks, the premises were occupied by a person who *claimed* to be a carpenter making repairs, etc., under the orders of the plaintiff. It does not state that he made a chip or a shaving; and what is decisive upon the point, it is not *alleged that such person occupied the premises 342
at the time they were burned.

"In Shaw v. Robberds, 6 Ad. & El., 75, one of the conditions of insurance was that the building (a barn) should not be 'made use of to stow or warehouse any hazardous goods.' Lord TENTERDEN, C. J., held, that this must be understood as forbidding only the habitual use of fire, or the ordinary deposit of hazardous goods, and not their occasional introduction for a temporary purpose connected with the occupation of the premises. And he instructed the jury that the introduction of a tar-barrel, for the purpose of repairing the building, was no breach of the condition, notwithstanding it led to its destruction." (See this case which is quoted and indorsed in 2 O. S., pp. 466, 467.)

The English case was one of express warranty.

It is next claimed that while the policy provided that "persons sus-

taining loss or damage by fire shall forthwith give notice thereof, in writing, to the company or their agent; and as soon after as possible they shall deliver as particular an account of their loss and damage as the nature of the case will admit," etc., the plaintiff did not give notice of his loss to the company forthwith nor deliver an account of the loss until five months after the happening of the same, whereby the company claims that the plaintiff has no right of action. It is shown that on the morning after the fire, the agent of the company in Cairo gave the company notice of the loss, and informed the plaintiff that he had done so, and that, in pursuance of such notice, the company sent an agent to Cairo to examine into and report the nature of the loss, which agent did so. This clearly was a sufficient notice upon the ground that the insured made the agent at Cairo his agent, for that purpose, and it was also a waiver of notice.

Ronmage v. Mechanics' Fire Insurance Company, 1 Green, N. J., 110.

Phillips v. Protection Insurance Company, 14 Mo., 220.

Schenck v. Mercer Co. Mutual Insurance Company, 4 Zabr., 447, and any number of cases to the same effect.

After the examination made by the company at Cairo, it and its co-insurers of the property, without waiting for any proof of loss, met and decided among themselves that they were not liable upon their policies, and would not pay plaintiff his loss. The Cairo agent, in giving notice to the companies of the fire, stated that there were strong suspicions of incendiarism, and the evidence shows pretty conclusively that the property was set on fire, but it entirely fails to cast even the shadow of a shade of suspicion upon Frick as being implicated in any way in causing it. Suit was brought in April, 1870. The answer was filed in October, 1870, in which it was specially alleged as a defense, among others contesting the right of the plaintiff to recover
343 on other grounds than that of failure to deliver an account of the loss, that the property was burned by the procurement of the plaintiff. This answer was not withdrawn until in November, 1871, just before the trial of the cause, when it was discovered that there was no evidence to sustain the charge. It is admitted, that if within a reasonable time, these denials of plaintiff's right to recover had been communicated to him, he would have been excused from making any proof of loss whatever; but, that because the company did not thus make known to him its decision, he should have made such proof as a condition precedent to his right to maintain an action upon the policy. He did furnish it, five months after the loss, not having heard from the company, and it refused to pay him, not assigning, as we can find from any evidence, the failure to make such proof within a proper time, as a reason for such refusal. It is clear that the company did not deem such proof necessary to be furnished to enable it to determine whether it would pay such loss or not, and to have furnished it would have been the mere doing of a vain thing. Payment would have been refused all the same whether it was made or not, and to hold it necessary, under such circumstances, to enable the insured to maintain his right of action upon the ground of condition precedent, would, we think, be the enforcement of a barren technicality, to the obvious denial of justice. We think the facts of the case, as above stated, require us to hold that the company waived such proof of loss.

See the case of Protection Insurance Company vs. Harmer, 2 O. S., 453, cited several times above.

Lampkin v. Ontario M. & F. Insurance Company, 12 Up. Canada, 2 Q. B., 578.

Norwich and N. Y. Trans. Co. v. Western Massachusetts Insurance Company, 34 Conn., 561; same parties 6 Blatch., C., C. R., 241.

"The rejection of the claim of the insured by the company, made *after* the time prescribed by the policy for furnishing the proofs of loss has *expired*, upon other grounds than that the proofs were not furnished within the required time, is a sufficient waiver by the company of the non-fulfillment of such a condition, and no new consideration is required to support such a waiver."

Dohn v. Farmers' Joint Stock Insurance Co., 5 Lansing (N. Y.) R., 275.

Owen v. Farmers' Joint Stock Insurance Co., 57 Barb., N. Y., 518.

We are prepared to hold in every case, that where an insurance company relies upon failure to give notice, or furnish proof of loss as a defense, it must rely upon that alone; and *that, if it defends against 344
liability upon other grounds, it waives such defense. This, we think, is the fair conclusion to be deducted from the best considered authorities.

The next question presented for decision, is, as to the *value* of the property destroyed. The policy stipulates that "said loss or damage is to be estimated according to the true *cash* value of the property at the time the same shall happen."

The company claims that the property destroyed had no value; that the buildings stood upon leased ground, upon which the aggregate rent, per annum, was $480; the taxes $200; and the insurance $320; while the total rent derivable therefrom was only $720—in other words, that the possession of the property entailed an annual loss upon the plaintiff of $280. It, however, sets up no counter claim to recover from the insured for the benefit so conferred upon him by the fire; perhaps for the reason that the company did not cause it to be burned. The value to be compensated for in such cases, is always "the true and actual cash value of the property insured at the time the loss shall happen." This is the common-law rule, and the present policy simply expresses such rule.

Wolf v. Howard Insurance Co., 1 Sandfr. N. Y., 124; S. C., 3 Seld. N. Y., 583.

We take it that the sound and only practicable ordinary rule is to ascertain how much money will be required to restore the property burned; and if that be as much or more than the amount for which the property is insured to award a recovery for the full amount of the property. Cash *market* value can not be the test. Owing to its construction for a particular purpose or use, and to its surroundings, the market value of a building might not be as great as the market value of the simple materials of which it is composed. The latter might, if taken out, sell for more than the building. The value of the building should not, however, be lessened on that ground, for that would furnish no test of the cost of replacing it in as good condition as it was when the loss occurred. Again: the market value of some buildings (as tenement houses often) may be much greater than their actual cash value. Should an insurance company, were it to insure for that amount, pay two thousand dollars—the market value of a tenement house—which it would cost but one thousand dollars to replace, or to build new, originally? We think not. Besides,

the market value rule would render it almost, if not quite, impossible, in many cases, to determine the amount of a loss; as in the case of country houses, built upon farms, or even in cities, where houses and the lots upon which they are built, have a joint market value entirely different from what the aggregate would amount to if they were to be considered separately, and detached from each other.

345 *This view is fully sustained by the case of Laurent v. Chatham Fire Insurance Company, 1 Hall, N. Y., 41, and we find no case which questions or holds the rule of law to be otherwise.

The record discloses that the trial below proceeded on the theory that the facts and circumstances to which we have adverted, did not excuse the plaintiff from furnishing the company with proof of the loss, and that, *prima facie*, five months after the loss was an unreasonable length of time in which to deliver such proof. But there was evidence tending to prove, that at the time of the fire, one Reardon was the general agent of the company at Cairo; and that, by his conduct and influence, the insured was induced to delay furnishing the account of his loss till after the lapse of five months, which, if true in fact, would, as is well settled, excuse such delay. After the jury had been charged and had retired to consider of their verdict, they came into court and asked, "Was Mr. Reardon a commissioned agent of the defendant before the fire?" asking the judge to consult his notes and see the answer of the witnesses to that question. The court did so, and answered in the affirmative, and asked the counsel for the defendant to say whether that was not correct; but the latter declined to say anything, and objected and excepted to the inquiry and the answer, on the ground that it was the finding of a fact by the court. Had such inquiry and answer been material to the cause, the record showing that it related to Reardon's alleged acts, dispensing with the furnishing of such proof, this action of the court would have been an error, for which the judgment would have to be reversed. It is a case in which the parties had the right to have the facts found by a jury, and, without their consent, the court was not authorized to ascertain any fact for the jury. But we have seen that the fact was wholly *immaterial*, because the company itself waived the delivery to it of such proof of loss. It is well settled that the commission of an immaterial error upon a trial, will not authorize the granting of a new trial, or the reversal of a judgment.

The last objection relates to the admission of improper testimony on the part of the plaintiff against the objection and exception of the defenddant. The plaintiff himself being a witness on the stand, was asked by his counsel, "What did the buildings (those burned) cost?" He answered, "They cost $7000, or $7500." His counsel then asked him, "How did the v lue of the houses at the time of the loss compare with the original cost?" He answered, "They were worth more than the cost at the time of the fire. I had *expended*, in improvements and repairs, $2500," and upon this subject the court charged the jury, as requested by the plaintiff and excepted to by the defendant, that, in finding the true cash value of

346 the property at *the time of the loss, the jury might consider the *original cost*, together with the deterioration of the property by use and the difference in the cost of material at the time of building, and at the time of the loss.

Now, this testimony and charge related to a most vital part of the case; and if unwarranted, could not fail to be prejudicial to the defendant;

so that the rule that the admission of improper evidence upon the trial of a cause, is not a sufficient ground of reversal, unless it tends to prejudice the party complaining of it, has no application here, especially as the evidence of value was very meager and conflicting. Such testimony seems to have been received without objection in the case cited above from 1 Hall, but it is difficult, upon principle, to see how it can be competent. The property may have cost twice or thrice what it ought to have cost. The prices of construction and materials may have been extravagant. When such testimony is admitted in chief, it raises those and other collateral issues, which, in law, must stamp it as incompetent. Upon cross-examination, the defendant may ask questions of this nature, and many more collateral and immaterial ones, subject, however, to the discretionary control of the court, in order to test the witness, his bias, his knowledge of the subject, and the facts, his judgment, prudence, etc. This has been decided by our supreme court, recently, in the case of Wroe v. Ohio, 20 O. S., 460. The question should have been—"What *ought* such a building, composed of just such materials, and finished in like style and workmanship, to have cost at the time of the loss?" Size, materials, finish, etc., being given, experts could answer the question. Then the age of the structure, and the nature of its use being proved, such witness could answer what deduction ought to be made on that account. Cost, what the property would rent for, and all collateral circumstances could be called for, if desired, by the defendant, upon cross-examination, to test the accuracy of such general estimate. We are, therefore, constrained to hold, that in admitting this testimony, and in its charge relating thereto, the court below erred, and upon this ground reverse the judgment and grant a new trial.

Mathews & Ramsey, for Plaintiffs in Error.

J. H. & C. Bates, for Defendants in Error.

---

*LEASE—SPECIFIC PERFORMANCE. 347

[Superior Court of Cincinnati, General Term, 1873.]

BUCKWALTER, ADM'R, v. KLEIN, ADM'R, ETC.

1. An option conferred (in a lease for a term of years) upon the lessee to purchase the inheritance within the term is binding upon the lessor and his representatives; and the exercise of such option within the term, and an offer to pay the purchase-money after the death of the lessor, entitle the lessee to require specific performance as against the heirs or devisees of the lessor.
2. The effect, in equity, of the due exercise of such option upon the character and transmissible quality of the property, is to make the purchase-money land as to the vendee, and the land, money in the hands of the vendor, which passes, in the event of his death, to his personal representatives.
3. When, after the execution of such a lease, and before the exercise of the option of the lessee, the lessor having by one clause of his will devised to his wife for life, remainder to her children, all his real estate, including that described in the lease, and by another clause bequeathed to his wife all his personal estate for the support of herself and children, the wife and children are entitled to the purchase-money, and the legacy is specific. But the fund is first liable to be applied to the payment of the debts of the testator, and his executor is entitled to receive and apply it in due course of administration.

4. An action by the assignee of the lessee having been successively prosecuted for specific performance, and the purchase-money having been paid into court, the court, by order, directed such money to be paid to the administrator *de bonis non* of the lessor, with the will annexed, as such administrator, etc, and it was so paid. *Held*, in an action against the sureties on the bond of such administrator, etc., that such money was assets of the estate, and the administrator, etc., having died without accounting for such money, the sureties were liable.

This is a case reserved at special term on demurrer to the petition and amended petition of the plaintiff, and the question litigated in it is that of the liability of the defendants, Dunn, Stickney, and Phillips, on the bond of Runyon, the intestate of Klein, as administrator *de bonis non*, with the will annexed of Daniel Ruffner. The case presented on the pleadings is this:

In July, 1857, Ruffner, a resident of Campbell county, Kentucky, made a lease, reserving rent of a lot of ground situated in Cincinnati, to the "Ohio Farina Co.," for a term of ten years, containing a provision conferring upon the lessee an option to become the purchaser, within the term, of the reversion, at a price to be determined by persons to be chosen in a manner stated in the lease.

348 *In July, 1865, Ruffner departed this life, having, in September, 1860, made his last will and testament, which, soon after his death, was admitted to probate, in the probate court of Hamilton county. By the 3d clause of this will, the testator gave to his wife, during her life, all his "real estate, of whatever description, whether in the city of Cincinnati, Ohio, or elsewhere, which might be owned by him at the time of his death;" remainder to certain infant children. By clause 4, the testator gave to his wife all the personal estate which he might own at the time of his death, consisting of goods and chattels, choses in action, etc. He made his wife guardian and sole executive of his will, and dispensed with security.

One George Henshaw became assignee of the lease, and owner of the leasehold estate, and having, subsequently to the death of Ruffner, declared his option and purpose to become a purchaser of the reversion, brought an action in this court against Mrs. Ruffner, then a widow, and against the infant children named in the will of Daniel Ruffner, and, by the action, demanded specific performance of the provisional contract of purchase contained in the lease. This action appears to have been vigorously defended; but the result was that the plaintiff prevailed. The amount to be paid as purchase-money was ascertained under the direction of the court, and it was paid into the court by Henshaw, and a conveyance was directed to be made to him. Mrs. Ruffner, having intermarried with Runyon, the court, in general term, subsequent to such intermarriage, and on the 30th of March, 1869, by order directed the money remaining in court to be paid to her as executrix of Ruffner, and guardian of her infant children. On the 3d day of April, 1869, Runyon obtained from the probate court of Hamilton county, letters of administration *de bonis non* of the estate of Ruffner, with the will annexed; and on the same day the court, then also in general term, on the application of Ruffner, by order so modified the order of the 30th of March as to direct the fund to be delivered to him, and it was so delivered.

The bond executed on the granting of the letters of administration was in due form of law, and was executed by Runyon, and by the defendants, Stickney, Dunn, and Phillips, as sureties. Runyon, in August, 1870, departed this life intestate and insolvent, and the defendant Klein was

appointed his administrator. Letters of administration, *de bonis non*, with the will of Ruffner annexed, having been granted to the present plaintiff, and Runyon having squandered, or failed to account for, the moneys which had come to his hands, a claim for such moneys was presented to Klein, the administrator of Ruffner, and by him rejected. The plaintiff then obtained from the * probate court the order authorizing an action on Runyon's bond; 349
this is that action: Breaches are assigned coextensively with all the conditions of the bond, and the general question is whether or not, as against the sureties, a recovery can be had on the facts here stated.

JUDGMENT.

TILDEN, J.

The question thus presented requires us to consider whether or not the payment out of court to Runyon, made on the 3d of April, was received by him as administrator with the will annexed of Ruffner. On the part of the plaintiff it is contended that it was so received; and that he having authority under the grant of letters of administration to him to reduce into possession the unadministered estate of the testator for the purposes of administration and of the will, the plaintiff may, under the permission given him by the order of the probate court for that purpose, maintain an action against the sureties of Runyon. On the other hand, while it is not denied that such an action will lie, in a proper case, against the administrator of Runyon for example, it is claimed, under the demurrer, that this is not such a case, because, it is said, it is not made to appear that Runyon received the money, as assets of the estate, or as administrator or executor under the will, or that he was entitled so to receive it in either character; and that, therefore, as against the sureties, the action can not be maintained. The reasons stated in support of this proposition are, that the money received by Runyon, though having the actual form of money, was, in contemplation of the law in equity, real estate, and was by the 3d clause of the will given directly to the widow and children; that the money, therefore, is to be regarded, for the purposes of the present controversy, as having been real estate, subject to the control of the executor, only to the extent that the will gave him control over the real estate; that, so far as the will gave him such control, and he exercised such control over land having the actual form of money, he acted as trustee and not as executor; and that, construing the obligations of sureties strictly in their favor, and on this principle confining their undertaking to subjects strictly within the words of them, they can not be made liable on their bond. These propositions embody the essential elements of the case on both sides; and the manner of their presentation in the arguments of counsel, both at the bar and on paper, evincing critical and careful preparation, has greatly aided us in our examination of them.

As to the character of the fund: It has been contended that the interest of the lessee in the inheritance was an estate upon condition precedent, and that, the option not having been exercised * in the 350
lifetime of the lessor, the condition was broken and therefore that the reversion was in him, as lands; that it passed as such to the widow and children under the will. We are, however, of opinion that this proposition, supposing it to be correct as a proposition of law, does not enter into the consideration of the case before us, which we regard as one

presenting no question of title to land. It is certainly true that the exercise of the option of the lessee, and an offer to pay the purchase-money, were conditions precedent to the obligation to convey. But these were the conditions of the executory contract to convey, and not of the estate conveyed. The conveyance—*i. e.*, the lease—was absolute for the term granted by it, and the provision for the purchase of the remainder of the estate was collateral to it, and one conferring an equity for specific performance from which proceeds the doctrine of equitable conversion as now invoked. That doctrine, as we understand it, and as applicable to the present case, may be generally stated to be this:

If a binding contract be made for the sale of land, enforceable in equity, such contract, though in fact unexecuted, is considered as performed, so that the land becomes, in equity, the property of the vendee, and the purchase-money that of the vendor. If the vendee die before completion, the equitable right descends to his heir; and on the death of the vendor, the purchase-money passes to his personal representative as personal property. See Adams on Eq., 140–1. It is essential that the contract be binding, and one which a court of equity will specifically execute. If the vendee die before completion of the contract, and the contract be one which was not obligatory on him at his decease, the contract is incapable of execution. If, however, the contract be one binding on the deceased vendor, it is immaterial that it was optional with the vendee. When there is an option, if it be declared against the contract, the property regains its original character, and such will be the case so long as the option is undeclared; but when the option is made in favor of enforcing the contract, the conversion will take effect from the date of its being declared. These principles are well settled, and appear to us to be precisely applicable to the facts presented by the case before us. (Jarman on Wills, 49; Broome v. Monck, 10 Vesey, 547; Rose v. Cunningham, 16 id., 550; and Townley v. Bedwell, 14 id., 541.)

It is, however, contended that, as the doctrine of equitable conversion is derived from the maxim that what ought to be done will, in equity, be considered as done, therefore, that where the thing to be done is one which, in point of fact, may or not be done, according to the option of one of the parties, the doctrine itself can have no application. It is true the principle is one referring to the obligation of the parties.

351 *There must, as we have said, be a binding contract, and equity never assumes to enforce one which is not so; but when an option is conferred upon a vendee, which is exercised by him in the manner provided for by the contract, the contract of the vendor becomes absolute and binding upon him and his representatives. Then an enforceable obligation arises; then the contract ought to be performed; then equity will consider and treat it as performed.

These principles of the common law of equity, which are a necessary part of our jurisprudence, have, we think, been also recognized by statute, in our own state, as a rule of property. We refer to the act in relation to real contracts (1 S. and A., 259), to which our attention was called in the course of the argument. This act was intended to furnish a short and summary remedy to the survivors of vendors, and to executors and administrators of deceased vendors, and the heirs of vendees, to enable them to make or obtain a title, and to obtain or pay the purchase-money due from the vendee. The remedy was not designed as a substitute for the ordinary one for specific performance in equity, and is

not adapted to all cases calling for the remedy last named. But the act plainly recognizes the principle of equitable conversion, and provides for its consequences. Thus section 7 provides that in case of the death of a vendee, his heirs may compel a conveyance, the vendee under an unexecuted contract for land being recognized as the owner of the land, which descends to the heirs; and what is still more to the point, section 8 makes it the duty of the court to secure the purchase-money to the *estate* of the deceased vendor, meaning, as we understand it, the executor or administrator of the deceased vendor. The provision last referred will probably also serve to explain the directions contained in the order of March 30th and April 3d for the payment out of court to the party to receive it as administrator with the will annexed; and it would not be by a forced construction, perhaps, to hold that these orders, under the provisions referred to, operated conclusively to determine the nature of the fund. But we do not place our decision upon this ground; and we only treat the statute as supporting us in holding, as we feel bound to hold, that the fund in court was personal property.

It does not, however, necessarily result from the conclusion just stated, that Runyon had a right to receive the fund, or that the sureties became liable because he did so. Had the testator died intestate, or if we were authorized to find that the conversion of the fund withdrew the subject from the operation of the will, so that, as to that, the testator died intestate, the question would present no difficulty; we should be required to hold the fund to have been assets. It *becomes necessary, 352
then, to consider the provisions of the will. The 4th clause of it gives the entire personal estate to the wife, subject only to the claims of creditors, in trust for the support of herself and infant children, and the 3d gives all the real estate owned by the testator at the time of his death, "whether in Cincinnati or elsewhere," to his wife for life, remainder to his infant children, named in the will. It is not disputed that the proceeds of the real estate became vested under the 4th clause of the will, so that the real parties beneficially interested were the widow and children. This question is not, however, very material, because if the beneficial interest did not pass under the 3d clause, it clearly did under the 4th, and under either clause the wife and children would be the beneficial owners. Assuming them to have been such, as we think they were, the controlling question would be whether or not Runyon was entitled, either as administrator, whose duty it was to administer the estate according to law, or as executor bound to perform the will of the testator, to receive the money; that is to say, whether or not the money was assets which could be applied to the payment of debts, or if not, whether or not it was a fund which the law or the will authorized the executor to receive, control, and apply to the purposes intended by the will. If either of these questions requires an answer in the affirmative, then it is manifest that the sureties, however strict the construction of their obligation, are liable under the terms of their bond.

At common law the whole personal property of the testator devolves upon his executor. It is his duty to apply it in the first place to the payment of the debt of the deceased, and he is responsible to creditors for the satisfaction of their demands to the extent of the whole estate, without regard to the testator's having directed that a portion of it shall be applied to other purposes. Hence, as a protection to the executor, the law imposes the necessity that every legatee, whether general or

specific, must obtain the executor's assent to the legacy before his title as legatee can be complete and perfect. Hence, also, the legatee has no authority to take possession of his legacy without such assent, although the testator, by his will, expressly directed that he shall do so; for if this were permitted, the testator might appoint all his effects to be thus taken, in fraud of his creditors. If an executor refuse his assent without cause, he may be compelled to give it by a court of equity. 2 Wms. on Ex., pp. 1176-7-8. These principles, so far as they bear on the question before us, have been adopted in the legislation of this state, and are embodied in the acts in relation to executors and administrators. Thus it is provided in section 70 that such property as is specifically bequeathed, shall not be sold
353 *until the residue of the personal estate has been sold, and is found to be insufficient for the payment of the debts of the estate. Section 71 provides that property specifically bequeathed may be delivered over to the legatee entitled thereto, he securing the redelivery thereof on demand to the executor; otherwise it is declared the same shall remain in the hands to be distributed and sold. 1 Swan & A., 578-9. And section 116 provides that when an executor shall, within four years, be required by any legatee to make payment, in whole or in part, of his legacy, the court may require such legatee to give security to refund the amount so to be paid, to satisfy any demands afterward to be recovered and to indemnify the executor (id., 588). These provisions certainly imply a title in the executor, and in any view it is apparent, we think, that all the personal property of a testator, including such as is the subject of legacies, whether general or specific, is vested in the executor. He has a right to take possession of it, and indeed is bound to do so, and, of course, whatever he thus takes possession of he acquires as executor.

The circumstance that it is believed that there are no debts, however strong the grounds of that belief, does not affect the duty or the authority of the executor. The law contemplates the possibility of the existence of claims to be enforced so long as they are not bound by the limitation of four years, prescribed by sections 101 and 108 of the act in relation to executors and administrators (1 S. & Cr., 583, 587), and the executor is not bound to pay legacies until the end of four years, except on the terms of full indemnity (1 S. & C., p. 564, section 116). He has, on probate of the will, a full title in respect to all personal property ascertained to be assets. He has a right to bring actions to reduce them to possession, and even against legatees and next of kin, and is bound to apply all money received by him in the due course of administration. His powers are very large and much liable to abuse; but the law takes care to provide security against maladministration, and creditors and legatees who are not consulted in his selection, and who repose no personal confidence in him, as his sureties are supposed to do, are provided with the remedy sought by the present action.

We have examined all the authorities to which we have been referred, and find they assert the principles which we have stated, and sustain the conclusion to which we have been brought. The point material in the consideration of this case, determined in Griswold v. Frink, 22 O. S., 79, is that a sale of lands by an executor, under the statute for the payment of debts, being a coercion and not a voluntary act, is a conversion only
354 *pro tanto*, and that the surplus thereof goes to the heirs. *In Quinby v. Walker, 14 O. S., 193, the fund had belonged to the widow, who

had derived it from land producing rents, which she had agreed to receive in lieu of dower, and which was secured to her by bond. Her title was, therefore, paramount, and the persons entitled to receive the fund were her representatives, and not those of her deceased husband, the intestate, whose administrator was not entitled to treat it as assets. The text-books and cases cited by counsel who argued the case in support of the demurrer, do not appear to us to support his propositions.

The conditions, then, of the bond sued on being that Runyon shall account, and administer the estate according to law and the will of the testator, and it being admitted by the demurrer that he received the fund referred to, and failed to account for it, we are of opinion that the sureties are liable. The case will, therefore, be sent back to special term, with directions to overrule the demurrer.

FIRE INSURANCE COMPANY—SUMMONS.

[Superior Court of Cincinnati—General Term, 1874.]

†HEART V. LYCOMING FIRE INS. CO.

O'Conner, Tilden and Yaple, JJ.

So much of the acts of 1869 and 1873 (vol. 66, O. L., pp. 326-7, and 70 O. L., pp. 151-2) as attempt to empower courts to acquire personal jurisdiction in suits brought therein of foreign fire insurance companies, who have, as a condition of being permitted to do business in this state, complied with the terms of said act requiring them to consent thereto, by the issuing of a summons and mailing the same by the sheriff in the county where suit is brought, postage prepaid, directed to the foreign insurance company at its principal office in another state or government, such company having removed from this state, leaving no agent therein to represent it, is unconstitutional and void. Such obligation of such companies to the state is merely *executory*, or promissory; and being violated by such companies, the state itself cannot enforce the obligation within its own limits, but must seek the residence of such company to do so. It cannot, therefore, confer such right to acquire jurisdiction upon any of its courts in order to redress the grievances of its citizens, where no property or property rights within the state are sought to be subjected.

YAPLE, J.

The question to be decided in this case is, whether a foreign fire insurance company, which has entirely ceased to do business in, and has retired from, this state, leaving no agent or property within it, being sued in Ohio upon a policy of insurance made by it therein while so doing a fire insurance business, and, as a condition upon which it was permitted to carry on such business, consented, in writing, that it might, in such event, be brought into an Ohio court in that manner, can be served with a summons so as to give the Ohio court jurisdiction over it, personally, at its principal office located in another state; in other words, by the sheriff of the county in which it is sued mailing it a copy of the summons. 355

The petition in this case sets forth that the defendant is a foreign fire insurance company incorporated by the state of Pennsylvania, having its principal or home office at Muncy, Pennsylvania; that, desiring to transact business as a foreign fire insurance company in this state, it duly and fully complied with all the requirements of the laws of Ohio to authorize it so to do, and did establish an office and transact fire insurance business in the city of Cincinnati; there, on June 16, 1871, insuring the plaintiff's assignor in the sum of two thousand dollars upon a factory, machinery therein, etc., situated in Blanchester, Clinton county, Ohio, which on the 20th day of

†Judgment affirmed by supreme court in *Heart* v. *Ins. Co.*, 26 O. S., 594.

April, 1873, were wholly destroyed by fire, etc., etc., making out a *prima facie* case in favor of the plaintiff against the defendant; and averring further, that the defendant withdrew from and ceased to do business in this state in January, 1873, leaving no agent therein. The general law governing this subject is the act of May 7, 1869 (66 O. L., 325). Section 24 of that act provides, among other things, that "any such company desiring to transact any such business as aforesaid, by any agent or agents, in this state, shall file with the auditor of state a written instrument, duly signed and sealed, authorizing any agent or agents of said company in this state, to acknowledge service of process for and in behalf of such company in this state, consenting that service of process, mesne or final, upon any such agent or agents, shall be taken and held to be as valid as if served upon the company according to the laws of this or any other state or county, and waiving all claim or right of error by reason of such acknowledgment of service; and waiving all right to transfer or remove any cause then or thereafter pending in any of the courts of this state, wherein said company is or shall be a party to any of the courts of the United States; and if said company shall cease to do business in this state, or in any county thereof, where it had previously transacted insurance business according to law, and have any of its policies outstanding in the hands of any resident of this state, that
356 suit may be brought thereon in the county *where the property insured was situated, or where the same was insured, and service of process made therein by the sheriff of such county, by sending a copy thereof by mail addressed to the company at the place of its principal office when it ceased to do business as aforesaid, at least thirty days prior to taking judgment in said suit, and that service of process thus made shall be as valid as if personally made upon said company according to the laws of this or any other state or government. And the sheriff's return shall show the time and manner of such service," etc., etc. This act was amended by the 20th section of the statute of April 24, 1873 (70 O. L., pp. 151-2), prescribing, among other things, more particularly the mode of serving summons in such cases. It enacts that, "in case suit shall be brought against any company which has ceased to do business in this state as aforesaid, service upon such company shall be had by the sheriff mailing a copy of the summons or other process, postage prepaid, addressed to such company at the place of its principal office when it ceased to do business in this state as aforesaid, at least thirty days prior to the date of taking judgment in said suit: Provided that the sheriff's return shall show the time and manner of such service."

In the present case, the sheriff has made and indorsed upon the summons the following return:

"1873, May 14, served the within named 'The Lycoming Fire Insurance Company of Muncy, Pennsylvania,' by sending a true copy hereof by mail, postage prepaid, addressed to the Lycoming Fire Insurance Company of Muncy, Pennsylvania, Muncy, Lycoming county, Pennsylvania, no chief officer, agent or representative being found in this county."

Such being the state of the record, the defendant moved in special term to set aside this service and to dismiss the action for want of jurisdiction, it appearing by its counsel only for the purpose of making such motion. The motion was reserved for decision here, in general term.

It is to be observed that the plaintiff is not seeking to proceed against any property or property rights of the defendant in this state. Were he doing so, it would clearly be competent for the legislature of this state to prescribe the mode of serving the defendant with notice so as to give it jurisdiction over such property and rights, and to divest the defendant of title thereto to liquidate the plaintiff's claim, in case he should finally establish it. A judgment in such case could, however, only be binding to the extent of the property seized, and beyond that it would be a nullity. Arndt v. Arndt, 15 O. R., 33. And there is no difficulty presented so long as such insurance companies have agencies in this state. They could
357 *be prevented by the state from transacting business within it at all, being, as they are, the mere creations of the laws of other states or governments; and hence, the state may prescribe the terms upon which it will admit them and permit them to transact business within its jurisdiction. As such corporate persons are merely ideal—pure legal creations—they can only manifest their existence by and through living agencies; and a state may reasonably prescribe, as a condition of admitting them within it, the classes of agents upon whom legal process may be served, so as fully to subject them to the jurisdiction of its courts. But, even in such cases, it has been held, that a corporation created by and under the laws of one state, can not be deemed to pass beyond the limits of such state, and that a service upon its agents in another state in pursuance of some statute can not be considered other

than as constructive service, the judgment upon which can possess no extra territorial effect.

Freeman on Judgments, section 568, and cases there cited.

However, if as a condition of being permitted to do business in such state, a foreign corporation first complies with the law thereof, and consents that service therein upon its designated agents shall be a sufficient service upon it, I see no reason why a judgment rendered against it upon such service should not be binding upon it everywhere; for it would stand in the position of one person in one state, sued in another, who should appoint an agent to be served with process in lieu of himself. A judgment rendered upon such service upon such appointed agent is binding beyond the limits of the state in which it is rendered. Freeman on Judgments, section 566.

Neither is there any difficulty found in sustaining the right of a state to require of such foreign insurance company the waiver of its right to remove causes to the courts of the United States as one of the conditions upon which it shall be permitted to do business; for, by coming into such state to transact business, such foreign corporations become *pro tanto* domestic and not foreign corporations. Glen Falls Insurance Company v. The Judge of the Jackson Circuit, 21 Mich., R., 580; New York Life Insurance Company v. Best, 23 O. S. R., 105; S. C. 2 Cin., S. Ct. R., 329; Morse v. Home Insurance Company, etc., 30 Wis. R., 496. The right of such removal is also a mere appellate right, which parties may waive and which is waived by the acceptance of the terms upon which the state permits them to do business within it (see cases last above cited).

Far different, however, is the case of such company when it has ceased to do business in and removed from such state, leaving no agent there upon whom service of process issued against it may be made, independently of statute. Even in a *chancery suit, personal service of a subpœna upon a defendant beyond the limits of this state was void. 358

Daniels v. Stevens' Lessee, 19 O. R., 222.

The difficulty in that case arose out of the fact that both Ohio and Michigan claimed jurisdiction of the territory upon which one Sutphen resided. Ohio having passed a statute extending its jurisdiction over it. Here Sutphen was served with process, "at his usual place of residence," issued from the court of common pleas of Lucas county. The place was, in fact, in Michigan; and while it was conceded that Sutphen knew of the proceedings against him, it was held that the proceedings as to him were void. Hitchcock, C. J., pronounced the opinion of the court:

"No sovereignty can extend its process beyond its own territorial limits to subject either person or property to its judicial decisions." Story, Conf. Laws, section 539. Freeman on Judgments, section 564.

"The jurisdiction of state courts is limited by state lines, and, upon principle, it is difficult to see how an order of a court, served upon a party out of the state in which it is issued, can have any greater effect than knowledge brought home to the party in any other way."

Ewer v. Coffin, 16 Cush., 23.

These general principles are, however, conceded; but it is claimed that this defendant has, so far as it is concerned, made this service upon it binding and valid, because it positively agreed with the state that the service should be so, for which agreement it received and availed itself of the privilege of doing business in this state. This is true, but its agreement was *executory* on its part. It was made before the contract upon which this suit was brought was entered into by it, and necessarily, before the bringing of this suit. So it cannot amount to an agreement in the cause, made in the court where the same is pending. Suppose, in a proper case, the state itself were to attempt to enforce such *executory* agreement against the withdrawn defendant—it having returned to Muncy, Pennsylvania—could it do so within its own borders? No, because the defendant would be beyond its reach. The state itself would have to seek a remedy in some court in Pennsylvania. If this be so, as it seems to me is clearly the case, the state can not confer upon one of its citizens or courts a power greater, in this respect, than it possesses itself. Had the state enacted that, as a condition of being permitted to transact business within its borders, such foreign corporation should first file a written power, appointing any citizen of the state that any court might designate in case of its future withdrawal therefrom, its attorney in fact, upon whom service of process *might be made, the same as upon itself, such agent to mail the copy of the same directed to it at its principal office, a very different question would be presented. Such agent might then bind it to that extent as fully as an attorney appointed by a party by a warrant of attorney to confess a judgment against him, 359

though he should thereafter remove to a foreign country. This, if such general appointments were made irrevocable, would avoid any supposed hardships likely to be imposed upon our citizens by such withdrawing companies, by compelling them to go into other states or governments to seek remedies upon obligations incurred by such corporations at the homes of the insured. But no considerations of hardship can confer upon a state extra territorial power and jurisdiction. The attempt of the legislature to acquire such jurisdiction is, therefore, void, and the above statutes, so far as they seek to confer upon the courts of the state authority to bring before them such corporate persons, located at the time entirely beyond the state, are unconstitutional.

The insurance company has authorized no one to act *for* it in Ohio, but has merely stipulated that Ohio courts may act *upon* it by reaching their arm beyond the State into another state or government and dragging it from there here. It now objects to this in violation of its *promise*, and I see no way by which that promise can be enforced in Ohio. If there was any property in Ohio, which is not claimed, the agreement could be enforced so far as to exhaust that property. A judgment rendered in this court, under the circumstances, would admittedly be void in Pennsylvania, and in every other state, as one rendered there would be here. And as there is no property of the defendant in Ohio, why attempt to do a vain thing? I have not been able to find similar legislation in any other state, and the present is the first instance of the kind in Ohio. There are, therefore, no decided cases to be found upon the question here presented.

The motion must prevail.

DISSENT BY TILDEN, J.

I find myself unable to concur in the conclusion just stated by the court, and the question before us being somewhat novel and of great importance to the class of persons affected by it, I do not feel that it will be at all obtrusive to accompany my dissent by a general statement of my reasons for it.

It has been stated that the question before us is, "whether a foreign insurance company, which has entirely ceased to do business in, and has retired from, this state, leaving no agent within it, being sued in Ohio upon a policy of insurance made by it therein, while so doing a fire insurance business, and, as a condition
360 upon which it was permitted to carry on *such business, consented in writing that it might, in such event, be brought into an Ohio court in that manner, can be served with a summons, so as to give the Ohio court jurisdiction over it, personally, at the principal office, located in another state." The court has determined that such foreign corporation cannot be served with a summons in the state of its domicile, so as to give an Ohio court jurisdiction. I am of opinion that, under the statutes, which, I think, are valid, and which govern the question, it can be.

The reasoning of the court has placed its judgment on the proposition that the service of process of the court was made in the state of Pennsylvania, and that such service was void, because the state of Ohio possesses no extra territorial sovereignty, and is incapable of clothing its courts with extra territorial jurisdiction. This proposition implies that, in the case before us, jurisdiction depends upon the due service of process. If I could convince myself that this implication was correct, I should feel bound to concur in the conclusion of the court, and this on a principle always and everywhere maintained by courts of justice, which may be accepted as fundamental, and which restrains all courts from an exercise of authority inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, and on the other principle of natural justice which forbids condemnation without opportunity for defense.

The proposition, then, to which I am unable to assent, is, that the jurisdiction of the court is derived from, and dependent upon, the service of the process issued in the case. I am of opinion that jurisdiction does not depend upon such service of process, but am of opinion that it has been conferred by the voluntary and binding consent of the defendant, and that the service of the summons is not a jurisdictional act, but merely a notice required by the statute to give the defendant an opportunity to defend. In other words, the consent confers jurisdiction, and the service of the summons is the exercise of jurisdiction.

It is clear, and has been determined, that a corporation created by one state can transact business in another state, only with the consent of the latter state (Bank of Augusta v. Earl, 13 Pet., 519). This consent may be accompanied by such conditions as the latter state may think fit to impose, and these conditions must be deemed valid and effectual, provided they are not repugnant to the laws of the United States, or inconsistent with the rules of public law (18

How. S. C., 407). In the exercise of this power the act of May 7, 1869, which was in force at the time of the transaction, undertook to prescribe the conditions upon which foreign insurance companies should be *authorized to transact business in the state of Ohio. One of these conditions was, that any such insurance company desiring to transact business 361
in this state, should file a written instrument with the auditor of state, duly signed and sealed, containing, among other things, a provision authorizing service of process to be made upon its local agent; and if such company should cease to do business in this state, and have any of its policies outstanding in the hands of any resident of this state, that suit might be brought in this state, and service of process be made in the manner observed in the present case, and "that service of process thus made seould be as valid as if personally made upon said company according to the laws of this or any other state or government." The instrument thus required was duly signed and sealed and filed with the auditor of state; the defendant withdrew its agent and its business from the state, leaving the policy sued on outstanding in the hands of a resident of this state, and service of summons has been made in the manner which the express stipulation of the defendant declares "shall be as valid as if personally made upon said company according to the laws of this or any other state or government."

In the present instance, then, one of the conditions imposed was, that on the occurrence of a certain event, viz: the withdrawal of the agency and business of the defendant from the state, any holder of a policy, resident of this state, should be entitled to sue in the courts of this state, on compliance merely with the requirement to give notice to the home office by summons. I am wholly unable to discover anything in this provision either unreasonable in itself or indicating a purpose on the part of the legislature to project the sovereignty of the state into the state of Pennsylvania, or in conflict with any principle of public law. It cannot be deemed unreasonable that the state of Ohio should endeavor to secure to its citizens a remedy in their domestic forum, upon this important class of contracts, made and to be performed within the state, and fully subject to its laws; nor that proper means should be used to compel foreign insurance companies, transacting the business of insurance within the state, for their benefit and profit, to answer here for the breach of their contracts of insurance here made and to be performed. (18 How. S. C., 407.)

It is said, however, that the instrument filed with the auditor of state was an executory agreement merely, which the defendant is, of course, at liberty to violate on the terms of making compensation to the injured party; one which cannot be enforced in specie, and one admitting of no remedy except the single one of a personal action, to be brought, of course, in the courts of the state where the defendant resides, unless *property of the defendant, liable to attachment, could 362
be found and seized in this state. Such an action, it will be observed, would be one founded on the instrument, the breach of it would consist in the refusal of the defendant to appear in the courts of Ohio to an action on the policy, and the party plaintiff would be the state of Ohio. It is, I think, extremely clear that such a construction of the instrument would be contrary to the purpose of the defendant in the execution of it; would defeat the purpose of the law which required it, and be unjust to all persons accepting policies on the faith of it. Is the court bound, by any rule of law, to adopt this construction? I think not. Mr. Broome, quoting from Lord Coke the maxim, viz: that "A liberal construction shall be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties" (Co. Litt., 36*a*) states the law thus: "The construction must be such as will preserve rather than defeat the intentions of the parties; it must be as near the minds and apparent intents of the parties as the rules of law will admit; and, as observed by Lord Hale, the judges ought to be curious and subtle to invent reasons and means to make acts effectual according to the just intent of the parties. Deeds, then, shall be so construed as to operate according to the intent of the parties, if by law they may; and if they cannot in one form, they shall operate in that which by law will effectuate the intention." (Broome, 414, 415.) These propositions are supported by numerous citations from the older cases, and have not, so far as I know, been questioned by any modern one, and may be regarded, I think, as fundamental, and as nearly self-evident as any principle of law can be. I think they oblige me to conclude that the instrument in question should be held to operate, as it is evident to my mind it was intended to operate, by way of power, vesting in the court authority to entertain the case as the statute required it to do, and, on notice to the defendant by summons communicated as directed by law, to proceed to adjudicate upon the rights of the parties. Suppose,

instead of the provision under consideration, the statute had required the defendant to execute and file with the auditor of state, and that the defendant accordingly had filed a warrant of attorney authorizing an appearance to be entered in a case, or in any case to be commenced, can any one doubt that an appearance entered pursuant to such authority would confer jurisdiction? And yet such would be, substantially, the case before the court, if we are to construe the instrument as one operating by way of power. That the provisions of the instrument were executory can make no difference. All powers are executory and when, as in
363 the present instance, they are coupled with an interest, *they are irrevocable. Nor, in my judgment, is the circumstance that the event authorizing the execution, the power was one afterward to occur, and one that might never occur, at all material; nor is it so that the defendant did not name a certain person as the donee of the power. The power itself is coeval with the execution of the instrument creating it; until the occurrence of the uncertain event it remains dormant; but upon the occurrence of such event it becomes active and renders lawful every act done within the scope of it. The holding that the instrument is, in substance, a power, and that it should be so made to operate, authorizes all necessary details to be supplied by implication. The power (thus construed) authorizes a policy-holder to appear in court and commence an action; authorizes the court to entertain the action, and on the return of the summons and the expiration of thirty days, to render judgment. I think that this is the fair and just construction of the instrument, and that any other construction is one which "goes but skin deep into its meaning." I think, too, the occasion is a proper one for an observance of the maxim which makes it the duty of a judge, when requisite, to extend the limits of his jurisdiction (Broome 57). In a case in Hobart (p. 125), Lord Hobart is reported to have said: "I commend the judge who seems fine and ingenious, so it tend to right and equity, but I do not commend one who out of technicality will destroy, or out of incuriousness or negligence will not labor to support the act of the party by the art or act of the law." It is true a judge has no arbitrary discretion—that system of law is best which confides as little as possible to such discretion and that judge the best who relies as little as possible on his own opinion. But the matter before us is not one of discretion, but of construction, and that question is governed by settled rules of law which it is the duty of the court to ascertain and apply. Wise principles, in my judgment, require us to hold that the instrument executed by the defendant vests in the court, independently of the service of the writ, a rightful jurisdiction of the case. Should the defendant, by answer in the nature of a plea in abatement contest the execution of the instrument and sustain such plea by evidence, the jurisdiction of the court would be at an end. But the subject as now presented requires us to assume the fact as true, and to consider the direct question of the effect of the instrument, and that in my judgment is to confer the jurisdiction contested by the motion.

Such appears to me to be the just conclusions of reason. On the score of authority almost no aid is afforded us. But I feel warranted in saying that none of the cases or text-books which have been cited are entitled to be considered as im-
364 *pairing in any degree the correctness of the conclusion which I have formed. On the contrary, one case (18 How., S. C.), by the analogy afforded by it, and in the reasoning of the court, strongly, I think, supports it.

Teeter & Cole, for plaintiff.

Mathews, Ramsey & Mathews, for the motion.

CHATTEL MORTGAGE.

[Superior Court of Cincinnati, General Term, 1873.]

CLARK v. MORRIS.

1. The court at special term charged the jury "that if they were satisfied from the evidence that the chattel property mortgaged was left with the mortgagor with an understanding or agreement, at the time of the execution of the mortgage, between the mortgagor and mortgagee, that the mortgagor should have the power to sell the property so mortgaged (for the benefit of himself), the mortgage would be void, and they would find for the defendant."

2. "But if the mortgage was free from fraud when made, and valid as such, then 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, and that before the mortgage could be determined to be void, the jury must find that at the time the mortgage was given, it was provided in the mortgage, or understood by the mortgagor and mortgagee, that the mortgagor should have the power to sell or dispose of the property mortgaged, and that the mortgage would not be rendered void by a subsequent assent of the mortgagee to a sale of the property mortgaged, or a part thereof by the mortgagor." *Held*, That there was no error in the charge.

O'CONNOR, J.

This is a proceeding in error to reverse a judgment rendered at special term.

It appears from the record that on the 23d of August, 1870, A. D. Morris, the defendant in error, received from his brother, Winzer H. Morris, a chattel mortgage on a dairy stock, consisting, among other chattels, of fifty-four cows; that this mortgage was given to secure a debt of some $2,000, and that it was duly filed with the recorder of Hamilton county, the mortgagor being, by the terms of the mortgage, permitted to retain possession of the mortgaged property, but expressly prohibited from disposing of any part thereof. That on the 2d of June, 1871, the sheriff of Hamilton county seized all of said mortgaged property which was then left under an execution on a judgment in favor of the plaintiff in error, A. C. Clark, and against the mortgagor, Winzer H. Morris. Whereupon the mortgagee, A. D. Morris, replevied the chattles from the sheriff, and A. C. Clark being substituted for the sheriff as defendant, the action was tried by a jury, and resulted in a verdict and judgment for the plaintiff in replevin, the defendant in error here.

*365

The only error assigned in the petition in error is that the court erred in its charge. In order to understand the part of the charge objected to it is necessary to look at that part of the evidence only to which the charge relates.

Winzer H. Morris, the mortgagor, and Albert D. Morris, the mortgagee, are brothers. A. D. Morris testified that every cow named in the mortgage was in W. H. Morris's stable when the mortgage was given. That he made out the schedule himself. There were 54 cows in the stable at the time of the making of the mortgage. The sheriff levied on 30 cows, and one was killed in the yard before the replevin. That he could not tell what became of the other 24 head. Some of them died. Some were sold. That he sold some of them and bought feed for them to run the balance of the dairy. That Winzer Morris was carrying on the dairy, and that he could not tell how many of the cows he, A. D. Morris, had sold.

W. H. Morris, the mortgagor, testified that he was the owner of the dairy when the sheriff levied on it. That the stock replevied was the same included in the mortgage. That it had been in his possession ever since the mortgage was given. Two of the cows died and one was killed in the sheriff's hands, and that A. D. Morris sold most of the balance. That the proceeds of the cows sold were paid for feed to keep the dairy running and for money he got from A. D. Morris. That when A. D. Morris sold the cows they would settle up in the evening. That he did not think that he, the witness, ever sold more than three or four cows after the mortgage to A. D. Morris was given.

A. D. Morris being recalled testified that W. H. Morris never sold

a cow out of the stable with his knowledge after the mortgage was given. That when the mortgage was made they looked over the stock and made the schedule from the property as it then was.

It may be remarked here that the record shows that on the 1st of Nov., 1869, W. H. Morris executed a chattel mortgage to another brother, John Morris, and that the schedule attached to that mortgage, describing the same number of cows, and the schedule attached to the mortgage now in question, given to A. D. Morris in August, 1870, seems to be exact copies of each other. In addition to the testimony of A. D. Morris, that the schedule of the mortgage to him was made from the property as it then was, W. H. Morris testified on cross-
366 examination, that he was sure the schedule of the cattle included *in the mortgage to A. D. Morris was not taken from the mortgage to John Morris.

A. C. Clark, the plaintiff in error, testified that he knew the Morris boys for five or six years—they were in the dairy business in Corryville. That he sold the cattle to them. That both W. H. and A. D. Morris were indebted to him about seven or eight thousand dollars. That he saw some of the cattle included in the mortgage in the market at the Brighton House, A. D. Morris being with them sometimes, and sometimes W. H. Morris. Thought that Mr. Ives sold the cattle for them. A. D. Morris was there attending to the business, and he received the money. Cows in a dairy are changed every six months or a year. A cow is hardly ever kept in a dairy for a year. That he sold Morris about fifty cows a year while he dealt with him. Saw A. D. Morris give W. H. Morris some money in April, 1871, the proceeds of cattle of W. H. Morris sold by A. D. Morris. That he does not know that he ever saw W. H. Morris selling cattle after the date of the mortgage.

This being the evidence bearing upon the validity of the mortgage, and the conduct of the mortgagor and mortgagee, the defendant below, A. C. Clark, asked the court to charge the jury as follows:

"That if the jury were satisfied from the evidence that Winzer H. Morris, the mortgagor, retained a power of sale, or had the power to sell any of the said goods and chattels, after the said mortgage was given, or if, in fact, he did sell any of the said goods and chattels mortgaged, after the mortgage was given, with the knowledge or consent of A. D. Morris, the mortgagee, the mortgage would be thereby rendered void and of no effect as against the lien of the defendant Clark, and they must find for the defendant."

This charge the court refused to give, but did charge the jury as follows:

"That if the jury were satisfied from the evidence that the property was left with W. H. Morris, the mortgagor, with an understanding or an agreement between the mortgagor and mortgagee that the mortgagor should have the power to sell the property so mortgaged, the mortgage would be void and they would find for the defendant."

To this part of the charge the plaintiff in error does not except. But the court further charged:

"But, if free from fraud when made, and valid as such, then the mere fact that the mortgagor had sold or disposed of any part of the cattle, even with the knowledge of the mortgagee, would not vitiate and render the mortgage void; and that before the mortgage could be determined to be void,

the jury must find that, at the time the mortgage was given, it was provided *in the mortgage, or understood by the mortgagor and mortgagee, that the mortgagor should have the power to sell or dispose of 367 the property mortgaged, and that the mortgage would not be rendered void by a subsequent assent of the mortgagee to a sale of the property mortgaged, or a part thereof by the mortgagor."

To this charge the defendant below excepted, and now assigns for error the refusal of the court to charge as asked, and the charge given.

Before act of April, 1846, requiring mortgages of personal property to be deposited with the township clerk or recorder, in all cases where the mortgage was not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, or the mortgage be void as against the creditors of the mortgagor and subsequent purchasers and mortgagees in good faith, it was decided in Ohio that, "where the vendor in a bill of sale or mortgage of goods retains the possession, that circumstance is *prima facie* evidence of fraud, but is not fraud *per se* The question of actual fraud in such case is one to be left with the jury," Hornbeck v. Vanmetre, 9 Ohio, 153. But in the case of Collins & McElroy v. Meyers et al., 16 Ohio, 547, it was held that "a mortgage of personal property, where the mortgagor retains possession of the property mortgaged, with power of sale, is void as against subsequent purchasers and execution creditors."

In that case the mortgage showed upon its face that the mortgagor was to retain the stock of goods mortgaged for the usual purposes of sale and barter. But in the case of Freeman v. Rawson, 5 O. S., 1, it did not appear by the chattel mortgage itself that the mortgagor retained any power of disposition or sale of the mortgaged goods, and the court held: "If the power of disposition appear upon the face of the mortgage, or is fairly to be inferred from its provisions, it is the duty of the court so to declare it, without submitting the matter to the jury as a question of fact. If it does not so appear, but is so understood or agreed by the parties at the time the mortgage was executed, it is equally void; and such understanding or agreement may be shown by parol evidence, and may be proved by the conduct of the parties in relation to the subject-matter of the mortgage, and other circumstances, as in other cases. In either case, when the fact is made to appear, the mortgage is fraudulent in law, irrespective of the intention of the parties."

This is as far as our supreme court has gone, or, so far as we know, has been asked to go. But it is now claimed by the plaintiff in error, and the court was asked so to instruct the *jury, that even if the mortgage 368 was valid when executed, and that the mortgagor and mortgagee had at that time no understanding or agreement which would render it void, yet if at any time after its execution, the mortgagee gave to the mortgagor liberty or power to dispose of any of the mortgaged property, or if in fact the mortgagor did, after the execution of the mortgage, sell any of the chattels mortgaged, with the knowledge or consent of the mortgagee, that the mortgage, which was valid when executed and delivered, would thereby be rendered void as against the execution lien of Clark, the plaintiff in error. This charge, as we have seen, the court refused to give, but did charge substantially according to the decision in 5 Ohio St., above cited.

The question thus raised by the plaintiff in error has not been directly before our supreme court, nor have we been referred to or seen

any case in which it has been passed upon. It is claimed, however, that the doctrine now urged necessarily follows from the decision in 5 Ohio St.; for it is said, if a chattel mortgage, valid upon its face, is rendered void by proof of a secret understanding, existing at the time of its execution, between the mortgagor and mortgagee, that the mortgagor shall have the power of disposition over the mortgaged property, then such agreement or understanding entered into or had at any time after its execution must be equally fatal to its validity, because such agreement or understanding produces precisely the same result, to-wit: the uncontrolled power of disposition of the mortgaged property by the mortgagor, a power inconsistent with the idea of a lien upon a specific thing.

This deduction seems plausible, but we think it is not sound. The error lies in not distinguishing between the existence of a right and the waiver of a right; between the creation of a lien and the waiver of a lien or of part of it. What is called a chattel mortgage, that is, a paper which upon its face or by the secret agreement of the mortgagor and mortgagee made at the time of its execution, gives the mortgagor the uncontrolled power to dispose of the mortgaged property, is in fact no mortgage at all, has no existence as such, and creates no lien. The lien of a chattel mortgage must be upon a specific thing, and the very creation and existence of the lien necessarily imply that he who gives it shall not have the power to destroy it at pleasure. Such power can not co-exist with the lien. The creation of a lien is a limitation upon absolute ownership, which ownership always includes the power of alienation, and it is this power of alienation, this power of disposition, which the mortgagor contracts with the mortgagee shall remain suspended, and shall not be exercised by the mortgagor during
369 *the existence of the mortgage. Now, if at the same instant the mortgagor makes this contract with the mortgagee, the mortgagee restores to the mortgagor the power to dispose of the mortgaged property; in other words, restores the unqualified ownership, nothing has been effected, no lien has been created, and the instrument is a nullity. If ultimately, in such case, the mortgagee should obtain his claim through the property intended to be mortgaged, it would not be by force of any lien, but merely through the good will of the mortgagor, for the mortgagor might have sold the property and given a good title to any one.

But when a valid mortgage has once been given, and a lien created for the benefit of the mortgagee, it is a question *solely* for the mortgagee whether he will avail himself of the benefit of such lien. It is true that his creditors, if he be insolvent, may subject the lien to the payment of his debts, even against his consent; but, with this exception, he may abandon his lien in whole or in part, and the creditors of the mortgagor cannot rightfully complain. He is in no sense a trustee for them. His mortgage does not prevent them from asserting any of their rights, or from reaching so much of the property as may be left after his lien is satisfied. They may levy on the mortgaged property subject to his lien, and if it should turn out that nothing is left, they are in no worse condition than if the mortgagor had made an absolute bill of sale of the property to the mortgagee in payment of his debt, as he might have done; as in Ohio, a debtor, whether solvent or insolvent, may pay any debt he owes, and may thus prefer one creditor to the exclusion of all the rest. Of course we are now speaking generally, and not considering the effect

of the bankrupt act, which is exceptional and only temporary. If, then, after the execution and delivery of a valid mortgage, the mortgagee gives to the mortgagor, who is already in possession, permission to sell a part or the whole of the mortgaged property, upon what principle can the other creditors of the mortgagor complain? What difference can it make to them whether the mortgagee insists on his lien, and thus obtains the property for himself, or whether he makes a present of his whole lien to the mortgagor? The difference, if any, is in favor of the creditors, for it places the mortgagee and them again upon an equal footing. If he may abandon his whole lien, he may abandon any part of it, and if he permits the mortgagor to dispose of a part of the mortgaged property, that is his loss only, and he still retains his lien on the balance. We think, therefore, the court did not err in refusing the charge asked, nor in the charge given.

If there was any doubt in our minds as to the correctness *of our conclusion, it would still be a question whether the plaintiff in error 370
was entitled to the charge requested, even if it was law. The evidence does not tend to prove that at any time subsequent to the execution and delivery of the mortgage, the mortgagee gave permission to the mortgagor to dispose of any of the mortgaged property. The tendency of the evidence is to prove that at the time of the execution of the mortgage there was an understanding or agreement that the mortgagor was to retain such power. This question was left to the jury, under proper instructions from the court, and to decide it, they were to look at the conduct of the mortgagor and mortgagee, and consider how they treated the mortgaged property. And if the jury came to the conclusion that the mortgagor sold any of the property with the knowledge and consent of the mortgagee, which the mortgagee denied, the tendency of the evidence was to prove that such sales were made in consequence of an agreement entered into at the time of the execution of the mortgage that the mortgagee should have the power; and if the jury so found, the court charged them that the mortgage was void. The charge asked, therefore, might have been refused on the ground that the evidence did not properly warrant it, and was therefore an abstract proposition.

We find no error in the record, and the judgment must be affirmed.

YAPLE, J., dissenting.

I am not fully prepared to agree with my brethren in their view of the law, as announced in the decision of this case.

1. My holding would be that, where a chattel mortgage is taken and is valid, there being no right reserved to the mortgagor to sell or dispose of the mortgaged property as his own, and the mortgagee, *subsequently*, gives the mortgagor permission to sell or dispose of the property as his own, such property is, from that time, withdrawn from the operation of the mortgage—the *lien* of the mortgage upon it being destroyed—and that it may be levied upon as the mortgagor's by any execution creditor of his, who will hold it as against the claim of the mortgagee under his mortgage. The parties by no arrangement should be permitted to secure the property solely to the benefit of the mortgagor, and keep creditors from touching it. But, if permission be given to the mortgagor to sell only a specified part of the property, the mortgage will continue to be a lien upon the residue of the property of which the mortgagor is given

no power to dispose for his own benefit, such subsequent agreement will not render a chattel mortgage void *ab initio.*

371 *2. If the facts and circumstances in evidence upon the trial of such a case to a jury, fairly tend, in any degree, to prove such subsequent arrangement between the mortgagor and mortgagee, then it is for the jury, and not the court, to determine whether or not such subsequent agreement was made; and if the court charge, in effect, that whether made or not such subsequent agreement is immaterial, because it could not, in law, affect the lien of the mortgage, such charge is erroneous, and a verdict in favor of the mortgagee should be set aside, though the reviewing court should be of opinion that the evidence was not sufficient to warrant the finding of such agreement. In such cases it is not for a court to *weigh* the evidence and decide according to its prepondering weight, for that would destroy the right of trial by jury. This is so even though the court would have granted a new trial, had the finding been that such subsequent arrangement was made, for then the party would have still been in court, in a position to again try his case, and not be concluded by a judgment rendered upon the *court's* opinion of the weight of the evidence, when the jury considered it under a misconception of the law as to its effect in any event, and when they might, had the correct rule of law been given, have found differently from the court. A court, after two concurring verdicts upon the existence of a fact, will rarely disturb the finding of a jury, though it may differ from them as to the weight of the evidence upon which such fact has been so found.

Possibly, the evidence in this case may show, as my brethren claim, that the charge of the court at special term was immaterial, because there was no evidence in the case to call for it. As this is their view, I have not, pressed as I have been for time to examine other cases specially given to me, carefully read the transcript of the testimony, being satisfied that the judgment below would be affirmed upon the proposition of law contained in the charge of the court.

PARENT AND CHILD—VOLUNTARY CONVEYANCE.

[Superior Court of Cincinnati, General Term, 1873.]

MATHEWS v. RENTZ, ET AL.

O'Connor, Tilden and Yaple, JJ.

1. In Ohio, contrary to the rule in England, 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 voluntary conveyance, and the fact that the prior deed was regularly recorded is noticed.

372 *2. An actual eviction from the land warranted is not necessary to enable the grantee to maintain an action upon the covenants of warranty; he may purchase a paramount title and recover from the warrantor as in case of actual eviction.

This case was reserved at special term for decision here upon an agreed statement of facts.

O'CONNOR, J.

The action is brought upon covenants of seizin and general warranty, contained in a deed executed by Joseph Rentz to Nathan, Samuel and Ebenezer W. Parker for a tract of land in Hamilton county, containing about 27 acres, and which land was sold in proceedings for foreclosure of a mortgage against said Parkers, and purchased by the plaintiff.

Joseph Rentz, the warrantor, derived title as follows:

In 1812, James Sisson, being seized in fee-simple of a tract of land containing 81 acres, of which the 27 acres above mentioned formed a part, executed and delivered to Daniel Drake and Arthur Henrie a deed of trust for the 81 acres, for the benefit of his four daughters, reserving to himself a life estate therein. One of the daughters dying, the other three, by the terms of the trust-deed, became entitled each to one-third of the 81-acre tract. These three were Amelia Sophia, who married John Forbes; Eliza Ann, who married Patrick Smith; and Sally, who married William Pounsford. James Sisson, the father, died about 1830, and in 1833, Eliza Ann Smith conveyed her undivided one-third interest to her brother-in-law, John Forbes, she being then a widow. In the same year John Forbes conveyed this one-third interest to E. D. Mansfield, in consideration of one dollar, and on the same day Mansfield, in consideration of one dollar, conveyed the same one-third to Amelia Sophia, the wife of John Forbes, for life, remainder in fee to Sarah and Emily Forbes, the daughters of Amelia Sophia and John Forbes. Mrs. Forbes had now the equitable estate in one-third in fee, and a life estate in another one-third, and her daughters, Sarah and Emily, an equitable estate in remainder in one-third, or each an equitable vested estate in remainder in fee in one-sixth of the 81-acre tract. Sarah Forbes married H. H. Edwards, and Emily Forbes married James Mayo Wells, and these two daughters have always lived in Texas. John Forbes, their father, died about 1860, and Mrs. Forbes, their mother, died in January, 1872, at which time, as is claimed by the plaintiff, Sarah Edwards became possessed of the equitable estate in fee in one undivided sixth of the said 81 acres.

In February, 1838, five years after the conveyance to Mrs. Forbes of one-third, for life, and remainder to her two daughters, Mrs. Forbes and John Forbes, her husband, executed and *delivered to James Mayo Wells, their son-in-law, a deed, purporting to convey to him two undivided thirds of said 81 acres in fee- 373
simple, thus ignoring the deed from Mansfield to Mrs. Forbes of one-third for life only, and treating said deed as a deed to Mrs. Forbes in fee, and also ignoring the remainder of one-sixth to Sarah Edwards created by said Mansfield deed.

September, 1838, James Mayo Wells and his wife Emily, now claiming to hold two-thirds in fee of said 81 acres, instituted proceedings in partition in the court of common pleas, of Hamilton county, Ohio, making Harriet Pounsford and Arthur Pounsford, infant heirs of Sally Pounsford, defendants, they being entitled to the remaining one-third in right of their mother. Daniel Drake and Arthur Henrie, the trustees of the legal estate, were also made parties, but Sarah Edwards was not made a party. In July, 1839, by decree of the court, Daniel Drake, as master commissioner, conveyed all the right, title, and interest of said James Mayo Wells and wife and of said Harriet and Arthur Pounsford in said 81 acres, to Ferdinand Rentz, he being the highest and best bidder at the sale in partition.

In January, 1844, Ferdinand Rentz out of the 81 acres, conveyed to Joseph Rentz the 27 acres which are now the subject of litigation, and which, as we have already said, were conveyed by said Joseph Rentz, with covenants of seizin and general warranty, to Nathan, Samuel, and Ebenezer Parker, and were purchased by the plaintiff, C. Bentley Matthews, at a judicial sale upon the foreclosure of a mortgage given by said Parkers.

As we have seen, Sarah Edwards, who claimed an estate in one-sixth of the 81 acres, was not made a party to the proceedings in partition, and received no part of the proceeds of the sale of the property thereunder. She was living in Texas at the time of the partition sale in 1839, and at the time of her mother's death in 1872, when, if at all, she was first entitled to the possession of her one-sixth interest in remainder in fee, her mother having held the life estate. She accordingly commenced an action in the court of common pleas, of Hamilton county, Ohio, to recover possession of said undivided one-sixth part of said 27 acres from the plaintiff in this case, who being advised by counsel that her title could not be successively disputed, purchased said title from her, for the sum of $1,125, a sum, as the plaintiff alleges, was much below the real value of said one-sixth, and the lowest sum for which he could obtain it. The plaintiff now seeks to recover from the heirs of the warrantor, Joseph Rentz, the sum thus paid to Sarah Edwards.

To this claim of the plaintiff two principal objections are urged:

374 *1. That as against James Mayo Wells and those claiming title under him the conveyances to Mansfield, and from Mansfield to Mrs. Wells for life, and remainder in fee to her daughters Emily and Sarah, now Sarah Edwards, are void under the statute of 27th Elizabeth, which, it is claimed, being declaratory of the common law, is the common law of this state.

2. That there has not been such an eviction of the plaintiff as will authorize the court to compel the defendants to repay him the money he expended to quiet his title.

As to the first objection, that the voluntary conveyances from Forbes to Mansfield, and from Mansfield to Mrs. Forbes for life, and remainder of one-sixth in fee to Sarah Edwards the daughter, is void according to the law of England, as against the subsequent conveyance to Wells for a valuable consideration, there is no doubt. By the construction uniformly given to the statute of 27th Elizabeth, 4, it has always been held in England, since its enactment, that a voluntary conveyance is rendered void by a subsequent conveyance for a valuable consideration, even where the subsequent purchaser had actual notice of the prior conveyance. H. W. May, in his work on *Voluntary and Fraudulent Alienations of Property in England*, page 178, says: "Many opinions of judges are recorded condemning the doctrine; but as it has now stood ever since the act was first passed, it is, as Lord Eldon observed, too late for any judge to dispute it; but the opinions of so many eminent judges as to the injustice of the rule, would seem to warrant the interposition of the legislature." "It must, I conceive, be assumed," said Sir W. Grant, "that the statute of the 27th Elizabeth has received this construction: that a voluntary settlement, however free from actual fraud, is by the operation of that statute deemed fraudulent and void against a subsequent purchase for a valuable consideration, even when the purchase has been made with notice of the voluntary settlement. I have great difficulty," he continues,

" to persuade myself that the words of the statute warranted, or that the purpose of it required, such a construction ; for it is not easy to conceive how a purchaser can be defrauded by a settlement of which he has notice before he makes his purchase. But it is essential to the security of property that the rule should be adhered to when settled, whatever doubt there may be as to grounds on which it originally stood."

In the United States, however, as well as in states where the statute of Elizabeth has been re-enacted, as where it has been accepted as declaratory of the common law, a different rule of construction has generally prevailed. The same author, May, on p. 180, says: "In the New York statute, substantially re-enacting the 27th Elizabeth, there is a clause to the effect that no such conveyance or charge shall be deemed fraudulent in *favor of a subsequent purchaser who shall have actual or legal notice thereof at the time of his purchase, unless it shall appear 375 that the grantee in such conveyance, or person to be benefitted by such charge, was privy to the fraud intended." And the author adds: "And it seems that throughout the United States, where the principles of the statute have been adopted (without in all cases any formal re-enactment), the same law prevails; as in New York, that a purchaser cannot avoid a fair voluntary conveyance prior to his own. and of which he had notice;" and cites 4 Kent on American Law (11th edition), 539, and note.

Counsel for defendants have cited us to two cases in this country where the English doctrine has been held in all, its force, that is, that notice makes no difference: 1 John. Chan. Rep., 260, Sterry v. Arder; and Lewis v. Love's Heirs, 2 B. Mon., 346, and also cases in which it has been held that the notice must be actual and not constructive; 6 Geo. 350, 110; 11 Geo. 350, 356; Gardner v. Cole, 21 Iowa, 205; and Lewis v. Casttman, 27 Texas, 407.

The question, however, has been settled in Ohio, by the case of Vanzant v. Davis, 6 Ohio St., 52, where it was held, "that where a father buys land, pays for it, and causes it to be conveyed to his child, the law, in the absence of proof to the contrary, presumes it to be an advancement."

"Where such conveyance is caused to be made with intent to defraud creditors of the father, no trust results in favor of any one, except creditors and subseqent *bona fide* purchasers, without *notice* of the prior conveyance."

And "that the absence of all concealment of the prior conveyance, and the fact that it was duly recorded, is constructive notice to subsequent purchasers." And the court held that such constructive notice was sufficient to protect the voluntary conveyance against the subsequent purchaser.

The voluntary conveyance through which Sarah Edwards claims, was executed and delivered on the 20th of May, 1833, and recorded the same day. Counsel for defendant say it does not so appear in the agreed statement of facts, but the deed itself is attached to the agreed statement of facts and referred to as a part of it.

The conveyance, then, to James Mayo Wells, for a valuable consideration, did not defeat the prior voluntary conveyance to Sarah Edwards.

The second objection urged to a recovery, is that there has not been *such* an eviction of the plaintiff as will authorize the court to compel the defendants to repay him the money he expended to quiet his title. We

do not understand that it is claimed by the defendants that there should
376 have been *an actual eviction of the plaintiff from the land, before he could maintain the present action; or that the plaintiff had not the right to buy in an outstanding paramount title, and then maintain his action against the warrantor for the price paid for such outstanding title, if reasonable and not greater than the purchase-money paid by him for the land; because that the plaintiff might do so, and that an actual eviction is not necessary, is well shown in the case, cited in argument of McGary v. Hastings, 39 Cal., 360, where all the principal authorities are reviewed. But we understand the defendants to claim that the title of Sarah Edwards was of such a character that it presented an improper case for compromise, and that the proper course for her was to recover her one-sixth interest in the land in kind.

On this point, it is argued for defendants, that the interest of Sarah Edwards is one-half the interest of Eliza Ann Sisson, afterward Eliza Ann Smith, under the deed of 1812. That John Forbes purchased the interest of Eliza Ann, and conveyed it through Mansfield, to his (Forbes') wife for life; remainder to his (Forbes') daughters—Sarah Forbes, afterward Sarah Edwards, and Emily Forbes, afterward Emily Wells—but that the title of Mrs. Smith, one half of which was thus secured in remainder to Sarah Edwards, is conditional, as the deed of 1812, it is claimed, provides that the share of any one of the four children shall pass to survivor or survivors, in case of the death, without issue, of any one of the four. Hence, in case Mrs. Smith dies without issue surviving her, her estate or interest will be at at an end, and pass to the survivors of the four, and in that event Sarah Edwards will have no estate. Therefore, it is said, the interest of Sarah Edwards continues only for the life of Mrs. Smith, and that such interest should have been set off to her in the land itself, to expire with the life of Mrs. Smith.

The chief, and as we think a sufficient answer, to this argument is, that it does not state the facts. The deed of 1812 does not provide generally that in the event of the death of any one or more of the four daughters without issue, her or their shares shall pass to the survivor or survivors of the four; but it does provide that after the decease of the said James and Sally Sisson, the grantors, whenever it shall be found that all of the four children, or such of them as may be alive, are arrived at full legal adult age, the said Daniel Drake and Arthur Henrie, trustees, shall immediately proceed to divide the 81 acres equally among and convey the same separately to the above named children by general warranty deed to each, or to the child or children of those that may die leaving issue; and in case either of said children shall die without issue the premi-
377 ses *shall be divided equally among those of the above-named children that survive. Thus by the terms of the deed the property was to be equally divided after the death of the grantors among such of the children, or their issue, as should be living when the youngest child arrived at full legal adult age. It appears by the agreed statement of facts that the grantors died before 1830, and that Caroline, one of the four children, died intestate, without issue, leaving her three sisters heirs-at-law.

In 1833, more than 21 years after the execution of the deed of 1812, and when of course the three children then living were past legal adult age, Eliza Ann Smith, then a widow, conveyed her one-third interest in

the eighty-one acres to her brother-in-law, John Forbes, the father of Sarah Edwards, and he caused this same one-third to be conveyed to his wife for life, remainder to his two children, one of whom was Sarah Edwards. The one-third interest which Eliza Ann Smith conveyed to Forbes was an equitable estate in fee; because she was over 21 years of age, and James and Sally Sisson, the grantors in the deed of 1812, were dead, and by the provisions of said deed of 1812, she was then entitled to have her one-third interest set apart and conveyed to her in fee by the trustees, Drake and Henrie, and because equity considers that done which ought to be done. This being so, it necessarily followed that Sarah Edwards, upon the death of her mother, came into possession of one-half of the one-third, which Sarah Ann Smith had conveyed to John Forbes, and which Forbes had conveyed to his wife for life, or to one-sixth of the whole property. The interest of Sarah Edwards, then, was known and definite, and subject to no condition at the time the plaintiff purchased it. and as we think her title to said one-sixth was paramount, he is entitled to recover.

This also disposes of another objection of the defendants, which is, that if the plaintiff is entitled to recover, he is only entitled to recover the value of one-eighth and not one-sixth of the property. Although the agreed statement of facts does not in express words say that Caroline, one of the four children of Sisson, died a minor and before the deed was executed from Eliza Ann Smith to John Forbes, yet we think that is the fair meaning of it, and must have been so intended by the parties, because among other reasons, it is therein agreed that if the plaintiff shall recover in this action he shall recover $1,125, and interest from July 10, 1872, that being the estimated value, and the amount actually paid by the plaintiff for one-sixth of the value of the property.

There are some other questions raised by the defendants, not necessary further to notice, those which we have passed *upon being the 378
only ones on which, as we think, the defendants can seriously rely.

Judgment must, therefore, be entered for the plaintiff for the sum of eleven hundred and twenty-five ($1125) dollars, and interest from July 10, 1872.

CONTRACTS—STATUTE OF FRAUDS.

[Superior Court of Cincinnati, General Term, 1874.]

†CHARLES WITTER v. J. R. GOTTSCHALK.

Witter and Gottschalk entered into a verbal contract, by the terms of which Gottschalk agreed not to carry on a certain business, in a certain neighborhood, for five years. *Held*—That the contract was within the fifth section of the statute of frauds, and not being in writing could not be enforced, and that the possibility of Gottschalk's death within the year would not take it out of the statute, such possibility not making it the less a contract not to be performed within the year.

O'CONNOR, J.

This is a proceeding in error to reverse a judgment rendered at special term.

Charles Witter, the plaintiff in error, who was plaintiff below, states in his petition that in February, 1871, the defendant, Gottschalk, was the owner of a

†Judgment affirmed by supreme court in Gottschalk v. Witter, 25 O. S. 76.

building on Everett street, in Cincinnati, in which, for between one and two years, he (Gottschalk) had carried on the business of selling meats and provisions, and that he had a large trade and custom which were valuable. That the plaintiff being desirous of engaging in the same business, the defendant sold him certain personal property used in said business; induced him to take a lease on said premises for five years, at a rent larger than said property could have been rented for except to carry on said business, and sold the plaintiff the good will and custom of said business, and agreed that during the continuance of said lease he (the defendant) would not engage in said business in the neighborhood, or in any part of the city of Cincinnati, where he might interfere with the custom so sold, or in any manner diminish the same. In consideration of the premises the plaintiff paid defendant the sum of $300 cash, and one thousand dollars in three promissory notes, secured by chattel mortgage, and agreed to pay for said premises, under said lease, the sum of $45 per month. Plaintiff says that, in violation of said agreement, the defendant has, since said sale, opened store and commenced to carry on business of a character similar to
379 that sold *to the plaintiff, close to and within the range of customers who formerly traded with the defendant, and that the defendant has sold meats and provisions on the same square and street upon which plaintiff carries on his business, and has entered into competition with the plaintiff, and has induced a large number of plaintiff's customers to transfer their custom to defendant.

Plaintiff claims damages and asks that the defendant be restrained and enjoined from carrying on said business and from interfering with and diminishing the business, rights, and interests so sold and conveyed.

The defendant, in his answer, as a first defense, denies that he agreed not to carry on business of the same or of a similar character in the neighborhood of the old stand, or in any part of the city of Cincinnati, and denies that he sold to the plaintiff any rights or privileges except such as are contained in the written lease.

As a second defense, the defendant says that the supposed agreement alleged in the petition is not to be performed within one year of the making thereof; that the same is not in writing; that there is not any memorandum or a note of any such agreement signed by the defendant, nor has he authorized any person to sign any memorandum or note or agreement, as the same is alleged in the petition.

To this second defense the plaintiff filed a general demurrer, which was overruled by the court below; and as said overruling rendered it unnecessary to ascertain the truth of the first defense, judgment was rendered for the defendant, to reverse which this proceeding is prosecuted.

The 5th section of the statute of "frauds and perjuries," 1 Sev. and Ch., 659, provides, among other things: "That no action shall be brought whereby to charge the defendant upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized."

In Brown on Statute of Frauds, sec. 272, it is said: "Brief, and, at first sight, simple as is this clause of the statute, it has been subjected to so much refined and critical discussion, that it will be probably found to require, for a correct understanding of the construction put upon it by the courts, more careful and exact discrimination than any other clause which we have had or will have to consider." As to the meaning of the words "to be performed," the same author says, section 273: "The result of the decisions seems to be that the statute does
380 not mean *to include an agreement which is simply not *likely* to be performed, yet one which is simply not *expected* to be performed, but that it means to include any agreement which, fairly and reasonably interpreted, does not admit of a valid execution within the space of a year from the making."

At sec. 274, the author states the following rule: "Suppose that the parties make no stipulation as to time, but the performance of the agreement depends upon the happening of a certain contingency which may occur within the year; in such case it is settled, upon authority and reasonable principle, that the statement shall not apply. The agreement *may be* performed entirely within the year, consistently with the understanding and rights of the parties." The cases which illustrate this rule are then divided into four classes, in the sections next following, and citations of the authorities are there given:

First. Cases where the thing promised is to be done when a certain event occurs; as, for instance, to pay money on the day of the promisor's marriage; to leave it by will (the promise of course taking effect in the event of the promisor's

death), or that his executor shall pay it; to pay on the death of a third party; to pay when a sum of money is received by the promisor from a third party, which payment may be made within the year: to marry at the end of a voyage, which voyage may be accomplished within the year; to save a party harmless from signing an obligation, which obligation may be forfeited within the year.

Second. When the promise is to do something until the contingency occur, as, for instance, to pay during the promisee's life; to pay during the life of another; to board the promisee during life; to pay the expenses of a child so long as it should be chargeable to the town; to educate a child; to support a child, who is eleven years old, till she is eighteen. In all these cases, the authorities hold, the promise is not affected by the statute, because the party whose life is involved may die within the year. And so, of course, the author remarks, whatever else be the contingency, provided it may happen within the year.

Third. Agreements to refrain altogether and for an indefinite time from doing something, are, upon the same general principle, saved from the operation of the statute, being necessarily limited, in point of duration, to the term of life of the party making the engagement. And the author cites the case of Lyons v. King, 11 Metcalf, 411, where it was so held by the supreme court of Massachusetts, in the case of an oral promise not thereafter to engage in a certain business in a certain town. Dewey, J., delivering the judgment of the court, says: "This contract might have been wholly performed within the *year. It was a personal engagement to forbear doing certain acts. It stipu- 381
lated nothing beyond the defendant's life. It imposed no duties upon his legal representatives, as might have been the case under a contract to perform certain positive duties. The mere fact of abstaining from pursuing the business, and the happening of his death during the year, would be a full performance of this contract.

In accordance with this decision, and the cases cited by the court to sustain it, the plaintiff in error claims that the agreement set out in the petition is not within the 5th section of the statute of frauds. That the agreement not to carry on the business for five years, was a personal engagement only; that it would terminate with, and be fully performed by, the death of the promisor, and as that event might happen within one year from the making of the contract, it is not therefore an agreement that is not to be performed within one year.

To this claim of the plaintiff there are two answers: First, the authorities are not uniform. In the case of Dobson v. Collis, 1 Hurlston & Norman, 81, it was held that "a contract for service for more than one year, but subject to determination within the year, on a given event (to-wit, the giving of three months' notice by either party), is within the statute of frauds, and must therefore be in writing." The court says: "The object of that enactment was to prevent contracts, not to be performed within the year, from being vouched by parol evidence, when, at a future period, any question might arise as to their terms. To guard against that, the Legislature has said that such contracts shall be in writing. No doubt formerly it was the practice to construe not only penal statutes, but statutes which interfered with the common law, as strictly as possible, but that is not a proper course of proceeding. We ought faithfully to interpret acts of Parliament as we think the Legislature meant. Bracegirdle v. Heald, 1 B. & Ald., 722, is an authority that this contract, apart from the defeasance, would clearly be within the statute. Then does the defeasance take it out? I think that a contract is not the less a contract not to be performed within the year, because it may be put an end to within that period. A lease for five years, subject to a defeasance on the happening of a certain event, does not cease to be a lease for five years, because it may be defeated at the end of the first year." And the court cite the case of Birch v. The Earl of Liverpool, 9 B. and C., 392, as being precisely in point.

In the same case, Baron Alderson said: "The very circumstance that the contract exceeds the year, brings it within the statute. If it were not so, contracts for any number of years might be made by parol, provided they contained a defeasance, *which might come into operation before the end of the first year. The rea- 382
son for the enactment was, that there might be no dispute beyond the year, as to the terms of the contract. * * * When once the contract exceeds the year, the circumstance that it is defeasable will not make it other than a contract for more than a year. See the absurdity of holding otherwise; at the end of two years and a half, one of the parties might claim a right to put an end to a parol contract for five years by giving three months' notice; but the very subject of dispute might be, whether or no he had a right to give such notice. That shows that this is a contract within the statute."

To this decision is appended a note, which is worthy of attention, and which states the following rule: "In order to exempt a contract from the operation of the statute of fraud, on the ground that it may come or be brought to an end within the year, the contingency must be one which tends to the performance or accomplishment of the contract, in the sense originally contemplated by the parties, and not merely to its avoidance or determination." A number of authorities are cited, among others, 1 Smith's Leading Cases, 5 Am. Ed., 436; Browne on the Statutes of Frauds, 288. In the case of the Packet Company v. Sickles, 5 Wallace, 580, there was a parol contract between Sickles and the company, that Sickles should attach, for use, to a steamboat owned by the company, the Sickles cut-off, a certain patented contrivance which was designed to effect the saving of fuel in the working of steam-engines; and that, in consideration thereof if the said cut-off should effect a saving in the consumption of fuel, the company would use it on their boat *during the continuance of the said patent, if the said boat should last so long*, and that they would, for the use of the cut-off, pay to Sickles, weekly, three-fourths of the value of the fuel saved. *The patent had, at the date of the alleged contract, yet twelve years to run.* The supreme court of the United States, Judge Nelson delivering the opinion, say: "The substance of the contract is that the defendants are to pay in money a certain proportion of the ascertained value of the fuel saved at stated intervals throughout the period of twelve years, if the boat to which the cut-off is attached should last so long. The statute applies to contracts not wholly to be performed within the year. It is insisted, however, that this contract is not within it, because it may, by the happening of a certain event—the loss or destruction of the boat—terminate within the year. The answer is, that the possibility of defeasance does not make it the less a contract not to be performed within the year. The court then cites the cases of Bozdell v. Drummond, 11 East, 142; Birch v. The Earl of Liverpool, 9 Barnwell & Cresswell, 392; Dobson v. Collis, 1 Hurlston &
383 *Norman, 81; and Broadwell v. Getman, 2 Denio, 87; and say: "We might refer to many other cases arising upon this statute. They are numerous and not always consistent, for the reason, probably, given by Pollock, C. B, that the courts at first construed the enactment as strictly as possible, as it interfered with the common law. We think the construction given in the cases referred to is sound, and adopt it. The result is, that the contract in question is void, not being in writing. It is a contract not to be performed within the year, subject to a defeasance by the happening of a certain event, which might or might not occur within that time. All the mischiefs which the statute was intended to remedy apply with full force to it."

We think the reasoning in 1 Hurlston & Norman, and in 5th Wallace, is conclusive of the construction we ought to put upon the contract now before us. It is a contract not to enter into a certain business for the term of five years; and even if it were true that the death of the promisor within one year would terminate and fully satisfy the contract, it would, in the language of the authorities cited, be not the less a contract for five years. After the lapse of four years the promisor might commence to carry on the business, and if it was then claimed by the promisee that he was violating his contract and the violation denied, the parties could only rely upon hard proof, which, by reason of its uncertainty, the legislature has said shall not be resorted to to prove any contract which is not to be performed within a year from the making thereof. But if we were in doubt as to the correctness of our conclusion from the authorities last cited, that doubt would be dispelled by another consideration. The authorities which hold that a contract not thereafter to carry on a certain business in a certain place, or to abstain from the doing of a particular thing for an indefinite time, is terminated by the death of the promisor, which may happen within the year, seem to take for granted that the particular business must necessarily cease, or the particular thing be incapable of execution upon the death of the promisor; or, in other words, that one's influence over his affairs does not extend beyond his life. Yet, it has long been recognized that a testator may direct the continuance of a trade or business by his executor, or by a trustee, and courts will enforce the trust. In the case of Gondolfo v. Walker et al., 15 Ohio St., 251, the testator directed in his will that the executors should carry on his brewery business for seven years, for the benefit of the estate, and the court upheld the will, holding "that the moneys and profits arising from the business were assets in the hands of the executors for the administration of which their sureties are liable." In the present case the contract is not by its terms for an indefinite time, but for five years,
384 *and in this regard may be distinct from the cases cited by the plaintiff in error. The death of the defendant in error within the year would not necessarily terminate the contract, nor terminate the business which the plaintiff in error desired

should not be carried on. Or, in the case of Gondolfo, the defendant could have directed his executor to carry it on, and as it was the business, the competition, to which the plaintiff objected, the death of the defendant could not, therefore, necessarily have terminated the agreement, nor have satisfied the reasonable expectations of the plaintiff. Of course where personal skill is an element of the contract, as in the case of a professional man, or an artist, a different question would be presented.

For the reason given, we think the contract set out in the record was one which, by its very terms, and by a fair and reasonable construction, was not to be performed within a year from the making of it, and being in writing, is within the fifth section of the statute of frauds. The judgment rendered at special term must therefore be affirmed.

The authorities on this subject are collated in Browne on the Statute of Frauds, commencing at section 277; 1 Smith's Leading Cases, 432; and in Parsons on Contracts, vol. 2, p. 316.

J. R. Healy, for Plaintiff in Error.

Jacob Wolf, for Defendant in Error.

---

*PARTNERSHIP—JUDGMENT. 392

[Superior Court of Cincinnati, General Term, October, 1872.]

O'Connor, Tilden and Yaple, JJ.

†ISAAC MARKS v. S. W. FORDYCE.

1. Where partners reside in different states, but one or more of them reside in the state where the firm-business is carried on, and manage and control such business, and a suit be brought in a court of record, in the state where the firm is located, against all the partners jointly, as individuals, to enforce a liability against them arising out of a partnership transaction, and the non-resident partner, or partners, are not personally served with process, and do not appear in person to defend such suit, but such resident partners employ an attorney to defend the cause, and such attorney does appear, and file a pleading, and defend for all—*Held:* That such resident partners are the agents of the non-resident partners, for such purpose, and have implied authority *and power, by virtue of such partnership, to employ such attorney on behalf of all the 393 partners; and that his appearance for them will bind all; and a judgment rendered against them will be *conclusively* binding upon them all, as individuals.
2. In such case, the resident and managing partners have, by virtue of the partnership, authority to employ counsel and institute suits in the individual names of all the partners, to recover, jointly, any money or property due or belonging to the firm, or to secure indemnity to such firm and all its members against loss or liability on account of partnership transactions; and when the members of the firm are sued jointly, such remedies may be sought by way of counter-claim or set-off, pleaded to such action, in courts where the same is permissible under their rules of practice; and if a judgment be rendered against the members of the firm upon such set-off or counter-claim, and in favor of the plaintiff in the cause, upon his demand such judgment will conclusively bind all the members of such partnership individually.
3. If suit be brought in one state upon the transcript of the record of a judgment rendered by a court of record in another state, which transcript shows that the defendant was not served with process, but recites that he appeared by attorney only, the judgment-debtor may, under the rule of law as settled by the supreme court of the United States, aver and prove that such attorney had no authority so to appear; and, if proven, such judgment will be void. The rule is otherwise, when suit is brought here upon a judgment rendered in Ohio.

---

†The judgment of Superior Court in Special Term, which this opinion affirms is published in 1, Rec., 257.

QUERY: Ought not the rule to be that such recital should be conclusive, in the absence of alleged fraud, everywhere, except on motion or petition to vacate or set aside such judgment, made in the court rendering the same?

4. A transcript of the record of a judgment rendered by a court of record of a sister state, upon which suit is brought in this state, is not a "deed, instrument, nor other writing whereon the action is founded" within the meaning of sec. 361 of the code; and if a copy thereof be demanded by the defendant, as provided for in that section, and is not furnished, such transcript will still be permitted to be given in evidence on the trial of the cause; such transcript is a "written instrument as *evidence of indebtedness*" within the 117th section of the code, and should be attached to or filed with the pleading, as therein required, but not made part of it; and, in case the same be not so attached or filed, the proper remedy of the party is to move to strike such pleading from the files, which motion will be granted, unless the same be so attached or filed.
5. All rights of such party will be waived, however, if he accepts the transcript itself for inspection, and retains it for some weeks, though he may not thereafter receive it upon requesting it again. His demand of it, and not insisting upon a copy, will constitute such waiver, though he may also have demanded a copy in writing. He must rest upon such demand or waive it.
6. The question, whether or not there has been such waiver, is for the court to determine upon the *voir dire*, when the document is offered in evidence, and the decision of the court upon such question will not be reversed, unless clearly against the evidence offered; all of which must be set forth in the bill of exceptions.

YAPLE, J.

394 *This is a petition in error brought to reverse a judgment rendered by this court, in special term, in favor of Fordyce against Marks, for the sum of $10,265.96 and costs.

The action below was founded upon a transcript of the record of a judgment, or final decree, rendered by the chancery court of the city of Louisville, Kentucky, on the 11th day of November, 1870, for the sum of $7,341.28, with interest from July 1, 1865, and $——— costs. It purported to have been rendered in favor of Fordyce, against Bennet Marks, Nathan Bensinger, and the defendant, Isaac Marks, styling them "late partners under the firm of Marks & Co."

Isaac Marks' defense in the court below was that the judgment and proceedings of the Louisville chancery court were void as to him, because, during the pendency of the suit there, he resided in Cincinnati, Ohio, and was never served with process, as is shown by the record; did not personally appear in that court to defend that action, or authorize any one to enter his appearance; and that, while the record recites that he, with his co-defendants, appeared by one Stirman, their attorney, Stirman had no authority to enter such appearance or defend the action for him. That action was brought on December 15, 1865, and was pending until the rendition of final decree, on November 11, 1870. Isaac Marks was the father of Bennet Marks, who verified all the defendant's pleadings in the case, and seems to have had charge of the business of defending it, and the brother-in-law of Nathan Bensinger. The three became partners about February 2, 1864, and continued as such until June 1, 1869, for the purpose of carrying on the brokerage and United States claim-agency business in Louisville, Kentucky. Bennet Marks and Bensinger resided, during all this time, in Louisville, and conducted and managed the copartnership business, while Isaac Marks furnished the principal part of the capital, and resided in the city of Cincinnati, but during the time, and during the pendency of the suit there, was frequently in Louisville.

The firm had Stirman employed as its attorney, by the year, during the pendency of such suit, and before it was begun; and at the request of Bennet Marks and Bensinger he appeared in that suit as attorney for

the defendants. Stirman died before his testimony could be taken in this case in this court.

It seems that in Kentucky there is no statute authorizing a copartnership to sue and be sued in its firm name, and making a judgment in such action binding and enforcible by execution only upon the partnership effects, and not against the individual partners, as in in Ohio; but that every suit, whether at law or *in chancery, by or against partners, must be in the individual names of all the persons composing the copartnership. Their rights 395
and liabilities are treated as joint and individual. The partnership is not made distinct or separate from the persons composing it It cannot be rendered liable, except by rendering liable, jointly, all persons who compose it; and when the partnership is rendered liable all its members are, as a consequence, rendered thereby individually liable. This is the rule everywhere in this country, independently of statute, both at law and in equity, in all cases of resort to legal remedies by or against copartnerships.

Fordyce instituted his suit in Louisville, as the law compelled him to do, against the three partners as individuals, upon a partnership transaction to obtain an account and judgment for such amount as might be found due to him from the defendants, jointly.

On January 12, 1866, Stirman, a regular practicing attorney and counselor-at-law in that court, assuming to represent and act for all the defendants, which he did throughout the whole progress of the cause, filed an answer in their behalf, styling them "partners under the style of Marks and Company." They could not appear and answer as a "firm," merely under the law of that state, but only as individuals; and this and subsequent answers, in such *form*, were so treated by the court. It was a joint individual answer, the styling of the defendants being mere *descriptio personæ*. Afterward, on June 8, 1866, an amendment to the answer was filed, in the same form, setting up a payment of $2,500, and asking that Marks & Co. be indemnified by the plaintiff against liability for certain outstanding government-orders. And again, on April 17, 1868, another amended answer was filed on behalf of Marks & Co., sworn to by Bennet Marks, one of the defendants and signed by Stirman, "as attorney for defendants," alleging a set-off in their favor against the plaintiff for $1,129.75, with interest from August 16, 1865, which answer was made a cross-petition, and judgment thereon prayed over against Fordyce, as for money had and received.

Also, on the trial of this cause, at the special term of this court, a question was made by Marks' counsel as to the admissibility of the transcript of the Louisville judgment in evidence, which question was heard by the court upon the *voir dire*, and the transcript permitted to be given in evidence, to which an exception was reserved. The defendants proved to the court that, as the transcript was not filed in court, due notice had been given Fordyce's counsel to furnish the defendants' counsel with a copy thereof, as required by the 361st section of the code, which was not done; but that the transcript itself, then *produced for the purpose of being offered in evidence, had been delivered to Marks' counsel 396
and been retained by them some weeks, but that it was inquired for some two or three times when needed, and was not delivered as desired. The transcript is very voluminous, and a copy of it would cost more than $100.

The foregoing statement of the case is as full as we deem it necessary to make, as we think such legal principles arise from the facts contained therein as must control our decision. Other facts, and a discussion upon them of other rules of law arising out of them, will be found in the reported decision of the case at special term, in AMERICAN LAW RECORD, p. 257, Fordyce v. Marks.

As the basis of its judgment, the court below made a special finding *First*—that the defendant, Isaac Marks, was not *personally* served with process, and did not appear *in person* in the said action in the Louisville chancery court; *Second*—that his copartners and co-defendants, Bennet Marks and Nathan Bensinger, did so appear and defend the action, and for that purpose employed an attorney of said court to appear and defend the same, and who did appear and file an answer and cross-petition in the cause, on behalf of the firm, demanding affirmative relief and a judgment over against the plaintiff therein; and *Third*—that Isaac Marks was a partner in said firm of Marks & Co. Whereupon, as a conclusion of law, the court found that the filing of such answer and cross-petition, or counter-claim, gave that court jurisdiction over Isaac Marks, and authorized the rendition of the said judgment against him by said court; and that the parol evidence introduced by the defendant, to disprove the authority of such attorney to appear for him in that action in that court, was insufficient to overcome the recitals and findings contained in the record that such attorney did appear for Isaac Marks.

We concede that it is settled by the supreme court of the United States—Shelton v. Tiffin, 6 How. R., 186—that when a suit is brought in one state upon the transcript of a judgment rendered in another, and the record shows that the party was not served with process, but appeared by attorney, he may disprove the authority of such attorney to appear for him. See also *Freeman on Judg'ts*, Sec. 563. This is so, though such recital cannot be disproved in the state where suit is brought, or where the judgment was rendered in the case of actions brought upon judgments rendered in such states, as in Kentucky and Ohio, where such proof cannot be received. (Roberts v. Caldwell, 5 Dana, Ky. R., 514; Callan v. Edmiston, 13 O. S., 446.)

We also concede that faith and credit, merely exceptional to
397 *the common law, or peculiar to the statutes of a state, given by such state to judicial proceedings within it, will not, to the same extent, be accorded by the courts of another state, or by the federal courts, though the act of congress (1 Stat. at L., 122), prescribes that "records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have, by law or usage, *in the courts of the states from whence the said records are or shall be taken.*" The federal constitution (Art. 4, sec. 1), and the above mentioned act of congress, passed in pursuance of it, relate only to judgments, etc., rendered in accordance with the settled rules and usages of law as commonly recognized. (Note to Mills v. Duryee; McElmoyle v. Cohen, 2 Am. Ld. Cas.; D'Arcey v. Ketchum, 11 How., 165; Cheever v. Wilson, 9 Wal., 123.)

Were the question a new one, I should be inclined to hold as the safest rule, and one at the same time compatible with justice, that parties denying the authority of attorneys to appear for them in courts of justice, where it appears of record such attorneys did so appear, should be required to go into the courts in which the proceedings were had, and

there set them aside, but not permit the same to be otherwise questioned —especially not in any collateral proceeding, as in an action founded upon such records. In Ohio, this may be done upon *motion*. Abernathy v. Latimore et al., 19 O. R., 286; code, secs. 534, 535, 541.

So in the federal courts: U. S. Bank v. Moss, 6 How., 39.

Notwithstanding the decision of the supreme court of the United States in Shelton v. Tiffin, some courts have held that such recitals in a record are *conclusive*. A leading case of this class is Warren v. Lusk, 16 Mo. R., 102, where most of the cases are cited and reviewed; and a leading case holding the opposite independently of the authority of the supreme court of the United States is Phelps v. Brewer, 9 Cush. (Mass. R.), 390.

As the question is one depending upon the construction of the constitution of the United States and the act of congress of 1790, it is for the supreme court of the United States to settle such construction, and its decision is to be followed by all other courts, state as well as federal. We therefore feel bound to be governed by its authority, though I, for one, believe that that court might well entertain a re-argument of the question, and determine the law to be as I have indicated I think it ought to be—viz., to compel the party to resort to the court, entering the judgment for relief.

The main question, then, for decision, in this case, is one of agency. Where two or more persons, residing in different *states, enter into copartnership, to carry on any business in one of the states where 398
the active managing partners are domiciled, what implied powers have the latter to bind the former, individually, in the general prosecution and management of the joint business? Can a resident partner, in a suit brought in a court in his state against all the members of his firm, to enforce a joint personal liability against them arising out of the joint business, enter the appearance of a non-resident partner to such action, so as to enable such court to bind the latter, personally, by its judgment? Has such resident and managing partner the implied authority, from his non-resident partners, to bring an action in the courts of the state where the business is carried on in the individual names of the members of the firm, to recover a debt due the firm, or to sue for and in the names of all to obtain indemnity for all against anticipated liability on account of some partnership transaction, and for which, if rendered liable, the individuals, as well as the joint property, would be liable and bound? Where part of the members of a copartnership are intrusted by their copartners with the management and control of the firm business, the latter impliedly grant to them authority to do all things fairly and reasonably necessary, properly and safely to prosecute the firm business, so as to prevent the loss or sacrifice of the firm's property, and, as a consequence, to guard all against individual liability resulting from such loss of the firm property; for, if that be sacrificed, and any partnership liabilities be left undischarged, all the partners will be personally liable for the same.

The question may be, too, to some extent, one of public policy—how far the safety and proper protection of the community, and of the partners themselves, require that such implied agency of one or a part of the members of a firm for all should be carried.

Upon a most extended search and examination of the cases bearing upon the point, and after long reflection upon them, it seems to me that this question has been erroneously considered as identical with that of

the power of one partner to bind his copartners, personally, by a submission to arbitration of a partnership matter; when in the matter of submission to arbitration *three* questions are involved, while but *one* is to be considered in cases like this at bar.

In arbitrations it may be said: First—that submission to arbitration is no mercantile transaction, and could not have entered into the minds of the partners when entering into partnership; Second—that it might compel the partners, by force of the award (as arbitrators are judges, jurors and chancellors from whom there lies no appeal), to do things never contemplated by them, and in no sense mercantile; and Third,
399 *—that the law, while it favors arbitration in many respects and ways, on the other hand is jealous of it, as courts are, or have been until within a very recent period, unwilling to enforce or sanction an agreement by which parties are compellable to renounce the perfectly impartial and well constituted tribunal which is open to all the public, for one which the parties construct themselves, and which is open to very many possibilities of error. (Pars. on Part., 2d ed., pp. 176, 177 (marg.); Story on Part., 6th ed., sec. 114, and note.)

It is obvious that the first of these objections applies to the authority of one partner to enter the appearance of his copartner to an action in a court against the members of the firm, relating to a firm-liability. In relation to such first alleged reason, Mr. Parsons, in his work upon Partnership, above cited, says: "It seems to us to beg the question, and to be a very feeble reason." The second, he says, "seems to have little more force." The third, he claims, is the only reason against the implied authority to exercise such power by one partner for his copartner. For that reason, both he and Judge Story hold that a partner has no such power; yet, in the first edition of his work on Partnership, Parsons says: "And we have some doubt whether any of our courts might not now be expected to sustain such a submission, if it were in itself unobjectionable (p. 178.)" This passage seems to be omitted in the last edition of the work. On the last, or third ground, we must, of course, expect to meet with conflicting decisions; for some courts hold that contracts by which parties preclude themselves from resorting to courts of justice, and bind themselves to arbitrate, are invalid, while other courts hold such agreements valid. All decisions, therefore, which hold that one partner has the power to submit a firm-matter to arbitration, and thereby bind his copartner, are authority for the proposition that he may accept service for or enter his appearance to an action against the members of the firm, while those which hold the contrary are not necessarily opposed to the authority of one partner to enter the appearance or to employ counsel to appear and defend for all.

There is one case—Phelps v. Brewer, 9 Cush., 390—entitled, both on account of the exceptionally high character of the judges composing the court, and the masterly reasoning contained in the decision to the very highest consideration, which holds that one partner has no such power, and that a judgment rendered against a copartner, upon such an appearance, is void. In deference to this authority, the court below held the rule of law to be as stated in that case. But it is not convincing, after all. Like Bishop Berkeley's theory of the non-existence of matter,
400 but merely the idea of it, that decision, *while susceptible of no satisfactory answer, yet is capable of producing no conviction. Carefully studied, it will be found that it takes for granted, impliedly,

that the transaction is not mercantile, and could not have entered into the minds of the partners when entering into the partnership. This, as Mr. Parsons has said, begs the question, and is a very feeble reason. If the assumption is not true, if the very opposite is, the consumate and masterly fabric of reasoning, raised up as a column of overshadowing authority in that case, falls to the ground.

In the case of Bennett v. Stickney, 17 Vt. R., 531, it is held that every partner has such implied authority from his copartners, and is their agent for such purpose. "When a suit is commenced against a firm, one of the partners has power to employ an attorney to attend to the suit on the part of the defendants, and an appearance in the suit, entered by the attorney thus employed, will be binding upon the other partners." is the language of the syllabus of that case.

In Taylor v. Coryell, 12 Serg. & Raw., 248–250, the court, in sustaining the power of one partner to submit a partnership matter to arbitration, and thereby bind his copartners, holds the same way.

The supreme court of Illinois (Hallack v. March, 25 Ills., 48) has held the same doctrine, in a case of submission to arbitration. The reasoning in this case, following Taylor v. Coryell, directly applies to the point here involved, if it fails to answer the third objection stated above, to the right to submit to arbitration. The court says: "How many partnerships are there where all the business is transacted by one of the members of the firm, while the others give no attention to the business, and perhaps reside abroad. The act of one partner is the act of both. There is a virtual authority to that purpose, mutually given by entering into partnership; and in all things relating to their usual dealings each must be considered as the attorney of the other. We can perceive no reason or justice why one partner may not exercise this authority in this instance as well as in the others. To deny it would certainly be a great impediment to commercial dealings, and would be to deny all the analogies of the law merchant," etc.

It is also held in Alabama (Clark v. Stoddard, 3 Ala. R., 366) that one partner may acknowledge service of a summons for all. (See, also, Harrison v. Jackson, 7 T. R., 208 (argument); Mux v. Humphrey, 8 T. R., 25; Southard v. Steele, 3 Mon. (Ky.) R., 435; Gilly v. Singleton, Litt., Ky. R., 250.) And the supreme court of Ohio, on the circuit, have held that one partner has the power to submit the arbitration and bind his *co-partners thereby. (Wilcox v. Singletary, Wright's Rep., 420.) 401

If this be the law, and we do not feel at liberty to deny it, in the absence of any other decision by our supreme court, the authority questioned in this case clearly existed.

Many cases, besides Phelps v. Brewer, might be cited to the contrary upon both propositions; but that case contains all that can be said against the authority of one partner to bind a copartner by the entry of his appearance to an action brought against both, to enforce a joint or firm liability against them personally.

We are, therefore, constrained to hold, in this case, that the employment of Stirman as an attorney to defend the action against the firm in the Louisville court, by the resident and managing members there, and his appearance for them all, was binding personally, upon Isaac Marks, and that the judgment rendered against him is as conclusive as if he had been personally served with a summons.

Besides, two counter-claims were filed, demanding joint relief in behalf of all the partners against the plaintiff in that case—one to secure from the plaintiff their indemnity from liability on account of certain uncollected government orders, for which they were personally liable, because liable as a firm (and to protect the firm, in that behalf, would have been to protect every person composing it); the other prayed a money-judgment against Fordyce.

Now, if Fordyce had not sued these parties, but they had sued him, to secure such indemnity, and to recover such sum of money, jointly, and he had set up, by way of counter-claim, the demand upon which he has obtained a judgment and recovered, as he has done, will it be contended that the partners resident in Louisville could not have instituted such action for want of authority from Isaac Marks? We think not; and if not, Fordyce suing first, and they setting up these cross demands against him as to which they were plaintiffs, make the two cases equivalent.

In the present developed state of the country, by means of railroads and telegraphs, men residing in various states of the union form partnership, and carry on business through managing partners in distant states, and to deny the latter the *implied* power to sue in the names of all for moneys due the firm and to protect its rights, and thereby save all from individual liability in case of the loss of the firm-property and its insufficiency to pay the partnership debts, would render it impossible to attempt to carry on business by men so situated or circumstanced. The interests of partners, and the safety and convenience of themselves and the community, render the recognition of such implied power an absolute necessity.

402 *The objection that the court erred in admitting the transcript of the record in evidence upon the trial is not well taken. We do not think that the transcript is such an "instrument or other writing," as is contemplated by the 361st section of the code; and if it were, it appears that the defendant's attorney, instead of insisting upon a copy and refusing the document itself, received the transcript and kept it for some weeks, though he was not able to get it on two or three occasions when he asked for it instead of a copy of it. The object of that section is not to compel a plaintiff, who sues a defendant, to give the latter any property, in a paper, but merely to enable him to prepare his defense; and when he is enabled to do so by being furnished with the original, all the purposes intended by the statute are attained.

The question was one upon the *voir dire* to the court, and the court upon the evidence may well have found that the defendant had received all the advantages he could have done, had a copy been furnished; and that the copy was insisted upon merely to put the plaintiff to expense, as it would have cost to furnish it more than one hundred dollars. We think that in such an action the transcript should be filed as required by the 117th section of the code, and if that be not done, and the defendant desires to inspect it, he should move to require such filing, or, in default thereof, to strike the petition from the files. (Memphis Med. Col. v. Newton, 2 Handy, 163.)

The provision contained in sec. 361, that it shall not apply to "any paper a copy of which *is* filed with a pleading, as provided in section one hundred and seventeen," simply means "which is required to be so filed." The law presumes that will be done which it requires to be done, and

when done, a copy being so filed, no further copy shall be required to be furnished.

This clause does not say that copies of papers not filed as required by sec. 117 shall be furnished under sec. 361, only that this section shall not apply to such.

The judgment rendered in special term is, therefore, affirmed.

Hoadly & Johnson and J. & V. Abraham, for Plaintiff in Error.

Long & Kramer, for Defendant in Error.

---

*RAILWAY—PLEADING—NONSUIT. 403

[Superior Court of Cincinnati, General Term, 1874.]

O'Connor, Tilden and Yaple, JJ.

†THOMAS POWELL v. THE P., C. & ST. L. RY CO.

1. Where a railroad company sells a *commuting* passenger a ticket entitling him to ride upon its cars a certain number of times during a given month, which ticket specifies that it is good only during such named month, and the price of travel per mile is *less* than the *maximum* rate it is authorized by law to charge passengers, such passenger failing, from any cause, to ride the specified number of times during such month, will not be entitled to ride upon such ticket during any month subsequent to that named therein. There is in such case a valid consideration moving to the purchaser of such ticket, the company selling it him being bound to provide the means to carry him while his ticket has not expired, no matter how over-burthened it may be from the demands of other passengers seeking to be conveyed by it.
2. If, to a petition alleging an assault and battery upon a plaintiff, by the agents of a railroad company, for ejecting him from a train of its cars for refusing to pay his fare otherwise than by such expired ticket, the defendant by its answer admits the assault and battery, but justifies on the ground that the plaintiff refused to pay his fare otherwise than by the offer of such ticket, and that no more force was used than was necessary to eject the plaintiff from the cars, and the plaintiff fails to reply to such answer, the only issue presented for trial is the legal construction and effect of such ticket, the rate per mile being less than is authorized by law to be charged, is, *prima facie* and as matter of law, reasonable.
3. Such answer, as it admits the assault and battery and justifies it, must be replied to before the plaintiff can be permitted to prove that excessive force was used in ejecting the plaintiff, such answer averring that there was not.
4. Where a plaintiff gives certain evidence to the jury and rests his case, it is not error in the court to instruct the jury to return a verdict for the defendant, if all the evidence offered by the plaintiff is assumed by the court to be true and taken as fully establishing all the facts it in any way tends to prove, if, *in law*, it is insufficient to entitle the plaintiff to recover.
5. The right of the court to grant a non-suit is taken away by the 372d section of the code.

YAPLE, J.

This cause comes before us upon petition in error to reverse the judgment of this court rendered at special term in favor of the defendant in error.

The action was brought by Powell against the railway company to recover damages for being wrongfully, and with force and violence, put off one of the defendant's *accommodation railway cars, by the conductor and brakeman thereof, on the 2d day of August, 1871, at Pendleton Station, on the line of defendant's road, between the city of Cincinnati and Branch Hill Station, to which latter point the plaintiff purposed riding in such car, for the alleged reason that the plaintiff had failed 404

†The judgment in this case was affirmed by the supreme court, see opinion 25, O. S., 70.

and wholly refused to pay his fare as a passenger, when the plaintiff avers that he had paid the same in full to the company, and had its ticket, which he showed to the conductor, evidencing that fact. After being so ejected from the cars, the plaintiff again got upon the train, and, under protest, was compelled by the conductor to pay the full fare, seventy cents, between Cincinnati and Branch Hill, the distance between the two points being about twenty miles.

The answer admits that the plaintiff was, by the conductor and brakeman, put off the defendant's car at the time and place alleged, but avers that no more force was used in doing so than was reasonably necessary and proper to accomplish such end. To justify such act, it is then alleged, that the usual and lawful fare for a passenger between Cincinnati and Branch Hill was seventy cents; but that, on June 30, 1871, the defendant sold and delivered to the plaintiff, for the sum of seven dollars and fifty cents, a ticket entitling the plaintiff to ride to and from Cincinnati and Branch Hill *fifty-four* times, upon any of its accommodation trains stopping at the latter station, *provided* he should take all said rides during the month of July, 1871; that the plaintfff did not take fifty-four rides on the cars during that month, and having not done so, claimed the right to ride the remaining number of times after the month of July, and, in pursuance of such claim, presented his July ticket, at the time he was put off the car, on August 2, 1871, and claimed that he was entitled to ride thereon, and refused, when asked to do so by the conductor, to pay any other or further fare for such trip, whereupon he was put off the car. The answer sets forth in *hæc verbale*, this ticket and the coupon attached thereto, as follows:

"Pittsburg, Cincinnati, and St. Louis Railway. Monthly ticket at rates below the regular fare. Good on accommodation trains only.

"This ticket will entitle Thomas Powell to fifty-four single continuous trips in the cars of the P., C. & St. L. Railway, between Cincinnati and Branch Hill. The conditions upon which this ticket is sold by the P., C. & St. L. Railway, and purchased and used by the holder, are as follows:

"1. This ticket is good only during the month of July, 1871.

"2. That passage shall be taken only on such trains as stop at the above sta-
"tions.

405 * "*Notice.*—These tickets are sold only on the first five and last five days of each month. (999.)

F. R. MEYERS,
General Ticket-Agent."

This is followed by numbers in figures from two to fifty-four inclusive, to remain on the ticket in the hands of the holder, a number to be punched every time the ticket should be used. There was also a coupon attached, which was required to be taken off the ticket the first trip upon which it should be used, and returned by the conductor to the auditor of the railway company. It was as follows:

"(1.) Good for one trip, P., C. & St. L. Railway. Monthly ticket for use of Thomas Powell, between Cincinnati and Branch Hill, during July, 1871. This check to be taken up by conductor on first trip and returned to auditor."

The answer admitted that the plaintiff did not exhaust by *eleven* all the trips he had the right to make upon the ticket during the month of July, 1871.

To this answer the plaintiff did not reply. With the exception of one witness, a Mr. Longley, who merely testified to the transaction of putting the plaintiff off the cars, the case was submitted upon the testimony of the plaintiff alone. He did not deny the existence of the ticket and coupon as stated in the answer. He exhibited the ticket and thought there was a coupon attached, which was taken up by the conductor on the first trip, but of this he was not certain. He says that on the first day of August he presented this ticket to the conductor who informed him that it did not entitle him to ride on the cars, it being August, but that he paid nothing and was not put off the cars, nor was the ticket punched; also that he rode in the cars again, but that the conductor neither asked him for fare or ticket. On his next trip the occurrence of which he complains took place. He also testified that this road, before July 1, 1871, it being till then under the management and control of the Little Miami R. R. Co., the lessor of the defendant, gave to himself and other residents of Branch Hill, and others residing upon its line in the vicinity of Cincinnati, *commutation* tickets upon much cheaper and more favorable terms than those insisted upon by the defendant, upon the face of this ticket. He also stated that before July 1, 1871, learning that the defendant contemplated changing its terms of commutation so as to make them dearer to this class of the patrons of the road, he, for himself and others, drew up and caused to be presented to the defend-

ant a protest against such contemplated change. But he says he never read the ticket he purchased or the coupon attached thereto until after he was put off the cars by the conductor at the time complained of. *And he swore that four 406
times more force than was necessary was used in putting him off. He swore also, that he only rode forty-three times upon his ticket during July, he having been sick several days during the time. The court charged the jury substantially, that the ticket in question amounted to a contract between the plaintiff and defendant, and entitled the plaintiff to ride fifty-four times only, upon the condition that he should take such rides during the month of July, 1871, and that, if he failed to do so, he could not ride out the remainder of the fifty-four times, or any part thereof, after July, 1871. To this charge the plaintiff excepted, and thereupon the plaintiff's counsel stated that he wished to submit no other question than that of the validity or invalidity of the ticket after July, 1871, to the jury, whereupon the court instructed the jury to return a verdict for the defendant. They did so. The plaintiff moved for a new trial, which motion was overruled and judgment entered upon the verdict, and bill of exceptions was taken embodying all the testimony and the charge of the court; and this petition in error, founded upon the same, is now prosecuted here to reverse such judgment and proceedings, because they are contrary to law and to the evidence in the cause.

We hold that the single issue presented by the pleadings for trial, was, whether or not this commutation ticket entitled the plaintiff to ride upon the defendant's accommodation passenger cars between Cincinnati and Branch Hill, during the month of August, 1871, as many times as would amount to fifty-four trips in all, from July 1, 1871, he having rode but forty-three times during the month of July, and it was really a question of law instead of one of fact. The answer admitted, expressly, the assault and battery upon the plaintiff by the conductor and brakeman of the defendant, and then justified under the contract, as evidenced by the ticket and by alleging that no more force was used than was proper, reasonable, and necessary to remove the plaintiff from the car. To this the plaintiff did not file any reply. It was new matter amounting to a justification, if the defendant's claim of the rights conferred upon the plaintiff by the ticket was correct and valid in law. It was not the mere statement of facts in an affirmative form which amounted only to a denial of the allegations of the petition, as in case of Hoffman v. Gordon, 15 O. S., 211, where the plaintiff charged the defendant with the commission of a wrongful act, which the latter by answer denied, and further averred, that a third person, naming him, committed the act. The court held that no reply to such answer was requisite, as it denied the allegation of the petition, and that it was wholly immaterial who did the wrongful act, if it was committed, if the defendant did not. The present case was *governed by the 101st section of the code, which requires new matter set 407
up in an answer constituting a defense to be replied to; otherwise such allegations of new matter are required to be taken as true (code, sec. 127). The question of the degree of force used was not in issue, though the plaintiff stated upon the trial that more force was used in his ejectment from the car than was proper or justifiable, and the record shows that the plaintiff's counsel stated in open court that he did not wish to present that question of fact to the jury, as we may reasonably suppose he did not, from his failure to reply to the auswer, in this respect.

And, upon the pleadings and the evidence, we find no error on the part of the court in instructing the jury to return a verdict for the defendant, if, upon the whole testimony, taking it to be true in every particular, as claimed by the plaintiff, it could not, *in law*, make any case for a recovery in his favor against the defendant.

There is no such thing as a "non-suit" granted by the court under the code. A non-suit was a dismissal of an action by the court, against the consent of the plaintiff, without prejudice to the bringing of new action. The 372d section of the code only gives the court the right, without consent, to dismiss an action without prejudice in certain specified cases, and provides that, "in all other cases, upon the trial of the action, the decision must be upon the merits." Hence, if any testimony is to be considered by the jury, in order that they may determine whether certain facts, or any fact, does or does not exist, and which, if so found, may or may not entitle the plaintiff to recover, the court, however slight it may be, cannot weigh it for the jury and direct them to return a certain verdict. The case must be one in which the law requires a certain judgment to be rendered against the party after taking all his testimony to be true, and establishing all the facts it tends, in any degree to prove.

Then as to the effect of the plaintiff purchasing this ticket for $7.50, and accepting it and using it forty-three times during the month of July, 1871, it is conceded that, whatever be the limit fixed by statute of the *maximum* charge per mile,

that the defendant may make for passengers riding upon its cars, the rate per mile (about fourteen cents for twenty miles) is far below that *maximum*. It is, therefore, *prima facie*, as a matter of law *reasonable*, and upon the plaintiff was cast the burthen of alleging and proving that, under all the circumstances of the case, such charge for such ticket was unreasonable and oppressive. This is but the converse of the proposition decided in the case of Campbell v. M. & Cin. R. R. Co., 23 O. S. R., 168. There it was held that, "where a railroad company is authorized to demand and receive compensation *for transportation of property, 'not exceed-
408 ing 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 for a less distance than thirty miles, such reasonable rate as may be from time to time fixed by the company,' it is unreasonable, as a *matter of law*, that the company should fix a greater sum for a less distance than thirty miles than the *maximum* allowed for full thirty miles."

For the same reason, where the law provides that a company may charge as high as a certain sum per mile for a distance of thirty miles or more, it is *prima facie* reasonable to charge a *less* rate per mile for a shorter distance than thirty miles. In this case, the plaintiff filed no reply averring the unreasonableness of the charge for this ticket. There was also a valid legal consideration received by Gen. Powell. The company agreed that he should, if he so desired, ride between the two-named points fifty-four times during the month of July. Now, suppose he had, at any time during that month, applied to ride, and all the company's cars, from an unusual and unexpected rush of passengers, had been so overcrowded that he could not have been accommodated, there would have been by the company a breach of its contract-obligation to him. It bound itself to provide the necessary cars to carry him whenever he presented himself and chose to ride. Not so as to ordinary passengers. As to them, it was only bound to provide all the cars and means of carriage fairly and reasonably necessary to carry all persons likely to present themselves; but if, without notice, a thousand persons should present themselves at some station and demand to be carried on the cars, the defendant might lawfully excuse itself, because, not then provided with the means to do so safely, though amply provided for all reasonable emergencies. Yet, it bound itself to furnish the means to carry, and to carry Gen. Powell as a passenger fifty-four times during that month, whenever he might choose to ride. It is like the case of a guest at an inn. The inn-keeper is bound to supply his guests with proper food, after he has obliged himself to entertain them. They must, therefore, pay for the meals usual and necessary to be prepared for them, whether they choose to go to his table and eat them or not. So this plaintiff was bound to pay for the room in its cars provided by the defendant to enable him to ride fifty-four times during that month, whether he did so or not. His sickness did not release it from its obligation to provide for his carriage, and he can claim no deduction on account of it, any more than the guest at the inn can, who fails to go to his meals because confined to his room by sickness.

The judgment is affirmed.

Pugh & Throop, for Plaintiff.

Matthew & Ramsey, for Defendant.

---

454 *DEATH BY WRONGFUL ACT.

[Superior Court of Cincinnati, General Term, May, 1873.]

SARAH VAN CAMP v. ALDRICH & COMPANY.

Aldrich & Company, oil merchants at Cincinnati, Ohio, upon a written order of Mary Van Camp, a druggist doing business at Metamora, Indiana, and a stranger to A. & Co., forwarded one barrel of gasoline to B., at Metamora, with instructions to deliver it to Van C., if she was responsible. The gasoline was delivered and placed in the cellar of Mrs. Van C., where, in consequence of the barrel leaking, an explosion occurred, causing the death of four persons, among them that of C. M. Van Camp, the plaintiff's intestate. By a statute of Indiana, a copy of the Ohio statute, it was unlawful to sell gasoline in that state, for illum-

inating purposes, before the same was inspected and branded "approved." The gasoline had not been caused to be inspected by B., at Metamora, before delivery to Mrs. Van C., and there was no evidence that A. & Co. knew for what purpose she bought it, or that they gave any instructions to B. to deliver it without inspection, or that they knew or had cause to believe that he would do so. All that A. & Co. did in the matter was done in Cincinnati. By the code of Indiana, as by statute in Ohio, an action is given to the personal *representative 455
of the deceased who comes to his death by the wrongful act, neglect, or default of another. The plaintiff, the duly appointed administratrix of the deceased C. M. Van Camp, under the laws of Indiana, brought her action in the superior court of Cincinnati against A. & Co., for causing the death of her intestate by their wrongful act and neglect in delivering the gasoline to Mrs. Mary Van Camp, by their agent B., at Metamora, before the same was inspected

Held:

1. That A. & Co., had not violated the statute of Indiana.
2. That if they had, neither the statute of Indiana nor the code in connection with it, has any force outside of that state, and that the plaintiff can not maintain this action in Ohio.

O'CONNOR, J.

This is a motion for a new trial reserved for decision in general term.

This case presents a number of new and interesting questions. On the 2d day of June, 1870, Mary Van Camp, the mother-in-law of the plaintiff, residing at Metamora, Indiana, and then keeping a drug-store, sent to the defendants, Aldrich & Co., merchants residing and doing business at Cincinnati, Ohio, an order for some gas burners and one barrel of gasoline. The defendants, not knowing Mrs. Van Camp, shipped the barrel of gasoline and the gas-burners to Alfred Blocklege, at Metamora, with instructions if Mrs. Van Camp was responsible to deliver them to her. Blacklege knowing the responsibility of Mrs. Van Camp, made the delivery at Metamora, and Mrs. Van Camp afterward, on July 14, 1870, paid for the same by sending the money to Cincinnati, and receiving in return from Aldrich & Company, a receipted bill made out at Cincinnati. No member of the defendants' firm was at any time in Indiana in reference to the transaction, nor, is there any evidence that either of them was ever there. Blanklege was not the general agent of the defendants, nor had he anything to do with the making of the contract, or the receipt of the price, but was merely requested by the defendants to deliver the gasoline and burners to Mrs. Van Camp if she was responsible. It appears from the evidence that gasoline is a product of petroleum, obtained by distillation, and is used not only for illuminating purposes, but for mixing with paints, varnishes, etc., and that it is nonexplosive, but emits a vapor or gas, which, when mixed with air, is highly inflammable and dangerous. Besides these known properties and uses, there is no evidence that the defendants knew for what purpose the gasoline was purchased.

The barrel of gasoline was placed by Mrs. Van Camp in the cellar of her drug-store, and it thus remained until the following August, she in the meantime having retailed the greater part of it, probably for various purposes. Some time in the month of August, the barrel of gasoline having commenced *to leak, Mrs. Van Camp requested one Bennett, 456
and her two sons, C. M. and Joseph Van Camp, to assist her in stopping the leakage. Bennett, and her son C. M. Van Camp, and two children, accompanied her down into the cellar, she carrying a lighted lamp, and there, after arranging the barrel, an explosion occurred, causing the

death of Mrs. Van Camp, that of the two children, and of C. M. Van Camp, whose widow is the plaintiff in this case, and who, as his administratrix, duly appointed under the laws of Indiana, now prosecutes this action for the benefit of herself and her three minor children, claiming that her husband's death was caused by the wrongful act of the defendants, in selling the barrel of gasoline to Mrs. Van Camp without having the same inspected as required by the statute of Indiana.

The statute of Indiana referred to, was passed in 1863, and the last statute of Ohio upon the same subject, passed in 1867 (Sw. & Sayler, 402), is substantially and almost word for word the same as that of Indiana, so that at the time of the death of C. M. Van Camp, and at the time of commencing this action, the laws and policy of Indiana and Ohio, in reference to the inspection of mineral oils for illuminating purposes, were precisely the same. The Indiana act, like our own, provides for the appointment of an inspector, upon the application of five or more citizens of any county, wherein any coal oil, petroleum oil, or a mixture of coal and petroleum oils is made, refined or manufactured for the purpose of burning in any kind of lamps as an illuminator, or where the same or any one of them is sold for that purpose, the duty of such inspectors being to test the quality and safety of such oils for such purpose, at the request of any one manufacturing or vending the same, and to brand the vessel or barrel containing the same according to the result of his examination. If the oil meet the requirements of the law, the inspector shall affix his brand "approved;" if not, he shall affix his brand "rejected for illuminating purposes." And the act then provides that if the vessel, cask, or barrel is so branded "approved," "it shall be lawful for any manufacturer or dealer to sell the same as an illuminator;" but if the vessel has been branded "rejected for illuminating purposes," "then it shall be unlawful for the owner thereof to sell it *for illuminating purposes.*' It will be seen that the statute does not make it unlawful to sell the oil, whether the same be inspected or uninspected, or whether the same be branded "approved" or "rejected" unless it is sold for *illuminating* purposes. No sale for any other purpose is prohibited, nor is an inspection of such oils for any other purpose enjoined.

The statute further provides that if any person, whether
457 *manufacturer or dealer, shall sell or attempt to sell to any person in the state of Indiana any of said illuminating oils, before having the same inspected, as provided by this act, he shall be fined in any sum not exceeding five hundred dollars. * * * And any person violating any provision of this act, or who shall neglect to do what is required herein, whether manufacturer or dealer, shall be liable to any party injured for damages sustained thereby; and if any loss of life result it is a consequence of not doing what is herein required, or by the neglect or refusal to do what is hereby enjoined, by the manufacturer, refiner, or dealer, the person so delinquent shall be deemed guilty of manslaughter, and punished according to the statute, in such case made and provided.

It will be seen that this act, like our own, gives an action for damages to any person who shall be injured in consequence of a non-compliance with its provisions—that is, to any person who shall sustain an injury by reason of the sale of any such oil for *illuminating purposes*, said oil not having been inspected and branded "approved." But said act does not give an action for damages to any person injured by the explosion of such oil or fluid, where the same has been sold for other

purposes than that of illuminating, where it has been sold for the mixing of paints or varnishes, or for lubricating machinery. Nor does this act give any action for damages to the personal representatives of the deceased, where death has resulted from injuries received in consequence of the unlawful sale of such oil or fluid for illuminating purposes. Such action, however, is provided for by sections 782 and 784 of the Indiana code, passed in 1852. These sections read as follows:

Sec. 782. A cause of action arising out of an injury to the person, dies with the person of either party, except in cases in which an action is given for an injury causing the death of any person, and actions for seductions and false imprisonment.

Sec. 784. When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages can not exceed five thousand dollars, and must enure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.

By these sections, if C. M. Van Camp, in his lifetime could have maintained an action against the defendants in Indiana, his personal representative could also maintain an action there.

The case below was tried to a jury and resulted in a verdict
* for the plaintiff for $3000. A motion for a new trial was made 458
which was reserved for decision here. The grounds of the motion for a new trial are:

1. That the verdict is against the law of the case.
2. That the verdict is against the evidence.
3. That the court erred in its charge to the jury.
4. That the damages are excessive.

We will consider these grounds for the motion in their inverse order. As to the damages we do not think they are excessive if the verdict is otherwise warranted.

Did the court err in its charge to the jury? The court among other things charged the jury "that very many statements in pleadings were unnecessary and need not be proved." Here it is unnecessary for the plaintiff to prove that this gasoline was sold by the defendants to Mrs. Van Camp for illuminating purposes. If the jury believe this oil was one of the prohibited oils, and that the defendants sold this oil in Indiana without inspecting and branding the barrel according to the laws of that state, that is all that need to be proved for the purposes of the action in this respect. The second fact, therefore, was to ascertain whether the barrel was inspected and branded according to said act. It was the purpose of that legislation to interdict the sale and use of the oil, unless inspected and branded, and if inspected and branded, if parties choose then to run the risk of using such oils for illuminating purposes, they assume all the consequences of such use." The court having concluded its charge, one of the jurors asked the court: "Did I understand your honor to say that if this oil was to be used for mixing paints or varnishes, or purposes other than illumination, it must be inspected and branded?" And the court answered, "Yes, under the

Indiana law in evidence." To these instructions the defendants at the time excepted.

From a careful examination of the testimony we are satisfied that, but for these instructions, the jury could not have found a verdict for the plaintiff. There is no evidence in the case showing, or from which it can be inferred, that the defendants sold this gasoline to Mrs. Van Camp for illuminating purposes, or that they knew for what purpose she wanted it, unless it be inferred from the single fact that she at the same time ordered two dozen of Meleck's gas-burners. Mrs. Van Camp was a stranger to the defendants, living in another state, and sent to them an order in writing for the gasoline. Moses Aldrich, who was the salesman of the defendants, testified that "in June, 1870, a man whom he did not know presented the order to him at the place of business of the defendants in Cincinnati;" the order was signed by R. H. Pilcher, for Mrs.
459 *Van Camp. "Pilcher," he says, "was not our agent. We did not know him. I never saw him. I did not inquire of the man who presented the order the uses to which the oil or gasoline was to be put. All I asked him was who Mrs. Van Camp was, and what was her business, and he told me she was a druggist and was responsible." Now under the construction we have already given to the Indiana statute, which is almost word for word like our own, and was copied from our first statute on the subject, passed in 1862, it was incumbent on the plaintiff to show by a fair preponderance of the evidence, that the defendants sold the gasoline for illuminating purposes, or, at least, that they knew it was to be so used. There is no evidence on this subject except the order itself and the testimony of Moses Aldrich. Nor is there a word of legal testimony that Mrs. Van Camp ever sold any of the gasoline for illuminating purposes. Bennett says Chas. M. Van Camp had been burning the contents of the barrel in his lamp for some time, and that he saw the lamp filled two or three times and filled it himself; that he was boarding with Chas. M. Van Camp, but he does not say how he knew the fluid in the lamp came from the barrel in Mrs. Van Camp's cellar. It was in testimony that gasoline is used for various purposes besides that of illumination, and we think that neither the statute of Indiana or that of Ohio requires it to be inspected at all unless it is sold for illuminating purposes. This we have seen is so by the provisions of the two acts, and the titles of the acts confirm this view. The title of the Ohio act is, "An act to provide for the inspection of mineral oils for illuminating purposes." The title of the Indiana act is, "An act to provide for the inspection of petroleum oils for illuminating purposes." And although the title is no part of the act itself, yet it has always been held to be good evidence of the legislative intention. In fact, J. J. Davis, a witness in the case on the part of the plaintiff, who was an inspector of coal-oils in Cincinnati, was permitted to testify that it was not unlawful in Ohio in 1870 to sell gasoline without inspecting or branding it. Also, Robert Hosea, a dealer in petroleum-oils, was permitted to testify that he should have filled the order with the articles named as the defendants did. And being asked whether from that order he should conclude that this oil was to be used for illuminating purposes in lamps, he was permitted by the court to answer, and he answered that he should not think so. Also Charles Moser, who was a large dealer in oils and gasoline, was permitted by the court to testify that he should have filled the order as the defendants did. Now, although

statutes are not to be construed by witnesses, yet the understanding and practice of such witnesses are not to be* lightly regarded. We think, therefore, the court erred in the instructions given and excepted to, and as the instructions were material, we think for this reason a new trial should be granted. 460

It is next claimed that the verdict is against the evidence. If the construction we have given to the Indiana statute be correct, the verdict is clearly against the evidence. But if we admit the construction of the statute claimed by the plaintiff, it remains to inquire whether the defendants, not having been in Indiana, violated the statute by causing the gasoline to be delivered to Mrs. Van Camp, it not being inspected; or, whether the defendants, being resident in Ohio, were responsible for the act of Blocklege in Indiana, in delivering the gasoline before the same was inspected and branded. Blocklege was not the general agent of the defendants, had never acted as their agent before, and in this matter was simply requested to perform a single act for them, to wit, to deliver the gasoline if Mrs. Van Camp was responsible, he having nothing to do with the terms of the contract or its payment. If, under the circumstances the defendants could have given him authority to do an illegal act in a foreign state, so as to bind them as to third persons, yet there is no evidence of such authority, and in this case, from the relations of the parties, it can not be presumed.

In Story on Agency, section 197, the author says "It will not be presumed, that an agent is authorized to violate the laws of a foreign country, (as, for example, by smuggling); and, therefore, either an express authority must be shown, or an implied authority from the known habits of the particular trade, or the general dealings between the parties in similar enterprises." And this is sustained by Owings v. Hall, 9 Peters, 607; Wassem v. Underhill, 2 N. H., 505; Campbell v. Hellman, 15 B. Mon., 508; 32 Vermont, 316; Morton v. Bradley, 30 Ala., 683. The evidence here shows no authority, expressed or implied, to violate the laws of Indiana, and even if the defendants must be presumed to have known the law, because the statute of that state and of our own are identical, or if they must be presumed to have known that a law, such as was in force in Ohio, was also in force there, and this would be carrying presumptions to the extreme verge, if not altogether beyond, or even if it be admitted that they did in fact know the law of Indiana, yet there is not a scintilla of evidence in the whole case to show that they either knew or had cause to believe that Blocklege, citizen a in good standing in that state, would without solicitation on their part, or even with it, voluntarily violate one of his own statutes, and thus subject himself to a fine of $500, and to an action for damages, *perhaps for thousands more, and in the event of the death of the person injured thereby, to imprisonment in the penitentiary. 461 Yet the authority, express or implied, or the knowledge and consent, must either be proved or be assumed, to establish the agency and thus to warrant the verdict. As such agency to violate law, if it were possible to create it at all, was not proved, and without proof could not be inferred or presumed, we must hold that the verdict was against the evidence, and that for this reason also a new trial must be granted.

It is next claimed that the verdict is against the law of the case, and we think it is manifestly so for two reasons:

1. Because the law of Indiana was not violated by these defendants.
2. Because, even if it be admitted that they did violate the law, and

would therefore be liable in Indiana, yet the plaintiff can have no remedy in the courts of Ohio.

And first, did the defendants violate the statute of Indiana? As an act can be done only in person or by agent, and as we have just seen that no agency to violate the law was proved, and therefore for the purpose of the case did not exist, and as the defendants were not in Indiana in person, would necessarily result that they did not violate the statute. But this will be more apparent by looking at the statute and code of that state, and considering the consequences which must necessarily follow, if it be admitted that the defendants are liable in damages to the personal representatives of the deceased, either here or in Indiana. The action is really brought under the code of that state, and the acts claimed to have been done, and those claimed to have been omitted in violation of the statute are merely evidence. Where the oil or fluid is sold for illuminating purposes before the same is inspected and branded, three results follow, or may follow: 1. For the mere sale a fine not to exceed $500; 2. The seller shall be liable to any party injured thereby for any damage sustained; 3. If death result from such injury the person so delinquent shall be deemed guilty of manslaughter. But the statute gives no action to the personal representative of the deceased that is provided for in the code. Section 784 provides: "When the death is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission."

It thus appears that the action for damages under the statute, and the action of the personal representative, where death ensues, under the code, must be for the same act or omission, but the act or omission which will sustain an action for damages
462 *under the statute, renders the person liable for the damages, guilty of manslaughter where death results; therefore, the person liable to the personal representative of the deceased for damages under the code, shall be deemed guilty of manslaughter under the statute; and, therefore, if these defendants, Aldrich & Co., are liable in law for damages, either in Ohio or in Indiana, to the plaintiff in this case, they are deemed guilty of manslaughter by the statute of Indiana, and all that is necessary to send them to the Indiana penitentiary, is to get a requisition and then convict them. And it is also true that if they are not guilty of manslaughter in Indiana, they can not be liable for damages here in this action. This conclusion is inexorably true—there is no possible escape from it. And if it be legally impossible to convict them in Indiana of manslaughter, it is equally legally impossible to hold them liable in Ohio for damages. The impossibility of a legal conviction in Indiana, is simply the impossibility of laying the venue in any county in that state, it being a well established principle that no person in one state can commit a crime in another, by or through an agent who is himself responsible, that is, of sound mind and legal capacity to do the act.

But in the second place, if it be admitted that the defendants did violate the statute of Indiana, and would be there liable in damages to the plaintiff, and also to a prosecution for manslaughter, can the plaintiff maintain this action in Ohio? We think not. By the common law, or under the code of Ohio, no action could be brought against these defendants for wrongfully causing the death of the plaintiff's intestate, for at common

law his cause of action died with him. Such action in Ohio is maintainable only by force of the statute of 1851, "requiring compensation for causing death by a wrongful act, neglect, or default." But this act has no operation in Ohio where the act causing the death occurred without the state. 2 Handy, 110; 10 Ohio St., 121. The plaintiff, then, has no remedy in Ohio by virtue of our code, and our statute is not applicable to her case, and if we take jurisdiction of the cause at all, it must be solely by force of the laws of Indiana. But the laws of Indiana have no force or validity beyond her own territory, and if it be said that we can enforce the rights acquired under the Indiana laws, by virtue of the law of comity, it may well be answered that comity can not confer jurisdiction of the cause on our courts. We must look solely to the laws of Ohio for such jurisdiction as our courts possess. The jurisdiction must be found in the laws of the *forum*, and if it exists there, the rights acquired by the *lex loci* may be enforced by the law of comity.

The case of Woodward, administratrix, v. The Michigan *and Indiana Railroad Co., 10 Ohio St., 121, has a strong bearing on this. 463
In that case the deceased came to his death in Illinois by the negligence, as alleged, of the defendants there. The widow of the deceased took out letters of administration in Ohio, and brought her action in Ohio for the wrongful death of her intestate. The court held that she could not maintain the action, she being appointed administratrix in Ohio. But the court says: "We do not undertake to decide whether an administrator appointed under the law of Illinois might, or might not, maintain such an action, for the purpose of recovering the fund to be distributed under the law of Illinois. That case will present very different considerations from the present." In the case of Richardson, administratrix, v. The New York Central Railroad Co., 98 Mass., 85, it was held that an administrator appointed in Massachusetts could not maintain an action there on the statute of another State, which gives to the personal representatives of a person killed by a wrongful act, neglect, or default, a right to maintain an action for damages in respect thereof. The deceased was killed while a passenger on defendants' cars, in the state of New York. The defendants demurred, for the reason, among others, that "No action can be maintained in this state, by the plaintiff, under or by reason of any statute law of the state of New York." The court says: "There is great difficulty in ascertaining what cause of action this plaintiff has against the defendants, or how she acquired any. By the common law, and by the laws of this commonwealth, no action could be brought against the railroad company for negligently causing the death of the plaintiff's intestate. This is conceded and the plaintiff rests her case wholly on the statute of New York. If this be a penal statute it cannot be enforced beyond the territory in and for which it was enacted. If it gives a new and peculiar system of remedy, by which rights of action are transferred from one person to another in a mode which the common law does not recognize, and which is not in conformity with the laws or practice of this Commonwealth, there is an equally insuperable objection to pursuing such a remedy in our courts." * * * "A succession in the right of action not existing by the common law, cannot be prescribed by the laws of one state to the tribunals of another." And the demurrer was sustained. In the case of Hunt and Wife v. The Town of Sownal, 9 Vermont, 411, an action for damages for injuries happening through the insufficiency of a road, the question turned upon the proper county in which to bring the

action, and the court held that the action under the statute was not local, so as to require it to be brought in the county where the injury occurred.
464 But the court says: "If the cause *of action occurred without the state, it would be very questionable whether this action could be sustained; not that it is an action for a nuisance, or for obstructing a public highway, but for an injury resulting from the default of defendants to perform a duty imposed by statute, and in itself concerning intimately the internal police of the state. And in either case, the remedy is confined to the forum of the place, where the cause of action accrued." Also in the case of Pickering v. Fisk, 6 Vermont, 102, which was a suit in Vermont on a sheriff's bond executed in New Hampshire. The court says: "The question whether such an action can be sustained, relates to the remedy, and must be sustained by the *lex fori*. A court can sustain a suit on a foreign contract, only when it can enforce it agreeably to the rules of the common law, and will not take cognizance of a matter which concerns the internal police of a foreign state."

Now we think it is clear that the very foundation of the present action is "an injury resulting from the alleged default of the defendants to perform a duty, imposed by the statute of Indiana, and in itself concerning intimately the internal police of that state." The statute is one highly penal in its character. It imposes a fine of $500 for the mere prohibited sale of the article, although no injury ensue; and where death results it provides for a prosecution of manslaughter. It is true the statute may be said to be remedial, in so far as it allows damages to the party injured; but those very damages are in the nature of a penalty for the violation of a statute, and are not founded in any idea of natural justice, nor in the ordinary course of business transactions; for the damages are given to the purchaser who is injured by the sale, whether he knew the seller was violating the law or not, and the statute is therefore so far penal, even as to the damages which may be recovered under it, that the seller can not plead the guilty knowledge of the purchaser as a defense to the action, the prohibitions ot the statute being directed against the seller only.

We have been referred by counsel for the plaintiff to cases in 30 Barbour, 107, and 23 New York, 471, growing out of the deaths of persons who were passengers in the cars of the Panama Railroad Company, while crossing the Isthmus, and whose deaths were caused, as alleged, by the negligence of the company. The court, in these cases, intimated that if there had been a law in New Granada like that of New York, the plaintiffs might have maintained their actions; but these announcements were merely *obiter*, and were not characterized by the same caution observed by Judge Gholson in 10 Ohio St., 121, who said expressly, that the court would not undertake to decide whether such an action as this could be maintained in Ohio.

465 *We have also been referred by counsel for plaintiff to the case of Kanaga v. Taylor, 7 Ohio St., 134, as being a case in point. In that case, the plaintiff, Kanaga, sold to one Gregory, at Buffalo, New York, a piano, and received from Gregory a chattel mortgage on the same to secure the balance of the purchase money. Kanaga duly registered the mortgage according to the statute of New York, and afterward Gregory removed to Cleveland, Ohio, bringing the piano with him, still owing the balance of the purchase-money. At Cleveland, Gregory pledged the piano to one Moore, an auctioneer, for advances, with power to sell it if

the advances were not paid by a certain time. The time having expired, and the advances not being repaid, Moore sold the piano to the defendant, Taylor, in Cleveland, whom the plaintiff sued for the conversion of the piano, and for the balance of the purchase-money, due from Gregory. Now it is to be observed that the right which the plaintiff sought to enforce in Ohio, was one arising on contract in New York, and in the ordinary course of business, a right, to be sure, so far as creditors of the mortgagor and subsequent innocent purchasers were concerned, secured by the laws of New York, and in so far, not in accordance with the common law; but it was not a right or claim growing out of the violation of the statute, penal in its nature, and intimately concerning the internal police of another state. Besides the form and nature of the action was in accordance with our code, and did not depend upon a statute which gave a cause of action unknown to the common law. The court had jurisdiction of the parties and of the cause by virtue of the code, and looked to the statute of another state only to ascertain the rights there and thereby acquired. The court, in deciding the case, place the right of the plaintiff to recover upon three grounds; to-wit: the fraud of the mortgagor, Gregory; the negligence of the auctioneer, Moore; and the harmony of the New York statute with our own, under which, by virtue *of a contract*, the plaintiff had acquired his right. The court says: "It is a general rule of international law, that the rights of the parties *to a contract*, as distinguished from their remedies, are to be determined by the law of the place where the contract is to be performed." We do not think that the case in 7 Ohio St. is analogous to the present.

If it be urged that the construction which we have given to the operation of the Indiana statute, and other like statutes in our own and other states, will enable citizens of one state to violate the statutes of another with impunity, by means of agents, we think a sufficient answer is found in the fact, that the agent subjects himself to all the penalties and consequences of a violation of the statute, and that such agents may be very *difficult to find; and also in the fact, that such state may, if it desires, confiscate the goods sold contrary to its policy. 466

We think, therefore, that the verdict is also against the law, and for that, and for the other reasons given, that a new trial should be granted.

New trial granted.

Dunham & Foraker, for Plaintiff.

Hagans, Broadwell & Hyman, for Defendants.

DISSENTING OPINION OF YAPLE, J.

I find myself unable to agree with my brethren, in the conclusion to which they have come in this case.

The Indiana statute is literally a transcript of that of Ohio, passed May 1, 1862. 59 Ohio L., 84. This act has since been amended, but not in any essential feature. S. & S., 402.

At the same time, there was an act in Indiana, providing that "when the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter, for an injury for the same act or omission. The action must be commenced within two years. The damages can

not exceed five thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." 2 Col. Ind. Stat., 330, 331, section 784.

The act of Ohio (2 S. & C., 1139, 1140) is substantially the same; but now allows the recovery of an amount not exceeding ten thousand dollars.

Let us inquire, at the outset, what is the nature of the parties' rights who are made the beneficiaries of such actions—that is, those founded upon Lord Campbell's act, passed in 1846, 9 and 10 Vict., chapter 93, sections 1 and 2, and upon the statute of New York, from which that of Ohio and nearly all the Western States are copied. Their rights are to be compensated in money for the reasonable expectation of pecuniary profit, to be derived from the continuance of the life of the deceased, whether those profits were payable to them by deceased as a matter of right or otherwise. Franklin, Adm'r, v. Southeast R. Co., 3 H. & N., 211.

It is not the same right of action which the deceased would have had, had he lived, but a new and independent right of action vested by statute in the deceased's representatives, for the beneficiaries specified in the statute. This is so well settled by judicial decisions as to need the citation of no authority in its support. The entire pecuniary value of deceased's life is not recoverable, only the reasonable expectation of pecuniary
467 *benefit that would have been derived from its continuance. The injury done is really one done to the beneficiaries' property rights; compensation is made for pecuniary loss.

It is the civilized revival and enlightened application of a rule of law in force in very early times. Anciently, among all nations, the death of a member of a family, caused by the wrong of another, had to be compensated for to the family of the deceased. The family had a property in all its members, though they were not slaves. In the early propagation of the Christian religion, its disciples, in the fervor of devotional zeal, taught that the death of a human being, made in God's own image, was the direct act and visitation of God; and hence, the common law denied the survivor's relatives a right of action against any one alleged to have occasioned his death, though, had he survived, he could have sued to recover damages on account of injuries sustained by him.

The legislation of Massachusetts on this subject is peculiar to itself, being entirely different from the English statute, and those which have been suggested by and followed it. Massachusetts legislated before England did. See laws of Mass., 1842, ch. 89, sec. 1; Gen. Stat. of 1860, ch. 127. It is limited to carriers of passengers, their servants or agents; punishes by fine, upon indictment; and awards the fine, from $500 to $5000, to the widow and children of the deceased, equally. Under this legislation, it is the deceased's right of action which survives. Under it, the supreme court, by C. J. Shaw (9 Cush., 108), held, that if the death occurred the instant of receiving the injury no right of action could accrue to the representatives, and consequently, none survive.

Then, it can not, I think, be doubted that there was, in the state of Indiana, by force of its statute, a primary obligation cast upon the defendants not to injure the wife, children, and next of kin of the deceased, by wrongfully causing his death, by this oil, sold in Indiana in violation of its laws, and that for doing so, there was, by the law of that state, a secondary obligation imposed upon them to render such persons

compensation, in money, for the injury sustained by them in being deprived of their expectancy of pecuniary interest in the life of the deceased, co-extensive with the boundaries of the state. Had the sale and injury taken place in Ohio, the result would have been the same, so far as its borders and jurisdiction extend. The legal obligations, duties, and rights of the parties in both states are identical; their policy and laws upon the subject are the same.

But, it is said, the legislation in both states is in derogation of the common law; that such obligations, duties, and rights are imposed and conferred by the statute of each state alone; *and that the statute of Ohio can not have any force or effect beyond the limits of the state, 468
nor can that of Indiana; and hence, when a party, injured in one state, is compelled to go into the other to enforce his right to compensation, which could not have existed but for the statute of his state, his right is annihilated the moment he crosses his state line, and he brings with him nothing to sue for, though the laws of both concur in the declaration that he ought to be compensated for his injury to the very extent he asks. It this be so, there is a great defect in our general system of jurisprudence. The new additions to the valuable, but often dangerous, kinds of property constantly taking place. and wholly unknown to the common law, and the use of which must be regulated solely by statute, coupled with the fact that facilities for locomotion, transportation and trade between points far distant, and between those living in different countries and states, must leave many obligations unredressable. Kentucky and Ohio may both have such statutes in relation to illuminating oils, but dealers on each side of the Ohio river can violate them and inflict injuries upon the opposite side, but the injured party's right to redress will fall off him as he crosses the stream to seek it. This will be the case though every state in the Union were to pass similar statutes.

We would look in vain for a remedy to congress. Congress (14 St. at Large, 484), in 1867, did pass an act to prevent the sale of such dangerous oils for illuminating purposes. Its terms were broad and comprehensive enough to include sales within states, but the supreme court of the United States (United States v. Devitt, 9 Wal., 41), held that the act could not be made applicable to the states, but must be limited to the territories and places over which the United States had exclusive jurisdiction.

So, we are brought to this condition: if. because a statute of one state can not be made to give a personal right or create a personal obligation, as between persons who are beyond its jurisdiction at the time of the occurrence of the transaction out of which they are claimed to arise, even when sought in the courts of such state—which all the authorities establish it can not--and if such right or obligation be created in favor of or against persons solely by the provisions of a statute of another state, neither can be recognized or enforced by the courts of another state, where the parties may be found and suit brought, for the same reason, that such statute can have no force beyond the state enacting it, though the statutes of the state where the suit is brought create the same rights and obligations within its limits, our courts must remain powerless to enforce many and valuable personal rights and obligations; *since, in modern times, a large part of them have arisen with the 469
introduction and growth of new things entirely unknown to or at variance with the common law.

This difficulty must have long ago suggested itself to the world, di-

vided, as it is and has been, into many independent states, the laws and authority of none of which could, by any possibility, extend to or have any force whatever in any other, because each is sovereign. And if they, without formal treaties, conventions, compacts or alliances, by tacit and implied consent, adopted a general system of law by which rights and obligations in persons, however created or arising in one—whether by grant of king, parliament, congress or convention—should, if not in opposition to their own laws and policy, be recognized and enforced in every other, then such tacit and implied consent to a like code, or *jus fœdaris*, will be assumed in the case of the states of our Union, which are bound together by a common constitution as individual members of one common family.

I think that no one who is widely conversant with systems of laws, will deny that such a code, or unwritten *jus gentium*, has long been in existence; and where it is recognized as applying to cases of mere personal rights or obligations, they not being mere personal privileges, or monopolies, such rights or obligations will be vindicated or enforced everywhere —each state according to its own method or form of remedy. Thus, a right arising where the civil law prevails, will be enforced in England according to the forms of remedy provided by the common law, and *vice versa;* so in our states, where codes of civil procedure, or of the common law system of remedies prevails. Relief is according to the right, no matter where it originated; the form of remedy, that given by the law of the place where sought.

The law of nations embraces, among other things, first, rules for their observance in their dealings and transactions with each other as nations—with this we have here nothing to do; second, the system, method and forms each takes to preserve and perpetuate its own power and authority within its limits and over its citizens or subjects; and, third, private and personal rights that individuals may have derived from it through the operation of its policy and laws, and which individuals may be found in another state seeking there to enforce such rights so derived.

Now, as to the second class, in the absence of express treaty or alliance, or by a constitutional provision in the case of our own state, no state will lend itself to enforce or aid another in the preservation of its authority, or to vindicate itself against violators of its policy or
470 laws. In the height of the *power and dominion of Rome, no one who incurred its fatal decree could flee to a place of refuge anywhere on the known globe, and escape its avenging wrath. Its arm reached and destroyed him, fly where he might. Since then every nation has been a city of refuge for all offenders against the laws of every other. This principle is so rigidly adhered to and applied, that the courts in one of our own states will not even enforce a bond given for the performance of any duty connected with the administration of any department of a sister state.

In the third class of cases, however, the rule is entirely different. There a right is vested in an individual person by his state, there being nothing remaining in the state itself; and if that right be such as another state is accustomed to invest its own citizens with, it will enforce it for him within its limits, when properly asked to do so.

In relation to property rights created by contract, which would be in violation of the common law, except for the authorization of the statute of

a sister state, I need not go farther, in support of my proposition, than the decisions of our own supreme court.

By the common law of Ohio, all sales or mortgages of personal property, by the terms of which the seller or mortgagor was to retain the possession were *prima facie*, fraudulent as against creditors and subsequent *bona fide* purchasers. The common law of the state of New York was similar, if it was not like that of England, which made such sales and mortgages *conclusively* fraudulent. New York and Ohio both passed what are familiar to us all—chattel mortgage laws—by which, if such mortgages be deposited, etc., they shall be valid against the mortgagor's creditors and purchasers from him, though he retain the possession. Afterward, a citizen of New York there took mortgage upon a pianoforte from another citizen of that state. The latter, without the mortgagee's knowledge or consent, brought the piano into Ohio and sold it to a *bona fide* purchaser for full value, from whom the mortgagee replevied it. Here the statute of New York could confer no authority in Ohio, and the statute of Ohio could not, for the mortgage was not taken under it, nor within the territorial extent of its operation; and the common law could render no aid to the plaintiff, for such laws would have given the property to the purchaser, assuming the mortgage to have been made in fraud of his rights. Yet the court (Kanaga v. Taylor, 7 Ohio St., 134) held that the New York mortgagee could recover the piano. This was simply by force of our *jus fœderis*, or *jus genitum*, impliedly adopted by all our states as a system of general law, which the common law of each recognizes, and enforces the same as any other recognized body of law. It is often called **comity*, which term would seem to imply mere grace or favor, analogous to legal discretion, which courts exercise, but which is 471
really required to be exercised or withheld by force of certain legal rules, as any other right is determined by a court; as, for instance, cases of specific performance.

Then, unless this system of law is applicable only to rights and obligations created by contract by the authority of the foreign state alone, and not to rights acquired or obligations incurred by *delicts* or torts, we have no greater difficulty in seeing our right to enforce them in the one class of cases than in the other. In this case, the right created in favor of this plaintiff by the Indiana law, in that state, was one enforcible by her by a civil action, and by a civil action alone.

As to statutes remedial in one part and penal in others, see Sedg. on Stat., etc., 362.

Now, if in the case of *delicts* occurring in one nation, compensation therefor will be enforced in another, the question of delict or not to be determined by the local law of the nation in which it transpired, for a stronger reason will such law be applied in the states of our Union. That this is the law, see Whart. Conf. L. Priv. Inter. L., section 477. "With regard to acts committed on the high seas, the defendant can not invoke the protection of his own law. But there is in such cases the peculiarity that a general law maratime exists, to which the municipal law of any country is regarded as only introducing exceptions; so that, if such municipal law be not common to the parties, *in which case it would certainly apply though the tort was committed beyond the territory*, it is natural to fall back on the general rule rather than to appeal to the principle of the law of the defendant."

Westlake Priv. Inter. Natl. Law, section 158.

"But it is worthy of inquiry whether, if the English and American laws had been proved to agree, that would not have formed a case for applying their common provisions between a plaintiff of one country and a defendant of the other, no less than between parties of the same state (4 K. & J., 391). It is evident that the force of the general maratime law between members of different nations, as one common to the parties, does not depend on the existence of a common authority imposing it upon them both, for no such authority exists; it depends on the fact that the provisions of that law are received by the community to which each belongs, as the rule of justice of which, in certain descriptions of cases, it gives a free assent. Now this consideration arises with equal strength when the municipal laws of two nations agree. How, in fact, did the law maratime first come into being? Simply by this very process. The laws
472 of Wisby and Ole'ron, the Consolato *del Mare, and all the various other sources of that code, even the Roman law in this application of it, were originally the laws of particular populations, the justice of which insured their reception in widening circles, and which, as they spread, were applied between the merchants of the different ports which adopted them, as well as between those of the same port. Why then should this process cease now? Must all nations adopt successively a limitation of the owner's liability to the value of the ship and freight, and yet treat each other on the footing of a ruinous liability, which they all abandon individually for themselves? Id., section 276.

The industry of counsel and our own researches have failed to bring to our notice any case in which compensation for such *delicts* as are complained of in this case, growing out of the statutes of other states, has been sought in the courts of another State. All have been cases where such wrongs were done abroad, and remedies for them were sought under the provisions of state statutes in force where such actions were brought. Such actions never have been sustained, for the statutes claimed to provide for them had no force in the places where such wrongs were done.

Campbell v. Rogers, 2 Handy, 110. Woodward v. Mich. South., etc., R. R., 10 Ohio St., 121. Whitford v. Panama R. R. Co., 23 N. Y., 465. S. C., 3 Bosw., 57. Crowley v. Panama R. R. Co., 30 Barb., 90. Beach v. Bay State Steamboat Co., Id., 433. Needham v. Grand Trunk R. R. Co., 38 Vt., 294. Richardson v. N. Y. Central R. R. Co., 98 Mass., 85. Mumfort v. Canty, 50 Ill., 370. Erickson v. Nesmith, 15 Gray (Mass.), 2 21. Smith v. McLean, 24 Iowa, 322. Vanquelin v. Bouard, 15 C. B. (N. S.), 341.

All these cases, which speak on the precise point now under consideration, take the same view of the law that I do, and none controvert it. It is true, they are not direct authorities, as the question was not involved in the decision of any of those cases; but, being the obvious opinion of so many jurists, they are strong evidence of what is regarded as the law arising from the implied assent and acquiescence of the states.

The Massachusetts case, it will be observed, fails fully to realize the nature of the New York and similar statutes giving compensation for causing death, caused, doubtless, by the fact that their own law is so different.

Actions like the present are not, legally speaking, brought under the statutes of sister states. They are what, under our former system, would have been special actions of trespass on the case. An obligation on

*the case. An obligation on the defendant's part not to injure the beneficiaries of the plaintiff in the manner they did, and having done so, that they incurred a secondary obligation to make compensation therefor, would have been averred as vested in the plaintiff's beneficiaries by the statute of Indiana. That right vested in them personally and exclusively—the state of Indiana retained no part of it; and being similar to the policy of our own state, the latter would recognize and enforce it in behalf of such beneficiaries. 473

It is also obvious to me that even if the purchaser of this oil, Mary Van Camp, and the agent of defendants who delivered it to her, would have been liable to the plaintiff, the defendants are also. The agent at Metamora, had no authority, except to ascertain if the purchaser was responsible, and if so, to deliver the oil to her. He was not instructed to inquire whether the oil could be legally sold. It was illegal to sell it, except as inspected and condemned, for illuminating purposes in Ohio; and the defendants, residing here, were bound to presume the law of Indiana was the same as that of Ohio. The case of Owing v. Hull, 9 Pet., 607, is not in point. There the agent was authorized to sell slaves, which were the subject of legal sale; he sold them illegally. Here the subject-matter of sale was illegal, and the defendants expressly authorized and ordered it. They are, therefore, civily liable for damages caused thereby to others.

Upon the whole case, I feel clear that the judgment should be rendered in favor of the plaintiff upon the verdict; though it is, perhaps, due to myself and my brethren to say, that, upon questions involved in the case, other than the one discussed by me, I have not critically examined them, but have stated my general convictions of the law, only as to such as I have deemed it necessary to speak of at all.

---

*CONTRACT OF SHIPMENT—AGENCY. 553

[Superior Court of Cincinnati, General Term, January, 1874.]

O'Connor, Tilden and Yaple, JJ.

MILTON TOOTLE v. WILLIAM J. RUSK.

Where a merchant residing in one city selects and purchases and pays for goods from merchants doing business in another city, and directs the sellers "to ship by boat" to his agents at an intermediate point, without designating a particular boat, and giving no instructions to insure against the unavoidable accidents of navigation and fire, and the vendors make a contract of carriage with the master of a boat, deliver the goods to the carrier and take bills of lading, and before the boat leaves port upon her voyage it is found that the contract of carriage was improvidently made, and that, under it the goods will not go forward at all, or reach their destination in a reasonable time, the consignor has authority by virtue of the purchaser's direction to him "to ship the goods by boat," to rescind the contract of carriage and to reship the same by another proper and suitable boat; and if such reshipped goods be lost in transit upon the second boat by the unavoidable accidents of navigation or fire, the owner of the boat with whom the contract of shipment was made will not be liable to the purchaser of the goods for their loss.

554 *YAPLE, J.

This case comes before us for decision upon reservation from special term. All the evidence is before us.

The action was brought by Tootle against Rusk, as the owner and master of the steamboat "St. Cloud," to recover the sum of $1,282.50, with interest from the first day of March, 1866, for a breach of contract to carry, as a common carrier, upon said steamboat "St. Cloud," certain specified articles of merchandise—furniture—from Cincinnati to St. Louis, as evidenced by a bill of lading dated "Feb. —, 1866."

The bill of lading witnesses that Mitchell & Rammelsburg shipped, on that day, upon the "St. Cloud," in good order and well conditioned, the said furniture, marked "T." "For Milton Tootle, St. Joseph, Mo.," "which are to be delivered without delay, in like good order and condition, at the port of St. Louis, Mo. (the unavoidable dangers of navigation and fire only excepted), unto Howard & Hirschman, or assigns, he or they paying freight for said goods at the rate of $26.50 for lot. Please forward to St. Louis." * * * Signed, "R. H. Kerr, clerk." Tootle, a furniture merchant, residing at St. Joseph, Missouri, has selected, purchased, and paid for the goods at the house of Mitchell & Rammelsburg in Cincinnati, the price being $1091.00, and authorized them "to ship by boat to Howard & Hirschman, St. Louis, for him at St. Joseph, Missouri," giving no instructions as to insurance against unavoidable dangers of navigation and fire, and no insurance was effected. In pursuance of such authority, Mitchell & Rammelsburg, the consignors, delivered the goods on board the "St. Cloud," then lying in port at Cincinnati, for carriage to St. Louis, and took from the clerk of the boat the bill of lading forming the basis of this action. The bill of lading was made out in triplicate—one being sent at once to the consignee, one delivered to the consignor, and the other retained by the carrier. Soon thereafter, Mitchell & Rammelsburg were notified by the master of the "St. Cloud" that the boat would not make her contemplated voyage to St. Louis, but that another boat, the "Nannie Byers," was about to commence such a voyage; that she was in all respects as good and safe a boat as the "St. Cloud," was newer and stood as well with the insurance officers (all of which representations were true); and asked the consignors to consent to the re-shipment of the goods upon the "Nannie Byers," to the same consignees at St. Louis. This Mitchell & Rammelsburg assented to, and the merchandise was accordingly re-shipped on the "Byers," her bill of lading making the same exceptions from liability in case of loss by unavoidable dangers of navigation and fire as that given by the "St. Cloud." This was all done before the goods or the "St.
555 *Cloud" had left the port of Cincinnati. "The "Byers" began her voyage on the evening of February 23, 1866, during the night-time, but in the morning of February 24, 1866, the "Byers," descending the river, was run into and sunk by an ascending boat, the "C. G. Hillman," wholly by the fault of the latter, and through no neglect or fault of the "Byers," and the plaintiff's goods were entirely lost. And the question to be decided is whether or not the plaintiff upon this state of facts is entitled to recover against Rusk, the owner and master of the "St. Cloud," for such loss.

It may be conceded, and in this case we shall assume, that the property, when placed on board the "St. Cloud" by Mitchell & Rammelsburg

for carriage to St. Louis, and bills of lading therefor were made out and delivered, passed to the purchaser and consignee, Tootle; and that, without authority given them by Tootle, to ship the goods, Mitchell & Rammelsburg and the master of the "St. Cloud" would have re-shipped on the "Nannie Byers" at their own risk. The single question, then, for our determination is, whether the authority given to Mitchell & Rammelsburg by Tootle, to ship the goods by boat to St. Louis authorized them to rescind the contract for such carriage they had made with the "St. Cloud," and re-ship the goods on the "Nannie Byers" for St. Louis, to the consignees originally designated by Tootle. To our surprise, the researches of the able counsel in the case to which our own have been added, no case, similar in its facts, in England or the United States, has been found. It is not denied, that, if the consignors, Mitchell & Rammelsbrug, had authority by the terms of their agency from Tootle to make the re-shipment, they exercised it in the same manner that a prudent and discreet man would manage his own affairs, which in such event they were bound to do. It is clear, too, that they could have refused to rescind the contract with the "St. Cloud," or to re-ship the merchandise, and that the boat or her owner would have been liable to Tootle in damages for breach of the contract, had the boat neglected or refused to carry the furniture; or Mitchell & Rammelsburg might have insisted, as a condition of releasing the "St. Cloud" from herself carrying the goods, that she or her owner should re-ship at their own expense and risk, which, if refused, as might have been the case, would have left the contract in force and preserved to the plaintiff a right of action in this court for its breach.

The obvious intention of Tootle in giving instructions to Mitchell & Rammelsburg to ship by boat to St. Louis, was, that the *goods* should be sent forward by boat, in the usual course of trade and within a reasonable time, under all the circumstances, and, to secure this, no particular boat was named. The *consignors could make choice of any proper one going to St. Louis within such reasonable time. Now, when the 556
"St. Cloud's" master abandoned his purpose of making that trip at that time, and communicated the fact to Mitchell & Rammelsburg by not rescinding the contract and re shipping by the "Nannie Byers," or some equally suitable and available boat, the *goods* could not have gone to St. Louis as plaintiff was directed to send them. Instead of that, the agents would only have succeeded in vesting in the plaintiff a right of action for breach of the contract of carriage, which was not the thing he directed Mitchell & Rammelsburg to invest him with. It was the furniture, not such right of action, that the plaintiff desired and directed to be forwarded to him. The damages recoverable for such breach would, considering his distance from Cincinnati and the almost certain great expense attending such recovery, in all probability, have failed to compensate the plaintiff for the failure to receive his property, which was merchandise, in which he dealt and which he had purchased to sell as a merchant. The goods were no more liable to accident or likely to be lost on the "Nannie Byers" than on the "St Cloud;" and had the latter started on such trip she might have been the boat struck and sunk, and thus the property shipped have been lost, instead of the "Nannie Byers." The plaintiff was guilty of remissness, as a business man, in not directing the goods to be insured against fire and the unavoidable accidents of navigation. Here, we think, was the fault which has entailed upon him this loss. We think that the consignors had authority, by the terms of the plaintiff's instruc-

tions to them, to rescind the contract for carriage upon the "St. Cloud," when they found that she would not make the trip, and to re-ship on the "Byers," which was willing and undertook to carry according to the instructions of the plaintiff to have the goods shipped to St. Louis. When the contract was rescinded and the re-shipment made, the "St. Cloud" had not begun her voyage, but was still in the port of Cincinnati. The agency of Mitchell & Rammelsburg was, we think, a *general* agency to do a particular thing—to ship by boat (*any* proper boat), making a trip to St. Louis in a reasonable time. We think, as was said by the court, Nelson C. J., in Anderson v. Coonley, 21 Wend., 280: "This power is essential to enable the agent to protect the interests of his principal; otherwise, he is altogether disabled from getting rid of an improvident engagement, and is circumscribed in the exercise of his discretion when it might be most essential in the course of the execution of his powers. I venture to say such is the general understanding of *principals* and of the business community. It can not be an authorized stretch of power to modify contracts which a party is *generally*
557 *authorized to enter into for another; and if he may do this, he may upon the same principle waive them altogether."

This language has peculiar force when applied to the shipment of goods by boat upon our western rivers, which are subject to such differences in their stages of water. A large boat, while procuring a cargo, may find, from the fall in the river, that she will not be able to make her contemplated voyage as her master and those making shipments designed; and it may be of the greatest necessity or convenience that re-shipments should be at once made upon other and more suitable boats. It would be a very slow and unsatisfactory way of doing so, if consignors and masters of boats, in cases like the one at bar, were compelled by law to first get the consent of the consignees to such re-shipments, when they may be, as often will happen, at a great distance and not accessible to telegraphic communication. If persons having goods carried would, as prudence requires they always should do, insure them, we see no possible injury or wrong that can result from construing the powers of an agent under such an appointment or instructions as were given in this case, to give such authority as was exercised by Mitchell & Rammelsburg here. The point involved, we concede, is a very nice and important one, and it has been so regarded by counsel for both parties, who have ably and exhaustively argued the cause; and upon full consideration, we feel constrained to render judgment for the defendant.

King, Thompson & Longworth, for Plaintiff.

Lincoln, Smith & Stevens, for Defendant.

*ADVANCEMENT—TRUST. 611

[Superior Court of Cincinnati, General Term, January, 1874.]

O'Connor, Tilden and Yaple, JJ.

†PATRICK MULLEN V. ELLEN MULLEN.

1. Where purchase money is paid by a son, and the conveyance, by his direction, is made to his mother, the presumption of a trust resulting is not rebutted by the counter-presumption of an advancement, the relationship of the parties not being such as in law to found it.
2. A son buying property in his mother's name for a home for her and a place of business for himself, the resulting trust in his favor will only be enforced on his doing equity by providing that she get the benefit intended as if it were a contract, and as their hostility has become such that they cannot both occupy the property, a master will be appointed and required to ascertain what allowance should be made her, and the amount will be charged on the property.

TILDEN, J.

1. The evidence fully proves that the purchase-money for the purchase of the property in controversy, was wholly furnished by Patrick Mullen, and that the conveyance was made to his mother, Ellen Mullen, by his direction. On these facts, unless some distinct ground of defense is made out, we are bound to hold that a trust resulted in equity by operation of law, entitling Patrick Mullen to call for a conveyance of the whole estate.

2. The presumption of a trust thus resulting is not rebutted by the counter-presumption of an advancement, the relationship *of the parties, or mother 612 and son, not being such as in law to found it.

3. The controversy, then, arises upon evidence taken at the trial, and offered on the one hand to overthrow the trust and establish a gift, and on the other to uphold the trust. It is not controverted that this evidence was properly received, or that it must be considered for the purpose of ascertaining whether there was a gift, and if there was, then the extent and nature of it.

4. The evidence is extremely voluminous, and in some particulars not clear or entirely free from conflict. On consideration, however, we unite in deducing these conclusions, namely, that it was not the intention of Patrick, or the understanding between his mother and himself, that she should become the sole and exclusive owner of the estate, or hold the possession in such manner as would authorize her to expel him from it, and at her death to dispose of the property by will or transmit it by descent to her heirs; that it was the intention of Patrick and the understanding between his mother and himself, that he should provide for her a home and a support during her life; that the purchase of the property in controversy was made partly with a view to the execution of this purpose, and partly with the view to provide for Patrick, at the same time, a home and a place of business; that it was expected that Patrick would carry on his business as a merchant, and would occupy so much and such parts of the building as should be rquired for that purpose, and as a place of residence for himself and his mother; and that the family would live together in harmony, and the mother remain at the head of it; that no definite part of the building was set apart for the exclusive use of either party; that on entering into the possession, and until a breach occurred in the personal relations of the parties, the occupancy and enjoyment went on consistently with the original purpose and intention, and that after such breach occurred the parties became much embittered toward each other; the family was broken up, the parties having been unable to agree upon any separate use of the property, each claiming the whole.

On these facts we hold:

1. The plaintiff is in court seeking equity, and is bound to do equity. He is therefore entitled to have a conveyance adjudged to him only on the terms of making available to Mrs. Mullen the full benefit intended by the arrangement, in con-

†This case was affirmed by the supreme court commission, with modification, no report, 3 B., 310.

nection with which the conveyance was made to her. We regard that arrangement as having been, in substance, and in contemplation of equity, a contract, the performance of which on the part of the defendant is a necessary condition of relief
613 *in his favor. In ascertaining the nature of the equity of Mrs. Mullen, and the mode of awarding it to her, we are, we think, required to regard her attitude before the court as that of a party to a legally binding contract, coming into equity to have the contract enforced in specie.

2. In ascertaining the terms and the nature and extent of the obligation of the contract, we are to reject all particulars and circumstances not of the essence of the contract, and limit our legal judgment to what we can ascertain to be the substance of it, and then to apply the remedy adapted to it and best calculated to effect the real design and purpose of the parties. The contract, then, and the undertaking of Patrick, and that in which consisted the substance of it, was that he should provide for the support and maintenance of his mother. Both parties expected that this obligation would be executed in a particular way, but it was not confined to that mode, and the mode thus contemplated may well be regarded as not being part of the essence of the contract. But if it was so, and was so considered, still the terms of the contract are incapable of execution in this particular way. They do not certainly define the limits of the occupation of the respective parties in the contingency which has happened; the evidence does not enable us to define them, and we have no power to make a contract for the parties or to award partition between them. Besides, if we were at liberty to do either of these things, it is apparent from the evidence we should merely perpetuate the relations of hostility between the parties hitherto and still existing. In analogy, then, to the rule at law, giving damages for the breach of a contract, and to the practice in equity which awards compensation for breaches of trust, and of contract when incapable of execution in specie, we hold that the equitable claim of Mrs. Mullen should be turned into money, to be charged upon the property; and that, subject to this charge, a conveyance should be made to the plaintiff. The judgment will therefore be so modified as to conform to this view; and the case will be sent to a master to ascertain how much would be a reasonable sum to be allowed to Mrs. Mullen on account of her support and maintenance, from the time the defendant ceased to afford such support and maintenance, down to the day of his report; and what would be a reasonable sum, according to her state and condition in life, to be allowed to her, and paid in monthly parts, for her support and maintenance for life. The amount so to be ascertained will be charged as a specific lien on the property, with leave to Mrs. Mullen to have execution in case of default; and subject to such charge
614 the property be conveyed by her to the plaintiff, and in default of such conveyance the judgment operate as such. The cost down to the *present time to be paid by the plaintiff; those hereafter to arise to be subject to further order.

BILL OF EXCEPTIONS.

[Superior Court of Cincinnati, General Term, January, 1884.]

CHARLES O. TANNER v. SAMUEL J. BROWN.

O'Connor, Tilden and Yaple, JJ.

Section 291 of the code requires the party objecting to a decision of the court on the trial of a cause to except at the time the decision is made, and provides that time may be given to reduce the exception to writing, but not beyond the term. When, therefore, on a trial by the court, a defendant, at the close of the plaintiff's evidence, moves for judgment in his favor, which motion is overruled, and the defendant excepts, and then introduces his evidence which the plaintiff rebuts, and the finding and judgment are in favor of the plaintiff, and a motion for new trial is made by the defendant, claiming that the court erred in overruling such motion for judgment, and that the judgment is manifestly against the weight of the evidence and against the law, which motion is continued until a subsequent term and then overruled: *Held*, 1. That, upon error, the reviewing court can not determine whether the motion made by the defendant for judgment should have been granted or not, because no bill of exceptions was taken at the trial term.

2. When a bill of exception states that there was introduced in evidence the court-files of a case, but does not profess to make the same part of such bill of exceptions, but there is an indorsement on the wrapper containing the files that they were made an exhibit in the cause tried, such files can not be looked at by the reviewing court as part of the record, for they are no part of the bill of exceptions, and therefore the court can not determine that the judgment below was against the evidence or the law, these being the only available grounds of error for overruling a motion for a new trial at a term subsequent to that of the trial.

*3. A bill of exceptions defective in *substance* can not be amended after the term at which it was taken, but obvious clerical errors can be corrected at any time. 615

4. Where there is an imperfect record sent up to the reviewing court, and it be shown to such court that a complete record can be supplied from the court below, the case will be remanded to the lower court to supply such *diminution.*

YAPLE, J.

This is a petition in error prosecuted here to reverse the judgmen- of this court rendered at special term in favor of Brown and against Tanner for $1,772.89 and costs. The action below was upon two promissory notes indorsed by Tanner to Brown. The defenses were, that the defendant, as such indorser, had no notice of demand upon and non-payment by the maker; and that the notes were given for a patent right, which patent was void for want of utility in the invention of which the plaintiff had notice when he took the notes, and that he took them after due. The reply alleged that the defendant had waived such demand and notice of non-payment; that the plaintiff was the *bona fide* holder and indorsee for value of the notes before they became due and without knowledge of the consideration for which the notes were given, and that such patent right was not void because of inutility.

A jury trial was waived and the cause tried by the court at the May term, 1872. The court found the above amount due to Brown from Tanner, whereupon the defendant filed a motion for a new trial, which motion was heard and overruled by the court at the June term, 1872, and judgment was thereupon rendered for the plaintiff, and a bill of exceptions taken by the defendants at that term.

The bill of exceptions so taken at the June term, shows that on the trial at the May term, upon the plaintiff's resting his case in chief, the defendant moved the court for judgment in his favor, on the ground that it appeared that the defendant was indorser of the notes, and that no demand of payment from the maker or notice to him of such demand and non-payment had been made or given which motion the court overruled, and to which overruling the defendant excepted. But no bill of exceptions was taken at that term. The defendant then gave his evidence in support of his defense, and the plaintiff offered rebutting evidence. The bill of exceptions shows that there was introduced in evidence on the trial the record in cause No. 3856, Henry Cole v. Nathan Tanner, et al., in this court, "all the papers in the said cause were then put in evidence." The motion for a new trial, filed at the trial term, was based on the alleged error of the court in overruling the defendant's motion for judgment at the close of the *plaintiff's evidence in chief, and because the finding and judgment were manifestly against the evidence and against the law. The bill of exceptions states that "the foregoing was all the evidence offered upon the trial;" but while it states that the record in cause No. 3856 was offered in evidence, it does not profess to 616

make that record or any of the files part of such bill of exceptions. The files in that cause are now brought before us and asked to be considered by us as part of the bill. The wrapper inclosing them has this indorsement, "Made an *exhibit* in case 24,379, superior court of Cincinnati" (this case). But the bill of exceptions itself does not profess to make such files part of it.

As to the alleged error of the court in refusing the defendant's motion for judgment at the conclusion of plaintiff's evidence in chief, it is enough to say that no bill of exceptions was taken to such refusal at the May, or trial term. Code, sec. 291: "The party objecting to the decision must except at the time the decision is made, and time may be given to reduce the exception to writing, *but not beyond the term.*

The motion for a new trial, which was continued until the next term, carried over and preserved to the party only the right to claim that the finding and judgment were against the evidence and the law, for if manifestly against the weight of the evidence they would be against law. These questions we can not determine unless all the evidence is set forth in the bill of exceptions.

See Mowry v. Kirk & Cheever, 19 O. S., 384; Kline & Kerry v. Wayne, Haynes & Co., 10 O. S., 226.

The next question is whether we have before us in the bill of exceptions, all the evidence adduced by the parties at the trial. We think not. The bill expressly states that the record of cause No. 3856 was put in evidence and it does not profess to make that part of the evidence a part of it. Failing in this, any indorsement upon the wrapper inclosing such files, that they were made part of the bill, could not make them so; the bill itself would have to do that. But we know not who made that indorsement, when it was, or how it came to be made. In a case brought on error from special to general term of this court, it may be enough to state in a bill of exceptions, that the record or records in one or more causes in this court were introduced in evidence, and are attached to and made part thereof without manually attaching the same or a transcript thereof. But if so, the bill must expressly make them part of it, and clearly identify them. The better and safer practice is for counsel to offer in evidence only such parts of such records as are deemed material, and when it becomes necessary to take a bill of exceptions, to copy such portions as have been offered in evidence and have it agreed of record with the other side,
617 *that such copies are correct and shall be taken instead of the originals. If that cannot be done, certified copies of the portions of the record introduced in evidence should be procured and incorporated in the bill. In Hicks v. Person, 19 O. R., 446, it is said by the court, speaking of bills of exceptions: "It will not do, as is sometimes attempted to be done, to *refer* to the records of courts or records of deeds, and attempt to make them parts of bills of exceptions. It will not do to refer to depositions on file by the names of the deponents, *or by artificial marks upon the depositions themselves*, without something beyond this. They must be *attached* to, *or made part of* the bill of exceptions; so that when a record of the case shall be made, they can be introduced into that record as constituting a part of the case."

This language has been expressly reaffirmed in Wells v. Martin, 1 O. S., 388. See also Busby v. Finn, 1 O. S., 409; Coleman v. Edwards, 5 O. S., 51; 2 Nash's Pl. & Pr., 1035; Strader v. M. & C. R. R. Co., 2 Supr. Ct. R., 268.

And where a bill of exceptions is substantially defective (the defect or omission not being merely *clerical*) it can not be *amended* after the term at which the code requires it to be taken.

Hicks v. Person, 19 O. R., 426; Geauga Iron Co. v. Street, 19 O. R., 300; Busby v. Finn, 1 O. S., 409; Irvine's Lessee v. Brown, 6 O. S., 12, and cases above cited.

Where there is *diminution* of record, and a full record can be supplied, the cause is to be remanded by the court of errors to the lower court to supply the deficiency and to send up the record when perfected. The case of Hazlewood v. Parker, 2 Dis. R., 429, was a case of supplying a full record. "The bill of exceptions *stated* that a certain paper, which was still in the file of the case, and as to the identity of which there could be no question, *was attached* to *as part of the bill of exceptions*, and marked with the letter A, but in fact it was not done The transcript was sent to the supreme court, and upon a petition in error, did not contain that paper. A motion was made in this court to amend the record so as to incorporate in it that paper," and the motion was granted.

The same course has been pursued in this court in other cases. But never has a bill of exceptions, after the term at which it was required to be taken, been allowed to be amended so as to incorporate evidence it never purported to make a part of it. That is what we are now asked to do. We have no such power. These views preclude us from considering the case upon its merits; and we are therefore required to affirm the judgment.

S. T. Crawford, for Plaintiff in Error.

Job E. Stevenson, for Defendant in Error.

---

*CHATTEL MORTGAGE. 670

[Superior Court of Cincinnati, General Term, January 7, 1874.]

O'Connor, Tilden and Yaple, JJ.

HENDERSON & WHITE v. THAYER, ET AL.

1. Where the law, common or statutory, of a state or country, declares to be conclusively fraudulent and void as against creditors, all sales or mortgages of personal property not accompanied by an actual, continued, and exclusive change of possession from the vendor or mortgagor to the vendee or mortgagee, and the contract is to be performed in such state or country—that is, that the property is there to pass to the buyer or mortgagee—such sales and mortgages will be held to be conclusively fraudulent and void as against the 671 creditors of the vendor or mortgagor, in a state or country in which such transactions are deemed to be but *prima facie* fraudulent, and may be proved to be honest and fair, and when so proved, good as against creditors of the seller, and against subsequent mortgage creditors of the mortgagor, who had notice of such sale or mortgage.
2. Such foreign law fixes the validity or invalidity of the transaction and affects and controls the question of *title*, and it is not a mere rule of *evidence*, which courts of another state or country will disregard and apply its own.
3. To enable any such transaction to be held an equitable mortgage, the law of the place of the contract must be that if fair and honest in fact, the transaction is valid, which rule would necessarily authorize the admission of parol evidence to prove the *bona fides* of the contract. If the *lex loci* declares the transaction to be conclusively fraudulent, no matter how just, fair, and honest it might

have been in fact, such rule of foreign law destroys all equities of the parties; for no equitable right can grow out of or have its foundation in, what the law holds to be so clearly a fraud as to admit of no showing to the contrary.

YAPLE, J.

This cause comes before us upon reservation from special term. It stands upon a motion to set aside the report of a referee and for a new trial. There is a bill of exceptions setting forth all the evidence before the referee as well as his findings of fact and of law. The controversy, as the record shows, lies between Henderson and White, who claim to have been owners of the undivided two-thirds of what was known as "Thayer & Co's Circus and Menagerie," and as such entitled to the proceeds of the sale thereof by a receiver appointed by this court, and one Rosing, who has been allowed by the referee $3,181.93, with interest from January 4, 1869, on the ground that the property was not owned by Henderson and White, but by Robert H. Simpson and James L. Thayer, as partners; under the firm name of Thayer & Co., in the proportion of one-third in Simpson and two-thirds in Thayer, and that Rosing is a creditor of such firm; and also by Clary & Reilley, who hold two judgments secured by attachment upon the circus property, one for $715.75 against the former firm of Thayer & Noyes, and the other $2,297.23 against Thayer, Noyes, and David M. Simpson, the successors of Thayer & Noyes, which claims the referee post-poned until all the claims of Thayer & Co. shall be fully satisfied, and then receive merely the individual interests of the judgment debtors
672 in the residuum *of the proceeds of the sale of the property, which finding of the referee they seek to set aside, and to receive the amount of their judgments out of the proceeds of such sale, according to the dates of their levies of orders of attachment. Robert H. Simpson, whom the referee has found to be a partner with Thayer in the circus, claims, as do a great number of the creditors of Thayer & Co., whose claims the referee has allowed as liens upon the fund, that Henderson and White did not own the circus, but that it was the property of Thayer and Simpson as partners under the firm name of Thayer & Co.

The referee has found, as matters of fact, that, prior to the 10th day of November, 1867, this circus was owned in copartnership by James L. Thayer and C. W. Noyes; that between November 10 and 20, 1867, Robert F. Simpson, in the name of his brother, David M. Simpson, pur-chased for the sum of $15,000, the one-third interest in this show and show property; that, on the 5th day of January, 1869, the undivided third interest of Noyes was sold at sheriff's sale at Girard, Erie county, Pennsylvania, and bid in by said Henderson for Thayer; that, on Decem-ber 22, 1868, Thayer borrowed from Henderson & White $10,000, and took what purported to be an absolute bill of sale therefor upon Thayer's two-thirds' interest, reciting that all the property had been delivered by Thayer to Henderson & White; but on the same day, by another writing, the same two-thirds' interest in the circus was, in form, leased to Thayer for the term of two years, he to operate it, paying all expenses, etc., and to pay Henderson and White $200 per week during the showing season for its use; and when he should repay them, including such $200 per week, the said sum of $10,000, they should re-convey to him $1,000, of which sum he did repay to them; that by the law of Pennsylvania, and the terms of these two writings, and the parol evidence in the case in

reference to the transaction, such sale and lease, in form, amounted only to a chattel mortgage from Thayer to Henderson and White upon the property, and that such mortgage was void as against creditors by the law of Pennsylvania, there not having been an actual and continued change of possession from Thayer to Henderson and White, the contract having been made in that state where all the parties then resided, and where the property then was.

The position of the case, more fully stated, is this: Many persons, employes and others, who became creditors of the show during the year 1869, after the transactions between Henderson and White and Thayer, and the purchase of Noyes' interest at sheriff's sale, at Girard, Erie county, Pennsylvania, had, with Rosing, and Cleary and Reilly, sued out attachments and seized the property of the show at Cincinnati, O., *in the fall of 1869. Thereupon Henderson and White brought suit 673
against all such creditors, in this court, alleging such purchases by them from Thayer and at sheriff's sale of the undivided two-thirds interest in said show for $10,000, paid by them to Thayer, and the delivery to them by Thayer of the property, a subsequent lease on the same day to Thayer, with the privilege of repurchase by him on repayment of such sum of $10,000, within two years from the date of the bill of sale and lease, December 22, 1868, the sum of $200 per week to be paid to them by Thayer during the showing season as rent, the amount of rent so paid to be taken as part of the $10,000 in case of repurchase, etc.; and claiming, further, that all the creditors of the year 1869 trusted the lessee, Thayer, personally, and knew that they and Robert F. Simpson were the owners, and that Thayer had no other interest in the show property than that of lessee and manager, while Rosing's claim, it being a renewal without their knowledge or consent, was a debt contracted by the former firm of Thayer, Noyes & Simpson, and was renewed in the form of the note sued on by them and signed, without authority, by Thayer, for Thayer & Co., and that the smaller Cleary & Reilley claim is due from the old firm of Thayer & Noyes, and the larger one from Thayer, Noyes & Simpson. They further alleged that they are the owners and entitled, in case of its sale, to the proceeds of two-thirds of the property, and prayed the appointment of a receiver, etc. A receiver was appointed, who converted all the assets into money and brought it into court, and the litigation then culminated in conflicting claims as to the disposition of the proceeds. The case was referred to Charles P. Taft, as referee; the substance, generally, of his report, so far as the same is now material to be stated, has been above given.

The referee's findings of fact stand upon the same ground as the verdict of a jury, which the court will not disturb unless the same be manifestly against the weight of the evidence.

The first question then, is whether the referee was warranted in finding, as he necessarily must have done, that the *situs* of this circus and menagerie property, at the time Henderson and White claim to have acquired their interest in it by the bill of sale and purchase from the sheriff of Erie county, Pennsylvania, was in that state—the evidence being that some of the horses belonging to the concern were put out to winter in Ohio, while the winter quarters of the circus were at Girard, Erie county, Pennsylvania. What particular horses were in Ohio wintering is not shown. They were a mere incident or part of the circus at Girard, which seems to have been considered by all the parties as an entirety. In fact Hender-

son and White and Thayer bought at sheriff's sale in Erie county,
674 *Noyes' undivided third interest in the circus property as an entirety, which they could not well have done if the horses had been severed from the show and removed beyond the jurisdiction of the state. By so purchasing and treating it as belonging to the jurisdiction of that state, and as in the place where they all then resided, they have estopped themselves from now claiming that a part of the property was in Ohio, and that the transactions in relation to it must be governed by the laws of this state. For most purposes, though not always, the *situs* of personal property is the domicile of the owner. And, in a case like this, in view of all the circumstances and acts of the parties in relation to this property, the general rule ought to apply, and especially as we know not what particular property was, at that time, temporarily in Ohio.

The next question is, whether the referee was warranted by the evidence in finding that the transactions between Henderson and White and Thayer at Girard, Pennsylvania, amounted to a mere mortgage to the former by the latter upon the show property to secure the loan of $10,000, or whether, upon the evidence, he ought to have found that there was a complete *bona fide* sale and delivery by Thayer to them of his undivided two-thirds interest, and a subsequent contract, disconnected with and independent of such sale, for the repurchase by Thayer from them of such interest for the sum of $10,000, the property to remain theirs until fully paid for by Thayer.

For myself, I think that, even under the law of Ohio, the bill of sale, and the so-called lease, made as they were *upon the same day*, when taken together, and whole unexplained, amount *prima facie* to a mortgage only, and as such *prima facie* fraudulent. As the equity of redemption is so highly favored in law, courts construe every transaction where property is conveyed to secure money advanced, as a mortgage, whenever it is possible to do so. This is the settled rule of construction in Ohio.

And in this case, Thayer swore most positively that the transaction was intended simply as a mortgage to secure the loan of $10,000; that no possession of any of the property was ever given to or taken by Henderson and White; that the second paper was called a lease simply to prevent his future creditors from seizing the property; that the $200 per week was not intended to be paid; that the money was loaned before the sheriff's sale of Noyes' third interest, and that that was bid in for him by Henderson for $1,700, he being present and it was paid for by himself out of the $10,000 advanced to him by them, and that he took the sheriff's receipt for the money. Franklin J. Howes also testified that White told him that the bill of sale (showing it to him) was taken as security for the
675 *$10,000 loan, and that $1,000 had been repaid, which was indorsed on the back of the paper, and it was conclusively proven that the sum of $1000 had been repaid by Thayer to Henderson and White. Upon the papers executed between the parties and this testimony, the referee was clearly warranted in his finding that the transaction was a mere mortgage by Thayer to Henderson and White.

The referee, then, having upon sufficient proof found the transaction between Henderson and White and Thayer to have been a mere mortgage unaccompanied by actual and continuous possession in the mortgagee, which, under the law of Pennsylvania, rendered the transaction conclusively fraudulent as against subsequent creditors, the Pennsylvania state

law was proved to be according to the finding of the referee by S. E. Woodruff, a lawyer residing in Girard, Erie county, Pa., and of some twenty-five years' standing at the bar. This rule of law in that state has also been recognized and declared by the supreme court of this state (Hombeck v. Vanmeter, 9 O. R., 153, 154); and by the 362d section of our code it is provided that "the unwritten or common law of any other state, territory, or foreign government, may be proved as facts by parol evidence; and *the books of reports of cases adjudged in the courts may also be admitted as presumptive evidence of such law.*"

The uniform current of decisions of the highest court in Pennsylvania fully sustains the finding of the referee: Clow v. Woods, 5 Ser. & Raw., 275; Kerr v. Gilmore, 6 Watts, 405; Brown v. Nickle, 6 Barr, 390; Hugus v. Robinson, 24 Pa. St. R., 13; Haynes v. Hunsicker, 26 Id., 60; Todd v. Campbell, 32 Id., 250; Billingsley v. White & Sparhawk, 59 Id., 464; McKibben v. Martin, 64 Id., 352; Miller v. Garman, 69Id., 134; 1 Smith's Ld. Cas. Amer., note to Twyne's case, p. 72., &c., 5th Amer. ed.

And many other cases to the same effect might be cited. These cases fully establish the law of that state to be, that a *sale*, or mortgage of personal property not accompanied by an actual, continued, and exclusive change of possession is conclusively, and as a matter of law, fraudulent and void as against subsequent creditors. And as the referee has found that there was no actual possession in Henderson and White, it is, if the law of Pennsylvania is to govern the transaction, wholly immaterial whether there was a contract of sale with privilege of repurchase, or whether the arrangement was simply *to secure the loan of money. 676
In either case by the law of that state, the transaction was void as against the class of creditors here claiming this fund in opposition to Henderson and White.

The law of Massachusetts, Maine, New York (since the revised statutes), Tennessee, Missouri, Georgia, Arkansas, Texas, North Carolina, Ohio, and, perhaps, some other states, is different from that of Pennsylvania, where it is stricter in this respect than elsewhere, and as declared by the courts of many of the states. In Ohio the rule is settled, that the sale or mortgage of personal property, unaccompanied by delivery of possession, is but *prima facie* fraudulent, and may be proved by parol to have been fair and *bona fide*, and if so, that it will be good between the parties and against all creditors and purchasers of and from the vendor or mortgagor, who had notice of the same at the time of the accruing of their claims.

Bloom v. Noggle, 4 O. S., 45; Sidle v. Maxwell, Id., 236, and many other cases.

This, then, presents the question whether the right to, or ownership of, this property is to be determined by the law of Pennsylvania or of Ohio.

"The general principles adopted by civilized nations is, that the nature, validity, and interpretation of contracts are to be governed by the laws of the country where the contracts are made, or are to be performed. But the *remedies* are to be governed by the laws of the country where the suit is brought; or, as it is compendiously expressed, by the *lex fori*. No one will pretend that, because an action of covenant will lie in Kentucky, on an unsealed contract made in that state, therefore a like action will lie in another state, where covenant can be brought only on a contract under seal."

Bank of the United States v. Donnally, 8 Pet., 362.

"In the common law of England and America * * * every contract, whether made between foreigners, or between foreigners and citizens, is deemed to be governed by the law of the place where it is made, and is to be executed."

Story Conf. of Laws, sec. 279; Westlake's Priv. Internat. L., secs. 110, 165, &c., 172, 173, 176, 177: Bolton v. Street, 3 Col. (Tenn.), 31; Miller v. Tiffany, 1 Wal., 298; Corcoran & Riggs v. Powers, 6 O. S., 19; Sovigny's Internat. L, (by Guthrie), p. 180, note *a*; Burge, iii. 758; Addison on Contr., 1034; Robinson v. Bland, 2 Burr, 1084, and many other cases. The presumption, in the absence of evidence to the contrary, is, that the contract is intended to be performed where made (Id., sec. 282); and to what such presumption the contract, if in writing, must state where it is to be performed. The law of the state or country, by which the nature, validity,
677 *and interpretation of such contract is to be determined, may be the common law, or the customs and usages recognized and adopted as part of the law of such state or country, as well as its statute law. Other states recognize and enforce the rights of private persons derived from such law, not because they are bound so to do, but by virtue of a rule of comity (a rule of private international law) universally adopted by all civilized countries. Each state of our Union establishes such systems of laws as to it seems most just and wise and best adapted to the convenience and necessities of its people; and hence, as upon the question now before us, different states have directly opposed rules of law governing the same subject; and were each to decide rights created under the laws of other states, according to its own, the greatest inconvenience and hardship would result. No contracts could be entered into anywhere with any safety, for migrations of persons from state to state are usual occurrences. A citizen of Ohio going into Pennsylvania to enforce a mortgage upon personal property here, and executed here, would be turned out of court, and the citizen coming here with property sold, but retained in his possession there, would find his title divested by crossing the state line, and vested in another, whose creditors and not his, would apply it to their debts. The law as administered everywhere, guards against such results:

Kanaga v. Taylor, 7 O. S., 134; Knowlton v. Erie Railway Co., 19 O. S., 260; Ballard v. Winter, 39 Conn. R., 179; S. C. 12 Amer. Law Reg. N. S., 759; Koster v. Merritt, 222 Conn., 246.

The law of Connecticut on this subject is the same as that of Pennsylvania, the law of Massachusetts like the law of Ohio. Personal property mortgaged, but left in possession of the mortgagor, was removed into Connecticut from Massachusetts, and the court of Connecticut recognized and enforced the mortgagee's rights according to the laws of Massachusetts. The court declared that such laws are not mere rules of evidence, but held that they operate to vest and perfect title. The distinction between what is of the essence of the contract and right, and what is mere evidence, is well illustrated by the case of Kerr v. Gilmore, 6 Watts, 405, which has been followed by subsequent decisions, and is the settled law in Pennsylvania. It is there held that the execution and delivery of an instrument, and, *at the same date*, the execution and delivery of a defeasance by the grantee, shall be construed to be a mortgage; and that it is not competent for the grantee to prove that the conveyance was executed and delivered *before* the defeasance, which was a

subsequent and independent agreement; and that *the transaction was intended by the parties to be an absolute sale, if the consideration money were not repaid within the time specified. Now, the legal presumption from such facts, and the conclusiveness thereof, so as to exclude the reception of any evidence to prove the contrary, are mere rules of evidence, standing alone and against all the decisions of courts elsewhere. See 3 Ld. Cases Eq. Amer., note to Thornbrough v. Baker; Howard v. Harris. Here we would be bound to follow neither presumption; but if the facts proved according to our rules of evidence should establish that the transaction was such as the laws of that state rendered void (the transaction, the parties, and the property being there), then our courts will hold it to be void here, though it would have been valid if consummated and to be performed here. 678

It follows, that, as the transaction is void as against creditors by the law of Pennsylvania, which governs it, being conclusively fraudulent as against them, Henderson and White cannot claim to be equitable mortgagees, for no equity can arise out of or be founded upon a conclusive fraud.

The reason, in Pennsylvania, that parol evidence is inadmissible to prove such transaction fair and honest, is, because if that were proved, it could do no good; the transaction would, admitting such facts to be true, still be *conclusively* fraudulent and void as against creditors, in opposition to whose rights no title is permitted to vest in such purchaser or mortgagee. This is so by reason of the established public policy of that state. To permit an equity to be proved, by establishing good faith in fact to found it upon, would be to change the rule of title as it exists in that state, and apply that of Ohio. If that should be done in the present case, I see no good reason why we ought not to follow our own rules of law in every case, and reject those of other sovereignties where transactions are consummated when their laws differ from ours.

I take the whole matter to be this. The facts constituting the transaction are to be ascertained according to the rules of evidence adopted in Ohio, and the legal effect and consequence of such facts by the law of Pennsylvania. On this subject the two systems of law are directly opposed to each other, and surely no reading could be correct which would determine the validity of the transaction by the law of Ohio as opposed to that of Pennsylvania.

Parol evidence must first be admissible to prove the *bona fides* of the transaction. The contract, that is, the vesting of the property in H. and W., was to be performed and consummated in Pennsylvania.

It is different from the case of a conveyance, not fraudulent in fact, but only constructively fraudulent in law, as having *been made to hinder and delay creditors, in which a court *may* allow the conveyance to stand and require the constructively fraudulent grantee to pay so much as a just price for what was granted to him, as in the case of McNally, et al. v. Bush, out of which grew Jamison v. McNally, 21 O. S., and cases there cited by the court and counsel. And it is different from what this case would be if the law permitted the transaction to be proved an honest one and good in fact, though *prima facie* fraudulent in law. I think no decision can be found sanctioning such a rule of equitable relief in a case like this at bar. 679

It follows that the report and finding of the referee in relation to the claims of Henderson and White must be confirmed, their motion for a

new trial overruled, and judgment entered accordingly. It may be said their case is a hard one, so would be the cases of these creditors if Henderson and White received this money to their exclusion; for they labored and expended their means for the benefit of this show during the year 1869, and it would be as hard for them to lose their claims as these plaintiffs theirs. We have there but to decide according to their respective, legal rights, though we may regret consequences we are not warranted by law to prevent.

As to the Rosing debt, we can not say that the referee erred in finding it a valid debt against the partnership of Thayer and Simpson. The original claim was against Thayer, Noyes and Simpson, but, on January 4, 1869, the new, or last firm of Thayer & Company, gave their note for the amount, payable six months after date, with interest from date, for the amount of such indebtedness, whereby we think it became a debt of the last partnership, and is entitled, therefore, to participate in the distribution of this fund in the order of its priority.

The referee properly rejected the claims of Clary and Reilley—one is a debt due from the firm of Thayer and Noyes, and the other from Thayer, Noyes and Simpson, and not from the new, or last firm of Thayer & Co.

There seems to be a clerical error in the report of the referee as to interest upon the claim of Russell, Morgan & Co. It is allowed from February 15, 1871, when it seems it should have been from February 15, 1870. If this be a clerical error, it may be corrected.

The motion for a new trial is overruled, and the report of the referee confirmed.

Tilden, J., dissented as to the Pennsylvania law being a rule of property right. He held that it is but a rule of evidence.

Logan & Randall, for Henderson and White.

Lincoln, Smith & Stevens, for Simpson.

Hoadly & Johnson, for same.

Forrest & Lindeman, for Rosing.

---

724 *INTEREST.

[Superior Court of Cincinnati, General Term, April, 1873.]

THE HILLSBOROUGH AND CINCINNATI R. R. CO. v. CINCINNATI.

O'Connor, Tilden and Yaple, JJ.

Prior to the adoption of the constitution of 1851, a railroad company was incorporated by the legislature of Ohio, with an authorized capital of $300,000, and with power to borrow money, not exceeding the amount of its authorized capital, at a rate of interest not exceeding *seven* per cent. per annum, payable at such times and *places* as might be agreed upon between it and the lenders; and afterward, the legislature, by another special act, authorized the city of Cincinnati to loan such railroad corporation an amount of money not exceeding $100,000, "upon such *terms, conditions* and *limitations* as might be determined upon by the city council," it first submitting the question to a vote of the people of the city; and in pursuance of such act, the people of the city, at an election duly held, voted such subscription, and the city council, by ordinance, made the loan

taking therefor *the bonds of the railroad company, payable in the city of New York, thirty years after date, with interest at six per cent per annum, 725
payable semi-annually, and reserving interest at a rate greater than six per cent per annum, but not more than seven per cent, six per cent being the ordinary legal rate of interest authorized by law. *Held:* that the city had authority to make such loan, at such rate of interest, payable in the city of New York, and can recover the interest due to it upon such bonds of the railroad company. Chillicothe Bank v. Swayne, 8 O. R., 257, considered.

YAPLE, J.

This is a petition in error prosecuted by the Hillsborough and Cincinnati Railroad company, incorporated under the laws of this state, defendant below, to reverse a judgment rendered against it in special term in favor of the city of Cincinnati, a municipal corporation, plaintiff below, for $130,000 and costs.

On the first day of August, 1850, the city of Cincinnati, for a valuable consideration, took from this railroad company twenty of the bonds of the latter, each for $5,000, and amounting to $100,000. They were made payable in thirty years, with interest at the rate of six per cent per annum, payable half-yearly, at the bank of America, in the city of New York, or such other place in that city as Cincinnati should designate. The bonds contained a provision, that, upon the default or neglect of the company to pay at maturity the installments of interest, or any of them, as the same should become due, the city should have the right to enforce payment of the principal and the interest due at the time of any such default. No interest has been paid upon any of the bonds since 1856; and the judgment sought to be reversed is for unpaid interest *alone*, exchange even being excluded therefrom. The court expressly found that none of the principal of any of the bonds was due. It is not claimed that the interest reserved to the city in the transaction exceeds seven per centum per annum.

To the city's petition, the railroad company interposed, among others, two answers, numbered three and four, and their sufficiency or insufficiency is the sole question presented for our determination.

The third answer sets up as a defense to part of the action, that $75,000 of the bonds and interest upon them, the city is not entitled to recover, because they are usurious, the city having only loaned the company $73,312.96, and took therefor $75,000 of bonds, drawing interest at the rate of six per cent per annum, payable semi-annually, which contract, the city, under the laws of the state, had no corporate authority or power to make. And the fourth answer claims that all the *bonds are in- 726
valid and void, because made payable at a place, to wit, the city of New York, not authorized by law, the same having been done to enable the city to obtain more than six per cent per annum upon its loan, money being of greater value there than in Ohio, and worth a premium of exchange when so payable.

It is not averred or claimed that the city received or reserved, or intended to receive or reserve more than seven per cent interest on the loan. To these two answers the plaintiff demurred, and its demurrer was sustained as to both of them. Judgment was rendered upon a finding of the facts stated in the petition and the other answers, in favor of the plaintiff for the amount of interest due on the bonds.

The demurrers admit the facts stated in the third and fourth answers to be true; and if the facts stated in either be sufficient in law to constitute a defense to the action, it was error in the court to render any judg-

ment against the company while such facts remained stated upon the record undenied.

The Hillsborough and Cincinnati Railroad company was incorporated by a special act of the legislature on March 2, 1846 (44 O. L., 276), with an authorized capital of $300,000. The 15th section of the act provides: "That said company shall have power, on the credit of the company, to borrow money, not exceeding in amount the amount of capital stock by this act authorized, and at a rate not exceeding seven per cent per annum; and, for the purpose of perfecting said loan, the directors of said company shall have power, in the name of the company, to make and execute such bonds, promissory notes, or other evidences of debt, and payable *at such times and places* as shall be agreed upon by the respective parties so contracting, which * * * may be made transferable and *redeemable*, in such *form* and at such *times* and *places* as may be therein designated."

Afterward, March 14, 1850, another special act was passed by the legislature, 48 O. L., 291, entitled "An act to authorize the city of Cincinnati to subscribe to the capital stock of the Hillsborough and Cincinnati Railroad company." This act authorized the city of Cincinnati, upon a vote of the citizens, to subscribe to that road an amount not exceeding $100,000, the subscription to be "made upon such *terms*, *conditions* and *limitations* as may be determined upon by the city council."

In pursuance of these two special statutes, as appears from Disney's Ordinances of Cincinnati, 302, at an election duly held, the people of Cincinnati voted to extend the authorized aid to this railroad company, whereupon the city council passed an ordinance authorizing such loan,
727 and providing for the *issue of $100,000 of its own bonds, to fall due in thirty years, payable with six per cent, half-yearly, in the city of New York.

Now it is sought, in behalf of the railroad company, to put such a construction upon these special statutes and the action of the parties under them, in view of our then general interest laws in Ohio, as would have precluded it entirely from obtaining any money aid, in the way of loans, from any corporation or citizen of Ohio, at a rate of interest greater than six per cent per annum, under pain on the part of the citizen having his security lessened to the amount loaned with six per cent. interest only, and forfeiture of the whole amount loaned by a municipal corporation, because of a lack of corporate authority and power to make loans on such terms.

The company could borrow at seven per cent., but no one in Ohio could legally lend it money at such rate of interest.

Yet, it is a well known fact in the history of that time, that most of our then projected railroads were mainly dependent upon aid from our own cities, counties, townships, and municipal corporations for the means of constructing them. Mere individual, or other aid, outside of the state, could not be obtained by them upon their own credit, unknown abroad as most of them were. Then, too, the city of New York, even more than now, was the great money center of the United States; and there the legal rate of interest was seven per cent. instead of six per cent., as with us. Western municipalities, extending money aid to such improvements, expected to realize the means of doing so mainly in the city of New York. Hence, the absolute necessity of such special legislation and such action under it as we find in this case. We can not con-

strue these special statutes and the transactions under them, by these parties, as contended for by counsel for the railroad company.

We think the whole case is withdrawn from the operation of the general statutes then in force on the subject of interest and usury. "The general rule must not be alleged in confutation of the special provision"—the latter "are to be read in the light of exceptions." Pot. Dwar. Stats., 273.

It follows that the authorities cited by counsel for the railroad company can not govern the decision of this case, not being sufficiently applicable to its facts. They are:

Bank of Chillicothe v. Swayne, 8 O. R., 257; Bank of United States v. Owens, 2 Pet., 527; Bank of Ashland v. Jones, 16 O. S., 145.

The case reported in 8 O. R., 257, would be followed by this court in a case precisely similar in its facts. But, considering how long ago (1838) that case was decided, and so soon after emancipation from the authority of the old English law, that *the taking of usury in a loan, forfeited the entire debt because of the illegality of the contract, 728 its principles might well be re-examined by our supreme court.

A rule of law, well settled in Ohio, as it is elsewhere, is, that money paid upon a *void* contract may be recovered, unless the contract be illegal in its character, and fully executed: Hoss v. Layton, 3 O. S., p. 357. Now, in that case the court decided that the contract of loan was void for want of corporate capacity in the Bank of Chillicothe to make it; and it could not be denied that it had paid its own money upon that void contract. Was the money paid under it non-recoverable for its illegality? The court expressly held not. "Upon the whole," says Hitchcock, C. J., "we entertain the opinion that the contract in the case under consideration is not void as being against the general law of the state upon the subject of interest," citing specially, Lafayette Benefit Society v. Lewis, 7 O. R. pt. 1, p. 80. The declaration in that case contained the common count for *money had and received*, under which it it is difficult to imagine why the bank could not have recovered back its money, which it had actually paid upon a contract merely void, and freed from the consequences attaching to its illegality.

The only possible answer is, that Swayne and Minor received no part of the money; that they merely went on the void note as sureties to enable one Paddleford to obtain it, and who did, in fact, obtain it for himself only, all of which the bank knew. Had Paddleford himself been sued, it seems impossible to resist the conclusion that he would have been compelled to pay the amount of money he actually received from the bank, with interest, under the count for money had and received.

In the case at bar, it is the very party obtaining the money from the city, and that used it, which is now seeking to interpose this defense—a defense of which we think it could not avail itself to defeat the action. But the city was expressly authorized by law to receive seven per cent. interest on the loan. See Vannata v. St. R. R., Ohio, 9 O. S., 27.

The judgment rendered at special term will be affirmed.

Hoadly & Johnson, for Plaintiff in Error.

Disney, for Defendant in Error.

729 *ESTOPPEL.

[Superior Court of Cincinnati, General Term, January, 1874.]

MICHAEL CLEMENTS v. COMRS. HAMILTON COUNTY.

A subcontractor being induced by the representations of one of the county commissioners, who assured him that there was enough money due the chief contractor with which to finish a certain public building, whereas the chief contractor had been largely overpaid and the sum left was insufficient to pay the subcontractor for finishing the construction of the building; it was held, that while between competent contracting parties an estoppel would clearly arise out of such representations, yet an estoppel could have no greater effect than an express contract would have as such commissioners had no authority to bind the public in that way.

ERROR.

TILDEN, J.

This is a petition in error to review the findings and judgment of the court at special term. The error assigned is the general one, that the conclusions of the court ought to have been the other way, and the questions for our consideration, and upon the evidence taken at the trial, in which is contained the bill of exceptions duly made part of the record.

The plaintiff in error, who was plaintiff below, brought his action under section 2, of the act of March 11, 1843 (1 S. & C., 834), "to create a lien in favor of mechanics and others in certain cases." He claimed to recover for a balance due him for work and labor performed, and materials furnished, under a contract with one Truman B. Handy, toward the erection of the county infirmary, Handy being the builder under a contract with the county commissioners, made pursuant to an act providing for the erection of certain public buildings, passed April 27, 1869 (66 O. L., 52). The "attested account of the amount and value of the work and labor performed, and materials furnished, and remaining unpaid," was delivered to the county commissioners on December 8, 1872, and it was claimed that there was then due to Handy, under his contract with the county commissioners, an amount greater than that due to the plaintiff.

It appears from the evidence that the contract of Handy with the commissioners was entered into in March, 1870; and by it Handy bound himself to furnish all the materials, and to erect and complete the infirmary for a stipulated sum, and on or before a specified day. He entered upon the performance of his contract and proceeded with it until a few days prior to December 8, 1870, when he abandoned the work in an uncompleteted state. During its progress, stated estimates were made by the architect and superintendent of the building, and upon these, and for the amount of these, deducting five per cent. to secure further performance, payment was made to Handy. Subsequently to the abandonment of the work by him, it was ascertained that he had been largely overpaid,
730 and that *$8,647.50 only would be due to him on the full completion of the work; and it was so completed by the county commissioners at an expense of $18,868, not including the claim of the plaintiff, thus making the overpayment to Handy $10,220.50, and including the claim of $3,900 of the plaintiff, to $14,120.50, besides which Handy was indebted to other subcontractors in very large amounts.

By the subcontract between the plaintiff and Handy, the plaintiff undertook to furnish the materials and to do all the architectual iron-work, at the prices stated in the estimates on which the contrrct, receiving payment from time to time, for the amount of estimates of the architect, deducting five per cent., and at the time Handy abandoned the work there was due to him from Handy, for work already done, the sum of about $600. This claim is not, however, part of that presented in the present case, it having been adjusted between the plaintiff and Handy.

At the time Handy abandoned the work the plaintiff had material on hand, worked into shape and made ready to be, but not put in place and attached to the building, part of which was at his shop, and the residue of which had been delivered at the building. Being unwilling to part with his ownership in these materials, or further to look to Handy, and on the advice of the superintending architect, he sought and obtained an intercourse with one of the county commissioners, and he claims he was told that at least $7,000 was then due to Handy, and advised to proceed with his work and to present an attested account; and that he did so on the faith of these statements, and of the promise of payment implied by them. The amount which accrued to the plaintiff afterward, being $3,900, is that for which the action was brought; and the general question is, whether or not, on the facts stated, the law will authorize a recovery.

It is not claimed that on the day the attested account was delivered there was any money whatever under the control of the commissioners belonging to Handy. But it is contended that a liability on the part of the defendants has accrued under section 6, of the act of 1843, creating a lien in favor of mechanics and others (1 S. & A., 864), which provides that "if by collusion or otherwise the owner of any building erected by contract, as aforesaid, shall pay to his contractor any money in advance of the sum due on said contract, and if the amount still due the contractor after such payment has been made, shall be insufficient to satisfy the demand made in conformity with the provisions of this act, for labor done and materials furnished, the owner shall be liabel to the *amount that would have been due at the time of his receiving the account of such work or materials, in the same manner as if no such payment had been made." 731

The evidence does not prove, as matter of fact, that the overpayments were collusion; and we understand it only to be claimed that they were so "otherwise" made as to bring the case under the operation of that word in the act. This is a general word following a particular word, and the rule is to construe them as applicable *ejusdem generis*. Sandiman v. Breack, 7 B. & C, 96. The word "otherwise," then, is to be restrained by the former words; and the mode of overpayment must be similar to that of a payment by "collusion." The evidence proves that the payments were made strictly according to the estimates of the superintending architect; and we are entirely convinced that the error was committed by him, and that it was occasioned by a want of care or judgment in his measurement or calculations. Without undertaking, then, to ascertain how overpayment might be made "otherwise" than by "collusion," so as to bring the case within the act, we conclude that those made under the circumstances do not make a case within it. Having thus found that the defendants had in their hands no money due and payable to Handy, and that the overpayments were not made "by col-

lusion or otherwise," so as to induce an independent liability in any case, it becomes unnecessary to inquire whether the county commissioners on any proper construction can be regarded as "owners" within the intent of the act, or whether such ownership is an essential element of the right asserted by the action.

The case has been presented to us on the further ground of estoppel; and, in a controversy between competent contracting parties, it is, upon the evidence, clear to us that an estoppel would arise. The difficulty consists in the incapacity of the county commissioners to bind the public in that way. An estoppel could have no greater effect than an express contract would have; and it is clear that a contract, in a case like the present, would be an act *extra viam*. The board of county commissioners is a local organization which, for purposes of civil administration, is invested with a few of the functions of a corporation. A grant of process to such a corporation must be strictly construed. When acting under a special power, it must act strictly on the conditions under which it is given. Their duties and powers are prescribed by statute, which all persons may know and are bound to know; and it will not be denied that under the laws under which they were acting, a contract, made contrary to the provisions prescribed by them, would be void.
732 That being so, how can we shut out proof of *the real facts, and, by an estoppel, raise a liability which the law does not authorize the commissioners to assume except upon conditions not complied with?

It must be admitted that the case is one which appears very strongly for redress. The plaintiff, trusting to the statements of public agents, has been induced to part with property, and the public have the benefit of it, and on principles of natural equity ought to pay for it; but on those of positive law, as we understand them, it is impossible for us to afford him any aid.

---

91 ## *PARTNERS AND PARTNERSHIP.

[Superior Court of Cincinnati, General Term, June, 1874.]

O'Connor, Tilden and Yaple, JJ.

†Henry Speer v. Bishop & Co.

H. S & Co., composed of H. S. and one of his sons, were copartners under that firm name, doing business for a number of years in the city of C., when they removed to the city of B., and carried on business together there as partners,
92 under the same firm name, H. S. *always being the monied man of the firm, and having a good reputation and credit as a business man; and while in B. they also kept an office in the firm name of the city of C. They dissolved their copartnership, H. S. retiring from the firm, and another of his sons entering it with the other, the first partner. Neither bore the name of H. S., the name of the father. By agreement, the new firm took the claims and assumed the debts of the old firm, and the new firm was to and did continue business under the old firm name of H. S. & Co.; H. S. recommended the new firm under the former name to the old customers. Notice of this change, etc., was duly published in the newspapers printed in the cities of C. and B., and advisory letters were sent to all who had formerly dealt with the old firm.

B. & Co., merchants of the city of C., were strangers to the old and the new firms, and had no personal acquaintance with any of the members thereof; but they

†The judgment in this case was affirmed by the supreme court. See opinion 24, O. S., 598.

knew H. S. by reputation, and that his reputation was good, and they took daily the newspapers in which the notice of dissolution, etc., was published, but never saw or had knowledge thereof. One of the new firm called upon them and purchased goods. He represented himself as one of the firm of H. S. & Co. B. & Co. did not inquire of him who composed the firm, nor did they know; but they inquired on 'Change concerning the standing of H. S. & Co., and learned it was good. After the first purchase, H. S. & Co. purchased by orders written upon paper with letter-heading, printed H. S. & Co.

After these purchases, and in ten months after its formation, the new firm of H. S. & Co. failed, with liabilities amounting to some $60,000, and with assets not exceeding $6,000 in value.

In an action by B. & Co. against H. S. & Co., including H. S. individually by name, for the price of the goods so sold and delivered to the new firm: *Held*, that the firm name H. S. & Co. was more than a mere designation of a house, or association of persons of any names indifferently, but was a declaration that H. S. personally was a member of the firm, and strangers not knowing the facts were justified in dealing with the firm on the faith of such representation, without inquiring further; that as H. S. voluntarily and actively caused and assented to the use of his name as a partner in that connection, he was, as against B. &. Co., estopped from denying that he was a partner in the firm, and that they could sue and recover against him as such, for the goods so sold and delivered by them.

2. The fact that one of the new firm, in the absence of all the members of the firm of B. &. Co., may have handed their porter or other employee a card with the names of the two members printed in the upper left and right corners, and H. S. & Co. in the center, was not notice to B. & Co. of the fact that H. S. was not a partner, such card never having been handed to B. & Co.

*YAPLE, J. 93

This is a petition in error prosecuted here to reverse the judgment of this court at special meeting, rendered in favor of R. M. Bishop & Co. against Henry Speer, for the sum of $387.74 and costs. The action below was brought by R. M. Bishop & Co. against Henry Speer, Edward Speer, and James H. Speer, as late partners doing business in Brookville, Indiana, as Henry Speer & Co., to recover on an account for goods sold and delivered, amounting to $365.80, with interest from March 8, 1872. Henry Speer only was served with a summons, or who appeared as a defendant to the action. He denied that he was a partner in the said firm of Henry Speer & Co., when the goods, the price of which was sued for, were sold and delivered. And he was not, in fact, such partner.

The facts were, that for several years previous to 1868, Henry Speer and his son Edward Speer, carried on at Cincinnati, Ohio, the business of manufacturing paper, under the firm name of Henry Speer & Co., when they transferred their business to Brookville, Indiana, where, under the same name of Henry Speer & Co., they carried on the same business, and the manufacture of flour and general merchandising, until the first day of June, 1871, when Henry Speer retired from the firm, and James H. Speer entered it. During all this time the firm had kept a place-of-business office in Cincinnati, under the name of Henry Speer & Co.

Henry Speer sold his entire interest in the business to his said two sons, they to collect all claims, and pay all the debts of the old firm. The notice of such resolution was published in a Brookville, Indiana, paper and also in two of the Cincinnati dailies, and letters stating the fact and terms of dissolution were sent to all who had had previous dealings with the firm. The plaintiffs, R. M. Bishop & Co., had never dealt with them before selling the bills of goods for the price of which they sued and recovered the judgment now in question, but they had heard of Henry Speer, and had always heard that his business reputation was good and his financial condition sound; and he had the financial means in the firm.

The following is a copy of the published notices of dissolution, etc.

"CINCINNATI, *June 1, 1871.*

"I have this day sold my entire interest in the manufacture of paper and flour, and general merchandising, to my sons, Edward D. and James H. Speer, who will continue the business as heretofore under the same firm name of Henry Speer & Co., and collect all claims and pay all debts of the late firm.

"HENRY SPEER."

94 *"In retiring from the above business that I have been so long connected with, I recommend my sons to my old customers, and solicit for them their future patronage.

"HENRY SPEER."

"The undersigned have this day entered into a copartnership, under the firm name of Henry Speer & Co., to continue the manufacture of paper and flour, and general merchandising.

EDWARD D. SPEER,
JAMES H. SPEER."

R. M. Bishop & Co. took at their store in Cincinnati the two city newspapers in which this notice appeared; but the evidence shows that they failed to read it, and were ignorant of its existence and terms. The two sons on taking the business had cards printed with the name of Edward D. Speer in the upper left corner, and James H. Speer in the upper right corner, and Henry Speer & Co. in center of the card; there being, in fact, no Henry Speer in the firm.

About January 8, 1872, Edward D. Speer called at the store of R. M. Bishop & Co., found no member of the firm there, and left one of his firm cards with some person whom he took to be a porter or employee of the house. He returned afterward and found one of the firm, William T. Bishop, whom he told that he was a member of the firm of Henry Speer & Co., of Brookville, Indiana, and that he wished to purchase goods on credit, but did not tell him the names of his firm, nor did R. M. Bishop & Co. inquire of him who were the members composing the firm. They supposed at the time, and until they learned otherwise, after they had sold all the goods for the price of which they sued, that Henry Speer was one of the firm. They never saw or knew of the card left by Edward D. Speer, as stated by him. Before selling the first bill of goods, they went on 'Change and inquired as to the standing of Henry Speer & Co., and were informed that it was good, and they sold on the faith of Henry Speer's name. The first bill of goods was sold January 8, the second January 13, and the third January 16, 1872, the last upon written letters addressed to Bishop & Co. by Henry Speer & Co., the names of Edward D. and James H. Speer not appearing on the letter-heads, which were printed as coming from Henry Speer & Co. In April, 1872, or in ten months after its formation, the firm failed with liabilities amounting to some $60,000, and assets amounting to about $6,000. After the failure of sundry negotiations for settlement, which are immaterial to the consideration of this case, Bishop & Co. sued, and the suit resulted as above indicated.

It is clear that if the acts and conduct of Henry Speer *estop*
95 *him from denying as against Bishop & Co., that he was a partner, he was properly sued as such. It is also undoubtedly true that when any one undertakes to deal with and give credit to a firm, it is incumbent on him at his peril to ascertain who are the persons composing such firm; and he should inquire of the person seeking the credit, as well as from other sources, and if he acts on the supposition that some person is a member of the firm who is not, he and not such person must bear the consequences, unless such person has held himself out, or so represented himself, as a member of such firm, that the party giving credit would, as a prudent and intelligent business man, be authorized to take such holding out or representation of such person as his word, or declaration of the fact that he was a partner. Then no further inquiry need be made, for such holding out or representation would be equivalent to the declaration of the person himself to the party giving credit, of his being a partner. In such case the party giving credit can recover of him so representing himself as a partner, the latter being estopped to deny the fact.

The question, then, is whether Henry Speer, after he retired from the firm, held himself out, or represented to strangers that he still continued a member of it, or liable as such for the obligations it might incur? Is the name Henry Speer & Co. a declaration that Henry Speer and others compose it, or is it a mere designation of a business house carried on by any person or number of persons indifferently, none of whom might even bear the name of Henry Speer? If the former, Henry Speer was liable; if the latter, not.

We think that by actively consenting to the use of the firm name of Henry Speer & Co., by his sons, Henry Speer held himself out to the world and declared that he was a member of such firm, or that he consented to be held liable for its engagements.

In the case of McGowan Bros. Pump and Machine Co. v. McGowan, 2 S. C. R. 313, 314; S. C. 22 O. S., 370. two brothers had been in partnership together under the' name of McGowan Bros. One of the brothers, John, sold out to the other and went into business for himself. The other brother went into a corporation styling itself "McGowan Bros. Pump and Machine Co.," and John enjoined the use of the name McGowan Bros., as that represented to the world that he was in such company, and the injunction was made perpetual. This is a stronger case than that. It evidently deceived R. M. Bishop & Co., and those on 'Change who represented the firm as in good standing. Henry Speer & Co. was not a trade-mark, or governed by the law in relation to the use of trade-marks by a new firm purchasing out an old one.

*"It is clear that if a partner retires, and does still hold himself out as a partner, that is in fact signifying that he is willing to incur the responsibilities of a partner *for the sake of those with whom his name is associated*; and therefore he will continue to be answerable for their conduct, even to persons dealing with them with knowledge of his retirement." 96

1 Lindlay on Partnership, pp. 414, 415. Williams v. Keats, 2 Stark R., 290. Dolman v. Orchard, 2 Car. & P., 104. Brown v. Leonard, 2 Chit. R., 120.

As Henry Speer was well known in the business world as a man of means and high business character and standing, as the others were without means, and his own sons whom he naturally wished to see prospering and enjoying good credit, we can well infer that his leaving his name in the firm was "for the sake of those with whom his name was (so) associated."

The judgment is affirmed without penalty.

McGuffy, *Morrill* and *Strunk*, for Plaintiff in Error.

Simrall and *Hosea*, for Defendant in Error.

☞This case, we are informed, will be taken to the supreme court.—ED. RECORD.

---

*INSOLVENT DEBTORS—SURETIES. 140

[Superior Court of Cincinnati, General Term, June, 1874.]

WILLIAM F. THORNE, ET ALS., v. C. G. MEGRUE, ET ALS.

O'Connor, Tilden, and Yaple, JJ.

1. Where an *additional* undertaking, or a *new* undertaking with *additional* sureties, conditioned according to law, is given by the trustee of an insolvent debtor who has made an assignment for the benefit of creditors, by requirement and order of the probate judge, in pursuance of the provisions of sections 1 and 14 of the act "regulating the mode of administering assignments in trust for the benefit of creditors," passed April 5, 1859, as amended in 1860, the sureties on such undertakings are liable for the fiduciary conduct of the trustee provided for therein, from the time he was first duly qualified as such trustee, and not merely from the time they became bound as such sureties by the execution of such undertakings. Their engagement is concurrent with and covers the same subject in behalf of the same principal as that of the sureties in the original undertaking, and is not distinct from or independent of the same.
2. Whether, where sureties apply, under said section 14, to the probate judge to be released from further liability, and, in pursuance of such application, a new undertaking with new sureties is given and such former sureties are thereupon, by order of the probate judge, discharged from further liability, such new sureties, upon such substituted undertakings, are not free from all liability on account of the breaches of duty of such trustee occurring prior to the execution by them of such new undertaking. *Query?*

YAPLE, J.

This case comes before us upon a demurrer to the three answers of the defendant, Wm. Stoms, the demurrer being reserved at special term for decision here.

The plaintiffs, creditors of Moore, Herrick & Davis, insolvents, who made an assignment to Megrue on May 31, 1866, under the assignment laws of the state, sued Megrue as principal, and Wm. Stoms and others, Megrue's sureties, upon a bond executed by them in the probate court of Hamilton county, on September 28, 1868, to recover their distributive shares of the moneys arising from the assets of such insolvents.

141 *The bond, which is copied into and made part of the petition, is as follows: "Whereas, by a certain deed of assignment executed by Moore, Herrick & Davis to C. G. Megrue, on the 31st day of May, A. D. 1866, the said C. G. Megrue was appointed trustee for the purposes therein expressed; and whereas said court has ordered said assignee to give an additional bond: Now, therefore, we, C. G. Megrue, William Stoms, (.....) undertake and bind ourselves unto the state of Ohio in the sum of sixteen thousand dollars that the said C. G. Megrue *will faithfully perform his duties as such trustee according to law.*

"Witness our hands and seals this 28th day of September, A. D. 1868.

[SEAL.] C. G. MEGRUE,
[SEAL.] WM. STOMS.

"Signed and sealed in presence of Albert Paddock."

The petition then avers that Megrue thereupon continued to act as such trustee until he was removed on the —— day of ——, A. D. 1872; and assigns the following breaches of the bond: First, that on the 1st day of December, 1868, the said probate court made an order that the said Megrue, as such assignee, should, on or before the 15th day of December, 1868, proceed to declare and pay a dividend of all moneys in his hands to the creditors of Moore, Herrick & Davis, and report his proceeding to the court. Second, that afterward, on the 8th day of February, A. D. 1870, the said court made a further order that Megrue, as such trustee, should sell all the uncollected accounts at auction, and make a final dividend among such creditors within twenty days from that date, which time expired on the 28th day of February, 1870; both of which orders Megrue wholly neglected to obey, or to pay such creditors anything, though he had in his hands a large amount of money payable according to law and by virtue of such orders to such creditors, which money he had received from the assets of such insolvents prior to the making of such orders by the court, etc.

The first answer of Stoms admits that Megrue, as such assignee, is indebted to the trust in the sum of $6,179, with interest from October, 1870, the plaintiff's share of which is about $1,250, but the answer denies that Megrue received any moneys or assets after September 28, 1868, and avers that he had received and squandered the same before that day, of which the defendant was, at that time, ignorant. And every fact stated in the petition not admitted in the answer is denied. In a second answer adopting and affirming all the statements of the first one, Stoms alleges that the bond executed by him and dated September 28, 1868, was a *new bond* ordered by the probate court. He also avers that on the 21st day of January, 1870, a new bond was given by Megrue upon which he, Stoms,

142 *was not one of the sureties, and that upon the giving and acceptance of this last bond he was released and discharged from all liability as surety by order of the probate court. And he says that during the time he was surety, Megrue neither received nor paid out any money belonging to the assignment of Moore, Herrick & Davis; and that there-

was no act or omission on the part of said assignee which made him, Stoms, liable upon his bond to the plaintiffs. A third answer filed by Stoms is, in substance, the same as the others, the statements in which are reaffirmed with the additional averment that if the bond executed by him purports to be an additional bond, the same is a mistake, as the probate court ordered the giving of a new bond, and he supposed he was siguing a new bond, and he asks that the bond be corrected accordingly. The plaintiffs demur generally to all these answers.

The statute (1 S. & C. p. 709, amended sec. 1) prescribes the condition of every such bond or undertaking. That condition is, that said trustee *shall faithfully perform his duties according to law.* The same section provides that "the probate judge shall have the power to require an assignee to execute an *additional* undertaking whenever the interests of the creditors of the assignor demand the same, *and an action may be brought thereon as upon an original undertaking.*" Section 14 of the same act provides that the probate judge shall have the right at any time "to require *new* undertakings with *additional* sureties." And it further provides that on "application made by any surety or sureties of any assignee," the probate judge "may, if satisfied of the reasonableness of such application, discharge such surety or sureties from *further* liability, and require that said trustee shall be removed, or give *new* sureties."

It will thus be observed that after such assignee or trustee has been appointed and qualified, two methods are prescribed by statute to insure the proper administration of the trust, and to secure creditors against loss; one is, that the probate judge may require an *additional* undertaking, which creditors may sue upon as an original undertaking; or the probate judge may require a new undertaking to be given by the trustee with *additional* sureties. These two provisions are substantially the same. The second is, that upon an application made to him by a surety or sureties, the probate judge may, if he shall deem the application reasonable, release such surety or sureties from further liability, and require the assignee to give *new* sureties or be removed.

The same two classes of provisions are made in relation to county treasurers, and in reference to nearly all other county and township officers: 2 S. & C., 1589; S. & C., 742, 743.

The extent of the legal obligations assumed by sureties on *such additional bonds, or new bonds with additional sureties, and by the sureties on new bonds where the former sureties applying 143 for release from further liability are so released on the giving of the new bond with new sureties, is, therefore, a matter of the highest public concern as well as material to such sureties. The same rules of liability or non-liability will govern in all such cases.

It will be observed that the condition of undertakings in the class of cases now before the court is short and comprehensive. It does not enumerate all the duties the law requires of such assignee, and say that he shall perform each of such enumerated legal duties, but simply that he shall perform *all* the duties the law requires him to perform. The effect of this is the same as if every such legal duty had been enumerated in the condition of the bond. The statute (amended sec. 5, S. & C., 710) requires, among other things, such assignee to proceed at once to convert all the assets received by him into money, and to sell the real and personal property assigned, etc.; and section 10 requires him, "at the expiration of eight months" from his appointment and qualification,

and sooner if it can be done to the interest of all parties concerned, and as often thereafter as may be deemed proper by the probate judge, to declare a dividend payable out of the assets of the assignor, etc.; then how such dividends shall be advertised, and report thereof to be made to the probate judge within sixty days after the day fixed for the payment of the same, etc.

Now, the first failure of Megrue to perform his duties as such trustee according to law, is averred by the petition to have been his failure to obey the order of the probate court made December 1, 1868, to proceed to declare and pay a dividend of all moneys in his hands to the creditors, on or before December 15, 1868. This was after the Stoms bond was given, and before the new one (from which time he avers he was discharged from further liability by order of the probate judge) was taken. The next failure alleged in the petition was a disobedience by Megrue as assignee to obey the order of the probate court made February 8, 1870, to sell all the uncollected accounts at auction, and make a final dividend among the creditors within twenty days from that date, which time expired February 28, 1870. This order of court, and this failure of performance of duty by Megrue, was after the 21st day of January, 1870, when Stoms alleges that a new bond was taken and he expressly, by order of court, was released from further liability. But he expressly declares in all his answers that Megrue received in his hands no effects belonging to his trust after he, Stoms, became his surety.

Upon these answers, the last alleged breach must be considered as out of the case, which stands upon the first one alone.

144 *As the liability of a surety is never to be extended beyond the strict letter of his obligation, we are to inquire what was the obligation into which Stoms entered when he executed this undertaking; and when that is ascertained, the measure of his liability will be known. The fact that in two of his answers he says this undertaking is a *new* one, does not change the case, for it is to be presumed that it was simply a new one with additional sureties as he does not claim that the prior sureties on the first or original bond were thenceforward discharged, as he does in reference to the future discharge of himself by the giving by Megrue of the undertaking of January 21, 1870. In view of these averments, and the difference between a new undertaking with additional sureties and a new undertaking, the giving of which releases prior sureties after its execution and acceptance, the facts which constituted his undertaking a new bond, releasing after its execution the former sureties, ought to have been stated, especially as he prays that such fact be made the foundation for the correction of the recital in his bond on the ground of mistake. The question for decision then is, whether Stoms, as a co-surety with the sureties on Megrue's first undertaking, bound himself equally with them for the faithful performance by Megrue of all his duties as such assignee from the time of his appointment until Stoms' discharge on January 21, 1870; or did he merely enter into a distinct, independent, and original obligation to become bound for Megrue from the date of his bond until he was released by order of the probate judge? It was decided in the leading case of Deering v. Winchelsed (Earl of) 1 Cox, 318; S. C. 2 B. & P., 270, which case has since been every where followed, that parties are co-sureties where they are bound for the same principle and the same engagement, though they may have bound themselves at different times by different instruments, and the

last without the request or knowledge of the first. Now, upon reason, upon every principle of common-sense construction, would not we infer that the term *additional* bond, new bond with *additional* sureties, means to add or join them to those already existing, the better and more amply to secure the performance of the same duty? It is not *another* bond or a new bond with *other* securities that might imply difference, distinctness, independence. Two distinct things made and kept separate by law, can not be "added" to each other. And why should the statute declare that such additional undertaking may be sued upon as an original obligation, if it were not open to doubt since the code, that, upon the entire conduct of such assignee as a basis, the sureties on both bonds should be joined as defendants because equally and commonly bound? To remove such doubt, and to leave clear the application of the common-law rule as to the joinder of parties defendant, *seems to have been the only possible end such provision could serve. 145

These provisions in relation to additional bonds and bonds with further or additional sureties have long been made in the statutes of this state. They were construed by our supreme court in 1836, in the case the state of Ohio v. Crooks & Shaw, 7 O. R. pt. 2, 221, marg. 575 top, which construction has never since been questioned in any reported case, and the legislation governing the present litigation and the subject of fiduciary bonds, has taken place with such construction placed upon it. The act of February 25, 1824, 2 Chase's Stats. p. 1351, in relation to sheriffs and coroners, provided, that they should give bond, "conditioned for the faithful discharge of their respective duties," and that the court might, "at any time during the continuance of such sheriff or coroner in office, require of them such *further* and *additional* security as may be deemed necessary," etc. The court, in that case, per HITCHCOCK, J., says: The bond now in suit was given in pursuance of this latter provision of the statute; and the question presented by the demurrer to the second plea is, whether such further or additional securities can be made liable for the default of the sheriff until the first bond is exhausted.

* * * "This is a provision of law well calculated for the security of the public, and ought in all cases to be resorted to when there is the least apprehension that the first bond is not sufficient, either on account of the limited amount of the penalty, or of the inability of the sureties to respond in that amount. If a *second* bond is required and executed, *the condition is the same as in the first*, and the *obligors are equally bound with those in the first, for the same conduct* of the sheriff." * * * A breach of the condition of one would be a breach of the condition of the other. As, however, different bonds have been executed, and by different obligors, they cannot be joined in the same suit."

This is the language of Judge HITCHCOCK, (speaking for the court) whose fame as a jurist is due more to his ability to construe the statutes and legislation of the state, than to anything else. In this department of our law, he has reigned supreme and without a rival in the estimation of the bar and the courts of Ohio. The defendant's counsel have, in a laborious and able presentation of his case, cited us to the following cases:

Farrer v. United States, 5 Pet., 373; Miller v. Stewart, 9 Wheat., 681; Bigelow v. Bridge, 8 Massachusetts 274, 275; Worgany's Admr. v. Clipp et al., 21 Ind., 119; Newman v. Metcalf, 4 Bush (Ky.), 67; Chelms-

146 lord Co. v. Damerest, 7 Gray 1; *Middlesex, etc. v. Lawrence, 1 Allen 339; Bruce v. United States, 17 How., 437; Inhabitants of Rochester v. Randall, 105 Mass., 295; Myers v. United States, 1 McLane, 493; County of Mohaska v. Ingalls, 16 Iowa, 81, 85, 86; Warren County v. Ward, 21 Iowa, 85; Thompson v. Dickson, 22 Iowa, 360; Post Mast. Gen. v. Norvell, 1 Gilpin, 106; United States v. Linn, 1 How. 104; United States v. Boyd, 15 Pet., 187; Townsend v. Everett, 4 Ala., 607; Moore v. Madison Co., 38 Ala., 670; Vivian v. Otis, 24 Wis., 518.

We have examined these authorities, and find that they apply only to certain classes of cases very different from the one at bar. The first class is where a person acting as a public officer receives moneys in his official character, and afterward gives bond for the faithful discharge of his duties, the sure ies on the bond so given, will not be liable for the moneys received before the execution of the bond. Second, where an officer or public agent is elected or appointed for several successive terms and gives bond for each term, no set of sureties will be held liable for monies received during a term prior to the one during and for which they became bound; the case being in no wise different where the principal is his own superior, from what it would have been had he been chosen in place of another, or had another been chosen in his place. Third, where bonds cover certain territory, or a given subject-matter, and that is enlarged or changed by law without the assent of the sureties, they are not liable, because released on account of such change. Fourth, where under statutes similar to one provision of our own, sureties on their application are released from further liability on the principal giving a new bond with new sureties, in which case the latter sureties will be liable only for breaches of the bond occurring after they executed the new bond; it being substituted for the former, and constituting a separate and distinct liability.

The case of Warren County v. Ward, 21 Iowa R., 84, is the only one that would seem to bear upon the case now before us. There the first set of sureties had been sued and the bond fully satisfied; the second set on the further bond, given in pursuance of the statute were sued, and they relied on the satisfaction of the first bond as a defense. The court held it was not that the law required the officer to make returns at certain stated periods, and when these showed a certain balance in his hands which he failed to pay over according to law, there was a breach for which an action would lie, and these were held to

147 *have been satisfied by the payment of the first bond, leaving the last sureties liable for subsequent breaches. The court says: "It must be admitted that these sureties could not be made liable for the money received prior to the executiou of this bond, unless, of course, *the failure to pay over*, or defalcation took place after that time."

In the case before us, the assignee was ordered to declare a dividend, and pay over to the creditors after the giving of the additional bond, or a new bond with additional sureties, and before Stoms was discharged from further liability. Surely that was a breach. Suppose the trustee had received all the assets before he gave this additional bond, and had deposited the money in bank in his own name, or had used it for his own purposes. He had never been called on to pay it over by any order of the court. When he was so ordered, it was his fiduciary duty to do so; failing, he broke this bond as well as the condition of the original one.

The plaintiff's counsel has cited many cases which bear very nearly upon the case before us, there being some differences in the terms of the statutes upon which such decisions were made, as between each other and our own statute; but they fully establish the general principle of liability, in the case of such additional sureties as Stoms.

The cases so cited are:

Loring v. Bacon, 3 Cush. Mass. 465. Jones v. Blanton, 6 Ired. Eq. 115. Glenn v. Wallace, 4 Strobh. Eq. 149. Bryant v. Owen, 1 Kelly, Ga. Rep. 355. Justice v. Woods, Id. 84. Armstrong v. State, 7 Black, Ind. 81. Enicks v. Powell, 2 Strobh. Eq. 196. Commonwealth v. Cox, 36 Pa. St. 442. Jamison v. Crosby, 11 Humph. 273. Ennis v. Smith, 14 How. U. S. 400. Phillips v. Brazeal, 14 Ala. 746. Ingram v. McCombs, 17 Mo. R. 558. Frederick v. Moore, 13 B. Mon. 470. State v. Stewart, 36 Miss. R. 652. Freeman v. Taylor, 2 Bailey S. Car. 524. Miller v. Moore, 3 Humph. 189. Steele v. Reese, 6 Yerg. 263. Atkinson v. Christian, 3 Grat. 448. United States v. Anderson, 1 Blach. C. C. 330.

These cases fully establish that additional sureties on an additional or new bond, given in pursuance of the authority or requirements of statutes, are liable co-extensively with the sureties on the first bond, the case we are called upon to decide. *But the authorities are in conflict as to whether sureties on a new bond, given as a substitute for a former 148
one, the sureties on which have been duly discharged in pursuance of statute from further liability, are or are not liable for the defaults of the principal back to the time of his first qualification, as well as from the time of the execution of the new bond. This question we are not now called upon to decide. Were Stoms to pay the assignee's defalcation and sue the bondsman of January 21, 1870, for contribution, the question would then arise for decision. We intimate no opinion upon the question.

But the first answer does not admit the execution of the bond sued on; it denies every allegation of the petition not admitted by it. This is equivalent to the plea of *non est factum*. Both the amended answers expressly reaffirm the first one. This will put the plaintiff upon proof of the bond as set out in the petition, and the several alleged orders and proceedings of the probate court. Upon this ground alone do we overrule the demurrers to the answers.

Judge Tilden dissented.

---

*REVIVOR OF DORMANT JUDGMENT—PARTIES. 220

[Superior Court of Cincinnati, General Term, June, 1874.]

†NEWTON B. TAYLOR ET AL. v. PETER C. BONTE AND E. P. BRADSTREET

O'Connor, Tilden and Yaple, JJ.

1. The former commercial court of Cincinnati was abolished by law (Vol. 51, O. L., 317), January 27, 1853, and the court of common *pleas of Hamilton county 221
was made its successor. The superior court of Cincinnati was not created until the year 1854 (1 S. & C., 388), and never has been made the successor of the commercial court as to any of the records or business of the latter.

†The judgment in this case was affirmed by the supreme court in Bonte v. Taylor. See opinion, 24 O. S., 628. Bonte v. Taylor cited 25 O. S., 629, 635.

Held, that proceedings of revivor of a dormant judgment, rendered in the commercial court, brought in the superior court of Cincinnati, where a final order reviving such dormant judgment and its lien upon real estate within the city of Cincinnati, under sections 416 and 417 of the Civil Code, was had by petition filed and service of summons issued upon the same, is void. Proceedings to revive a dormant judgment must be prosecuted in a court of record rendering such judgment, or in such court as the law may have made its successor after it had ceased to exist.

2. To save the running of a statute of limitations against defendants not served with process, actually or constructively, by serving a summons properly on one of their co-defendants, the latter must have a joint interest with the former, or be united with them in interest, under section 20 of the Civil Code; and where the plaintiff's, action is against certain defendants to recover from them a personal judgment upon an assessment for a street improvement, and to enforce his lien upon the lot of ground assessed, averring that such defendants own in fee simple, and against another defendant who claims the premises by virtue of a tax title, service of a summons upon the tax title claimant, is not a commencement of the action as against the defendants claiming to own the fee; for, the interest of the tax title claimant is not joint or united with theirs, but is separate, distinct, and adverse.

3. The act of March 29, 1867—S. & C., 837, provided as to liens for assessments for streets, etc., improvements theretofore made, that they "shall continue for and during the term of two years, from and after the passage of this act * * * and no longer, unless * * * the person authorized to collect such assessment, shall, before the expiration of such time have caused *the proper* action to be commenced in some court having jurisdiction thereof, to enforce such lien against such lots or lands"

Held, that an action commenced against the holder of a tax deed, alone to enforce such lien against the property, within two years from March 29, 1867, did not save the right of the plaintiff to make the title in fee simple to the lot subject to such lien, parties to such action aft r the two years had expired, and to enforce the lien upon the lot assessed as against them; and where this was attempted to be done and a decree of sale, and a sale of such lot were had to satisfy such lien as against the fee simple owners only, they not having appeared to the action, such decree and sale are void as against them.

4. Where in such case, such fee simple owners all reside out of the city of Cincinnati, and none of them are served with process in the *city, and do not
222 appear to the action in any way, except by an answer for the infant defendants filed by a *guardian ad litem* appointed by the court, no personal judgment against them for the amount of such assessment can be taken, the court not having jurisdiction of any of them personally. Such a judgment so rendered is void. See 1 S. & C., 390, and Id., section 15, an act creating this court, and Civil Code, section 53; Id., section 70.

5. Where a defendant in error is named individually, as if he were proceeded against in his individual capacity, and the record made part of the petition in error as required by law, discloses that he is only interested in his representative character of administrator, the omission so to designate him, will not be held a defect of parties defendant, but merely a mistake in the name of a defendant, and can be amended instanter, under section 137 of the Civil Code.

YAPLE, J.

These proceedings in error were commenced on June 1, 1872, to reverse judgments of this court in causes Nos. 24449 and 22382, finally rendered June 2, 1869, and a confirmation of sale of real estate and final order of distribution of the proceeds of such sale in the last case, rendered July 7, 1869.

The first named action, No. 24449, was brought by Bonte against the above named heirs of Isaac N. Taylor, deceased—E. P. Bradstreet, the deceased's administrator being made a party before final judgment, and filing his answer as such—to revive a judgment rendered by the commercial court of Cincinnati at its October term, 1849, in favor of Thomas A. Wilson against Isaac N. Taylor and others, partners as Taylor, Fuller & Co., for $1,463, and $—— costs, with interest from October 24, 1849, the cause in the commercial court being No. 1554. This judgment passed by regular assignments to Bonte. The judgment was revived by the judgment of this court in special term, on June 2, 1869, for the sum of $3,174.71, with costs. The right of revivor was founded upon sections 416 and 417 of the Civil Code. The pro-

ceeding was by petition and summons, the petition setting forth the judgment and the amount due thereon, and asking that the same be revived against the adverse party.

The principal ground of objection to this proceeding of revivor (and the only one we deem it necessary to consider) is, that the court of common pleas of Hamilton county is the successor of the former commercial court of Cincinnati, expressly made so by the act of January 27, 1853, 51 O. L., pp. 317—320, and that by law no part of the business of that court could be transferred to the superior court of Cincinnati, which court was not created until the year 1854, 1 S. & C., 388, etc. Upon examination of these acts, it will be found that the objec-
*tion is well taken, unless a judgment rendered in one court of record may be
revived in another and distinct court, having no legal connection with the 223
court rendering the judgment sought to be revived. We are satisfied that proceedings to revive a judgment under sections 416 and 417 of the code must be begun and prosecuted in the court rendering such judgment originally, or in such court as the law made its successor in case it has been abolished.

We, therefore, hold that the proceedings and judgment or order of revivor in that case in this court was void.

The second suit, No. 22382, was brought in this court on December 14, 1867, by Peter C. Bonte against Isaac N. Taylor, Stewart R. Parcell, Wm. D. Bigham and Robert N. Cochran, all of whom were then dead, except Cochran, who in the final judgment rendered in the case, was found to have had no claim upon the property or fund. Isaac N. Taylor died in 1854 or 1855. Bonte brought suit to recover a personal judgment against Isaac N. Taylor for $46.94, with interest from September 1, 1864, and to enforce a lien for the same on lot No. 34 in Block D, of Ambrose Dudley's subdivision, in the city of Cincinnati, fronting twenty-five feet on the south side of Oliver street, and extending back the same width south eighty-seven feet and ten inches arising out of the improvement by Bonte of Oliver street, and an assessment in his favor thereupon made by the city of Cincinnati for that sum on Aug. 12, 1864, payable in twenty days. He claimed that Taylor owned the lot in fee, and that Parcell and Bingham each had a claim for taxes paid thereon, while Cochran appeared to have a note secured by mortgage on the lot.

On January 29, 1868, the plaintiff filed an amended petition alleging that Wm. D. Bigham was dead and that all his interest in the alleged tax claim of the deceased was owned by his son, David L. Bigham, whom he made a party to the suit. David L. Bigham, filed his answer to the petition on March 9, 1868, denying the claims of the plaintiffs and all the other parties to the suit, claiming to own the lot by virtue of a tax deed made by the auditor. The lot having been sold for taxes as the property of Stewart Parcell, Sr., the only parties then in court were the plaintiffs, Bonte, claiming a lien on the lot for the amount on his assessment, and David L. Bigham claiming to be the owner of the property and denying the plaintiff's right and claim, Isaac N. Taylor's widow and heirs were not in court, nor were Parcell's. Thus matters stood until April 17, 1869, when the plaintiff filed an amended petition, averring the death of Isaac N. Taylor, before suit brought, and making his widow and heirs, these plaintiffs in error, parties defendant, and also heirs of Parcell whose names it is not necessary to allege *here, as the court finally found and determined in 224
the case that they had no claim upon the property or fund. It seems Parcell had a tax deed for the lot, founded upon the non-payment of the taxes in 1848 and 1849, but he failed to pay the subsequent taxes, and the lot was sold for taxes, and deeded to Wm. D. Bigham by the auditor of Hamilton county.

None of the plaintiffs in error resided in Hamilton county, some of the heirs resided in Chicago, Ill., and the others and the widow in Butler county, Ohio. Those residing in Butler county were served by the sheriff of that county by summons issued from the clerk's office of this county. Those who resided out of the state were served by copy of the summons. None of them answered or in any manner appeared to the action, except that answers were filed on behalf of the minor heirs of Taylor and Parcell by a guardian *ad litem* appointed by this court to answer for them, etc. On June 2, 1869, Bonte having revived the judgment of the commercial court in the manner above spoken of, filed a supplemental petition in the assessment suit stating the fact of such revivor and asking to have it paid out of the proceeds of the sale of the lot in that suit.

On the same day he took a judgment against the Taylor heirs for the amount of his assessment and interest amounting to $62.42, and an order for the sale of the premises to pay the same; all other parties, interests and every other question was reserved for decision on final disposition of the proceeds of the sale.

An order of sale was issued, and the lot appraised and advertised for sale on the same day, and sale thereof was made to Bonte, on July 3, 1869, for $1,200. It was confirmed and final order of distribution made on July 7, 1869. Cochran was found to have had no lien or claim, Parcell's heirs none, David L. Bigham was found to have a valid claim for taxes amounting to $300, which it was found Bonte *then* owned, and the same was ordered to be paid to him. After paying all costs, Bonte's assessment and his $300 tax claim, there was the sum of $468.98 left, which the court ordered to be paid to Bonte on his revived judgment, finding th t a lien upon the premises, Emma Taylor, the widow, expressly barred of dower and all the other parties of their claims and interests. The plaintiffs in error insist that this last judgment and the decree of confirmation and distribution are also void They maintain that no action was brought against them until the amended petition making them parties was filed on April 17, 1869. They say that on March 29, 1867, a law was passed (S & S, 837) expressly limiting the existence of liens for assessments for street improvements theretofore made to two years from the passage of the act, so that the lien upon the lot, which the plaintiff sold the land to satisfy, expired
225 *some eighteen days before they were sued. This they claim left only a personal demand existing against them as the owners of the lot for such assessment, and for that personal demand they insist that they, or some of them, should have been served with process in Cincinnati in order to justify serving any of them in Butler county, Ohio, and that none of them could be served with publication, or with summons out of the state. The act organizing this court (1 S. & C., 390) provides that such personal action may be brought in this court "where the defendant, or some of the defendants reside or may be summoned in the city of Cincinnati; section 15, where any of the above enumerated actions is rightly brought in said court, a summons shall be issued to any county, against one or more of the defendants, at the plaintiff's request"

In relation to actions concerning or affecting real estate situated in the city of Cincinnati, section 14 provides, among other things, that actions for the sale of real estate under mortgage or *lien* may be brought in this court. In such cases, summons may be sent to other counties, and served there upon parties, or if they be non-residents of the state, they may be constructively served by publication, or with summons and copy of the petition. Now, unless making David L. Bigham a party in January 1868, was such a valid bringing of the suit as to save the lien upon the lot as against Taylor's heirs and widow under the statute, and to authorize them to be made parties subsequently, these objections of the plaintiffs in error are well taken, and the judgment, sale, confirmation and final order of distribution are void. The act (S & S., 837) limiting the duration of such liens to two years provides "unless" the party entitled to the assessment " shall have caused the *proper* action to be commenced in some court having jurisdiction thereof, to enforce such lien against such lots or lands, in which case the lien shall continue," etc.

Bigham was not interested jointly or in common with the Taylor heirs and widow; his interest was distinct from and adverse to theirs, as much so as it was to Bonte's. Section 20, of the code provides: "An action shall be deemed commenced, within the meaning of this title, as to *such* defendant, at the date of the summons which is served upon him, or on a codefendant who is a *joint contractor*, or otherwise *united* in interest with him; where service by publication is proper, the action shall be deemed commenced at the date of the first publication, which publication is regularly made." Bigham was not *united* in interest with the Taylors, and no suit was commenced against them until after the lien of plaintiff against the lot had expired, and the plaintiff Bonte, in his petitions, averred that they owned it in fee simple, and
226 the decree of sale was *founded upon plaintiff's claim for such assessment alone. As against them and the widow such decree, sale, confirmation and distribution are void. The case of Smetters & Harris v. Rainey, 14 O. S., 287; Bradford v. Andrews, 20 O. R., 208, 219; Buckingham v. Commercial Bank of Cincinnati 21 O. S., 131, relate to cases where parties to a joint judgment, or having a joint and inseparable interest were brought into the action after the period prescribed by the statute of limitations had expired, their defendants having been properly sued in time. None of the plaintiffs in error could be sued here personally—code, section 53: also 1 S. & C., 390— and as none of them could be personally served with a summons in this city, they could not be served constructively by publication, or otherwise elsewhere. Code, section 70.

The defendant in error, however, moved to dismiss the petitions in error, because of a defect of parties defendant. In No. 1773, the petition to reverse the proceedings of revivor, E. P. Bradstreet is named as defendant, his character of administrator of Isaac N. Taylor not being stated. The record attached to and made part

of the petition discloses his representative character, and it is a mere mistake in the name of a party, which may be amended at once under the provisions of section 137 of the code. In the other case, the administrator is not a necessary party. The assessment was a claim against the Taylor heirs, their father having been dead some eight or nine years before the assessment was made.

The judgment and proceedings in both cases will be reversed on the ground that they are void—the defendants in error to pay the costs of these proceedings in error.

Wm. Disney, for Plaintiffs in Error.
I. J. Miller, for Defendants in Error.

---

*LIFE INSURANCE. 272

HOLTERHOFF V. MUTUAL BENEFIT LIFE INS. CO.

[Superior Court of Cincinnati, General Term, June, 1874.]

O'Connor, Tilden and Yaple, JJ.

1. Where a policy of life assurance contains a provision that in case the assured shall die "by reason of intemperance from the use of intoxicating liquors, the policy shall be void," death must be the natural and proximate result of intemperance from the use of intoxicating liquors. Such use must be the controlling cause of death. No degree of intemperance will render such clause available to the insurer unless it shall have actually caused the death of the insured. If the insured becomes sick or delirious from intemperance in the use of intoxicating liquors, and such sickness or delirium be not necessarily mortal, and the assured, or others, through mere *omission* or **neglect*, fail to take 273
or administer proper remedies, or if the assured, in consequence of his sickness or delirium produced by intoxication, himself, by accident or voluntarily, takes dangerous or overdoses of medicine, or by exposure while in such condition takes cold which destroys his life, such clause in the policy is violated, and no recovery upon it can be had; but if a physician, or others, his attendants, to effect his cure, administer drugs or medicines sufficient to cause death, and death results therefrom and not from the intoxication or sickness produced by it, then the condition of the policy is not broken, and a recovery may be had notwithstanding such provision. And *a habit*, or long continued course of intemperance, which impairs the vital powers of the assured, and thereby invites the attack and facilitates the ravages of any disease, and which disease becomes the controlling, immediate, and proximate cause of death, will not, combined with death resulting from such disease, avoid the policy.
2. Where, *in such policy*, it is provided "that if the *declaration* made by the assured, and upon the faith of which this agreement is made shall be found in any respect untrue, then this policy shall be null, and void:" *Held*, that the "*declaration*" so mentioned in the policy is a *warranty*, and must have been literally complied with by the assured to authorize a recovery upon the policy.
3. Where such "*declaration*," signed by the assured, stated "that I do not and will not practice any bad or vicious habit that tends to the shortening of life:" *Held*, that the assured, at the time of signing the "*declaration*" was, or subsequently became, addicted to intemperance from the use of intoxicating liquors to a degree or extent amounting to a *habit*, and such habit was bad or vicious, tending to the shortening of life, the warranty was thereby broken, and no recovery could be had upon such policy.
4. Where the same "*declaration*" contained the further provision that, "I hereby agree that the *answers* made by myself and my friend shall be the basis of the contract between myself and the said company, and if any untrue or fraudulent allegation is contained in said answers, or in this declaration, all moneys which shall have been paid to the said company, etc., shall be forfeited for the benefit of the said company;" and where the applicant for such life insurance and said friend, in response to printed questions, "Is he sober and temperate?" "Has he always been so?" answered, in writing signed by them, "Yes:" *Held*,

(a) That such answers, though so referred to in the "*declaration*," were not a warranty of the truth of such answers, but only a *representation* that they were true, and to avoid the policy they must have been both untrue in fact and *material*.

(b) That the effect of the writings containing such answers, and the provisions of the "*declaration*" making them the basis of the contract, is to make such answers material by force of express contract between * the parties, and
274 that it was the duty of the court, as matter of law, to declare the same, and not to submit the question of materiality to the jury.

(c) That if such answers when made were untrue, and neither the officers nor agents of the insurance company, before the issuing of the policy, or before accepting any payment of premium therefor, knew, or had notice of facts equivalent to knowledge that such answers were not true, there could be no recovery upon such policy.

5. The court correctly charged the jury that such questions and answers refer to a *habit* of the applicant, and not to an isolated instance of intemperance, or to a spree, or to several of such instances at a distance of months apart, unless these instances were of such a character or so often as to ripen into a habit; but that if the deceased had an appetite for intoxicating drinks to such an extent that a single indulgence necessarily instigated him to a repetition of it, and led him into what have been called "sprees," and these sprees were frequent and rendered him incapable of controlling his appetite whilst they continued, then, although there were intervals during which he remained entirely sober, there was such a repetition of acts of drinking as amounted to a *habit*.

6. The same rules of construction apply to the legal interpretation of policies, etc., relating to life assurance that apply to and govern all other writings—the subject matter, and the nature and the circumstances of the transaction, being always to be looked to in arriving at a correct interpretation; and in case of doubt or ambiguity (and only in that event) as to the meaning of any provisions of any written instrument, are such provisions to be taken most strongly against him who made them and in whose favor they were intended to operate.

7. When the only issues involved are the violation of the above provision of the policy in relation to alleged death from intemperance, the alleged falsity of the "declaration," in respect of the assured having been addicted to the bad or vicious habit of intemperance, and the alleged untruth of the answers of the applicant and his friend in the application as to his temperate and sober habits, all charges of general rules of law asked of the court, and given to the jury, are to be understood (and it is to be presumed the jury so understood them) as applicable to and limited by the context as having reference only to the state of facts involved in the issues.

8. Upon a trial of such issues alone, it would be improper for the court, and mere *obiter* were it to do so, to construe such "declaration" and "application" containing other statements and other answers on other subjects than those involved in such issues—such as what would be the effect of the insured's having a bad or vicious habit of overeating, and irregular eating, overlabor, being thinly clad, and sitting up late at night; and testimony tending to prove these to be bad
275 or vicious * habits ought not to be admitted, because of its irrelevancy. Nor is the court, in such a case, to determine what is meant by the phrases, "Has the party been *successfully* vaccinated?" "Has he, since childhood, had liver complaint, bilious colic, rheumatism, vertigo, or disease of the bowels, kidneys, or bladder?" "Has the party ever met with any accidental or personal injury, and if so, of what nature?" "Whether an untrue or fraudulent allegation, made in effecting the insurance and rendering the policy void, must or need not be *fraudulently* untrue, if not material?" etc.

9. There is nothing in law or public policy which forbids persons, who are temperate in their habits, and bind themselves to continue so, to incorporate themselves into a mutual life insurance company, upon terms precluding persons of intemperate habits (whose chances of life are greatly less than those of temperate persons) from becoming co-members and sharing the profits with them and such others as themselves, whom they may receive; and in seeking life assurance in such a company, it is the duty of every applicant *to tell the truth*. Then if he is received, the company will be estopped from questioning his rights on account of his habits, and if he is rejected, he can apply elsewhere.

10. Life insurance is no mere matter of sentiment, in which sensibilities are to be respected and saved, and human ailments and infirmities are concealed or overlooked in charity, but it is a business matter, involving only dollars and cents.

YAPLE, J.

This is the second time that this case has come before us in general term The first time, it was brought here by the present defendant in error, the defendant below, upon petition in error, to reverse a judgment in favor of Holterhoff as such administrator, the plaintiff below, which judgment was reversed on the ground that the verdict and judgment were manifestly against the evidence, all the evidence being contained in the bill of exceptions. The case—Mutual Benefit Life Insurance Company v. Holterhoff, Adm'r, etc.—is reported in 2 Cin. Sup. Ct. Rep. 379.

The case was retried in special term, and resulted in a verdict *and judgment for the defendant, the insurance company, a motion for a new trial having been made and overruled. The bill of exceptions, 276 upon which the present petition in error is based, does not profess to set out all the evidence given upon the trial, but it contains certain charges to the jury asked by the defendant below and given by the court, the charge of the court, and certain charges asked by the plaintiff, which the court refused to give; to all and every part of which the plaintiff excepted. It also contains certain written or documentary evidence. Hence, we do not know that the testimony was the same as that adduced at the first trial of the cause, or whether it was different; but we are bound to suppose it was sufficient to warrant the verdict and judgment against the plaintiff if no error of law was committed by the court, otherwise the plaintiff would have set forth all the evidence and asked for a reversal of the judgment, because manifestly against the weight of such evidence.

The action was brought to recover the sum of $5,000, with interest from July 20, 1869, upon a policy of insurance upon the life of Francis M. Davidson, dated on the 4th day of May, 1868, acknowledging the payment by Davidson of one year's premium in full. to-wit, the sum of $125, which sum he was to pay annually thereafter, or forfeit the policy, etc.

Davidson died on January 31, 1869, or within less than nine months after taking out this policy. The policy contained the following provisions: "And it is also understood and agreed by the within assured to be the true intent and meaning hereof, that if the *declaration* made by or the said assured, and bearing date the 4th day of May, 1868, and upon the faith of which this agreement is made, shall be found in any respect untrue, then and in such case this policy shall be null and void? and it is further agreed by the within assured, that in every case where this policy shall cease or become null and void, all previous payments made thereon, and all profits, shall be forfeited to the said company." Also "provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the assured upon these express conditions, that in case the said Francis M. Davidson *shall* * * *die* * * * *by reason of intemperance from the use of intoxicating liquors*, * * * this policy shall be void, null, and of no effect."

The "*declaration*" mentioned in the policy, made by Davidson, when proposing to be insured, which was signed by him, declared "that I do not now, nor will I practice any bad or vicious habit that tends to the shortening of life, and I hereby agree that the *answers made by myself*

my physician, and my friend shall be the basis of the contract between myself and the said company; and if any untrue or fraudulent allegation is con-
277 tained *in said answers or in said declaration, all moneys which shall have been paid to the said company on account of the assurance to be made in consequence thereof, shall be forfeited to the benefit of the company."

Davidson in proposing for such insurance, further answered in writing the following, among other printed questions: "12 A. Is the party sober and temperate?" "Yes." "12 B. Has he always been so?" "Yes." "16. Name and residence of the party's usual medical attendant, or of the medical attendant of his family, to be referred to for information as to his health." Ans. "Dr. McCarthy." "17. Name and residence of an intimate friend to be referred to for similar information," Ans. "Geo. H. Alcoke." "20. Is the party aware that any untrue or fraudulent allegation made in effecting the proposed assurance will render the policy void, and that all payments of premiums made thereon will be forfeited?" "Yes."

Alcoke, the friend referred to, answered in writing: "3 A. Are his habits of life temperate?" "Yes." "3 B. Has he always been temperate?" "Yes."

If any questions were asked of or answered by McCarthy, the family physician, they are not shown by the record. Dr. W. W. Dawson, the company's examining physician, in his written statement of the examination of the applicant, states: "1. Are you acquainted with the party?" "No." "10. What is your opinion of his life?" Ans. "Life healthy; risk advised."

Macy, the agent who took the application, stated to the company that he had known Davidson several months, and that he was temperate. All this preceded the issuing of the policy. After the death of Davidson, Dr. McCarthy's affidavit appears in the proofs of loss. He is asked: "How long have you known the deceased?" Ans. "About eight years." "How long have you been the attending or family physician?" Ans. "About eight years." "How long was the deceased sick?" "About two weeks." "A. What was the date of your first visit?" "January 25, 1869." "B. Your last visit?" "Evening of January 31, 1869." "Of what disease did he die?" "Congestion of the brain." "What were the general symptoms present during the progress of his disease?" "Great prostration of the nervous system." "What causes in your opinion, operated to produce the disease or diseases of which he died?" Ans. "Cold and derangement of the excretory organs and *overstimulation.*" A. "Was the deceased in the habit of using spirituous liquors?" Ans. "*Periodical*, would go for months without liquors." "B. If so, how did it affect his health?" Ans. "Never had delirium."

To the plaintiff's petition, which made a *prima facie* case, the defendant answered:

1. That the insured, Francis M. Davidson, died by reason of intemperance from the use of intoxicating liquors.

278 *2. That his "*declaration*," which, by the terms of the policy was made a "warranty" that he did not and would not practice any bad or vicious habit that tended to shorten life was untrue, and not kept, in this, that he was then addicted to the habit of intoxication and drunkenness from the excessive use of intoxicating liquors, and continued such habit to the time of his death.

3. And that the representations of the insured and his intimate friend Alcoke, that Davidson was sober and temperate, and had always been so, were untrue; that he was an habitual drunkard, etc.; and that these statements were materially and expressly agreed to be made the basis of the contract by the assured in his "*declaration*," which "*declaration*" was, by the policy made one of its terms.

The plaintiff, in his reply, denied the first ground of defense—that the insured died from intemperance in the use of intoxicating liquors—and also denied that the "declaration" and the answers to the questions asked of the insured and his friend were untrue "within the true intent and meaning thereof," which denial savors somewhat more of a legal construction by the plaintiff of such "*declaration*" and answers than a denial of the facts stated in the answer of the company as a defense. The reply then avers that the defendant, through its officers and agents, knew, when they took the deceased's application and issued the policy of insurance, his habits in relation to the use of intoxicating liquors. The bill of exceptions shows that the defendant offered evidence tending to prove that none of its officers, agents, or medical examiner knew of such habits at the time of his application for insurance when it received the premium and issued the policy to him, nor until after his death; but the bill of exceptions does not state that the plaintiff offered any evidence tending to prove such knowledge, nor was any charge asked of or given by the court, on such branch of the case, except one asked by the defendant, and obviously correct; so that we may fairly assume that no knowledge of such habits of the deceased, if they existed on the part of the insurance company, was really claimed by the plaintiff at the trial. Had there been any such evidence, the bill of exceptions would surely have shown it; for we have frequently held in this court that where material and false representations are made by an applicant for insurance as the basis for effecting it, and the agents of the company, at the time or before the insurance is effected, knew or had the knowledge of such facts, as fairly to amount to notice of the falsity of such representations, that will estop the insurer from setting up such misrepresentations as a defense unless they have been incorporated into the policy and made warranties.

It appears that the defendant gave evidence tending to prove *all its defenses, making apparently, from the statements of the bill 279
of exceptions, what is called a strong case: that the deceased had been treated three times for *delirium tremens*: that the habit of intoxication from the use of intoxicating liquors was a bad and vicious habit, tending to shorten life, and that congestion of the brain is one of the attendant phazes of the disease of drunkenness. And the plaintiff, in rebuttal, gave evidence tending to prove that the deceased did not die from drunkenness; that he was at no time in the habit of using intoxicating liquors to excess, and never had delirium; that he was a sober and temperate man when he made his declaration and application for insurance, and that overeating and irregular eating, overlabor, being thinly clad, and sitting up late at night were all bad habits that tended to shorten life. Why this last proof was introduced we are at a loss to understand; for if the habit of doing them were bad or vicious, tending to shorten life, that would not make the habit of drunkenness less so, nor would it establish that they were injurious or dangerous to life in the same degree, or their effects be so easily observed or certainly known, as drunk-

enness. Besides, there was no claim that the deceased was the subject of such habits. The proof was not pertinent to the case, was calculated to mislead the jury, and might very properly have been ruled out.

The plaintiff then asked the court to give *ten* specific written charges to the jury, eight of which were given, and but two refused, as asked. The third one, which was given, was as follows:

"*Third.* That the words 'Are you sober and temperate, and have you always been so?' used in the application, refer to a *habit* of said Davidson, and not to an isolated instance of intemperance or a spree, or to several of such instances, of months apart, unless these instances or sprees, so called, were of such a character or so often as to ripen into a *habit.*" This, the court, upon the asking and in the language of the plaintiff's attorney, instructed the jury was the legal interpretation and effect of those words contained in the application. The *seventh* and *ninth* charges asked by the plaintiff the court refused to give. The *seventh* was as follows: "That these questions and answers are to be construed in their common signification; and where there are different meanings of any of the same, while construed fairly, they are to be construed most strongly against *the insurer* and *in favor* of the assured."

The "*declaration*" that we have spoken of contained no questions and answers, the latter being found only in the application and statement of the deceased's friend, Alcoke. And as the issue between the parties was whether the insured was a sober and temperate man or not when he
280 effected the insurance, and *whether he had always been so, and as the court had charged, as asked by the plaintiff's counsel himself, as to the meaning and legal effect of such questions and answers, it is difficult to perceive any ground upon which this seventh instruction was not a mere abstraction, having no reference to the cause tried. But we do not think that answers to the questions made by a party applying for insurance, in order to effect it, should be construed most strongly against the insurer, as the language is that of the applicant, and not the insurer's. The policy of insurance is in the language of the latter, and must be construed most strongly against him and in favor of the insured, wherever the meaning is doubtful; while the very opposite reason would seem to govern answers made by the applicant to effect an insurance, though the court did not say they should be taken most strongly against the applicant. This instruction was obviously refused properly, and we shall not again refer to it.

The *ninth* charge asked was as follows:

"That if it should appear in this case that Davidson got on a spree some three weeks before he died, which made him sick, but that *he had got over his spree* and was recovering from *the sickness* and would not have died *therefrom*, excepting that he took a violent cold, or that *he took the wrong medicine by accident*, and he died by reason of congestion, *immediately caused* by the cold *or the taking of the medicin*, then the plaintiff may recover though the spree may have made him sick, and he may have been more liable to the cold because of such spree."

"Which charge," says the bill of exceptions, "the court refused to give in the words of the charge, but qualified the same by the general charge, and gave so qualified." This qualification will be found in paragraphs one, two, three, and four, were last so numbered before the close of the charge. They will be hereafter considered. It may be enough to say here that this ninth charge was asked as a *whole*, and that, if incor-

rect in part, might have been entirely refused—the court not being bound to separate the correct from the incorrect portions, and give the former and refuse the latter. This is a well-settled rule of practice in this state. French v. Millard, 2 Ohio St. 440.

It is enough to say that if the deceased had been on a spree, got sober, but was sick in consequence of it, and to get well, *he* by accident *took* wrong medicine, which killed him, that the insurer would not be liable. The risk of such accidents to himself, *by his own acts*, the insured took upon himself if he got drunk and sick therefrom. Had the medicine been administered to him by any third person, the case might have been different. May on Ins. 519; Id. 333, 334.

The court might very properly have refused absolutely to give this charge.

*The defendant asked *seventeen* specific charges to be given to the jury, all of which, except three, the court gave, and them it refused. One of the three refused was the fourteenth, as follows: 281

"Although congestion may have been the cause of death if it was preceded by intemperance, and intemperance was the final or original cause, although a cold may have supervened and accompanied it, still intemperance is to be accepted as the cause of death. It is for the jury to weigh the amount of each cause which contributed to this result." ("Which charge the court refused to give as asked, but gave or qualified by the general charge to the jury.")

Another charge refused was the fifteenth, as follows:

"That if Davidson, in his answer to the questions propounded to him, concealed any fact material to the defendant to know, and which a general question was asked that would elicit that fact, then plaintiff can not recover, even though said Davidson did not think said fact material."

The other charges refused, related to the effect of the preliminary proof of loss, and is not material.

Among the charges asked by the defendant and given to the jury by the court, were the following:

"1. That the contract of insurance in this case is to be construed in the same spirit and manner as other contracts between man and man." * * *

"3. That the '*declaration*' and the statements therein contained, made by F. M. Davidson in his application for this insurance are *warranties*, and must be *literally* complied with. If, therefore, you find said '*declaration*' untrue *in any respect*, the plaintiff can not recover."

"4. If you find that at the time of effecting this insurance, or at any time subsequent thereto, said Davidson practiced any bad or vicious habit, tending to shorten his life, the plaintiff can not recover, even though said habits did not actually shorten his life or cause his death."

In construing the two last charges, we must bear in mind that only a single bad or vicious habit was claimed in the issues, or attempted to be proven, as shown by the bill of exceptions, to have been practiced by Davidson, to-wit, the habit of drunkenness; and this language is referable only to that habit, and could not have misled the jury by leading them to imagine him addicted to other vicious or bad habits that might tend to shorten life, of which there was no evidence offered or claimed. This, and similar charges and expressions are to be interpreted by, and limited to, the context The evidence offered by plaintiff, that overeat-

ing, etc., was such habit, was of a general fact, not that Davidson was addicted thereto.

282 *"5. If you find that, after effecting this insurance, said Davidson used intoxicating liquors to such extent so as to become a bad or vicious habit, tending to shorten his life, then the plaintiff can not recover, even though his said use of liquor did not actually cause his death."

This charge the court also gave. Also the following:

"6. The court charges you that the statements contained in the application, made and answered by the said Davidson, and by his friend, George Alcoke, are *the basis of the contract* between the company and Davidson; and if you find that they, or any one of them, are untrue; 'then the plaintiff can not recover.' The same remark applies to this charge as to the two above-mentioned ones: 'Davidson's habits as to sobriety and temperance.'

"7. That the statements made in the said application of Davidson for this insurance, in reply to specific inquiries in regard to his sobriety and temperance, are material to the insurers, to enable them to estimate the risk proposed, and to determine upon the propriety of entering into said contract, and the jury is to consider only whether they are true or false, *and not whether material or immaterial*, and if found untrue, the plaintiff can not recover."

The Court, TILDEN, J., thereupon charged the jury as follows:

The plaintiff, on resting his case, became entitled, on the pleadings and proofs, had the case gone no further, to a verdict for the amount named in the policy sued on, with interest from the time when, by the terms of the policy, that amount became demandable and payable.

To overcome this right of recovery, it became incumbent upon the defendant to establish by evidence, some one or more of the several grounds upon which a recovery is attempted to be resisted. It is not necessary to sustain, by evidence, all these defenses; it is enough if either one be made out to your satisfaction. But evidence has been offered with a view to prove all of them; and the counterproof has been directed to all of them; and all of them, therefore, will have to be considered and determined.

The first defense, to which I shall refer, arises upon a clause contained in the declaration of the deceased, Francis M. Davidson, accompanying the application for insurance, and which is in the words: "I do not, nor will I, practice any bad or vicious habit that tends to the shortening of life." This clause, by a provision contained in the policy subsequently issued, is made a part of the policy itself, the provision in the policy being, "that if the declaration by or for the said assured, and bearing date the 4th of May, 1868, and upon the faith of which" the agreement was made, "shall be found in any respect untrue, then, and in such case, this policy shall be null and void."

283 *On another provision or statement contained in the declaration, an argument, equally pertinent to the clause now under consideration was pressed upon the court with great earnestness, and which I will notice here. It was, that in the construction of instruments of the kind now under discussion, courts should, somehow, lean against life insurance companies, and in favor of those who held their policies; that in the administration of the law of these transactions, the construction should be strict and rigid and exacting as against the company, and liberal and tender, and plastic in favor of the policy holder; and, finally, that in

the construction of the clauses and provisions of a life policy, the court should rather aim to give effect to the policy as generally understood by what were called the common people, than according to the rules of law which govern in the construction of other instruments. This court declines to adopt this view of the subject thus broadly stated, and here claimed to be applied, conceiving it to be unsound and unsupported by any recognized legal principle. And the argument by which it might be attempted to be supported is one against which courts, I conceive, ought to be careful to be on their guard. Contracts between insurance companies and individuals are to be read and interpreted in the same spirit, and according to the same rules, as in other cases. It is not an unfrequent occurrence that courts, in the construction of instruments made in the ordinary course of the transactions of men, meet with great difficulty in ascertaining the real intentions of the parties. But these cases present no occasion for the exercise of any merely arbitrary discretion; and it would be extremely dangerous if their decisions were made to depend upon the varying fancy, and it might be the caprice, of the different judge. It would be as little correct to hold, where one of the parties is less intelligent than the other—less capable of making an advantageous bargain—or is especially exposed to the importunities or wiles of the other, that, therefore, in a proceeding not to be relieved from an improvident contract, but in a proceeding in which he is the party who seeks to enforce the contract, the contract may be cut down by construction to his standard of intelligence or capacity, and then enforced according to the fancy of the court, as to what the parties ought to have meant or might have meant. It is not intended to be implied that these results have been contended for in form in the argument. They are merely stated as the results or some of the results, which the court conceive to be the necessary consequences flowing from the premises insisted on. A contract of life insurance, though one of the parties happens to be a corporation—a mere creature of the law—is still a contract whose written language is suggested and adopted by natural persons, to whom the law ascribes intelligence, judgment, *and volition; and although the contract on the one side is, in 284
legal contemplation, the contract of the corporation, yet no reason is perceived for ascribing to the language of it any different signification than that which it would bear when the same language is used on any other similar occasion.

Applying, therefore, what I conceive to be the law, to the clause which I have read, I am of opinion, and so charge, that that clause is a warranty; and unless it was literally true and continued to be so, the plaintiff is not entitled to recover. You will remember that the terms of the warranty were that the applicant did not and would not practice any bad or vicious habit, which tended to the shortening of life. You will therefore consider whether or not, at the time of the application or afterward, the deceased indulged, to an extent amounting to a habit, in the use of intoxicating liquors; and if so, then whether this was a bad or vicious habit, which tended to the shortening of life. In this connection I have to call your attention to another consideration. It is the duty of the court to construe the written stipulations of parties, and in doing so to adopt as the true meaning of words, the definitions of them according to which they are generally understood, the presumption being that the parties intended to use them in that sense. A habit then as gener-

ally understood, and as defined by lexicographers, is a disposition or condition of the mind or body—a tendency or aptitude for the performance of certain actions acquired by custom or a frequent repetition of the same acts. Habit is that which is held or retained—the effect of custom or frequent repetition. Hence, we speak of good habits and bad habits.

Frequent drinking of spirits leads to habits of intemperance, etc. Adopting this interpretation of the phrase used in the present instance and applying it to the state of facts as claimed to have been proven, I have to say to the jury that if they find from the evidence that at the time the application was made, or subsequently, the deceased had an appetite for intoxicating drinks to such an extent that a single indulgence necessarily instigated him to repetition of it, and led him into what have been called "sprees," and these sprees were frequent and rendered him incapable of controlling his appetite whilst they continued, then, although there were intervals during which he remained entirely sober, there was such a repetition of acts of drinking as amounted to a habit; and if you find that this was a bad or vicious habit, which tended to the shortening of life, the defendant will be entitled to a verdict. On the other hand, if you do not find the facts to be as thus claimed by the defendant, you will proceed to consider the next ground of defense.

2. In what is called the "particulars," etc., accompanying the
285 *application, and forming part of it, there are contained two questions: *One*, "Is the party sober and temperate?" and *second*, "Has he always been so?" and both questions are answered in the affirmative. These answers amount to a representation by the applicant that he was sober and temperate, and had always been so. This part of the application is not referred to in the policy, and is to be treated, not as a warranty, but as a representation. In order, therefore, to make it a defense to the action, it must be made to appear first that it was material—*i. e.*, would its truth or untruth have influenced the insurance company, in considering whether or not it would enter into the final contract and issue the policy. In the present case, this question is a question of law for the court, and the court state it to you as the law of the case, on this defense, that the representation was material; and unless the statement was true—if the defendant has proved it to be untrue—then this defense has been sustained, and the defendant is entitled to your verdict. The question, therefore, on this branch of the case, is the question of the truth of the statement, and this is a question exclusively for your consideration. But before you will be prepared to consider the testimony, it will be necessary to determine the legal meaning of the language of the statement whose truth is thus to be ascertained from the evidence. The statement itself amounts to an assertion that the applicant at the time of the application was sober and temperate, and had always been so. As a matter of construction, it is manifest and clear to the court that these words, taken as they are placed, together, refer to the character, state, or habit of the party, and that they are fairly convertible into the phrase or statement that the party was, and always had been, a sober and temperate person. The question of fact will then be, "Was he such?" In considering this question, you will inquire whether or not he continued the use of intoxicating liquors sufficiently long, or repeated libations sufficiently often, to amount to a habit; and if he did, then whether such habit, considered in reference to its extent or the degree of indulgence, was such

that he was not temperate and sober: and upon your answer to these questions will depend your verdict upon this defense.

3. The policy contains also this clause: "In case the said Francis M. Davidson shall die"—"by reason of intemperance from the use of intoxicating liquors"—the policy shall be void. The evidence of the parties has brought before you the circumstances, as they respectively claim to have been, which attended and immediately preceded the death of the assured; and it is for you to determine from these what was the cause and occasion of the death. I shall have but little to say upon what may, not inaptly, I think, be called the metaphysics of the law of *cause and effect. Such discussions sometimes serve only to increase the obscurity of the subject, and thus to lead the judgment astray; 286 and it is very important that we should understand the real and practical question to be determined. I shall therefore limit myself to a statement, in few sentences, framed with a view to make myself clearly understood, of the law, as I understand it, governing the evidence before you on this subject.

1. Then, if you find from the evidence that the assured, previously to his last sickness, had been upon a drunken debauch, and was thus enfeebled and made sick, and that the influence of the liquor upon his system had expended itself, so that he was merely sick from the effects of liquor, and then that a cold or some other disease supervened, and he died in consequence of that, or of that combined with the accidental administration of a hurtful drug, then he did not die by reason of intemperance from the use of intoxicating liquors.

2. If from the commencement and during the continuance of his sickness, the influence of liquor, at what time soever taken, was operating together with a cold and the accidental administration of a hurtful drug, still, unless the liquor thus exercising its influence was the main, principal, and controlling direct cause of death, he did not die in the manner named in the policy.

3. But if you find from the evidence that he died from congestion of the brain, and that such congestion was the direct and immediate effect of an excessive use of intoxicating liquors, then the congestion of the brain was merely the mode, and the excessive use of intoxicating liquors was the direct cause of his death, and he did die by reason of intemperance from the use of intoxicating liquors.

4. And finally, if you find from the evidence that he had recovered from a debauch; that the direct influence of intoxicating liquors no longer operated in his system; that he was simply sick from the previous excessive use of intoxicating liquors, and then, while thus sick, he again resumed the use of intoxicating liquors, and used them excessively, and so continued such excessive use until congestion of the brain supervened and that was directly followed by his death, then he did die in the manner warranted against in the policy, and the defendant is entitled to your verdict.

These observations present to you a brief outline of the case, and develop and present the various questions of fact requiring your special consideration. They are to be determined upon the evidence before you, and upon that alone. Much has been said during the trial with respect to the conduct and motives of the counsel and the parties in the case. I regret to be obliged to refer

287 *to this subject at all, and I only do so to remind you that you are not to give to the circumstances thus stated in our presence the slightest consideration. Next in importance to the obligation of absolute impartiality on the part of the court and jury, is the other one of avoiding all prejudice, and of being guided in our deliberation only by the lights afforded by the law and evidence; and I have reason to expect the conclusions which you shall reach will be equa ly supported by both.

To all and to every part of this charge the plaintiff, by his counsel, excepted, as he did to every charge asked by the defendant and given by the court, and to every charge which he asked the court to give and which was refused.

OPINION.

1. As to the first ground of defense, it must be conceded that if the deceased did in fact "die by reason of intemperance from the use of intoxicating liquors," the plaintiff had no legal right to recover upon the policy; for this term was contained in the policy itself, was part of it, and its fulfiilment a condition precedent to the plaintiff's right of action. This was not controverted by the counsel for plaintiff in error in the argument before us. This provision, standing alone, is an agreement on the part of the insurer and the insured, that the latter may drink intoxicating liquors to any extent short of actually dying from the excessive use thereof, but that if he shall die from such excessive use, no recovery shall be had upon his policy of insurance. It is a warranty, and entirely independent of what the insurer or agents may have known of the insured's habits in this respect when the insurance was effected. How important this provision really is to life insurance companies (unless, indeed, it tends to induce policy holders to lead temperate lives) is not the question. It may be that comparatively few persons actually die from drunkenness. In speaking of a table compiled from England, Wales, and Scotland for the year 1871, Dr. Sieveking, in his work "*The Medical Adviser in Life Assurance*," pp. 98, 99, says: "This table indicates the true bearing of intemperance, not so much in being itself the immediate cause of death as in its increasing the fatality of other disease. Were this not the case, the small number of deaths set down to alcoholism and delirium tremens combined (for both sexes, it amounted in 1871 only to 740) would scarcely attract attention, and the subject would not merit all the space we have bestowed upon it." Whether this is correct in the United States, we need not here consider. On this branch of the case, the court, in lieu of the special charges asked by counsel for both plaintiff and defendant, charged the jury in the words contained in paragraphs Nos. 1, 2, 3 and 4, next to the close of its charge hereinbefore given.

288 *This charge we think direct, clear, explicit, covering the whole question, and correct and sound in law. In the case of Miller v. Mutual Benefit Life Insurance Company, 34 Iowa, 581; S. C., 3 Big. Life and Ac. Ins. 581, Miller had the delirium tremens, and while in such condition escaped from those having charge of him, and was thereby exposed in his underclothes, while running at large in the city, to the inclemency of the weather, and died in consequence of his intoxication, from congestion produced thereby and from cold induced by such exposure. The court held that it was properly found by the jury that he died "by reason of intemperance from the use of intoxicating liquors."

And in Ranney v. Mutual Benefit Life Insurance Company, tried in the United States circuit court for the first judicial district of Massachusetts, in March, 1873 (May on Ins. 333, 334), the court charged the jury that "the real question in this case is, whether intemperance from the use of intoxicating liquors was the cause of the death, if the disease from which the insured was suffering was delirium tremens or *mania a potu*, or other disease resulting from intemperance from the use of intoxicating liquors, and that disease, though not necessarily mortal, yet from want of helpful application, or neglect of proper care or treatment, produced exhaustion or fever, and in consequence death. The death would properly be considered as resulting from the intemperance, even if the disease were not so mortal in itself, but that, with good care and under favorable circumstances, the insured might have recovered." * * * "But if the death was caused by a drug *administered to the assured in the course of medical practice*, for the purpose of cure, in sufficient quantity to produce death, and death was the effect of the drug and not of the disease, then the death could not properly be considered as resulting from the intemperance in the use of intoxicating liquors."

We find no error of law in this branch of the case.

2. Is the statement contained in the insured's "*declaration*," "that I do not now, nor will I practice any bad or vicious habit that tends to the shortening of life," a warranty on his part that he was a sober and temperate man, and would continue to be so?

We concede that no particular form of words will make a *statement* or *stipulation* a warranty, where it is apparent that it is not the intention of the parties to make the validity of the contract depend on the literal truth or fulfillment of the statement or stipulation. Wheelton v. Hardisty, 8 E. and B., 232; Kingsley v. New Eng. Mut. Fire Ins. Co., 8 Cush. (Mass.) 393. The policy here, however, expressly stipulates that if this "*declaration*" shall be found in any respect untrue, it shall be void.

Now, if a warranty, it is, upon all authority, and can admit *of 289
no question, an agreement in the nature of a condition precedent, and like that, must be strictly complied with; and whether the fact stated, or the act stipulated for, be material or not, is of no consequence —the contract being that the matter is as represented, or *shall be as promised.* Indeed, one of the very objects of the warranty is to preclude all controversy about the materiality or immateriality of the statement. The only question is, "Has the warranty been kept?" There is no room for construction, no latitude, no equity. If the warranty be a statement of facts, it must be *literally* true; if a stipulation that a certain act shall or shall not be done, it must be *literally* performed. May on Ins., 160, 161.

The court charged the jury that this term in the "*declaration*" was a warranty, and if they found that the deceased was addicted to intemberance from the use of intoxicating liquors as a habit, and that such habit was a bad and vicious one, tending to shorten life, the plaintiff could not recover. Is it a warranty? The statements contained in such "*declaration*" were expressly held to be a warranty in the case of Miller v. Mutual Benefit Life Ins. Co., 31 Iowa, 217; and in Mutual Benefit Life Ins. Co. v. Miller, 39 Ind., 475, it is held that not only this "*declaration*," but the "*answers*" contained in the application, are warranties, going much further than the court below, and the Iowa case went. The Indiana case, we think, fails to distinguish between a warranty and a repre-

sentation made material by express contract stipulations. Other cases upon this very form of "*declaration*," in which this company was involved as a party, might be cited in support of the charge of the court below, and none has been cited or found holding the contrary. There is then no error in this branch of the case, either in the charges given or refused.

3. As to the written answers to questions, made by the insured and his friend Alcoke, the court charged the jury that they were not warranties, but representations, and that false representations, to avoid the policy of insurance, must be not only untrue, but material; but charged the jury that such representations made by the insured and his friend, that he was sober and temperate, and had always been so, were material, and if not true, avoided the policy.

Did the court err in holding such representations material by intendment of law? We think not. "But when the representations are in writing, and the parties, by the frame of the contents of the papers, either by putting representations as to the history, quality, or relations of the subject insured into the form of specific questions, or by the mode of referring to them in the policy, settle for themselves that they shall be deemed material, they are to be declared so by the court, and the in-
290 sured can not * be permitted to show that a fact which both parties have treated as material, is in fact immaterial.

"The inquiry shows that the insurer considers the fact material, and an answer by the insured affords a just inference that he assents to the insurer's view. The inquiry and answer are tantamount to an agreement that the matter inquired about is material, and its materiality is not therefore open to be tried by the jury." May on Ins., 194, and cases cited in note 1.

The "*declaration*" of the insured, which is a warranty, stipulates, in reference to these answers: "And I hereby agree that the answers made by myself and my friend shall be the basis of the contract between myself and the said company, and if any untrue or fradulent allegation is contained in said answers or in this declaration, all moneys which shall have been paid to the said company, etc., shall be forfeited." etc. Surely, this made the fact of Davidson being a temperate or intemperate man material. Intemperance itself would seem to be *prima facie* material, for, says May, 518, "It doubtless, in a general sense, tends to shorten life."

On this subject it may be well to quote again from the before mentioned recent work of Dr. Sieveking, who, so far from advocating the practicability of total abstinence from intoxicating beverages, strongly recommends wines, and even pure fermented liquors, as not injurious to health or promotive of habits of intemperance. He even closes his remarks on the subject of abstinence as follows:

"Milton anticipated this controversy, and concentrated the pith of the matter in the following exquisite lines:

> "If all the world
> Should in a fit of temperance feed on pulse,
> Drink the clear stream, and nothing wear, but freeze,
> Th' Allgiver would be unthanked, would be unpraised,
> Not half his riches known and yet despised."

He says, p. 97: "Mr. Neison, in a very elaborate paper on the rate of mortality among persons of intemperate habits, shows that the expec-

tation of life of intemperate persons is much below the average; and an intemperate person of 20 has reduced the average expectation from 44.2 years to 15.6; a person of 30 from 36.5 to 13.8 years; a person of the age of 40 from 28.8 to 11.6 years; and also that while diseases of the nervous system and digestive organs give rise to 15.9 per cent. of deaths in the population at large, they form 50.40 per cent. of all deaths among the intemperate. . . .

"Mr. Neison finds that from the age of sixteen upward, the relative mortality of intemperate persons exceeds that of the general population of England 3.25 times. At the term of life
*21 to 30, the mortality is upward of five times that of the general 291
community, and in the succeeding twenty years of life it is above four times greater." He also says: "The spirit drinkers of every class" (having shown that intemperance reduces the expectation of life more in the upper class than among mechanics and laborers) "are liable to suspicion; but wherever it is elicited that *ardent spirits*, in any form, are *habitually* taken during the day, the suspicion amounts to a certainty, that the life, in insurance *parlence*, is a '*damaged*' one."

Insurance is no mere matter of sentiment, in which sensibilities are to be respected and saved, and human ills and infirmities concealed or overlooked in charity. It is a business transaction, involving only dollars and cents, and anything material to the risk may properly be inquired about and made a term of the contract.

We find no error, then, on the part of the court, in having charged the jury that these answers, in relation to the sober and temperate habits of the insured, were, as a matter of law, material, and if untrue, that the plaintiff could not recover.

The next question to consider is whether the court below erred or not, in instructing the jury as to the nature and extent of the use of intoxicating liquors by the insured—if he did use, or had used, them so as to constitute such use a bad or vicious habit on his part, or to make him other than a sober and temperate person. The court did charge the jury, in the words asked by the plaintiff's counsel, what use or what character of intoxications would *not* amount to such bad or vicious habit, or constitute a misrepresentation under the questions and answers upon that subject. The court then charged the jury on the subject as follows:

"You will therefore consider whether or not, at the time of the application, or afterward, the deceased indulged, to an extent *amounting to a habit*, in the use of intoxicating liquors; and if so, then whether this was a bad or vicious habit, which tended to the shortening of life." The court then defined, we think, correctly, what is meant by "*habit*," and then said: I have to say to the jury, that if they find, from the evidence, that at the time the application was made, or subsequently, the deceased had an appetite for intoxicating drinks, to such an extent that a single indulgence necessariiy instigated him to a repetition of it, and led him into what have been called "sprees," and these sprees were frequent, and rendered him incapable of controlling his appetite while they continued, then, although there were intervals during which he remained entirely sober, there was such a repetition of acts of drinking as amounts to a habit; and if you find this was a bad or vicious habit, which tended to the shortening of life, the defendant will be entitled to a verdict," etc.

*Then, as to the answers that the insured was sober and temper- 292
ate, and had always been so, the court said: The statement itself

amounts to an assertion that the applicant at the time of the application was sober and temperate, and had always been so. As a matter of construction, it is manifest and clear to the court that these words, taken as they are placed together, refer to the character, state, or *habit* of the party, and that they are fairly convertible into the phrase or statement that the party was and always had been a sober and temperate person.

The question of fact will then be, 'Was he such?' In considering this question, you will inquire whether or not he continued the use of intoxicating liquors sufficiently long, or repeated his libations sufficiently often, to amount to a habit; and if he did, then whether such habit, considered in reference to its extent or the degree of the indulgence, was such that he was not temperate and sober; and upon your answer to these questions will depend your verdict upon this defense."

This is correct in law as held in Miller against this very company upon a similar "*declaration*" and similar answers as in this case (34 Iowa 222). "He had seasons of sobriety which would continne for months. His debauches were not very contracted as to time, but most violent in excess.

4. But it is claimed that the court erred in its announcement of the rules of construction governing this class of contracts, and in its remarks characterizing the effect of the rules of construction pressed by the counsel for the plaintiff. Of this, we have to say that the construction of this policy and the writing accompanying it and put in evidence, was a matter solely for the court and not for the jury. And the court did construe them, and did not leave their construction to the jury; and if it committed no error in its actual interpretation of any of them, the plaintiff in error has no legal ground of complaint.

Now, what was there in issue upon the trial for the court to construe? Only—1. Whether the provision in the policy, "in case he shall die by reason of intemperance from the use of intoxicating liquors . . this policy shall be void," was a condition precedent to the right to recover, which it admittedly is; and what is a dying by reason of intemperance from the use of intoxicating liquors, within the meaning of this term of the policy? The court held that the deceased must have died from the direct use of intoxicating liquors, such use being the controlling or proximate cause of his death, and not the remote cause, to exempt the defendant from liability. This construction was obviously correct.

2. The court was next called upon to determine whether the "*declaration*" mentioned in the policy and the answers of the applicant and his friend, as to his habits to sobriety and temperance, *were *warranties* or only *representations*. It properly held that the "*declaration*" was by the policy made a warranty, and that such answers were but representations; that the first must be literally true, while representations must be substantially true and material.

293

3. Under the "*declaration*," the jury were required to find that the deceased was in the habit of getting intoxicated from the use of intoxicating liquors, and that the same was a bad or vicious habit, in order to find for the defendant.

4. It was then found by the court, that if the answers were substantially untrue in respect to such habits of the applicant, they were as matter of law material, made so by the parties themselves in the declaration and by the papers containing them. All this was correct.

5. The court then charged the jury as to what was meant by the habit of intoxication upon the face of these papers, and therein did not, as we think, err.

What else or what more, was there for the court to construe in the case under the issues joined between the parties? We can imagine nothing else.

It is true that the plaintiff's counsel raised the questions as to whether overeating and irregular eating, overlabor, being thinly clad, and sitting up late at night, were not, under the "declaration," bad or vicious habits, tending to shorten life. What was meant by the questions: "Has the party been successfully vaccinated?" "Has the party since childhood had liver complaint, bilious colic, rheumatism, vertigo, or disease of the bowels, kidneys, or bladder?" "Has the party ever met with any *accidental* or personal injury; if so, of what nature?" "Whether an 'untrue' or 'fraudulent' allegation made in effecting the insurance rendering the policy void, must not be fraudulently untrue or else material," etc., etc.

But there was nothing in the case authorizing, much less requiring the court to construe the policy and preliminary papers in reference to any of these subjects. To have attempted it, would have been *obiter* purely. In a case involving their consideration, in view of their nature and bearing upon the contract of insurance, many important questions might arise; and until a case presenting them for construction does arise, courts should be careful to attempt to decide nothing as to their proper construction. If they were pressed to draw attention to other *possible* cases, and away from the real case on trial, or to get the court to determine that the untruth of some or all of them would not affect the right of recovery on the policy, and thus lead the jury to determine that the intemperate habits of the insured, if they existed, would not bar a recovery in the case on trial, the court was right in giving no heed or effect to them, *or to the argument showing their immateriality or 294
frivolousness, and, as we have said, it might properly have rejected all substantive testimony offered by the plaintiff upon any of these subjects. By construing any of them away, it does not follow that these provisions in relation to temperate habits should be ignored. Yet, that seems to have been the object in pressing them, as they could have no other bearing upon the case. The objection, that the terms in which the court stated the effect of the rules of construction contended for by the plaintiff's counsel, may have influenced the jury to find improperly for the defendant, is not tenable.

The record does not disclose what rules of construction were maintained on behalf the plaintiff. They may, in effect, have been just what the court stated; presumably they were. We find in the charge this language: "Much has been said during the trial with respect to the conduct and motives of the counsel and the parties in the case. I regret to be obliged to refer to this subject at all, and I only do so to remind you that you are not to give the circumstances thus stated in our presence the slightest consideration," etc. As we cannot know what such "*verbal irregularities*," alluded to by the court in its charge, were; or what construction the court was called upon to give the policy, and other paper evidence in reference to the defendant's defenses, we must rest content when we find that the construction actually given by the court was correct in law.

The same rules of constuction apply to and govern all writings, the subject-matter and nature of the transaction being always to be looked to in arriving at a correct interpretation; and in case of fair doubt or ambiguity as to the meaning of any instrument, it is to be taken most strongly against him who made it, and in whose favor it is. To depart from this rule in insurance cases, and to render all stipulations in favor of the insurer inoperative, would be but to ascertain that an insurer was party defendant, and upon that ground instruct the jury to return a verdict for the plaintiff.

This company, from the questions required to be answered in applications, its forms of "*declarations*," and the terms of its policies, appears to be a mutual life assurance company *for temperate men only*. Men of temperate habits mutually agree to insure the lives of each other, and participate in the profits of such business; and they aim to admit none of a different class. who, having reduced the chances of life, would secure an advantage by being insured on equal terms with themselves. There is such a company in England—"The Temperance Provident Life Office"—having a "temperance" and a "general" section, and in which it is said the average life showing of the temperance section is better than in the general section. Applicants have their choice of sections. Sieveking, 101.

295 *We see nothing against law or morals, or in violation of public policy, in an insurance company organizing on the plan that the defendant, this Mutual Benefit Life Insurance Company, is formed upon. When parties apply for insurance therein, all that they need do is simply to tell the truth; and then, if the company takes them, it will be estopped from objecting to their habits and if it will not, they are left free to apply elsewhere.

Upon the whole case, and after giving due consideration to the very able and carefully prepared arguments of the counsel upon both sides, and the many authorities they have presented, the aid of which we have had, we must affirm the judgment.

O'CONNOR and TILDEN, JJ., concurred.

Lincoln, Smith & Stephens, for Plaintiff in Error.

Sayler & Sayler, for Defendant in Error,

SALES—PAYMENT—FRAUD.

[Superior Court of Cincinnati, General Term, June, 1874.]

HERMAN SCHROEDER v. FERDINAND KISSELBACH.

O'Connor, Tilden and Yaple, JJ.

Where an action is brought by a plaintiff upon an account, one item of which is for $1,930.78, for the price of a stock of goods sold and delivered to the defendant at the cost price thereof; and the defendant, by way of counter claim, sets up, among other items claimed in an account, one for $2,409.11, a balance due on a former account; and it appears that the defendant received the stock of goods in part payment for this item, and for which goods the plaintiff executed to the defendant a bill of sale under seal, acknowledging the receipt of $2,000 for the goods—all of which the defendant admits, but claims that he was only to allow the plaintiff as much for the goods as he might be able to realize net by their sale, which he claims was only $650.68; and then sets up that the price was fixed at $2,000 to hinder, delay and defraud the other creditors of the plaintiff, he

having himself *made use of the bill of sale and the former $2,409.11 indebtedness to successfully replevy the goods from plaintiff's creditors who had attached them. 296

Held, that sale of and payment for the goods were fully executed by both parties, and defendant was properly estopped under the charge of the court from denying the price of the goods as fixed by the bill of sale. The form of the action being upon an implied executory promise to pay the cash value of the item, must yield to the actual nature and substance of the transaction, and the account will be held to indicate simply all the property and money the plaintiff furnished to the defendant during the whole time covered by the transactions stated in it, and this item to have been paid by the cancellation of so much of the item charged by the defendant against the plaintiff.

YAPLE, J.

This is a petition in error prosecuted here to reverse a judgment rendered by this court at special term in favor of Kisselbach, the plaintiff below, and against Schroeder, for the sum of $992. Kisselbach sued Schroeder on an account to recover $4,995.19; and Schroeder set up by way of counter claim an account amounting to $5,338.38, for which he asked judgment against Kisselbach. One of the principal matters of dispute was an item of $1,930.78 in the account of Kisselbach, dated December 30, 1869. It was for the alleged cost price of the goods in the store of Kisselbach, claimed by him to have been sold and delivered to Schroeder at cost price, in part payment of an indebtedness of his to Schroeder of $2.409.11 on balance of accounts, dated January 1, 1867.

Schroeder claimed, that while he bought and took possession of the goods and store of Kisselbach, he only agreed to pay him therefor what he might realize net on their sale, which he says was only $650.68.

We may say that, upon carefully reading the testimony adduced upon the trial—the bill of exceptions containing all the evidence—we are satisfied that the great preponderance was with Kisselbach on this branch of the case; and it having been found by the jury in his favor, we are not satisfied that the verdict was wrong as to any other matter in dispute between the parties; on the contrary the evidence to our minds preponderates in favor of Kisselbach. On the trial, however, a bill of sale, under seal, of these goods from Kisselbach to Schroeder was introduced, dated November 25, 1868, acknowledging the receipt from Schroeder of their price in hand, $2,000. It also appeared in evidence that, after the execution of this bill of sale, creditors of Kisselbach attached or levied on these goods as his, and that Schroeder replevied and made good his claim to them by virtue of his having bought and paid for them as evidenced by this *bill of sale. Schroeder, to get rid of the effect of the evidence of this paper, corroborating the testimony of Kisselbach and other witnesses who swore they were present at the time of the sale and heard its terms, to-wit, that Schroeder was to allow Kisselbach cost price for the goods, which was about $2,000, swore,—and he was the only one who so testified—that the sum of $2,000 was put in the bill of sale for the purpose of keeping Kisselbach's creditors from seizing the goods, and that their actual price was to be fixed at what he might be able to sell them for *net*, which was $650.68. 297

On this branch of the case the court charged the jury: "If you find that the bill of sale was valid, and that the defendant was in no way misled or deceived by the plaintiff as to the value of the goods, or the consideration mentioned therein, and that the defendant was as familiar with the value of goods generally as the plaintiff, but that *the defendant* caused

to be placed in the bill of sale a price greater than the actual value of the goods for the purpose of preventing the other creditors of the plaintiff from interfering with the same, and treated the goods as his own, then the defendant can not be permitted to deny that such price was the real value of the goods; to permit him to do so would be to permit him to take advantage of his own wrong."

This part of the charge was excepted to by Schroeder. Whether it was right or wrong depends upon whether the transaction evidenced by the bill of sale was fully executed or not by Schroeder, as well as by Kisselbach, who delivered the goods to him. If it was not,—if the price named in the bill was not paid by the relinquishment of so much of the $2,409.11 debt held by Schroeder against Kisselbach, but the promise to allow and pay for the goods was to be performed in the future—then Kisselbach, though he may have delivered the goods, of what value soever they may have been, could not recover anything from Schroeder for them; but if such claim was satisfied to that amount between the parties by the delivery of the goods under the bill of sale, the contract was executed by both parties, and neither can avoid any of its terms on the ground that it was a transaction to hinder, delay, or defraud Kisselbach's creditors. Both these legal propositions are well settled in this State. See Goudy v. Gebhart, 1 O. S., 262.

Now, while the claims of the parties, to show their entire transactions, are stated in the *form* of open accounts, and, therefore, in the form of executory implied promises, yet the evidence showed, and Schroeder admitted, that the goods were received by Schroeder in satisfaction of so much of his $2,409.11 claim against Kisselbach, so the amount fixed might have been eliminated from the case made by the plaintiff in his petition
298 *and shown against the defendant's claim of $2,409.11 when he set it up. This being so, we think the court did not err in law when it charged the jury in the terms complained of.

We are unable to discover any error in the record. The judgment below is, therefore, affirmed without penalty.

Butterworth & Vogeler, Attorneys for Plaintiff in Error.
Thos. Powell, Attorney for Defendant in Error.

LIFE INSURANCE.

338 [*Superior Court of Cincinnati, General Term, October, 1874.]

THE CONTINENTAL LIFE INS. CO. v. MARGARET GOODALL.

O'Connor, Tilden and Yaple, JJ.

1. Where in an application for a policy of life insurance, intended to be for the sum of $5,000, the age of the applicant, by the *mutual mistake* of the person taking the application and the applicant, is stated at twenty-nine years when his true age was thirty-nine years, and a less premium has in consequence been paid, a premium sufficient to secure an insurance in the sum of $3,676.81; and the company issues a policy for $5,000, for the premium paid, under such mistake as to the age of the insured, the beneficiary of such policy, after the death of the insured, may maintain an action to correct such mistake and to recover upon the policy so corrected. Technically and strictly, such plaintiff should pay into court the deficiency of the premium with interest, or abate that amount from the sum insured, which would amount to the same thing; but the insured's beneficiary may elect to take only the amount the premium actually paid would

have insured, had the true age been stated; and if that course be pursued, the insurer can not object, as it will be manifestly to his benefit. Age is material, not as effecting the risk, but only as to the amount of premium that should be paid; and, in the absence of mistake in understanding it, or if it be fraudulently understated, such misrepresentation or fraud will enable the insurer, in law, to avoid liability upon the policy.

*2. Where an application to insure has been procured by and sent for the 339 insured through a firm of general insurance brokers, and the insurers forward to them a policy properly executed, but containing a clause that the policy should not take effect until countersigned by such firm of brokers, who are designated "agents," such brokers become thereby the agents of the insurers to consummate the contract, and any facts or reasons known to them why they should not complete the contract, because of known misstatements in the application for insurance, (such misrepresentations not being fraudulent,) the knowledge of which by the insurers would estop them from setting up such misrepresentations as a defense to an action on the policy, had they known the facts when they issued the policy, will also stop the insurers, because so known to such agents.

3. If such brokers have employed an employee to take such application, they furnishing him the necessary blanks to do so, and he takes the same, receives the policy after it is countersigned by the brokers, his employers, collects the premium from and delivers the policy to the insured, his employers and the insurers, by virtue of their agency for the insurers, will be bound by all his acts and knowledge of facts in relation to such application, he being but a mere hand, and, therefore, part and parcel of such agents who are bound to secure competent instrumentalities to prosecute their business, or they and their principals, and not others, must suffer the consequences.

YAPLE, J.

This is a petition in error prosecuted here to reverse a judgment of this court, rendered at special term, in favor of the defendant in error against the plaintiff in error for the sum of $4,024.20, and costs of suit, being the principal amount, $3,676.81, with interest to the first day of the May term, 1874, of the courts.

Margaret Goodall, widow of James Goodall, deceased, brought suit as the beneficiary named in the instrument, against the Continental Life Insurance Company, of New York, upon a policy of life insurance, insuring the life of James Goodall in the sum of $5,000. The policy was given to Goodall on August 2d, 1871, in consideration of $111.15, premium paid by him as follows: $78.95 cash, and the residue by a premium note bearing interest, and which interest was included in such note.

Goodall was insured as of the age of *twenty-nine* years, and the premium was the regular rate for an insurance in the sum of $5,000 of a man twenty-nine years old. He was, in fact, *thirty-nine* years old at the time, and for such cash premium at *that age, he could only have pro- 340 cured insurance for the sum of $3,676.81.

James Goodall died on the 24th day of April, 1872, and the insurance company refused to pay the loss after it had, by the terms of the policy, become due. Thereupon Margaret Goodall, the beneficiary, brought suit against the company upon the policy—alleging that the statement as to the assured's age, twenty-nine instead of thirty-nine years, was inserted by mutual mistake, which mistake she asked to have corrected, and to recover upon such corrected policy the sum of $3,676.81, with interest from July 24, 1872, when the policy became due, "*and for other proper relief.*"

The defendant answered averring that the insured had misrepresented his age in his application; also, that he had done so fraudulently; and that he had represented in such, his written application, that his life was insured for the sum of $5,000 in the Connecticut Mutual Life In-

surance Company, which was untrue, the insured having only applied to be so insured for that sum in that company, and which application then had been, or shortly afterward was, rejected by the Connecticut Company. This representation it was averred, was known to be false by the insured. The answer also claimed that the insured misrepresented his habits of life as to intemperance. The answer denied the allegations of the petition as to mistake in the application in reference to the deceased's age, and insisted that there was no contract of insurance subsisting between the parties.

The case was once before us upon a finding in special term by a jury, in favor of the plaintiff, and was remanded for a new trial.

The case was one in which the parties had not a constitutional right to a trial by jury, but was one properly belonging to the equitable jurisdiction of the court, and in which it had the power, under section 5 of the code, to refer questions of fact, not put in issue by the pleadings, to a jury. The court did so, submitting to the jury the following questions, which were answered by the jury upon the evidence, under the charge of the court as follows:

1. "Was the error in the alleged age of the insured made by his misrepresentation with the intent to defraud the defendant by securing a larger amount, in the event of his death, from the defendant than the premium to be paid would have given had his true age been stated?"

Answer—"No."

2. "Was the error in relation to the age of the insured inserted through mutual mistake of the parties?"

Answer—"Yes."

341 *3. "Did the insured represent, without the defendant or its proper agents knowing at the time the real state of facts in reference thereto, that his life was insured in any other life insurance company?"

Answer—"No."

4. "Was Israel Stern, in procuring the risk upon the life of the insured, the agent of the defendant?"

Answer—"Yes."

5. "Were Evans, Lindsay and Cassilly, in procuring, or taking the risk upon the life of the insured, the agents of the defendant?"

Answer—"Yes."

It may be well to state here, that, at the time the application was taken for this insurance, and when the insurance was effected, one H. R. Dutton was the general agent of the defendant in Cincinnati, when the transaction took place, and where all these persons resided. Evans, Lindsay and Cassilly were what is known as insurance brokers, having no special connection with the defendant except in this insurance. But they knew that Goodall's application for insurance in the Connecticut company had been made and refused, when they accepted from Mrs. Goodall the premium in this case and delivered the policy to her. And the president and secretary of the defendant signed and sealed the policy on July 29, 1871, and forwarded it to Cincinnati with the following provision contained in it: "*This policy to take effect only when countersigned by Evans, Lindsay and Cassilly, agents at Cincinnati, Ohio.*"

The latter countersigned it August 2d, 1871, put it into the hands of Israel Stern, who collected the premium from and delivered the policy to Mrs. Goodall.

Israel Stern was the employee of Evans, Lindsay and Cassilly, he being paid by them a salary of $1,500 per year, to perform for them the kind of services he rendered in this transaction. Furnished with the defendant's blank forms, he took Goodall's application, signing himself "Special Agent." He delivered the policy and collected the premiums, and after Goodall's death he took for the defendant the claimant's statement or proof of loss, being furnished by the defendant with a blank for such purpose, after he had notified it of the death.

After the court had prepared the above questions for submission to the jury, the defendant, by its counsel, asked the court to submit the following additional issues:

1. "Did James Goodall, at the time of making application for insurance, tell Mr. Stern that his age was 29?"

2. "Did James Goodall, at the time he was examined by Dr. J. L. Cilly, tell Dr. Cilly that his age was 29?"

3. "Was the policy issued by the Continential Life Insurance *Company, issued upon the statements contained in the application 342 signed by James Goodall and Margaret Goodall, now before the jury?"

The court refused to submit any of these questions to the jury, to which refusals the defendant, by its counsel, excepted.

As the issues to be submitted in such cases, under section 5 of the code, are obviously within the discretion of the court, it not being bound to submit any at all, but may itself hear the evidence and find the facts, and as the first two questions were obviously matters of evidence to be considered in passing upon the first two issues submitted by the court, and as the third question was a mere matter of legal inference for the court, upon the evidence and findings in the cause, we shall not further consider this part of the case.

The court charged the jury as follows: "This cause is submitted to you upon certain issues, which you are required to answer 'yes' or 'no'? The first interrogatory for you to answer is the following:" (No. 1, above stated, as to whether the insured *fraudulently* misrepresented his age or not.) "To answer this question in the affirmative, you must be satisfied by the preponderence of the evidence that the insured represented his age to be less than it really was, with the intention on his part to secure a larger sum of money in the event of his death, than the amount of the annual premium agreed upon would have procured, had he stated his true age. The law will not presume fraud: it is, therefore, incumbent upon the party alleging it to prove it to the satisfaction of the jury. If the defendant, upon all the evidence in the case, has satisfied you of the affirmative of this question, you will answer, yes. If the evidence and all the facts and circumstances in the case, which you are fairly and candidly to weigh and consider, fail to so satisfy you, you will answer no. If you should find that the person taking the application, Israel Stern, wrote the answer to the question for any purpose of his own, the insured having no design to secure a greater amount of insurance upon his life than he otherwise could have obtained, had his age been stated truly, for the amount of the annual premium agreed upon, then you should answer this question in the negative."

"But, if it was so written by Stern for some purpose of his own, with the assent of Goodall, the insured, with a view to secure a larger amount of insurance than he could have secured for the premium had his age been truly stated, then you should answer—Yes."

The second interrogatory is as follows: (No. 2 above stated in relation to mutual mistake.) "Upon this issue, it is for the plaintiff and not
343 the defendant to satisfy you by clear and *satisfactory proof, and you must be so satisfied upon all the evidence, that the error in the statement of the age of the insured was inserted by mistake of the person who wrote it, the insured intending to answer truly and the defendant to insure him according to his true age. If you so find them you will answer this question yes. If you are not so satisfied upon the evidence, of such mutual mistake, you will answer—No."

As to the *third* issue in relation to whether the insured represented that he was insured for $5,000 in the Connecticut Life Insurance Company without the defendant or its proper agents knowing at the time the real state of facts in reference thereto, the court charge the jury as follows: "It is admitted that in his application for insurance with the defendant, the insured answered that he was insured upon his life in another company; and it is further admitted that said Israel Stern had previously taken an application of Goodall for insurance in the Connecticut Mutual Life Insurance Company in the sum of $5,000, and that the said application had not then been definitely acted upon. If the said Evans, Lindsay and Cassilly were the authorized agents of the defendant for the purpose of effecting and consummating the present insurance upon the life of the deceased Goodall, and Stern was *their* employee to take and return to them the application, and they as such agent, or Stern, knew all the facts in relation to such other alleged insurance, then the defendant will be *estopped* from insisting upon such misrepresentation of fact, and you will answer this third question—No."

"The same answer must be returned if you find that Stern was the agent of the defendant to take the application."

"But, if none of such persons were such agents of defendant, or, if being such agents, they had not knowledge of the facts in relation to such other represented insurance upon the life of the insured, then you will answer—Yes."

The court then, for the time, passed over the fourth question, and instructed the jury upon the fifth issue, in relation to whether or not, Evans, Lindsay and Cassilly were the agents of the defendant as follows: (the policy being put in evidence after the issues had been framed and the jury sworn to try them.) "The policy contains this provision: 'This policy to take effect *only* when countersigned by Evans, Lindsay and Cassilly, agents at Cincinnati, Ohio.' And the policy is signed by the officers of the company in New York, of the date of July 29th, 1871, and is countersigned by Evans, Lindsay and Cassilly, 'agents,' of the date of August 2d, 1871."

"I charge you that the legal effect of this policy is to make the said Evans, Lindsay and Cassilly the agents of the defendant in effecting this
344 insurance; for the defendant was only *willing to make the contract in case they should assent to its terms and countersign it. It will, therefore, be your duty to answer the fifth question—Yes."

"And if Stern was the employee of E., L. & C., and only to take the application, and they entrusted him with that branch of their business, then they were bound in law by all he did, and are responsible for all he knew, the same as if they did, or knew the same personally—such acts and such knowledge were then theirs—and as they were the defendant's agents to procure this insurance, the defendant was bound thereby."

As to the fourth question—"Was Stern, in procuring the risk upon the life of the insured the agent of the defendant?"—the court charged the jury: "If you find that Stern was employed by E., L. & C., and wholly paid by them to hunt up applicants, take their applications in writing and return them to E., L. & C., the defendant knowing nothing of Stern, or giving him orders or directions in no way, then Stern was the agent of E., L. & C., and not of the defendant, and you should answer this question—No. He was in the employ of Evans, Lindsay and Cassilly only."

"If you find the defendant did recognize Stern as its agent to take applications and pay him therefor, then you should answer this question —Yes."

"And this will also be your duty if the company, not Evans, Lindsay and Cassilly, without the company's knowledge or consent, furnished Stern with blank applications for the purpose of getting applications for insurance in the company."

"With the effect of your findings, you have nothing to do—that will be for the court after you have returned your findings."

To each of such charges, the defendant excepted, and then asked the court to give each of the following charges:

First. "The company was not responsible for any mistakes or misrepresentation made by Israel Stern." This charge the court refused to give, remarking, "If E., L. and C. were agents of the company to procure and effect the insurance and Stern was *their* employee to take the application, his act was their's and their's the company's."

Second. "The knowledge of a mistake or fraud communicated to Israel Stern, will not be considered notice to the company." "Refused on same ground as first, and assumes he was not the company's agent."

Third. "That Israel Stern was not *such an agent* as could bind the company by representations made by him not contained in the application for insurance."

"Refused, as this depends upon Israel Stern's relation to the defendant, or to E., L. & C." And it would be more properly for the court alter the findings.

*Fourth. "If the answers in the application in reference to the age and date of birth, and the health are untrue, that is answers 345 to questions 4, 5, and 16, the policy issued on said appllication is null and void." "Refused as asked, and because the jury have nothing to do with it."

To each of these refusals to charge as requested, the defendant excepted.

On the coming in of the verdict, the defendant moved to set the same aside as against the evidence and the law, which motion the court overruled and the defendant excepted. Thereupon the plaintiff did not ask to be permitted to pay into court the balance of the amount of premium, with interest, sufficient to have secured a policy on the life of the deceased for $5,000, or to deduct from $5,000 such balance of premium, with interest, but elected to take only the sum which the premium paid and secured to be paid would have procured a policy for upon the life of the deceased at the age of thirty-nine years, to-wit, $3,676.81, with interest.

Such judgment the court gave, which the defendant moved to set aside and for a new trial, as being against the evidence and contrary to

law. This motion was also overruled, and the defendant excepted. Thereupon the case was brought here upon error, for review, both upon the facts and the law so found and ruled by the jury and the courts.

OPINION.

We may say, once for all, that there is no evidence in the case tending to establish the defense founded upon the alleged misrepresentation contained in the answer to question 16 of the application of Mr. and Mrs. Goodall. That was—"Are the parties habits of life correct and temperate? Have they always been so?"—to which the answer was "Yes." It merely appears that the medical examiner of the Connecticut Mutual company reported to it that Goodall was intemperate upon his application for insurance in it; but no evidence was offered on the trial of this case tending to prove that such reported fact was true.

Another fact that we consider of great weight in forming correct conclusions upon the disputed matters in the case, is, that Goodall never actively sought to insure his life. Had there been evidence that he had done so, his written application would have to be carefully scrutinized in view of the statements found to be contained in it. But, in truth, he and his wife were pursued by the man Israel Stern for a long time and importuned to insure his life. They always claimed that they were too poor, and could not spare the money to do so, he being a stone cutter and she
346 a milliner, carrying on a small store in the front room of their house. Stern was often there, and had *urged the subject of such life insurance atleast fifty times before he got their consent to apply for such insurance. Both applications were filled up by Stern, he and Goodall being alone in the back room of the latter's house. Mrs. Goodall was not present and simply signed, without reading, such applications when presented to her in her store for that purpose. She did not know their contents, but merely the object for which she signed them—she being the beneficiary, had to join in the application. It is not pretended that she knew what statements were contained in them, or what was the age of her husband as stated therein.

Next, we must look at the connection of Evans, Lindsay & Cassilly with the transaction. By its express terms, the policy provided that it should not take effect, that is, that no contract of insurance should be made, until they countersigned it, for which purpose they were made the agents of the defendant. It is said that this was done only to enable E., L. & C., who were general insurance brokers, to collect the premium, and take out their percentage. This may have been the *reason* why they were made such agents, but their agency was not so limited. They were to countersign and deliver the policy to the insured, and receive his premium. Till they so countersigned and delivered the policy there could be no contract of insurance, and hence, they became the agents to make the contract. Now, whatever reasons they may have known why Goodall's life should not be insured, whether misrepresentations contained in his application, or other facts which they knew, should have deterred them from consummating the contract, and if they completed it notwithstanding, they and their principal were thereby estopped from setting up such known reasons and facts to invalidate the policy, unless Goodall's representations or conduct was fraudulent. And it is enough, if they knew such reasons or facts at the time they countersigned and delivered

the policy, to raise such estoppel. It can make no difference if they acquired such knowledge before they became such agents.

Apply this conclusion to the facts in relation to one branch of the case. They well knew that Goodall was not insured in the sum of $5,000, or in any other amount in the Connecticut Mutual Company; for when Stern brought to them the application for the insurance in the defendant's company, one of them asked him if he had heard from the application in the Connecticut Mutual, he answered not, and this member of the firm shrugged his shoulders, laughed and said nothing. Stern did not pursue the inquiry, for he swears that he expected that, upon the report of the examining physician for it, the Connecticut Company would refuse to insure; and it was obviously the fear of such refusal that induced him to take the application for *insurance in this 347
company. He, therefore, carefully refrained from obtaining knowledge of such fact. How then can E., L. & C claim that they were deceived by the application, and if they cannot claim to have been so deceived, their principal cannot. It is unquestioned that Goodall and his wife did not know of the rejection, or the danger of rejection of the first application. It is clear that they did not want two policies of insurance of $5,000 each, and this shows that they entrusted Stern and relied upon him to get up the necessary papers to obtain them one such policy. And Stern, undoubtedly, undertook to get up an application that would secure one such insurance.

And here we may observe that there appears a most striking fact upon the application for insurance in the defendant's company. Stern swears that the writing was done by him in the back room at Goodall's house. Question 3 is, "Has the party now insurance upon his life?" Answer—"Yes. Connecticut Mutual $5,000 *applied for*." This is evidently in Stern's handwriting, and in the same ink as the body of the writing in the instrument. But immediately under this, in a separate line, in different, fresher ink, and in a much better handwriting, is written the words, "*Policy now received and collected.*" This has evidently been inserted after Goodall and wife had signed the application and in their absence, and it was done by somebody to effect this insurance; and no one is shown to have had the paper, except Stern and E., L. & C. If not subsequent, the answer as an entirety would be a contradiction.

This, we think, entirely precludes the admissibility of the defense based upon the alleged misrepresentation that Goodall's life was insured in another company. Both Stern and E., L. & C. knew the facts and knew them far better than the Goodalls could have done. They could hardly have known that the first medical examiner for the Connecticut Company had reported adversely to the risk on the alleged ground of Goodall's intemperance—the agents did.

As to the relation which Stern bore to the parties to the transaction, we will say, that if the plaintiff's right to recover depended upon the fact as to whether Stern was the agent of the defendant or not, we should decide in favor of the defendant. The finding of the jnry upon that issue was not correct. But Stern was the employee of E., L. & C., who were the agents of the defendant. Such agents must work with more hands than their own, and every such hand is in lieu of theirs. What it does they do; what its possessor knows or learns in the prosecution of the business for which it is employed, the employer knows and learns.

It is the same as an individual working by employees. He is bound by
348 what they do within the scope and in furtherance *of their employment the same as though he had done the same thing himself. If he would guard against injury or liability for their acts, he must see to it that he select capable and honest servants; and he should particularly inquire of them what they have done, and what they have learned affecting him in the particular transaction. If he does not, he will be the sufferer. What, then, Stern did in this transaction was done by E., L. & C., and what they did, being the unquestionable agents of the defendant, it is bound by, to the same extent that they would have been bound had they been the principals.

We are, therefore, to consider Stern as E., L. & C. in this transaction up to the time of effecting this insurance. It is not the case of an agent appointing an agent, but an agent doing his appointed work by the usual and necessary instruments.

In reference to the misrepresentation as to the age of James Goodall, it being stated at twenty-nine years in both applications instead of thirty-nine years, his true age, we may say that wé do not think the jury were wrong in finding that the same was not fraudulently made by Goodall. We are convinced from the testimony that Stern, who was anxious, earnest and long persistent in effecting an insurance upon the deceased's life, while the latter and his wife were averse to insuring, telling him that they were poor and could not afford to pay the premiums, drew the application so as to lead them to believe they could afford the premium on a policy of $5,000. Indeed, it is doubtful if they knew the materiality of age as affecting the amount of the premium. He never read it to Mrs. Goodall and he may not have read it to Goodall himself. His conduct was not a model for imitation by insurance solicitors or agents, to say the least. He was at the house of the insured many times before and after the insurance, when Mrs. Goodall swears the children were always present, and that he must have observed them—the eldest, a daughter, being between thirteen and fourteen years old. They ought to have convinced him, if he saw them, that Goodall was more than twenty-nine years old. But he says he never observed or thought of this until after Goodall was dead, when he saw the daughter and thought she was too large and old to be the child of a man but twenty-nine years of age. But, before Goodall was buried, or just afterward, he offered Mrs. Goodall $4,500 for the policy. She declined to talk on the subject then. She afterwards took the advice of a friend, who told her $500 was as good in her pocket as in Stern's. This she told him. He then reported to the company that he knew facts that would invalidate the policy; and he says that he does not know whether he would have so reported it if he had secured the policy from her for $4,500. It is, however, no great stretch of fancy to presume that
349 he would not. The age given *to Dr. Cilly, the medical examiner, as evidenced by his report in this case, was twenty-nine years. Dr. Cilly says Stern came with Goodall. He thinks Goodall stated his age to be what his report shows. But, upon reading this evidence, it will be felt that Dr. Cilly, who is a reputable and good physician, speaks rather from an exercise of his reason upon probabilities rather than from distinct memory of the fact. It is clear that Stern was with Goodall, and that Stern had determined to get Goodall insured, which he feared he could not, or knew that he had failed to do in the other company. Dr. Cilly

admits that he might have got the age otherwise than from Goodall. The fact that the two applications differed in this—one required age at *last* birthday and the other at *next* birthday—made the year of birth differ between 1842 and 1843. This is claimed to be evidence of fraud on Goodall's part, but the jury may well have supposed it was a careful calculation by Stern to make age, amount of premium, and the amount to be insured harmonize. If they so thought, we are not inclined to differ from them.

On the question of mutual mistake the evidence is much more doubtful. The jury were warranted in finding that Goodall was ignorant in the premises, and entrusted everything to Stern. It is hard to believe that Stern, who was E., L. & C., defendant's agent in this transaction, did not know that he was getting up an application which made Goodall misrepresent his age, but this cannot help the defendant; for, as is said in Harris v. Columbiana County Mut. Ins. Co., 18 O. R., at p. 122, "when the insurer misleads the insured, and causes him to fall short of making a valid representation, he should bear the loss occasioned by his own conduct;" and the court there further says: "They have led him into a mistake, which would operate as a fraud on his rights if he were thereby deprived of the benefit intended by the policy." If then, this misrepresentation was caused by the fraud upon Goodall of the defendant's agent, it would no more avail than if it was done by mistake. The jury, in charity to Stern, have found this representation to be a mistake on his part as well as on the part of Goodall and Mrs. Goodall, who paid the premium, she admittedly not knowing what representations were made in the application which she signed, and such finding could not prejudice the defendant any more than if the jury had found that the representation was inserted by Stern fraudulently as against Goodall.

But, it is said that Goodall evidently intended to effect an insurance in the sum of $5,000, and that to make it but $3,676.81 is to make a new and different contract for the parties, one to which neither ever assented.

It is true, we think, that the technical legal method in this *case, though not the most equitable one for the plaintiff to have pursued, would have been to pay into court enough money, with interest, to pay for a $5,000 policy upon the life of the deceased at the age of thirty-nine years, and to have claimed that sum, or to have deducted from the $5,000 the unpaid premium, with interest. This would have been according to the principle settled in the case in 18 O. R., 116, above quoted from; but it would have been far more onerous upon the defendant to have done so, than to take the amount the premium paid would have insured at the age of thirty-nine years. The error, if error it be, is one beneficial to the defendant and it has no right, therefore, to complain. The sense of fairness and justice on the part of the plaintiff and her counsel exhibited in the case, are worthy of commendation. 350

The minds of the parties evidently met in the intention to insure Goodall in the sum of $5,000, for the regular rate of premium at his true age. The mistake or fraud of the company was in understating the age, and reducing the premium to be paid, which, unless corrected in equity for such reason, would have rendered the policy void, and thus enable the company to keep the premium actually paid, for nothing.

An insurance policy may be corrected by a court of equity for fraud or mistake the same as any other written contract, and a recovery upon

it so corrected may be had. This has been held by this court in the case of McCarty v. Ætna Insurance Co., not reported. Thompson, a local agent of the company at Zaleski, Ohio, took McCarty's application for insurance on his house there. McCarty's house was at the time insured in the Home Insurance Co., of Columbus, but the risk was to expire in a few weeks. The local agent knew this fact, was told of it by McCarty, and he left the inquiry as to other insurance unanswered in the application. The application was forwarded to Cincinnati, where only policies were filled up and issued. The managing agent wrote in the policy "warranted no other insurance." He forwarded the policy to Thompson, who delivered it folded up to McCarty, who could not read and who was not aware of such insertion. His house was burned. He sued in this court to correct the mistake and to recover upon the policy as corrected, and obtained all the relief prayed for. Application was made for leave to file a petition in error in the supreme court and leave was refused. Want of a concurrence of minds, of mutual understanding, was the ground of defense mainly relied upon by the counsel for the Ætna company. Many cases might be cited, if that were necessary, sustaining the same course of procedure as in the present case.

We are the better satisfied to decide this case as we do, because, age
351 is only the material in life insurance as affecting the *amount of the premium to be paid for the life insured. And where there has been no fraud or wilful misrepresentation on the part of the insured in understating his age, the practice of every creditable English insurance company is now to do voluntarily what has been done in this case. Though, in the absence of mutual mistake, or fraud on the part of the company in inducing the misrepresentation, they are not legally bound so to do.

See Bliss on Life Ins., pp. 345, 346; Bunyon, 81; May on Ins., 339. The last author says: "A misrepresentation or an equivocation as to the age is material—*although a fact not entering into the risk*—in that the age is the basis upon which the premium is based, that being at a greater or less rate as the age is more or less advanced."

The truth is, a risk upon a person thirty-nine years of age at the rate of premium for that age is safer for the insurer than upon one at twenty-nine for the premium to be paid at that age.

The rule that E., L. & C., the agents of the defendant, and therefore, the defendant, were bound by the acts of Stern is now well recognized. Bowley v. Empire Ins. Co., 36 N. Y., 550; Miller v. Mut. Benefit Life Ins. Co., 31 Iowa R., 224.

The decision of the case between the same parties, 34 Iowa R., 222, in no manner qualifies or affects the rule as announced in the case in 31 Iowa Rep

The supreme court of this state has just announced the same rule of law, Dayton Ins. Co. v. Kelly, 24 O. S., ——. See propositions 6 and 9, of the syllabus of that case.

Insurance companies, like all other persons, should be protected by the law against the fraudulent acts and conduct of others, and their contracts should be governed as to their enforcement by the same rules that are applied in other cases; and others must be, in like manner, protected against their acts and have the same right to enforce contracts. We must not, therefore, so administer the law as to make it to the interest of these companies to employ reckless and fraudulent agents, the responsibility for whose acts they can escape, and yet secure the fruits of their conduct,

making the same a clear gain accompanied by no liability. Only in extraordinary cases, as for fraud, should they be permitted to receive and keep the money procured by the agency of employes, and, at the same time, assume no liability for the obligations sought to be imposed thereby.

The judgment will be affirmed without penalty.

Taylor & Johnston, for plaintiff in error.

Long & Kramer, for defendant in error.

WARRANTY—DAMAGES—JURIES.

*[Superior Court of Cincinnati, General Term, 1874.] 352

WOODWARD ET AL. VS. ALBERT STEIN.

O'Connor, Tilden, and Yaple. JJ.

ON ERROR.

1. In an action on an express contract for the hire of a chattel, with warranty of quality, and at a stipulated price for its use, the rule of damages, in case of recovery, is such stipulated price.
2. The hirer is entitled, in such action by counterclaim, to recover for breach of the warranty, the damages, to be assessed by the jury, actually resulting from such breach, and to have such amount applied to reduce the amount of the contract price.
3. To sustain, on error, an objection to the charge of the court, it must appear from the bill of exceptions that such charge was given, and in the absence of such showing, it will be presumed that the court correctly charged on every material point involved in the issue.
4. Where, in empaneling a jury, the court, *sua sponte*, under the jury act of 1873, inquire whether any of the jury have, within the preceeding twelve months, served as talesman on the trial of any cause in a court of record, and to such inquiry no answer is made, and both parties decline to challenge for such cause, all objection on that ground is treated as waived, and it is not error to refuse a new trial.

This was an action in this court at special term, to recover for the agreed price on the hire of a barge, and for injuries done to her whilst in the service of plaintiffs in error. The agreement was in writing, and contained a stipulation on the part of the owners to "furnish the barge in good order," and, on the other side, to return it "in good order, the usual wear and danger of river navigation excepted." There was evidence at the trial tending to prove that when the barge was delivered for service under the agreement, she was not "in good order," having been imperfectly caulked and being leaky, and to prove that in consequence of such defects expenditures were made to render her fit for the service intended, and that damages otherwise accrued from the breach of the contract of the plaintiff below. It would seem that the defendants below claimed to be entitled to have the jury ascertain the amount of these damages, and to have such amount applied in reduction of the amount *claimed by the plaintiff below. The court charged the jury in these words: 353

1. "If they found that there was a written contract for the hire of the barge James Goode by the plaintiff to the defendants, that contract must govern the rights of the parties; and if the defendants took said barge, and kept and used her under said contract, then for the time they

so kept and used said barge, they were bound to pay the contract price therefor."

2. "That if the defendants found, while they had said barge under a contract for hire made with the plaintiff, she was, without fault of theirs, not in good condition, or seaworthy when they received her, it was their duty, without unnecessary delay, to return or offer to return her to the plaintiff, and if they failed so to do, and on the other hand kept and used said barge, the defendants were liable to the plaintiff for the hire of said barge, during the time they so kept and used her, at the contract price."

Exception was taken at the trial, to the second charge as a whole, and to that part of the first charge in which the judge told the jury that if the defendants took the barge and held and used her under the contract, then for the time they so used her they were bound to pay the contract price therefor. After the verdict a motion was made for a new trial on the ground of misdirection. A motion was also made on the ground, in support of which evidence was received, that two of the jurors who sat in the trial of the case had, during the year next preceding the trial, been called in the common pleas as talesmen, and had so served on juries in that court. Both motions were overruled, and judgment was entered on the verdict. Exceptions were taken to the rulings of the judge, and a petition in error is now prosecuted to ascertain if, in the opinion of all the judges, the law was correctly administered by him.

CONCLUSIONS.

TILDEN, J.

That part of the second charge in which the jury were instructed that it was the duty of the defendants below, on discovering that the barge was not seaworthy or in good condition without fault on their part, to return her to her owners, and which made the circumstance of the omission so to return her, restrictive of their liability, may, in the present state of the case be regarded as immaterial and as not having been prejudical to them. This charge, then, is in substance the same as the first, and in both the law was stated to be that if the defendants took the barge, and kept and used her under the contract, then, for the time they so kept and used her, they were bound to pay the contract price. In this view of the law we all concur. On a sale or bailment of a chattel, with warranty, we suppose the law to be that the vendee or bailee, *notwithstanding a breach of the warranty, whether known to him or not, may affirm and assist upon the contract. Though he may, he is not bound to, rescind and return the chattel. If he affirm the contract and claim the benefits conferred by it, he is bound by it according to its terms; and in an action to recover the price or for the use of the chattel, the sum stipulated in the contract forms the measure of recovery. The performance of the warranty is not a condition precedent to the right of recovery of the price. It is collateral to the contract of sale or bailment, and in case of breach the remedy is by cross action, or by counterclaim under the code. In either form of remedy the measure of the recovery on the warranty, is the actual damages which have resulted from its breach, and where this breach is insisted on by way of counterclaim, in an action founded on the contract, such damages are applied by way of compensation and in reduction of the amount recoverable under the contract. The exercise of the right of recoupment, and of set off of cross demand does

354

not involve any modification of the contract or operate as the substitution of a contract different from that which the parties have made. It enforces the contract on the one side with respect to the price, as in other respects, by adopting the stipulation of the measure of damages, and on the other hand enforces the contract of warranty, by upholding a counter claim for its breach, and by giving actual damages for such breach; that measure being presumed to have been in the contemplation of the parties and so, by construction of law, as much a stipulation of the contract as if expressed in the contract in the very words of the risk of damages.

Bnt it is complained of that the charge, as given, involved a denial of the right of the defendants below to recover for damages under the warranty, and to set them off against the claims of the plaintiff. We think, however, that this objection is founded upon an entire misconception of the language and meaning of the charge. In our view the real ground of objection is that the charge is entirely silent on that subject. The bill of exceptions does not purport to give the entire charge, and for anything that appears, the general charge may have contained a correct exposition of the law of the entire case. It does not appear that the court charged the law to be otherwise than we have above expressed our opinion of it to be, or than what the plaintiffs in error now claim it to be, or that the judge refused, or was called upon to charge the law to be as so claimed. It is the duty of the court in conducting the trial of an issue of fact to a jury, in its general charge, to explain and apply the law of every material question arising on the evidence, and it is the right of the parties to supply any omissions by calling for a special charge. If no such demand is made, or being made, the *charge is not excepted to, all exceptions must, on error, be treated as having been waived. 355
We hold, then, as matter of construction, that there was no refusal to charge on the point in question; and that that question is not presented by the record; and, as matter of law, we hold that in the charge as given there was no error.

2. The error supposed to have intervened in the formation of the jury, presents this state of facts: two of the persons who composed the jury had, within the preceding twelve months, served already on juries as talesman in the trial of causes in the common pleas; the court, when the panel was filled, inquired, *sua sponte*, as required by section 11 of the jury act of April 26th, 1873, whether any of the jury had served as talesman within the preceding year; and to this inquiry no response was made. And there being no challenge in behalf of either party, the jury was thereupon sworn and proceeded to hear the evidence and render a verdict in the case. Neither party was aware, at the time the jury was sworn, or at any time before the verdict, of the truth of the objection, and it may, perhaps, be assumed that had the facts been known to the defendants below, they would have availed themselves of their right of challenge. The objection, (founded upon evidence produced after verdict) was the ground of the motion for a new trial, and the motion having been refused, and exceptions taken, the question now is whether the verdict should be set aside? And we are all of opinion that the motion was properly overruled.

The clause in the act of 1873 imposing upon the court the duty to reject from the jury, unless expressly chosen by the parties, persons who have already and within the preceding year, obtained some knowledge of the duties of a juror, although general in its terms and operation, was

undoubtedly intended for particular localities. Apparently a disciplined habit of attention to the details of evidence, and to the discussions arising in the progress of a trial, is an exercise calculated to render a person more or less qualified as a juror. Hence persons challenged for this cause alone may be thought to be inclined to ascribe such challenge to personal motive, and apt to regard the act as one of personal dislike, hostility, or prejudice. And in localities where persons liable to this objection are at all times numerous, forming a class habitually attending upon the sessions of the courts, it may have been thought by the legislature that some protection would be afforded to the parties by the unsolicited agency of the court. But we are of opinion that if they chose to rely on this mode of protection alone, there being no other cause of challenge against the juror, or objection to him, they are bound by such election. 356 The opposite view would be productive, we think, of any *inconveniences, and it is not required by any construction which appears to us to be authorized by the statute. Notwithstanding the action of the court, the objection is made a cause of challenge and one unknown to the common law, and is declared to be a principal challenge to be tried by the court. Such a trial, we suppose would involve all the means under the control of the court to ascertain the truth, and, on exception, as in other cases, the ruling of the court may be properly reviewed and corrected on error. This provision would be rendered practically inoperative by holding that the remedy afforded by it may be waived, and then that the very objection for the trial of which provision is made, may be renewed after verdict. It would be to encourage the parties, too, when secretly aware of the existence of the objection, to experiment upon the chances of a verdict, and then if disappointed, to experiment upon the chances of another trial. This would involve not merely an unjustifiable waste of public time, but in many cases would turn a jury trial into a farce, against which it would be most difficult to guard, since the existence of the supposed secret knowledge of the parties is a thing which would not be easy to find out—certainly not so easy as for the parties themselves, by the trial of a challenge, to ascertain whether the objection is well taken. A challenge is a regular step in the cause, and, where that is omitted, and the trial proceeds, the implication seems reasonable that neither party regards a talesman an unfit person to be juror, or intends to raise an objection, the proper mode of objection being by challenge.

Sage & Hinkle, for Plaintiffs in Error.
Caldwell, Coppock & Caldwell, Contra.

---

385 *PARTNERSHIP—ASSIGNMENT—ESTOPPEL.

[Superior Court of Cincinnati, General Term, October, 1874.]

†LEONARD W. MACK v. CHARLES FRIES.

Tilden, Yaple and O'Connor, JJ.

1. Where a note and mortgage, or a judgment upon them, is owned by a copartnership, the debtors being the members of another firm—one of whom dies—and a single member of the creditor firm assigns the same, individually, to an innocent purchaser for value, without the latter knowing that the assignor was not the sole owner of the claim, and that it was not payable to him individually,

† This case was reversed by the supreme court in Fries v. Mack. See opinion, 33 O. S., 52.

the written assignment stating the same to be a debt due and payable to the assignor individually; and where the surviving debtor represented to the assignee that the debt was due to the assignor, personally, and was active and urgent in inducing the assignee to take the assignment and incur the liability for which it was designed to indemnify him; *Held*, that, in an action by such assignee, or his assignee of such claim, against such surviving debtor, the latter will be estopped from denying that the assignment of it was valid to pass the entire interest and title thereto to such assignee.

2. And where such assignee informed the remaining partners of such creditor firm of such assignment to him, a few months after it was made to him, and they stated to him that the partner assigning had the right to do so, that he need not be alarmed as it was "all right," they thereby ratified and affirmed the agency of the member *assigning to do so, and such assignment becomes the valid assignment of all the members of the firm; and no new consideration was necessary to make such assignment valid, as it stands upon the ground of ratifying the unauthorized act of one, who assumed to be an agent, after knowledge of the facts. 386

3. Such assignee need not resort to an action for *deceit* against the debtor or the creditor firm; but can prevent them from perpetrating a fraud upon him by claiming the assigned debt and estopping them from denying such ownership or title. The longer he has held the claim the stronger has become his right to interpose such estoppel.

4. In such case, it is not necessary to state the facts raising the estoppel *in pais* in the *petition*. They would be mere evidence in that pleading. It is only by force of the code, in relation to what *defenses* should be pleaded specially, in an answer; or what replies to defenses contained in an answer must be specially set up in a replication thereto, that pleading an estoppel *in pais* would seem to be necessary. At common law, this defense could be made under the general issue.

5. The following verdict held sufficient to authorize a judgment for the true amount of interest, as well as the principal sum, when there were but seven notes of that date and for that amount in evidence, and they were payable in four, five, six, seven, eight, nine and ten months after date, respectively, and such notes being before the judges on the hearing of the motion for a new trial, and contained in a certified and admitted transcript of all the evidence adduced at the trial: "We, the jury, do find for the plaintiff the amount, $7,000 and interest from the date of the maturity of the seven notes of $1,000 each, given February 2, 1860, up to March 2, 1874."

Section 278 of the code, which requires a jury when they find for a plaintiff to assess the amount of the recovery, in their verdict, relates only to the questions of value and damage, and not to cases in which the amount can be computed from the record, or from the admitted evidence adduced at the trial, which may be resorted to by the court to compute the amount of the judgment to be rendered upon such verdict.

6. Where a note and mortgage, or a judgment thereon, are assigned in writing as collateral security for a liability incurred by the assignee in consideration of such assignment, and the amount of the claim assigned is greater than the liability incurred, the assignee may sue in his own name and recover the entire amount of the claim assigned, he being a trustee of an express trust, and need not, therefore, make the beneficiaries parties to the suit. But, if the jury, in such action only award the assignee the amount actually due to him, such finding is beneficial, to the extent of the sum not allowed, to the defendant, and he can not object on the ground that the entire amount of the claim assigned was not awarded against him.

*7. Notice given by the assignee to the attorneys of record having charge and control of a suit on a note and mortgage due to a firm, of its assignment to him by one member of such firm, is notice to all the members of the firm, but whether any effect should be given to such constructive notice, in connection with other facts, or not, tending to estop such members of the firm from their right to dispute the validity of such assignment, *Query*. 387

YAPLE, J.

Tilden having been of counsel did not sit.

This cause comes before us on a motion for a new trial reserved. All the evi-

dence adduced on the trial is before us, the same being certified by the judge before whom the cause was tried to a jury. Also three charges given to the jury by the court as asked by the plaintiff's attorneys and accepted to by the defendant; and also the verdict of the jury are here.

The action was brought to recover the sum of $10,542.19, less $3,314.15 paid, with interest from May 1, 1865, upon the transcript and record of a judgment rendered February 6, 1860, by the district court of the first judicial district of the then territory of Kansas, held at Leavenworth, in favor of Faust Freidenreich, Abraham Freidenreich and Moses H. Springer, partners as Springer, Freidenreich & Co., of the city of Baltimore, Maryland, against Lemuel H. Springer and Charles Fries, the present defendants—Lemuel H Springer, having deceased before the bringing of this suit This judgment, the plaintiff avers was assigned on February 17, 1860, to Henry Mack of the city of Cincinnati, Ohio, and by Henry Mack to himself on February 22, 1872. The defendant in his answer denied that the judgment sued on was ever assigned to Henry Mack, and he denied that Henry Mack, or the plaintiff Leonard W. Mack, had any interest therein.

The jury rendered the following verdict:

"We the jury do find for the plaintiff, the amount seven thousand dollars and interest from the date of the *maturity* of *the* seven notes of $1,000, each given February 2, 1860, up to March 2, 1874." March 2, 1874 was the first day of the term at which the trial was had. These were seven promissory notes for $1,000 each, dated February 2, 1860, payable to the order of Henry Mack, and endorsed by him, signed by Freidenreich and Duerbeck, due respectively in four, five, six, seven, eight, nine, and ten months after date. They were given by the above mentioned Faust Freidenreich, and J. G. Duerbeck, who were in the coal oil business in Cincinnati, to the plaintiff Leonard W. Mack, who had theretofore been a partner with them, for his interest in the copartnership—Henry Mack being the mere accommodation
388 payee and indorser of the notes, and liable as *such to the plaintiff, Leonard W. Mack. These notes were all given in evidence to the jury and are in the certified record thereof now before us. These were the only promissory notes in evidence in the cause. There were given in evidence seven other notes, *in form* of $1,000 each dated the same day, February 2, 1860, payable to the order of Springer, Freidenreich & Co., respectively in four, five, six, seven, eight, nine and ten months after date, signed by Faust Freidenreich, per Charles Fries, and J. G. Duerbeck, but which notes never became valid, as Springer, Freidenreich & Co. refused to endorse them. They were intended to pay Leonard W. Mack for his interest in the firm of Freidenreich and Duerbeck; and on such failure nominal payees to endorse them, the seven notes endorsed by Henry Mack were taken in their stead. The times at which both sets of notes were to mature or fall due were the same.

The assignment of the judgment sued on was signed by Faust Freidenreich alone, setting forth that he owned it, and that it was assigned to Henry Mack on account of his having endorsed the above mentioned seven promissory notes, and was to be void if Freidenreich & Duerbeck should pay the notes, and if Henry Mack should collect the note and mortgage (said judgment) so assigned to him by Faust Freidenreich, he was to pay over to Faust Freidenreich any surplus not required to pay the notes he, Henry Mack, had endorsed for Freidenreich and Duerbeck. The defendant, Charles Fries, witnessed this assignment, which is dated February 17, 1860.

What interest, if any, Charles Fries and his since deceased partner, Lemuel H. Springer, had in the firm of Freidenreich & Duerbeck, does not appear. They had been partners in the clothing business and failed in 1859. But they, and especially Charles Fries, this defendant, took an active part in getting Henry Mack to accept the assignment of the judgment sued on—the same being then (February 2, 1860) a note and mortgage in suit, but not yet in judgment. He and his former partner, Lemuel H. Springer, said according to the testimony of the plaintiff's witnesses, that Faust Freidenreich held the claim and that they would have him come out from Baltimore to Cincinnati and assign it to Henry Mack if he would endorse the seven notes, and that the claim was good, the mortgaged property at Leavenworth being worth $10,000. Charles Fries, the defendant, was not a witness in the case and there was no denial by anybody of such statements and conduct on his part, he being present at the assignment and having witnessed it.

Henry Mack testified that shortly after receiving the assignment, he wrote to the attorneys of Springer, Freidenreich & Co, Messrs. Ewing & McCook, at Leavenworth,
389 Kansas, they having *the suit on the note and mortgage in charge, advising them of the assignment to him They answered acknowledging the receipt of his letter, and saying that they would not change the style of the case, but let it

proceed in the names of the original plaintiffs, Springer, Freidenreich & Co. He also testified, that, in May, 1860, he went to Baltimore taking the assignment and the letter of Ewing & McCook with him, and showed or read them to Moses Springer and Abraham Freidenreich, and that they said he, Mack, "need not be alarmed about this; that this assignment is all right; that Faust Freidenreich had full authority to assign the mortgage and judgment," etc.

This, it is true, both Moses Springer and Abraham Freidenrich deny, as they deny all knowledge of Mack having written to their attorneys, Ewing & McCook, and I shall consider this part of the case, when I come to consider the evidence.

The court, then, at the plaintiff's request, charged the jury, * * * "2. If the jury believes that Charles Fries, the defendant, procured or assisted in procuring the indorsement of Henry Mack of the seven $1,000 promissory notes for the accommodation of Freidenreich & Duerbeck, by representations that said Faust Freidenrich owned or controlled the note and mortgage named in the transfer from him to Henry Mack, and that he, said Fries, owed the debt so secured by mortgage, and that the same were ample security to indemnify him, said Mack, from loss for assuming said liability, and if Henry Mack had no other knowledge than the representations so made to him, and, trusting to said representatives, indorsed said notes and took said security, the defendant, Charles Fries, is estopped from denying the truth of said representations, or that the note and mortgage which are the foundation of the judgment sued on, were assigned to said Mack as security for his said indorsement."

"3. If the jury believe that Henry Mack, afterward conversed with Moses H. Springer and Abraham Freidenreich the other members of the firm of Springer, Friedenreich & Co, on the subject of the transfer of the judgment to him, and showed them said transfer and the letter of Ewing & McCook, of March 14, 1860, to Henry Mack; and if thereupon, the said other members of Springer, Freidenreich & Co., stated that the debt and mortgage prescribed in said transfer were one and the same with the debt and mortgage which are the foundation of the judgment sued on, and ratified and confirmed the assignment thereof to said Mack, the complete title to said judgment became vested in Henry Mack, and his subsequent assignment thereof to the plaintiff carried with it the right to maintain this action."

"6. Notice to Ewing & McCook, the attorneys of Springer, *Freidenreich & Co., of the transfer of the note and mortgage to Henry Mack was notice 390 thereof to Springer, Freidenreich & Co., *provided*, that that note and mortgage are the same debt, or were intended to be the same debt which is the foundation of the judgment in evidence."

To the giving of each of these charges the defendant excepted.

The defendant moves to set aside the verdict and for a new trial on the grounds, First, That the verdict does not assess the amount of the recovery as required by section 278 of the code, which provides that "when, by the verdict, either party is entitled to recover money of the adverse party, the jury, in their verdict, must assess the amount of the recovery:" and because the verdict is void for uncertainty.

Second, That the court erred in giving each of the above mentioned charges to the jury.

And, third, that the verdict is manifestly against the evidence.

It is obvious from the verdict that the jury found that there was due from the defendant to the plaintiff the sum of seven thousand dollars, and that they intended to give him interest thereon in addition. If they have failed to do so, their language in this respect would simply mean nothing in law, and, meaning nothing, it could not affect the finding in favor of the plaintiff for seven thousand dollars. Such words, if nugatory, could not prejudice the defendant and he cannot therefore be heard to complain of them (Code, section 138.) In fact, in such event, the error would be one manifestly favorable to the defendant. But, are they void for uncertainty? The evidence upon which the jury based such finding is all before us, as it was before the jury and the judge who tried the cause; and there can be no doubt, in point of fact, that the seven promissory notes to which they refer, are *the* seven notes of $1000 each dated February 2, 1860, and payable respectively, in four, five, six, seven, eight, nine and ten months after date, from which respective periods each thousand of the seven thousand dollars found due to the plaintiff, was, by the verdict, to draw interest. The question is—Can we look at this evidence to render the amount of interest due upon the seven thousand dollars so found due, certain? Can we look at such evidence to calculate the true amount intended by the jury to be found due the plaintiff from the defendant?

Since the statute of 8 Henry VI. c. 15, in England, verdicts, though not named in the statute, have been amendable "by the plea-roll, memory or notes of the judge, or even by affidavit of what was proved upon the trial."

1 Tidd's Prac. 661, 662; 2 *Id.*, 807, 808. And see Emerson v. Bleakley, 2 Abb., N. Y. Ct. Appeals Decisions, 22.

391 *The present case is a stronger one in favor of the exercise of anolagous power on the part of the court, than the class of cases referred to by Tidd, for the verdict needs no amendment. It is definite and certain when the testimony in the case is referred to. "That is certain which can be rendered certain." It is as definite as the finding of two or more sums would be, not added together. In such a case the court could add up the several amounts without amending the verdict, without changing a word or a figure, and nothing of that kind is neccssary here. In the light of the undisputed evidence, we regard this verdict as a substantial compliance with section 278 of the code.

Section 359 of the Kentucky Code is, word for word the same as section 278 of our own. In Cooper v. Poston, 1 Duval's Rep., 92, the court of appeals of that state held, that, in an action upon a note, a verdict of a jury in the words, "we, of the jury find for the plaintiff," was sufficient, and gave judgment for the amount of the note and interest. The court say (p. 94): "Questions relating to value and damages are questions of fact. As a general rule in cases involving such questions, the jury must assess the amount of the recovery. In our opinion section 359 of the code relates only to such cases."

Neither, then, at common law, or under the code, do we find any legal objection to reckoning the amount of interest allowed by the jury in their verdict by applying the uudisputed evidence in the case thereto, as that evidence renders such amount mathematically certain.

We, therefore, hold that this objection to the verdict is not well taken.

Nor did the court err in charging the jury, that, if the defendant, Charles Fries, represented to Henry Mack that Faust Freidenreich owned the claim secured by mortgage on the Leavenworth property, that the property was worth $10,000, and induced him to endorse the seven one thousand dollar notes in consideration of the assignment to him by Faust Freidenreich of such Kansas claim; Henry Mack being ignorant of the facts, the defendant, Charles Fries, was estopped from denying, as against Henry Mack and his assignee, the plaintiff, that Faust Freidenreich did own such claim and had assigned it to Henry Mack. Beardsley v. Foote, 14 O. S., 414.

It appears from the written assignment to Henry Mack by Faust Freidenreich, that Faust Freidenreich stated therein that he held such note and mortgage and that they were made to him by the defendant, Charles Fries, and his partner Lemuel Springer, and Charles Fries was present at and witnessed such written assignment. He must have known the true state of facts, while, as such note and mort-

392 gage were not present, but in Kansas *and then in suit or just put in judgment, Henry Mack could not be presumed to know the real facts; and the evidence is uncontradicted that the defendant, Charles Fries, told him the facts were such as are stated in the assignment, by reason of which he obligated himself for $7,000, and took the assignment as a n indemnity for the same. This, surely, should estop Charles Fries from claiming that Faust Freidenreich was not the owner of the judgment and that he had no right to assign it.

But, it is claimed that the remedy against Charles Fries was by action for deceit, which action was barred by the statute of limitations when this suit was brought; and which right it might be also claimed could not be assigned by Henry Mack to the plaintiff, Leonard W. Mack. Such action would have been based on the fact that such note and mortgage were not made to and owned by Faust Freidenreich alone, and that he had only assigned his individual interest therein as a partner, which, upon the facts amounted to nothing in the firm at that time, whereas the action assumes that, as against Fries, he did own them and did assign them to Henry Mack, and it is claimed in support of the action that it should be so held in order *to prevent* Charles Fries from practicing a deceit or fraud upon Henry Mack. This claim hits the true distinction. An estoppel *in pais* is interposed *to prevent* the working of a deceit, or fraud. An action on the case for deceit and fraud, is for a wrong *consummated*. An estoppel *in pais* prevents such consummation.

And, in such cases, the longer a party has acquired a right by estoppel *in pais*, the stronger is his right to avail himself of it when his right is denied. In this case, too, it was sufficient for the plaintiff to plead that the claim was assigned, without stating why the defendant should be estopped from denying it had been assigned. In an answer, an estoppel *in pais* should, perhaps, be specially pleaded as a *defense*

(Code, sec. 92, pt. 2). In a petition averring a right which exists by virtue of the fact that the defendant is estopped from denying it, the facts amounting to such estoppel *in pais* are, in general, mere evidence, and, hence, should not be pleaded. At common law, estoppels *in pais*, conld be given in evidence under the general issue, and, under the code, they need only be set up in an answer to a cause of action, or in reply to an answer setting up a defence. (Code, sec. 101).

We do not find that the court erred in charging the jury; that, if after Faust Freidenreich assigned the claim to Henry Mack, the latter advised the other two partners of the fact, who assented to it and assured Mack that Faust Freidenreich had the right to so assign the same, the assignment was valid as against the firm and all its members, and they were estopped from denying its validity.

*The firm, without writing, could have appointed Faust Friedenreich their agent to assign, and that being so, they could affirm his acts after he had made the assignment though he may have done so at the time without authority. Again, if they had disaffirmed the act of assignment, it is not to be presumed that Henry Mack would have remained inactive, relying on his title to the claim, but would have taken steps to secure himself against Faust Friedenreich and Charles Fries for the fraud they would, in such event, have practiced upon him, This charge of the court is fully sustained by the cases of Fall River National Bank v. Buffington, 97 Mass., 498; Commercial Bank of Buffalo v. Warren, 15 N. Y., 677. No new consideration was necessary to bind the firm. These cases establish that. 393

Nor can we find that the verdict is against the evidence. The jury, which it is admitted before us in argument, was composed of business men of exceptionally high intelligence and worth, were the proper judges of the credibility of the witnesses. They may have known Henry Mack, and his character as a reliable business man and as a man of undoubted veracity, and have believed him rather than Moses H. Springer, and Abraham and Faust Friedenreich, the latter of whom, if his testimony was true, perpetrated a fraud upon Henry Mack by the assignment to the extent of seven thousand dollars. They may have thought it improbable that Henry Mack should have advised their attorneys in Leavenworth, Kansas, Messrs. Ewing & McCook, of the assignment, and that the latter never advised them of the fact. though other creditors of Springer & Fries, their debtors, were litigating the mortgage as fraudulent, and without consideration as against them. As effecting the credibility of these witnesses, the jury had the right to consider that the Springers were brothers, and the Friedenreichs also; that the latter were married to sisters of the former; that the Springers and Charles Fries were brothers-in-law, and that a few years (February 16, 1866) after the assignment to Henry Mack, the judgment in question was assigned by the firm to Gustav Fries, a brother of Charles Fries, the defendant, for $3,000, who still held the same. They may have thought it possible or probable that the assignment was really for the benefit of Charles Fries himself, and thus have looked with suspicion upon the evidence of these parties in view of the fact that Henry Mack testified that he went, in May, 1860, to Baltimore specially to inform the firm of the assignment to him, taking with him Ewing & McCook's letter to him, and that he fully advised them of both, and that they assented to the transfer. How much or how little weight was to be attached to these and other kindred considerations was a matter solely within the province of the jury, and it is enough for us to say that there was abundant evidence *to establish the assignment, if the jury believed the plaintiff's witnesses, as they seem to have done. 394

The charge that notice to Ewing & McCook, the attorneys of Springer, Freidenreich & Co., of the assignment, was notice to them, is abstractly correct. Walker v. Ayres, 1 Clarke, Iowa, R. 449. But, the court, in that charge, did not say what, if any, effect it had upon the rights of the parties. Whether it took away any right of Springer, Freidenreich & Co., and conferred any right upon Henry Mack, or whether it tended to estop the former from denying the validity of the assignment. We are bound to presume the court gave the law to the jury correctly in these respects, as its general charge is not given or complained of. It may have said that the law was hostile to mere legal or technical estoppels construing them strictly, but favorable to those where the party has acted or remained silent, having full actual knowledge of the facts, when to act otherwise, to be permitted to speak, would work a fraud upon others who relied upon his conduct.

Finally, this assignment to Henry Mack was as collateral security for his endorsement for $7,000. It created an express trust. When he paid himself out of the fund, or was paid otherwise, he therein stipulated to hold the residue for the assignors. This enabled him to sue for and recover the entire amount of the assigned claim in his own name (Code, section 27). The fact that the plaintiff re-

covered a verdict for only the amount due him, and not the entire amount due upon the judgment was not prejudicial, but beneficial to the defendant. He, therefore, can not complain of the verdict on this ground. The motion for a new trial will be overruled, and judgment rendered here upon the verdict.

O'CONNOR, J., concurred.

Hagans, Broadwell & Hyman, Attorneys for Plaintiff.

E. A. Ferguson, for Defendant.

JURY—VERDICT—GOOD WILL.

[Superior Court of Cincinnati, General Term, October, 1874.]

†JOHN R. GOTTSCHALK v. CHARLES WITTER.

Tilden, Yaple and O'Connor, JJ.

1. Where, under section 276 of the code, the court instructed the jury, that if they rendered a general verdict, to find upon particular
395 *questions of facts stated to them in writing by the court, and the jury found "upon all the issues joined," a general verdict for the defendant and answered all the questions except one, in favor of the defendant, and that one question they answered, so as to make the answer to it, expressly contradict each other, and thus amount to no answer to that question at all, the court will not set aside the verdict in favor of the defendant and grant a new trial, because the jury failed to answer such question, all the other answers and findings and the admitted facts and circumstances of the case, clearly showing that the jury supposed they were answering it in favor of the defendant, but by a mere clerical mistake, failed to do so. Had they purposely disregarded the instructions of the court, and left the question unanswered to cover up in the general verdict their failure to find upon the question, the court would have set it aside; such failure in effect, to find at all upon the question by answering it in two ways directly contradicting each other, does not make the findings upon such questions inconsistent with the general verdict, under section 277 of the code. Such findings are not a special verdict as it and they are defined by the code.

2. When promissory notes are given for the consideration of a contract and such contract is not enforcible because not in writing, and the maker of the notes has sued by the payee to enforce it, and judgment has been rendered against him upon a plea of the statute of frauds, he may, when sued upon such notes by the payee, set up such contract and its adjudged invalidity, to prove a failure of consideration, otherwise such payee of the notes would recover something for nothing.

3. The other questions involved in the decision of this case are fully stated in the syllabus of the case of Burkhardt v. Burkhardt decided with it.

YAPLE, J.

This case is before us, on motion for a new trial reserved at special term. Gottschalk filed the ordinary petition against Witter upon a promissory note, made by the latter payable to the order of the former one year after date for the sum of $333.33, dated July 1, 1871, upon which note he asked judgment with interest from the time it became due. So the action was one in which the plaintiff had the constitutional right of trial by jury.

Witter answered, admitting the execution of the note, and denying his indebtedness upon it. He then set up by way of cross-petition, that for some years prior to the making of the note, Gottschalk was the owner of certain premises in the city of Cincinnati, on the south side of Everett street, between Baymiller and Free-
396 man streets, where he had been and was *engaged in the business of the sale of meats and provisions, and had acquired a large and profitable trade and business, having many customers, by reason of which the good will of such business had become valuable; that about the time of the date of the note, Witter leased from Gottschalk the premises for five years, at the rate of $45 per month, the full rental value thereof for any purpose, for the purpose of carrying on for

†The judgment in this case was affirmed by the supreme court. See opinion 25, O. S., 76.

himself and continuing the business in which Gottschalk had theretofore been engaged, which rent he has ever since continued to pay and is still paying; that he also bought from Gottschalk the tools, implements and chattels used in the carrying on and prosecution of such business, for the sum of $300, which he then and there paid, and which was greatly in excess of the value of such property, it not being worth to exceed $100 to $150, that in consideration of the further sum of $1,000, agreed to be paid by Witter to Gottschalk, by three several promissory notes of $333.33⅓ each, payable in one, two and three years after date, Gottschalk sold to him the good will of such business and custom, and further agreed not to engage in the same kind of business in the city of Cincinnati, so near Witter's stand as to interfere with his business and custom there, or do any act which would diminish the rights and privileges so sold during such term of five years; that the note sued on was one of the three notes so given for such good will; that he commenced and carried on such business, at said premises; that afterwards the plaintiff, Gottschalk established himself in the same business, upon the corner of Eighth and Freeman streets, in the city of Cincinnati, sent circulars to, and made by and through his agent, Joseph Schwabler, whom he had had in his employ before and at the time he sold out to Witter, and whom he took in his new business, having enticed him away from Witter in whose employ he was until Gottschalk started again in business, personal solicitations to the old customers to quit Witter and deal again with him, which most of them did, as Gottschalk being a man of means, put down the prices of meats below the market price, to injure Witter's trade; Witter being a new beginner and poor; and that the plaintiff intentionally took away and destroyed the entire good will, which he so sold to the defendant; wherefore, the defendant asked judgment against the plaintiff upon the note sued on, and that the remaining notes be ordered to be delivered up and cancelled. The plaintiff, in reply denied that he agreed not to go into business again as alleged by the defendant, or that he made any agreement upon that subject. He denied that the sole consideration of such notes was the good will of the business. He averred that such alleged agreement not to enter into business for five years, or during the period of such lease, stated in the answer and cross petition, was not in writing, &c., and was not to be performed within one year, and relied upon the statute of frauds. He also claimed that Witter sued Gottschalk upon such agreement to injure him from continuing such business; that Gottschalk pleaded the statute of frauds; that Witter demurred to such answer of the statute of frauds, which was overruled, and that judgment thereupon rendered in favor of Gottschalk in such cause. This he relies on as a bar to the defense and the relief prayed for by Witter in this action. This case Witter v. Gottschalk is reported in 2 Amer Law Rec. 378.

*397

Upon the trial below the jury found a general verdict, in these words: "We the jury upon the issues joined, find for the defendant."

HENRY IVES, Foreman."

They also returned the following answers to the following interrogatories submitted to them by the court:

"1. Was there an agreement between plaintiff and defendant that plaintiff would not again engage in the same busiuess during the continuance of the lease as alleged in the defendant's answer."

Answer—"Yes."

"2. Did the plaintiff sell, or not, the defendant, the good will of the said business, when he leased the premises to the defendant."

Answer—"Yes."

"3. Has the plaintiff, in good faith, kept his agreement (if you find he made the same) with the defendant, to allow the defendant to enjoy without competition or rivalry from him, the good will of the business sold to defendant; and has the plaintiff, or not, violated and broken such agreement?"

First answer—"Yes." Second answer—"Yes."

"4. Were the note sued on, and the other two notes described in the defendant's answer, given by defendant to the plaintiff for the good will of the business the defendant succeeded plaintiff in, carried on at the place plaintiff leased to defendant; and has the defendant paid the plaintiff for all he purchased from plaintiff, exclusive of such good will?"

First answer—"Yes." Second answer—"Yes."

HENRY IVES, Foreman.

The plaintiff thereupon moved for a new trial on the ground that the verdict was against the evidence and the law, and because the verdict was contradictory.

This motion was reserved for decision here. No exception was taken to the charge of the court at the trial, which is to be regretted, as some of the questions involved have never been decided in the United States, so far as we have been able to find by an examination of the Reports, and but one case in England, which was decided by
398 Lord Romilly, Master of the Rolls, in January, 1872, and is reported *in 13 Eg. Cas. L. R. S, p. 322—the case of Labouchere v. Dawson. As the member of this court who gave the charge in this case, I will say that it laid down substantially the same rules of law as are announced in the report of the Labouchere case, though that case had not then been seen by the court, or by the counsel engaged in the trial.

The court further charged the jury that if Gottschalk should, upon the testimony, be found to have broken his contract in relation to not going into business again, as claimed in the answer, for five years, and had deprived the defendant wholly or in part of such good will, that might amount to a defense as to the entire amount of all the notes, or to one or more of them, or but to a part of one of them—that this would depend upon the fact as to whether the defendant had received from the plaintiff, or been permitted by him to enjoy, none, or part only, of what he was entitled to by his contract.

The court also charged, that, if the contract was verbal, and not such as the defendant could enforce because of the statute of frauds, he still could plead the contract to an action upon the notes to establish a total or partial failure of the consideration; and that a judgment rendered against the defendant in his action for relief, upon overruling his demurrer to the plaintiff's answer of the statute of frauds, did not estop him from making such defense, and from demanding the cancellation of such notes. All the evidence adduced by the parties upon the trial is before us, certified as required by the statute, 1 S. & C., p. 391, sec. 2.

The first question is whether a judgment can be rendered upon this verdict. Section 275 of the code provides that a verdict may be either general or special; section 274, that a verdict defective in form only, may, with the assent of the jury before they are discharged, be corrected by the court. Section 276 permits the jury, in their discretion, to find either a general or a special verdict. And the court may instruct them, if they render a general verdict, to find upon particular questions of fact to be stated in writing, and may direct a written finding thereon By section 277, when the special findings of facts are inconsistent with the general verdict, the former control the latter, and the court may give judgment accordingly.

The answers to the interrogatories in this case do not constitute them a special verdict, but only findings upon particular questions of fact. The question is—Are they as found by the jury, inconsistent with the general verdict?

Taken literally, the answers to the third question simply neutralize each other, and amount to no finding at all upon the subject, leaving the findings embraced in the
399 general verdict *and upon the other questions submitted, untouched and unaffected. It is, first, that the plaintiff has, in good faith, kept his agreement (which they found he had made) with the defendant, to allow the defendant to enjoy, without competition or rivalry from him, the good will of the business sold to the defendant; and second, that the plaintiff has violated and broken such agreement. Surely this is no finding at all. Should the court, then, set aside the entire verdict and grant a new trial, because the jury have failed to answer the third interrogatory so submitted to them?

The submission of such question, at all, was a matter purely within the discretion of the court, and had it declined to do so, its refusal could not have been assigned as error. C. C. C. R. Co. v. Terry, 8 O. S., 570; Adams Express Co. v. Pollock, 12 O. S., 618; Hopkins v. Shull, 3 West Law Mo., 609.

Had the jury intentionally, or purposely disregarded the instructions of the court in order to avoid a special finding and conceal the fact under the general verdict, the court would set the entire verdict aside; but it is obvious from the other findings and the evidence in the case, that the jury intended to answer the first branch of the interrogatory "No," but, by a clerical error, wrote "Yes" instead. When they found that Gottschalk had agreed not to engage in the business as stated in the answer, for five years, the undisputed fact existed that he had done so, and was then engaged in such business. They did, in the next branch of the interrogatory, answer that the plaintiff had violated and broken such agreement. We are not, therefore, willing to set aside the entire verdict because the jury have, by obvious mistake, failed to answer the third interrogatory at all, if the evidence fairly sustains the verdict rendered, and if that, excluding the unanswered question entirely, be enough to warrant the rendition of a judgment upon. As to the question of the statute of frauds and the estoppel by former judgment, we have simply to say,

that, if a man bargain for land verbally and gives his note for the price, and thereupon sues to enforce his contract for the land, and is met by a plea of the statute of frauds, for which reason judgment is rendered against him, he may, if suit be brought by the vendor upon the note, plead such verbal contract and the seller's failure to perform it, as a defense to the note given for the price. The judgment rendered against him would not prevent him from making such defense against the note. After such judgment against him, he could maintain an action for the delivery up and cancellation of any outstanding notes in the hands of the seller for the price of the land he had so failed to secure. The same principle governs this case; and the reply of the statute of frauds and such judgment cannot avail this plaintiff.

*The evidence warranted the jury in finding that the defendant failed to get anything from the plaintiff for these notes. Soon after they were given, 400
Gottschalk started again in the same business; he put down the price of meats, and sent circulars and the boy "Joe" to the old customers, and drew them to himself. In fact the evidence shows, and warranted the jury in finding, that while "Joe" remained in the employ of Witter, he knew Gottschalk was going into business again, that he would be employed by him—as he had been before Gottschalk sold out to Witter—and that he purposely did business for Witter in such a way as to offend his customers, and thus incline them to return to Gottschalk. "Joe" was the person who delivered meats and procured and took orders therefor. He had done so for a long time, and was well known to all the old customers. He solicited them for Gottschalk. The jury may well have thought that Gottschalk had obtained a full rent for his property, full pay for the personalty, and have asked themselves what he was getting $1,000 more from Witter for, when he was pursuing the very business he had sold to Witter for five years, and had taken from him the former custom? They may have concluded that the maxim much in vogue in the juvenile world applied to the case; that "a boy cannot eat his cake and have it.

Again, had the fact been that the purchase was of the personalty and the good will, and the exclusion of the plaintiff's right to engage in the business, as claimed in the answer, for five years, for the gross sum of $1,300; $300 cash, and these notes—the defendant would not be barred of his right to recoup the value of the good will, etc. That value, if the parties had failed themselves to estimate it, would have to be found by the jury from the evidence and all the circumstances in the case. Here, the lease of the realty was separated by the parties themselves, and the $300 paid was certainly more than the personalty Witter received was worth, so that the $1,000 could have been for nothing else than the good will, etc. This the jury have expressly found. Finally, the jury have found that the plaintiff agreed not to engage in the business, as claimed in the answer, for five years, and sold to the defendant the good will of the business. They have also found, in effect, that the defendant has entirely lost the benefit of both by the acts and conduct of the plaintiff.

This makes a stronger case for the defendant than the case of Labouchere v. Dawson, and as we have fully discussed the law arising on the case of the seller of the good will of a business, who expressly reserves the right to engage in the same kind of business, but also has deprived the purchaser of such good will wholly, or in part, in the case of Burkhardt v. Burkhardt, de-*cided at the present term with this case, we shall content ourselves with 401
merely quoting from the decision in the Labouchere case.

Lord Romilly, M. R., in that case says: "Now all the cases admit that he (the seller of the good will, who reserves the right to engage in the same kind of business in the same place) is entitled to carry on the same business wherever he pleases, and to solicit customers in any public manner that he pleases. Then it is argued that the power of soliciting the whole public to deal with him, includes the power of soliciting any one particular person who is a member of the public. On the other hand, the plaintiff says this: You cannot violate this principle, that if you sell a thing you are not entitled to take away its value. It is true that you sold it without binding yourself not to carry on the same business, yet you did sell it expressly including the good will, that good will being the probability of the old customers going to the new firm to which you have sold the business. The question is, may you go to those very persons and try to prevent their giving their custom to the new firm? It is very true you have not entered into an express covenant that you will not do that; but there is an implied covenant to that effect, for a person cannot sell a thing and destroy the value of it."

"I have considered the matter very carefully, and although the point is suggested or hinted at in one or two cases, yet in no case I have been able to find has this simple question come before the consideration of the court. I am of opinion that the principle of equity must prevail, that persons are not at liberty to depre-

ciate the thing which they have sold. Sir Richard Baglay (counsel for the defendant) puts this question to me very forcibly and very properly: where are you to draw the line?"

"I will state what appears to me the principle that applies to such cases. In a great number of cases the court has to deal with the matter which is never precise until the facts are brought before the court. There is no point on which a greater amount of decision is to be found in courts of law and equity than as to what is reasonable; for instance, reasonable time, reasonable notice, and the like. It is impossible *a priori*, to state what is reasonable in such cases. You must have the particular facts of each case established before you can ascertain what is meant by reasonable time, notice, and the like. So, in this case I am of opinion the defendant is not at liberty personally to solicit the customers of the old business to come to the new business. But this does not exclude what is a reasonable or fair solicitation of those customers; this, however, is a matter to be determined in each particular case. I *will specify what appears to me to be the rule in the present
402 case, so far as it can be laid down. In the first place, the new firm, the defendant in this case, is entitled to publish any advertisement he pleases in the papers, stating that he is carrying on such business. He is entitled to publish any circulars to all the world to say that he is carrying on such business; but he is not entitled, either by private letter, or by a visit, or by his traveler or agent, to go to any person who was a customer of the old firm and solicit him not to continue his business with the old firm, but to transfer it to him, the new firm. That is not a fair and reasonable thing to do after he had sold the good will; customers, it is true, may be affected by public advertisements and public circulars, but that does not in the slightest degree militate against the principle I have laid down. Then it is said: where are you going to draw the line? because this might happen, that a person might publish circulars in the papers, which circulars could have no meaning whatever, except as a solicitation to old customers of the old firm and they would be unmeaning if they related to any new one. If such a question as that came before me, exactly in those terms, I should hold it to be merely a colorable departure from what he was not allowed to do, that is, to send a circular to customers of the old firm, requesting them as customers of the old firm not to go on dealing with the person to whom he had sold the business, but to retain and employ him, who had conducted the old firm. That is the way I should look at it, and therefore to that extent I should grant the injunction; and I should say that the defendant was not to be at liberty to apply to any of the old customers privately, by letter, personally, or by traveler, asking them to continue their custom with the defendant, and not to go to the vendees. There I should stop, and I should test any other case by considering whether it was within those limits or not."

In that case, Benjamin P. Dawson, on June 12, 1871, sold his interest in the firm Benjamin Dawson & Co., in a brewery and his interest in the good will of the business, and in the firm name, reserving to himself the right to set up business as a brewer in the same place. He was enjoined from in any manner, applying to any person who was a customer of the old firm prior to June 12, 1871, privately, by letter, personally, or by traveler, asking such customer to continue to deal with him, or not to deal with the plaintiffs. That was a much stronger case for the defendant than the present one is for the plaintiff, whom the jury found, agreed not to do business so as to interfere with that of the defendant for five years, as well as to give him the good will of the old business.

Judgment will be entered for the defendant upon the cause of *action
403 upon the note sued by the plaintiff, and for the defendant that the other two notes be delivered up and cancelled. The judgment will be with costs.

Jacob Wolf, Attorney for Plaintiff.
John C. Healy, Attorney for Defendants.

*GOOD WILL—PARTNERSHIP. 418

[Superior Court of Cincinnati, General Term, October, 1874.]

†LEOPOLD BURKHARDT v. FREDERICK BURKHARDT.

Tilden, Yaple and O'Connor, JJ.

1. Where one partner sells his interest to his co-partner in the partnership property and business, and in the good will of such business acquired by the firm, and grants to the purchaser the right to the exclusive use of the old firm-name, reserving to himself, expressly, the right to engage again in the same kind of business, in the same city, in his own, or under any other name than that of the old firm, he may lawfully advertise such business to the world in the newspapers, by posters, and public circulars; and may trade with all who, of their own choice, see fit to deal with him, as no firm owns its customers, they being at liberty to trade with whom they prefer. The good will so sold is only the probability or chance that the old customers will continue to deal with the successor of the old firm, and that the purchaser's trade will be aided thereby in growing with the growth of the community. But such seller of the good will can not apply to any person, who was a customer of the old firm, privately, by letter, personally, or by runner or traveler, asking such customer to deal with him, or not to deal with the successor of the old firm. He would thereby actively destroy, and bring to himself, the chance or probability which he sold and for which he has been paid. He will not be permitted thus to derogate from his own grant. In this respect he is not upon an equal footing with other merchants, who were never connected with the old firm, and who have never been paid for not actively and directly competing with it for its trade. And where the custom of buyers, in a given city or community, is to divide their purchases among all the houses engaged in the same kind of business in such city or community, and purchase of runners for such houses, such seller of such good will, engaging again in such business, may send his runners for orders and receive and fill such as are given, but he can not use efforts to take from the old firm its proper portion of such orders for his house, whether by putting down prices for that purpose or otherwise.
2. Where one partner purchases from his co-partner the latter's interest *in 419
the partnership real estate, machinery for manufacturing, and furniture; the good will of the business, theretofore, carried on by the firm, and the right to the exclusive use of the old firm-name for a gross sum, and by going into the same kind of business, and in violation of his agreement of sale, deprives the purchaser of such good will, the court will, upon testimony, ascertain the fair value of such real estate, of such machinery and furniture, and, having done so, will for the purposes of the case, consider the residue of such purchase price as the value of the good will and old firm-name. If, by the acts of the seller, the purchaser has been wholly deprived of such good will, and the benefit that would otherwise have been derived from the old firm-name, the court, in an action by the seller against the purchaser to foreclose a mortgage executed to secure promissory notes made by the purchaser, will deduct the value of such good will so ascertained. But if such purchaser has enjoyed such good will in part, the value of such part to be estimated in the proportion it bears to the value of the entire good will, will not be deducted. In arriving at the extent of such deprivation, the party alleging it will not be required to prove all the particular amounts of his damages in dollars and cents, but that is to be ascertained upon the testimony in the case and in view of all the circumstances.
3. Where the parties themselves, for any proper purposes, have fixed the value of the partnership real estate, and the machinery for manufacturing, and furniture, separately, the court will take the same as the true value thereof, and will consider the balance of the value going to make up the whole sum fixed, as the value between the parties for the purposes of the case, of such good will and right to the old firm-name.

†The judgment in this case was reversed by the supreme court. See opinion 36 O. S., 261. The opinion of supreme court is cited. 42 O. S., 474, 475, 493; 45 O. S., 368, 375. See also decisions of superior court, 8 B., 253; 14 B., 108.

STATEMENT.

YAPLE, J.

This cause comes before us for decision upon the evidence and the law, upon a certificate of reservation made by the court in special term.

The action was brought by the plaintiff, Leopold Burkhardt, against the defendant, Frederick Burkhardt, on November 30, 1872, to foreclose a mortgage executed by the latter to the former, upon lots 224, 225, 226 and 227, situated on the west side of Sycamore street, between Third and Fourth streets, and running back west to Hammond street, in the city of Cincinnati, Ohio, which mortgage bears date October 25, 1871.

The mortgage was given to secure two promissory notes, of even date therewith, for $27,666.66⅔ each, payable by Frederick to Leopold Burkhardt, or order, at the Commercial Bank of Cincinnati, with six per cent. interest from date, the first of which notes was payable in one, and the other in two years after date. The petition, as originally filed, prayed for a *personal judgment upon the first note, but this part of the action was afterward dismissed by the plaintiff on his motion.

420

On July 3, 1873, a supplemental petition was filed to foreclose the mortgage for non-payment of the second note, it being then by its terms, overdue. Before the first note became due, Leopold assigned it as collateral security, to the Commercial Bank of Cincinnati for several certain sums of money it loaned to him; and by cross petition in this action, it, at the November term, 1872, obtained a judgment against the defendant, Frederick Burkhardt, for the sum of $8,200, which he has since paid, and for which he is entitled to a credit on that note.

Prior to the bringing of this action, No. 29,117, Frederick Burkhardt, as plaintiff, on November 6, 1872, brought an action against Leopold Burkhardt, as defendant, the same being No. 29,017, to restrain the negotiation and collection of both the notes upon the grounds made by the facts stated in the petition therein.

After both actions became pending, on motion, the two cases were consolidated, and the petition in Frederick's case ordered to stand as an answer and cross-petition in the present action—the one brought by Leopold to foreclose the mortgage. Afterward an answer and cross-petition was filed by Frederick in which he adopted the statements contained in his original petition, and made the same part of such answer and cross-petition. It goes to the facts stated in both the petition and supplemental petition of Leopold upon his mo tgage. The plaintiff filed a reply to it, and the case is to be determined upon the evidence adduced by the parties upon a trial of the issues so raised and presented.

The defendant, Frederick Burkhardt, by way of defense and cross-petition, alleges in substance, that he and Leopold Burkhardt, the plaintiff, who are brothers, were for many years engaged together in business in Cincinnati as partners, under the firm name of Burkhardt & Co., in the manufacture and sale of lard-oil and stearine, and in the receipt upon consignment and sale of petroleum and coal-oils, which business had grown up and become extensive, and the name of the firm had become favorably and well known in the community; that the firm had trade marks and brands that had become well known in the trade, and had a line of consignors of petroleum and coal-oils, who relied upon the business reputation and standing of the firm as an inducement for the consignment to it for sale of large amounts of petroleum and coal-oils manufactured by such consignors; that the firm had introduced into the market and made known the oils so consigned to them by the brands and names of the manufacturers, and had built up a large and extensive and profitable trade in, and market for, such oils, as *well as for stearine and lard-oils, manufactured by such firm of Burkhardt & Co.; that the firm had employed and instructed divers persons who had acquired the good will and favor of shippers and consignors of such merchandise, and the confidence and custom of customers and dealers therein; that such business and the manufacture of such stearine and lard-oil were carried on upon the premises described in the mortgage, there being thereon, buildings, fixtures, machinery, utensils, and furniture, used and employed in such co partnership business; that about October 16, 1871, the plaintiff and defendant mutually agreed to dissolve such co-partnership, which agreement was in writing and will be hereinafter given; that in pursuance of such agreement, the plaintiff sold to defendant his interest, it being the one-half thereof, in all the partnership property, (except certain personalty which it is not material to mention here), real and personal, with the good will of the business, and the right to the use of the firm name of Burkhardt & Co., which Frederick, who was to continue the old business, was to have, use, and enjoy, for the sum of $83,000, all of which the defendant paid to

421

the plaintiff, except the amount covered by the two above mentioned notes secured by the mortgage, sued upon; that $35,000 of such consideration, which is included in these notes, was the agreed amount to be paid for the good will of the business by Frederick to Leopold, the plaintiff; that immediately after the consummation of these transactions between the parties, Leopold for the purpose of injuring Frederick, entered into the business of receiving and selling petroleum, and coal-oils, and of stearine, and lard-oils, in the city of Cincinnati, under the name and style of "L. Burkhardt & Co" and has ever since continued the same and held himself out to the community and to the persons engaged in the trade with the original firm of "Burkhardt & Co.," as the successor to such firm, and has caused bill heads, cards, circulars, and brands to be made and printed in imitation of bill heads, cards, circulars and brands of the original firm of "Burkhardt & Co.," that were calculated and intended to deceive the public, and the customers and consignors, and those who had theretofore dealt with the firm of "Burkhardt & Co.," and to induce them to believe that he was carrying on and continuing the business of the original firm; and by promise of reward and otherwise enticed away the employees of the old firm, who had been employed and instructed by it, and who were acquainted with its customers and trade, and held out, and represented to the consignors of oils to the old firm, and to the customers thereof, that he was entitled to do the said business; and, in every possible manner, attacked, injured, and destroyed the good will of the business that he had so sold and conveyed to the
*defendant, whereby the good will of the business was wholly destroyed; 422
and that, as he avers, the consideration of such sale and of the promissory notes to the extent of the sum agreed to be paid for such good will of the business, has wholly failed.

He thereupon prays, among other things, that such notes may be cancelled or adjudged satisfied to the extent of the amount so agreed to be paid for such good will, he having also been deprived of any benefit from his exclusive right to the use of the firm name of "Burkhardt & Co."

The reply states that it is true the firm of "Burkhardt & Co." did deal in consignments of refined petroleum, and carbon, and lubricating oils; but their principal business, from which their profits and good will were mainly derived, was the manufacture and sale of lard-oil and stearine, in which branch of business the plaintiff has not engaged, but which has been left to the defendant, though the plaintiff had the right to engage therein under any other business name than that of "Burkhardt & Co.;" and that in the dissolution of the firm, and the sale and conveyance of its real estate, stores, and factory, and the chattel property used therein, the good will of the business, and the exclusive use of their firm name were included; but it was with the reservation that the plaintiff should have the right to carry on the same business in the city of Cincinnati, either in his own name, or in any name and style other than that of "Burkhardt & Co."

The reply then denies that such "good will," and the right to the exclusive use of the firm-name of "Burkhardt & Co.," were sold and conveyed for the sum of $38,000, (really $35,000 now claimed), or for any specific or several consideration, but that the plaintiff's half of all was sold and conveyed to the defendant for $83,000, in gross, of which the two notes covered by the mortgage are the unpaid parts. The reply then admits that some months after such dissolution, sale, and conveyance, he entered into the same business, except the manufacture of lard-oil and stearine, in the city of Cincinnati, under the name and style of "Leopold Burkhardt & Co.," which he did in preference to using the name of "L. Burkhardt & Co.," which he claims he would have had the right to do.

The reply then denies all the acts on the plaintiff's part alleged in the answer, except the carrying on of such business in the manner he had the right to do, so as to make it efficient and profitable.

Since the filing of this reply, the plaintiff, during the summer of 1873, sold out his business to others, and has retired therefrom and gone to banking.

The written agreement between the parties was as follows:

"Whereas, Leopold Burkhardt and Frederick Burkhardt are partners as
*Burkhardt & Co., now, therefore, they mutually agree, each with the other, 423
to dissolve the said partnership upon the following terms and conditions, to-wit:

"1. They agree to meet upon the 26th day of October, 1871, at the office of Stallo & Kittredge, and in the presence of E. W. Kittredge and Rufus King, to bid each with and against the other, in like manner as at a public auction, for the following property to-wit:

"The real estate consisting of lots Nos. 224, 225, 226 and 227, being eighty (80) feet front on the west side of Sycamore street, between Third and Fourth streets, in Cincinnati, and running back to Hammond street, with all the buildings and improvements thereon, *including* the fixtures, machinery, utensils, furniture, packages, and chattels used by said firm in the conduct of its business, but *not including* the stock of oil, lard, and stearine, or other merchandise, and the packages containing it, appertaining to the said business, nor the other property or assets of said firm not in use upon said premises; and they hereby agree, each with the other, to sell the said premises and property to the one bidding the highest price therefor, at said time and place, the party buying agreeing to pay the half of the price bid to his co-partner, one-third of the price so ascertained in cash within thirty days, and the balance in equal notes bearing six per cent. interest, payable in one and two years, to be secured by a mortgage upon said real estate; and the party selling agrees to execute a good and sufficient warranty deed of his interest with a release of dower in said premises to the party buying, and to transfer said personal property so to be included in said bidding and sale, together with the good will of the business heretofore done and carried on by said firm in said firm name, and to stipulate therein, that the party selling shall not thereafter do business *under the name of Burkhardt & Co.*, in the city of Cincinnati, but reserves the right to carry on business in his own name, or under any other name and style than that of Burkhardt & Co.

"2. The parties agree, before the time of bidding on said premises, as stipulated in the preceding provision, to have made an invoice of the merchandise on said premises, *not included* in said sale, and that the party buying said real estate, may, at his option, take the merchandise so invoiced at its invoice price, and pay his co-partner the one-half thereof in cash in sixty days from the twenty-sixth day of October, and in the event the party buying shall not elect to purchase said merchandise, it shall be sold on their joint account.

"3. Of the goods held by said firm on consignment, the party buying said real estate shall sell said goods and receive all the commissions and charges accruing thereon, *after* the said twenty-sixth *day of October, 1871; not including, however, the interest upon the advances on such consignment.

"4. The other property and assets of said firm, of every kind, shall be collected and adjusted and divided by both the parties, and the business liquidated upon equal terms, each party to deposit, in the Commercial Bank, all moneys and bills receivable collected by him, to account of 'Burkhardt & Co., in liquidation,' and a division to be made as often as the deposits accumulate, and as either party may request."

Signed, sealed, and witnessed, October 16, 1871. The italicising above indicating being as in the original.

On the 26th day of October, 1871, Frederick Burkhardt bid $166,000 for the property, under such agreement, and became the purchaser, and liable to pay Leopold therefor $83,000, as stipulated in the agreement. Leopold, by a general warranty deed, conveyed his undivided half of the real estate to Frederick for the consideration expressed in the deed, of $15,000, which would make the entire realty $90,000. This value was fixed in order to affix the proper revenue stamp upon the deed—the federal law, at that time, requiring a deed for real estate to be stamped according to the actual value of such realty. This, as there is no evidence of a greater value, must be taken as the true value of Leopold's half of the real estate.

The fixtures, machinery, etc., were invoiced (valued) by the parties at $5,800, and the furniture at $200, making 6,000 for them, or $38,000 for Leopold's half of all the partnership property, other than the real estate proper, sold by him to Frederick under the above agreement, which left $35,000 for "the good will of the business," theretofore "done and carried on by said firm in said firm-name," and for Frederick's right thereafter to the exclusive use of the old firm-name, of Burkhardt & Co. For Leopold's half of such good will and interest in the old firm name, and his half of such fixtures, machinery, etc., he, for the sum of $38,000, conveyed to Frederick, by another writing, bearing the date, October 25, 1871. It reads:

"Be it remembered, that in consideration of thirty-eight thousand dollars ($38,000) to me paid by Frederick Burkhardt, in pursuance of the agreement between us, dated October 16, 1871, receipt of which is hereby acknowledged: I, Leopold Burkhardt, do hereby sell, assign, and set over to the said Frederick Burkhardt my moiety, and all the right, title and interest to me belonging, of, and in all the fixtures, machinery, utensils, furniture, packages, and chattels heretofore used by us, as partners, under the style and firm of Burkhardt & Co. . . . Also, the good

will of said partnership and business subject to the reservation, in that behalf stipulated in said agreement."

There was an additional $3,350 given for Leopold's half of *certain part- 425
nership stock, not material to the consideration of the case. Nor is another agreement, made December 23, 1871, stipulating what merchandise should be considered as having been conveyed by the above agreement; that Leopold should pay half the current year's taxes on all the property conveyed by him; and that he should have the benefit of the current year's subscription to the Chamber of Commerce, and the Mercantile Agency, etc., material.

There can be no doubt, then, that the value fixed by the parties themselves, upon the good will and the right to use the old firm name of Burkhardt & Co., was $70,000, for the half of which, $35,000, Frederick agreed to pay Leopold. We find that was the amount. Leopold himself, after the close of the transaction, told Mr. Senior, that the property sold was worth about $100,000; when Senior said to him that made the bonus for the good will the highest he had ever known, and Leopold said he would "just as *lief* keep it as let his brother have it at that price."

The bookkeeper of the old firm, George Masters, who mostly conducted the correspondence, Frederick did not desire or expect to retain after January 1, 1872; but the active outdoor agent and salesman, Adam C. Fox, who was known well to the customers and consignors, he did desire and expect to retain in his employ, as he also did the foreman of the cooper shops, Frank Vennage, and the other employes. Masters made an arrangement with Leopold Burkhardt to act for him in the same capacity that he did in the old house; and about January 1, 1872, Masters and Fox rented for Leopold, and had fitted up, a store at 49 Main street, in the city of Cincinnati, where, about the 10th or 15th of January, 1872, Leopold Burkhardt entered into the same line of business as the old house had been and was engaged, except in the manufacture of lard oil and stearine; but these he bought, and also received on commission for sale, putting thereon his own brand, which would not indicate that he did not manufacture the same, and which brand was of the same general design as that of the old house, the name only being different. Upon the manufacture and sale of lard oils and stearine there was a greater proportional profit than upon coal oils and petroleum, but the latter had so greatly superceded lard oil in the market as to render the quantities of the latter sold comparatively small, and hence greatly reduced the profits of that branch of the business.

Over the door of Leopold Burkhardt's store was the sign, "Leopold Burkhardt & Co." He had no partner, and simply claims that "& Co." was added because he thought he might be able to find a young man of means to take in as a partner, in which event, it would not be necessary to change the name.

Before Leopold's store was opened, Masters procured for him *envelopes 426
of a size and color similer to those used by the old house, and had printed upon them, "L. Burkhardt & Co., Cincinnati, Ohio," not designating *the place* of business. Bill heads and circulars, headed "L. Burkhardt & Co.," were also printed. The printed envelopes of the old house were, "Burkhardt & Co., Cincinnati, Ohio," not designating the place of business.

Frederick, learning that Leopold was about to engage in such business, in such name, and that he had had printed such bill heads and circulars, and such envelopes, complained of it, and it was agreed by Leopold Burkhardt that he would change the designation to "Leopold Burkhardt & Co," having the privilege to use up such of the others as he had on hand, represented to be but few. This was assented to by Frederick, supposing that no other means would be taken by Leopold or his employes to lead old customers and the public to believe his was the continuation of the old house and business, than what would be implied from the designation of the new house, standing alone.

The new envelopes, similar in size and color to the former, were printed, "Leopold Burkhardt & Co., Cincinnati, Ohio, P. O. Box, 1169;" the place of business still not being indicated. Letters written under the new letter heads were usually signed "L. Burkhardt & Co.," to avoid, it is said, writing the long name "Leopold." This produced confusion in the business of the two houses; letters, remittances, and orders intended for the one often going to the other.

Since this case was reversed, by an addition to the evidence, it has happened that one Peter Jacobs, living in Hamilton, O., desiring to order carbon oils from the house of Frederick, for which he had previously bargained, inclosed the order in one of the old "L. Burkhardt & Co." envelopes, and made out his order in that name. It came to Leopold, and he, supposing it was for the new house, handed it to Coffin & Son, to whom he had sold out his business, and they filled the order. Some time and trouble were expended in explaining the mistake.

The circular issued by Leopold, dated February 1, 1872, was as follows:

"DISSOLUTION"

"The undersigned, heretofore partners under the style of Burkhardt & Co., have, by mutual consent, dissolved their partnership.

"LEOPOLD BURKHARDT,
"FREDERICK BURKHARDT."

"LEOPOLD BURKHARDT & CO.,
"GENERAL COMMISSION MERCHANTS,
"And dealers in all kinds of
"BURNING AND LUBRICATING OILS,
49 Main St., Cincinnati, Ohio.

427 *"Leopold Burkhardt, having withdrawn from the firm of Burkhardt & Co., the undersigned will carry on business as above described, under the firm name of Leopold Burkhardt & Co., and respectfully solicits the liberal patronage of the trade.

"LEOPOLD BURKHARDT."

"February 1, 1872."

Prior to this time, however, during the month of January, 1872, without Frederick's knowledge, special letters were written to all the principal customers of the old firm, consignors and purchasers from it, of which the following is a sample:

"Inclosed we hand you our card, which will advise you of a change in the old firm of Burkhardt & Co., by the withdrawal of L. Burkhardt, Esq., the senior member. We are prepared to furnish our customers, and the public generally, with all kinds of burning and lubricating oils at the lowest market prices.

"We are *sole* agents of Crane & Minshall's celebrated brand of carbon oil, and will receive their entire product as well as a large supply of other leading brands. We now have to arrive several car loads of C. & M.'s oil, which we offer you at 22½ cents, on sixty days' time, *without interest*. Also, extra W. S. (winter-strained) lard oil, at eighty cents, same time and terms. You will recognize the writer as the correspondent of the old firm, and the person who visited your house in May, 1870. We respectfully solicit a share of your patronage, and will be pleased to hear from you by return mail.

"Very truly yours,
"L. BURKHARDT & CO., *per Masters*."

In other letters to consignors of the old house it is stated that Fox is with "us." And, in a letter to purchasers of carbon oils in San Francisco, California, it is stated that the cooper attending to the tank cars is with "us." Such oils had been shipped by the old house across the continent to these customers in tank cars, and, of course, cooperage was of great importance.

A. C. Fox, while in the employ of Leopold, used the original "L. Burkhardt & Co." cards, with his name, "A. C. Fox, with," printed at the top thereof with *red ink*. He was known in the trade as "OILY FOX," and he seems to have had a desire to have the idea of "red" associated with such designation, rather than "gray" or "blue."

Leopold loaned Fox $800, gave him a salary of $1,500 or $1,800, and, perhaps, the privilege of drawing $2,000 per year, with a hope on his part of being admitted as a partner in the new house by investing $10,000, which he expected to obtain from his brother.

The testimony on these points is conflicting. He did draw $1,800 per year. He received $1,800 per year from the old house. He left Frederick suddenly, without
428 warning. It is *clear, also, that after Fox left Frederick he was advised by Masters or Leopold that he had better remain idle for a short time, so that it would not look like he had been enticed away from Frederick. Fox was acquainted with all the city and many other customers of the old house, and solicited and obtained their orders, few of them ever visiting the house to purchase. Leopold also got the foreman of the coopering department from Frederick. He was well known to many customers, so that the new house soon had all the principal employees of the old one; and the faces of those Frederick had to procure in their stead were strangers to his old customers.

The regular and chief consignors of carbon oils to the old house were Crane & Minshall, Jackson & Co., and Alexander, of Parkersburg, West Virgina, Hodkinson & Co., McCarty & Son, and Lovell & Co., Marietta, Ohio; and Livingston & Bros., Pittsburg, Pennsylvania. They were manufacturers, on a large scale, of refined carbon or petroleum oils; and from them, from one-half to three-fourths of all such oils disposed of in the Cincinnati market, came. They consigned nearly or quite all the oils they shipped to Cincinnati to the old firm of Burkhardt & Co. Crane & Minshall's brand had acquired the best reputation of any in the market, and they sent to the old house large quantities of it.

Fox had been largely instrumental in introducing it and keeping up its reputation. Just before Leopold commenced business, he and Crane & Minshall met at Masters' office, on Third street, in this city, and it was agreed that Crane & Minshall should make Leopold their exclusive consignee in this city, and that he should loan them $5,000 and take a mortgage on their works in Parkersburg. At the same time Fox was to go to Frederick and inform him that he should quit his employ, which he did that day.

This agreement between Crane & Minshall and Leopold was carried out, and they seem to have become active in his behalf to influence the other consignors to consign to Leopold instead of Frederick. Leopold made one or more trips and saw, personally, such consignors. Masters sent to Crane & Minshall a fictitious account of sales, to be shown to such consignors. It made the suppositious sales by Leopold's house higher than the prices which could, in fact, have been obtained. Crane & Minshall were advised that they were fictitious (in fact, they knew beforehand that they would be sent, as it was thought that would look more business-like than for them to report such sales verbally at home), and told to show them, but not to enter them upon their books, as account of real sales would be sent them in a few days.

Nearly all these consignors changed almost their entire consign-
*ments from Frederick to Leopold, by reason of his special solicitations, 429
inducements, and efforts, and thus the great bulk of Frederick's trade was swept away.

In Cincinnati, it is customary and usual for every such oil house to personally solicit trade through agents, or runners, or drummers, and city business houses dealing therein usually divide up their orders among the houses like the Burkhardts', so as to buy, at one time or another, oils from all. Orders, too, are solicited by drummers elsewhere.

Before Leopold began business, Burkhardt & Co., and Alexander McDonald & Co. did all the oil business, as consignees, in the city of Cincinnati. The Burkhardt & Co., house was large and its business very extensive, extending into and over many states. The father of these parties carried on the manufacturing and sale of lard-oil and stearine before them. They conducted the same business, and the petroleum trade after that grew up, for many years; and, by industry, prudence, economy, and fair dealing, amassed each a fortune of some $250,000.

When Leopold established himself in business, he, as the testimony establishes, through Fox and Masters, with a view to affect the trade of the old house, put down prices in many instances, and caused it to lose sales conditionally made or fall to such prices; and they changed the rate of commissions on consignments from two and one-half per cent. to one cent per gallon. A sharp competition with the old house and the trade was made by them; sharper than existed before or than has since existed. They did not, in the city, simply solicit such share of the trade as purchasers were in the habit of giving to every house dealing in such articles; but they tried to get what would have gone to the old house; thus, John Keeshan, a long established druggist, on the corner of Sixth and Walnut streets, testifies that Fox solicited him for the new house; that he told Fox he did not believe in having dealings with firms that had gone out under an agreement; that Fox told him there were no restrictions, and that he afterwards bought of him coal and lard oil. Fox and Masters would treat the draymen hauling oils from Frederick's house to purchasers, and get the marks off the barrels, so that Fox could go to the purchasers and try to sell for Leopold, by representing how much better he could do for them. On one occasion, Frederick's house had shipped a car load of oils to St. Louis, Fox seeing the barrels and knowing whence they came, went into the railroad office and asked to see the bill of lading, as there was some mistake in it. It was shown him, the railroad agent supposing him to be connected with the house, and he got the names of the consignees. He then went to the store of Leopold, and he, *or Masters, 430
wrote the consignees a letter, that the oil shipped was "off color," and expressed them a sample of their own, with statement of the terms upon which they would sell it. Fox pushed in the trade the Crane & Minshall, and other brands of oils of the

consignors of the old house, who had changed to the new one. Fox, shortly before Leopold sold out and quit business, left him and was taken back by Frederick, where he still remains, and this fact has induced us to give but little consideration to his testimony, except as he is corroborated by other witnesses. And we may say that he is strongly corroborated, and that much of his testimony is probable and reasonable in itself, and in harmony with the facts and circumstances of the case.

We have to be content with this lengthy, though general statement of the facts of the case, as the testimony, verbal and written, occupies more than one thousand written pages.

We are fain to believe that Leopold Burkhardt, who has ever sustained the character of a reputable and honest man, suffered himself in this transaction to be governed and led by Masters and Fox, who did not have as clear an understanding and high a regard for the obligations imposed upon business men as the law and a sense of fairness require; that they did not realize that they were taking from Frederick Burkhardt, what he had obligated himself to pay his brother $35,000 for. We do not believe that Leopold, of his own will and judgment, would have done what has been done in his behalf, and for which he must be held responsible. Certain it is, that for more than a year he had few, if any, customers—consignors or purchasers—except such as had been transacting business with the old house; and it is also certain, that Frederick's business and profits were almost entirely swept away.

OPINION.

We do not think the fact that Frederick bid for and purchased the partnership real estate, the fixtures, furniture, etc., the good will of the business of the old firm, and the right exclusively to use the firm name of Burkhardt & Co. as his trade mark, for the gross sum of $83,000, will bar his right to abate from that price the value of whatever he failed to get from Leopold, or his damages for what Leopold may have conveyed to him and afterward taken away or destroyed. Had the purchase been for a horse, wagon and gears for a gross sum, on failure to get any given part or parts thereof, the purchaser would have been entitled to deduct the value thereof from the price he agreed to pay. We see no difference in principle between such a case and the one at bar.

431 *Steamboat Wellsville v. Geisse, 3 O. S. 333. Timmons v. Dun, 4 O. S., 680. Upton v. Julian & Co., 7 O. S., 97.

The principle of apportionment is well illustrated by the case of Astle v. Wright, 23 Beav., 77. There the defendant agreed to pay £1,000 for a share in a partnership for fourteen years. The partners disagreed, and the partnership was dissolved by the court, with the assent of both partners. There being faults on both sides, the court directed a due proportion of the premium to be returned. The same principle is recognized and declared in Featherstonhaugh v. Turner, 25 Beav., 391. But in this case, the parties themselves have declared and admitted the value of the respective parts of the subject of sale and purchase: the real estate $45,000; the fixtures, furniture, etc., $3,000; which left the good will and old partnership name as a trade mark $35,000; and they, and the fixtures and furniture were conveyed in writing for the express sum of $38,000. There is, then, no difficulty in ascertaining such value for all the purposes of this case and in order to do justice between these parties.

Next, the right reserved to Leopold Burkhardt to do the same kind of business as the old house in the city of Cincinnati, in his own or under any other name than that of Burkhardt & Co., did not permit him to adopt such a name and to make such use of it, in the manner of prosecuting business, as would reasonably lead the business community to mistake such name and the business carried on under it, for the name and business of the old house. We are convinced that the name adopted by him and the method and appliances used in connection with it, did lead many to think it was the old firm, or its successor, and to deal with him, instead of it. Had a fair use been made of such name, we would not, in this case, hold it to have been in violation of the agreement between the parties, as Frederick, after complaining of the name of the L. Burkhardt & Co., assented to the use of such name as his brother then adopted. But he was not aware of and did not assent to its misuse to his injury.

The remaining question is one of the highest importance, and there is, so far as we have been able to find, but a single reported case directly applying to it. That is the case of Labouchere v. Dawson, 13 Eq. Cas., L. R. S., 322, decided by Lord Romilly, Master of the Rolls, in January, 1872, which was as to the sale and rights reserved to the seller, the same in its facts as the present one, and which will be

again referred to hereafter; and in deciding the case the Master of the Rolls remarked that he had been able to find no reported decision upon it, *which is strange, 432
considering that they have had the great commercial cities of London and Liverpool for centuries. The question presented is, when a merchant sells the good will of a business, independently of and beyond the good will attaching to the premises where it has been carried on, and reserves to himself the right to engage in and carry on the same kind of business, in the same town or city, under his own or any other than the old firm name, what may he do and from what must he refrain toward getting business in the line he so engages in.

The good will of a business is a probability or chance that the customers of the old firm will choose and continue to deal with the successor, and that from such advantage it will increase its business with the growth of the community.

From this it is clear that nobody owns such customers; that they may purchase and sell and deal where and with whom they choose; and, if the person selling such good will has done nothing to induce them to come to him, beyond making the fact generally known that he is carrying on such business, and where he carries on the same, or if he does nothing to keep them in ignorance of the fact that he has sold such good will, he may deal with them without subjecting himself to any legal or equitable claims, by the person to whom he has sold such good will. It is the mere probability or chance of the old customers choosing to continue to deal with him, that the purchaser of the good will buys; and if they do not so choose he has no legal grounds of complaint.

But it by no means follows that such seller of the good will, when he again engages in the same kind of business, in the same place, may rightfully do all that any other merchant may in competing with the old firm for the old business. He has sold something and been paid for it, other traders have not. He is either bound to observe some line of conduct different from an ordinary merchant, or he will be getting something for nothing. He must relinquish some rights and privileges with regard to the old trade, or the promise to pay him for it, is without consideration, and would not be enforcible on that account. But good will, though intangible, is property, and often valuable property—it is the very atmosphere that envelopes and pervades a business and that gives it the breath of life.

Our conclusion is, that a person selling such good will and rightfully engaging again in such business, may advertise the fact to all the world and invite it to come and deal with him; but, that he must refrain from specially applying to and urging and holding out special and designed inducements to the customers of the old firm to leave it and deal with himself. That tends directly to destroy or take away the chance or probability which he has sold and for which he has been paid. As to * that he must be *passive*, except as we have stated above, 433
and act in perfect good faith toward the house to which he has sold such good will.

This is the substance of the holding by Lord Romilly, in Labouchere v. Dawson, 13 Eq. Case., 322, and we think the rule a plain, just, and practical one, easily enough understood by men who have no desire to sell and get paid for a thing and yet keep and enjoy it themselves. See also, Cuttwell v. Lye, 17 Ves. Jr., 335. Churton v. Douglas, 1 Johnson, (Eng.), 174. Palmer v. Graham, 1 Pars. Sel. Cas. Eq. (Pa.), 476. Harrison v. Gardner, 2 Mad. Chy. R., 219. Clement v. Maddick, 5 Jurist. N. S. pt. 1, 592. Lee v. Haley, 5 Chy. Appeals L. R. S., 155. Chanter v. Leese, 5 Mees & Wells, 698. Same v. Same, 4 id., 295. Hogg v. Kirby, 8 Ves. Jr., 215. Holmes, etc. v. Holmes, etc., 37 Conn., 278. Angier v. Weber, 14 Allen, (Mass.), 211. How v. Learing, 6 Bos. (N. Y.), 370. Nye v. Raymond, 16 Ill. R., 153. Jones v. Buffum, 50 Ill. R., 277. Bryant v. Bryant, 35 Ala. R., 315. Hall's Appeal, 60 Pa. St., 458. 1 Phil. Ev., 433. 2 Lind. Part., 842-845. 2 Story's Eq. Juris., Sec. 95, Id. Story on Part., Sec. 99. 16 Amer. Juris., 87-92.

The above authorities have been cited to us and commented on by counsel, as applying to the several branches in this case.

Upon the evidence, and being governed by the rules of law, above announced, we have no difficulty in concluding that Frederick has not been permitted by Leopold to receive and enjoy the good will of the old firm, and the benefit of the exclusive use of the old firm name, to the extent it was agreed between them he should.

We therefore find and hold:

First, That Frederick purchased from Leopold the latter's half of the real estate, fixtures, machinery, etc., the good will of *the business* theretofore carried on by the old firm, in the firm name of Burkhardt & Co., and not merely the good will attaching to the premises upon which such business had been so carried on,

and the exclusive right thereafter to the use of the name of "Burkhardt & Co.," as his trade-mark.

Second, That he bid for and purchased them all for $83,000, and that Leopold
434 has failed to give him, or has deprived him of the * exclusive benefit, use, and enjoyment of such good will and such firm name of Burkhardt & Co., that the real estate sold by Leopold was only of the value of $45,000, the fixtures, machinery, furniture, etc., $3,000, and that $35,000 was the value of such good will and firm name as a trade-mark, as fixed by the parties in this transaction.

Third, Whether, in point of fact, Leopold is entitled to recover from Frederick no part of such sum of $35,000, or whether he is entitled to recover a part of it. and if so, what part, we do not now undertake to determine. That must be done by a Master, upon a reference of the case to him upon *the testimony now before us, and such other testimony as the parties may adduce before him, upon the subject of the extent of the deprivation, or damages sustained by Frederick, by reason of the premises.* The Master will determine such question upon such evidence, not requiring the defendant to make proof, as of a bill of particulars of his injuries; but upon the testimony applied to the case in view of the nature of the subject, to which and to all the circumstances he will give due weight and consideration. He will be required to report to the next general term of this court.

Had it not been that the counsel for Leopold intimated that, in the event of a decision adverse to their client, they would desire to take further testimony on this branch of the case, I would have been disposed myself to finally decide it. But I have a great advantage over my brethren. I heard all the evidence before the case was reserved. They have only heard it upon the argument here, and while they agree that some deduction should be made from these notes, they are not prepared to say whether $35,000 should be deducted, or only a greater or less part of that sum; and as to that, I shall express no opinion.

Findings may be prepared on the basis above indicated, and an entry made, embracing an order of reference to a Master, to consider such evidence, and to report his conclusions to the next general term.

The costs and the costs of such reference will be adjudged against the plaintiff, Leopold Burkhardt, when final judgment is entered.

King, Thompson & Longworth, for Plaintiff.

Stallo & Kittredge; Sage & Hinkle, and *C. B. Wilby* for Defendant.

---

435 # * SALE OF INTOXICATING LIQUORS.

[Superior Court of Cincinnati, General Term, October, 1874.]

†SARAH A. MASON v. THOMAS SHAY.

Tilden, Yaple and O'Connor, JJ.

1. In order to recover damages under the Adair law, plaintiff must aver and prove the unlawfulness of the sales, and if this be done, the law authorizes the award of exemplary as well as compensatory damages.
2. It is necessary that the illegal sales be proven beyond a reasonable doubt.

YAPLE, J.

The plaintiff in error, on September 23, 1871, brought suit against the defendant in error to recover from the defendant the sum of $10,000 damages, for *unlawfully* selling to her husband, Thomas H. Mason, during *four* years next prior to August 3, 1871 (at which time he died of *delirium tremens*), intoxicating liquors, by reason of which unlawful sales, and the drunkenness of her husband occasioned by his drinking the same, she was injured in her means of support.

The defendant denied all the allegations of the petition. The case was tried by a jury. The facts of the case transpired partly under the act of 1854 (vol. 52, p. 153 O. L.), and partly under the act of 1870 (vol. 67, p. 101 O. L.), known as the "Adair Law." The plaintiff asked the court to charge the jury as follows:

"1. In order to entitle the plaintiff to recover damages resulting from the sale of intoxicating liquors to her husband by the defendant subsequent to July 4, 1870, it is not necessary to prove that such sale was contrary to law.

"2. The fact of such sale of liquor need not be proved beyond a reasonable doubt; but the usual proof required in civil cases, viz., a preponderance of evidence is all that is required to prove such sale."

---

†The opinion of the superior court in special term which this judgment affirms will be found 1 Rec., 553. A contrary holding was made by the supreme court in Lyon v. Fleahmann, 34 O. S., 151. This opinion was followed 34 O. S., 157, 158; and is cited 40 O. S., 204, 205.

Each of these charges the court refused to give, but did charge the jury that, "under the present act, the intoxication must be occasioned by liquors sold in violation of law to authorize a recovery for any of the enumerated injuries resulting from such intoxication."

The court also charged the jury that, as for such unlawful sales, the defendant would be liable to indictment and punishment by fine or imprisonment, or both, such illegal sellings must be proved "beyond a reasonable doubt." To such refusals to charge as requested, and to those parts of the charge stated above, the plaintiff excepted.

The jury returned a verdict for the defendant, who moved for a new trial on the above grounds, which was overruled and judgment rendered upon the verdict. Thereupon this petition in error was brought to reverse such judgment.

This court, in general term, held in the case of Granger v. *Knipper and Cordesman, 2 Supr. C. R., 480, that "under what is known as the 'Adair Liquor Law,' no civil action for damages against the seller of intoxicating liquors * * * can be maintained by the wife, injured in her means of support by reason of the intoxi ation of her husband caused by such sales, unless they were *unlawful*." For the reasons stated in that case, we are still of the same opinion, and so hold. 436

This being assumed as the rule of law, it follows that, in order to recover damages in this class of cases, the plaintiff must aver and prove the unlawfulness of such sales, and if this be done the law authorizes the award of exemplary as well as compensatory damages. The plaintiff in this case averred in her petition that such sales were *unlawful*.

What degree of proof is required to prove the alleged unlawful acts of the defendant? Must they be proved beyond a reasonable doubt, or only satisfactorily, by the fair preponderance of the evidence? Where, in civil cases, the criminal act must be so set out in the pleadings as to raise that distinct issue before the jury, there such criminal act must be proved beyond a reasonable doubt; and when such criminal act need not be so set out in the pleadings to enable the party to maintain his action, or to establish his defense, the rule as to a mere preponderance of evidence applies.

Sinclair v. Jackson, 47 Me. R. (3 Hubbard), 102; Thayer v. Boyle, 30 Me. R. (17 Shepley), 475; 2 Greenl. Ev., sec. 408; Buttman v. Hobbs, 35 Me. 227.

"To support a special plea in *justification* (in actions of libel or slander) where *crime* is imputed, the same evidence must be adduced as would be necessary to convict the plaintiff upon an indictment for the crime imputed to him, and it is conceived that he would be entitled to the benefit of any reasonable doubts of his guilt." 2 Greenl. Ev., sec. 426.

Why in actions for damages in cases of assault and battery, criminal libel, etc., such unlawful acts need not be proven beyond a reasonable doubt arises from the fact that we follow in them the common law of England, where no such degree of proof has been required. We therefore, have permitted such cases to be governed by the English common law rule, and they are really exceptions to our general rule.

We are aware that, by the law of many states, no plaintiff, in any civil action, is bound to prove the facts of his case beyond a reasonable doubt; but such is not the law in Ohio, and if it is to be changed, we prefer that the supreme court should do so, rather than to make such effort ourselves.

Upon a trial under an indictment for selling intoxicating liquors in violation of the statute, the guilt of the defendant must be proved beyond a reasonable doubt. Fuller v. State, 12 O. S., 433.

*And the rule laid down in civil cases, as evidenced in the above decisions, cited from Maine, and by the citations from Greenleaf on Evidence, has been adopted in Ohio. Lexington Ins. Co. v. Paver, 16 O. R., 324; Strader v. Mullane, 17 O. S., 624; Chaffey v. United States, 18 Wal., p 545; *action, debt for penalty*. 437

In the last case it is held that, "in a civil action evidence to prove fraud, which does not amount to a criminal offense, need not be such as to exclude all reasonable doubt." And at page 626, the court say, citing Lexington Ins. Co. v. Paver, that "it seems to be established law that, in civil as well as in criminal cases, a party cannot be found guilty of a crime, unless upon proof which excludes all reasonable doubt. The court, in that case (16 O. R., 324), sustained a similar charge made by the court below, upon the express ground that the fraud charged and attempted to be proved was a criminal act."

Speaking for myself, I will say that, in the absence of any controlling decisions in this state, I would if recognizing it at all, apply this rule only in cases where the crime charged is a felony under our criminal code, and not where such offense is a

mere disdemeanor. This distinction the court below observed in the case of Fuller v. State, and its ruling was reversed. In the cases in 16 O. R. and 17 O. S., no such distinction is suggested, and we are not warranted in making it. Prior to the passage of our present criminal code, there were, in this state, no crimes defined as felonies.

The objection raised by the record, but not pressed in the argument, that for wrongfully causing the death of the deceased by selling to him, unlawfully, intoxicating liquors, the plaintiff was not entitled to recover damages, we do not think is well taken.

The court charged that there was a special statute allowing a recovery of damages, not exceeding $10,000, for wrongfully causing death, the damages being restricted to the pecuniary injury sustained by the widow and next of kin, excluding entirely exemplary damages, which are allowable in cases under this statute, that no such action can be maintained if the deceased, had he lived, could not maintain an action for the injury which the plaintiff's deceased husband could not have done, as he violated the law in becoming intoxicated by drinking such liquors; that the liquor statute treated only of injuries to the plaintiff's person, property, and means of support, things in themselves lower and inferior to the death of her husband, which could not, therefore, be construed as within it (1 Bl. Com., 88), and that his death must, in contemplation of law, be held to have resulted from the act, or restriction of God. But the court stated that, if the plaintiff was entitled to recover,
438 she was entitled to be *compensated for the injury to her means of support arising from the expenses of her husband's last sickness and funeral expenses, etc. This, we think, to be the proper construction of these statutes, and that the court did not err in so instructing the jury.

We deem it proper also to say that the record in this case represents the court as saying that, in a proper case, the plaintiff might recover damages within *four* years prior to the bringing of suit. This was because the plaintiff was only seeking to recover from that period, and not because the court held that to be the limit prescribed by the statute of limitations. (See 1 Amer. Law Rec., p. 554, par. 4.) Such actions being given by statute, and not being for the recovery of penalties and forfeitures, but compensation merely, may, it would seem, be brought within six years. Code, sec. 14.

Finding no error upon the record, the judgment will be affirmed.

Reuben Tyler, for Plaintiff in Error.

J. W. Okey and *C. H. Blackburn*, for Defendant in Error.

---

464 *RAILWAY LEASES—INJURY TO PASSENGER.

[Superior Court of Cincinnati, General Term, October, 1874.]

THE CINCINNATI & SPRINGFIELD RY. CO. v. HERMAN M. SLEEPER.

Tilden, Yaple and O'Connor. JJ.

1. At common law, a railroad corporation, without power given in its charter so to do, can not lease, and give possession and control of its road to another railroad corporation or person, and be exempt from liability for wrongful injuries inflicted by the lessee upon persons or property upon the road; but will be held liable for the acts of the lessee.

465 *2. By statute in Ohio this may be done where both the lessor and the lessee are corporations created by the laws of the state; but not if the lessee be a corporation created by the laws of another state.

3. Where an Ohio railroad corboration leases and gives possession of its railroad rolling stock, etc., to another Ohio railroad corporation to operate and manage, but has a stipulation put in the lease that the road is to be efficiently and economically managed under the direction and managemeut of an advisory committee of three railroad men, one to be chosen by the lessor and one by the lessee, and the other by another railroad corporation, whose line is to form a continuous line with the roads of the lessor and the lessee, for the common benefit of all the parties; and it is further stipulated that the lessor is to receive the gross receipts for local passengers on its road and the net local freight earnings, a passenger injured in going upon the cars from one station

to another on the leased road, by the negligence of the conductor, employed and paid by the lessee, can maintain an action therefore against the lessor corporation. The action being one of tort, he may sue either or both companies, as both have a voice in the control of the road as a matter of right and are principals.

4. In such a case, if the conductor was guilty of gross negligence, which directly occasioned the injury, the jury may, in their discretion award the party injured exemplary damages as against such lessor corporation. This is by virtue of and justified by a wholesome rule of public policy

5. In such a case the petition need not state that the negligence was gross to authorize the giving of exemplary damages. The averment that the train was "so negligently and carelessly" run and managed as to cause the injury complained of is sufficient to warrant the exercise of such power by the jury.

STATEMENT.

YAPLE, J.

This is a petition in error prosecuted here to reverse a judgment rendered at special term in favor of Sleeper, for $2000, against the plaintiff in error, a corporation under the laws of this state.

The plaintiff below, Sleeper, sued the defendant in error, the Cincinnati and Springfield Railway Company, for personal injuries received by him in the early night of July 27th, 1872, at or near Mound Station on the line of the defendant's railroad in Butler county, between Cincinnati and Springfield, Ohio, between which points the defendant was authorized by the law of its creation to construct and operate its railroad. He took passage on the cars at a station in Butler county, south of Mound Station, and between that station and Cincinnati, to go to Mound Station, paying the conductor his regular fare.

*He claimed that the train arrived at Mound Station in the night 466
after it had become too dark for a person to see; that the conductor stopped the train for passengers to get out about three hundred feet south of the station, without informing them of the fact, and that he, the plaintiff, was ignorant of the train being stopped short of the regular stopping place at the station; that the stoppage was so carelessly and negligently effected that the front platform of the car upon which he was riding, was directly over a culvert some seven feet deep, of which facts he was not aware; that he went out of the car to get off from such platform; that he put down his foot and felt no ground beneath it, when the bell rang for the train to go ahead, and he alighted falling into the culvert; and that, by reason of the fall, he was badly cut and bruised about the face and was severely injured in the head, that he has suffered great pain therefrom, and has been put to much expense, and has lost much valuable time in consequence of said injury. He also averred that his right eye has been greatly if not permanently injured in consequence of such fall.

The defendant, by its answer, denied all the allegations of the petition except, that it was a corporation as stated.

On the trial, it appeared that the defendant, on January 24, 1871, long before the occurrence, complained of, had leased its road, cars and other railroad property to the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, another corporation created by the laws of Ohio, for the term of nine hundred and ninety-nine years, which latter company had employed the conductor of the train in question, and that the defendant's road was operated, in fact, by the lessee, it being in full

possession and actually controlling the same. Between these two companies, and the Lake Shore and Michigan Southern Railway Company, there was a contract contained in such lease, for a continuous railway line between Cincinnati and Buffalo, New York, for the carriage of passengers and freights, upon certain stipulated terms as to the sharing of profits and expenses, etc. But the Lake Shore road was, in no manner, the lessee of the Cincinnati and Springfield road.

As to local passengers fares, and earnings for local freights, each of the three roads was to be entitled exclusively to the same, through fares and freights were to be divided upon a basis agreed upon in the lease and contract. Under this lease, the defendant, below was entitled exclusively to the money the plaintiff paid as fare on the trip upon which he was injured.

There was another provision in the lease, as follows:

"That it (the C., C., C. & I. R. R. Co., the lessee), will operate said
467 railway between Cincinnati and Springfield *in an efficient and economical manner*, and so as to form part of a continuance *railway between Buffalo, New York, and Cincinnati, by the way of Cleveland, Delaware, Springfield and Dayton, *and for the common benefit of all the parties hereto;* that it will *so* operate said railway *under the direction and management of an advisory committee* of three railroad men, one member of which said committee shall be appointed by *each party* hereto."

After the evidence and arguments of counsel had been concluded, the defendant asked the court to charge the jury, that if its road and equipments had been delivered to the C., C., C. & I. R. R. Co., under the lease, before the happening to the plaintiff of his alleged injuries, and if that train was not in the employment or under the control of the defendant, except by virtue of the terms of said lease and contract, but was under such lease and contract, ran and controlled by the C., C., C. & I. R. R. Co., then the defendant could not be held liable to the plaintiff. This charge the court refused to give, but charged the jury as follows:

"The court finds in the lease by the defendant to the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, introduced in evidence by the defendant, the following among other terms:

"That it, (the leasing company) will operate said railway between Buffalo, New York, and Cincinnati, by the way of Cleveland, Delaware, Springfield and Dayton, and for the common benefit of all the parties hereto; that it will so operate said railway under the direction and management of an advisory committee of three competent railroad men, one member of which said committee shall be appointed by each party hereto; together with other provisions in relation to the division of through and local freight and earnings along the route between the companies mentioned in the lease. This lease, I charge you, gives and reserves to the defendant authority and power over the subject of the proper management and manner of running cars upon the road by its lessee, to the end that the common benefit of all the parties may be secured and promoted. If, therefore, the plaintiff has proven to your satisfaction, under the other charges the court has given you in this case all other facts necessary to entitle him to recover, he is entitled to recover thrcugh the said Cleveland, Columbus, Cincinnati and Indianapolis Railway Company had the sole possession, charge, control and management, in fact, of said cars under said lease."

And in the main charge, upon the subject of damages, the court charged the jury: that, "If upon the facts of the case, under the rules of law I have laid down for your guidance, you find that the plaintiff is entitled to recover, and that the defendant was guilty of *slight* or *ordinary* negligence only, *his damages must be compensatory merely, 468
compensatory damages being such as I have defined to you. But, if the defendant's servants, or the employees whom it had a voice and right in directing and controlling, were guilty of *gross negligence* that is, more than ordinary negligence, then the plaintiff may be given by you, in addition to compensation, *exemplary* damages, which include reasonable counsel fees and the expenses and trouble of litigation, *and even something by way of example*, the jury as to this being careful, however, for, in but few cases ought a defendant to pay more than a plaintiff is justly entitled to receive."

To such charges and refusal to charge the defendant excepted; but no exception was taken to the charge of the court in any other respect, and it does not appear in the record. After verdict, the defendant moved for a new trial on the grounds that the verdict was against the weight of the evidence; that the damages were excessive; and that the court erred in refusing to charge the jury as requested by the defendant, and in giving the charges excepted to by the defendant. The motion was overruled and judgment rendered upon the verdict.

DECISION.

The weight of the evidence shows that the eye of the plaintiff was not permanently or seriously injured; but if his own and his witnesses' statements on his feelings, sufferings and conduct ever since being so injured, and of his inability to work, when he had worked constantly up to that time, except, for a short period about a year previously, when he lost his left eye by blasting stone, and received some powder and dirt in the remaining eye, were entitled to credence, and the jury were the proper judges of that, the damages were surely not excessive, compared with the amount of damages usually awarded in such cases. He was a stone mason, about forty years of age, and an industrious man with good habits. His condition at the trial might well have warranted the jury in believing that the shock to his brain and nervous system, caused by this fall and the blow inflicted upon his head thereby, produced settled melancholy, or hypochondria, or even illusions and hallucination. The physicians who had attended him testified, that, while they could discover no injury to the eye or brain, of which he complained, they, yet, could discover no evidences of any intention to pretend or deceive on his part. His complaints were always the same, and asserted with apparent earnestness and sincerity by him, and they admitted that the brain might be affected without the possibility of physical observation of such injury. It seemed to be obvious that that the plaintiff suffered much mentally *if not physically; and it was proven that such was not the case 469
prior to this injury. The plaintiff has been a much duller man since than before his fall that night. He sleeps much longer in the morning, and is liable to fall asleep, when not walking about at all hours of the day. I think, upon the evidence, it can not be said that this verdict exceeds the limits of fair compensatory damages. And if the court did not err in refusing the charge asked by the defendant, and in giving the

charge it did on that branch of the case, the verdict was not manifestly against the weight of the evidence, but was both authorized and required by the testimony.

This brings us to the consideration of the charges given and excepted to; for if the special charge was properly given, the charge asked and refused was properly refused.

In relation to the liability of the defendant for the act in question, it may be well to state the settled rules of law on the subject.

Where a railroad corporation is created and nothing is provided in relation to its power to lease its road to another corporation to be operated by the lessee, the original, or leasing company will be liable for all wrongs done by the lessee in operating the road of the former, on the ground that such leave is unauthorized *ultra vires*, and the acts of the lessee are to be deemed the acts of the leasing corporation, whose mere agent, in contemplation of law, the lessee is. But when the right and power so to lease is given by law, the lessor, if in the exclusive possession and control, cannot be held liable for the wrongful acts of the lessee in operating and managing the road. The case is then the same in principle as the leasing of real estate by the owner of the fee who cannot be held liable for the acts and conduct of his tenant upon the premises, the tenant being in the rightful and exclusive possession thereof. In Ohio, by statute, (O. L. vol. 66, p. 32), this defendant had the right to lease its road and cars to the C. C. C. & I. R. R. Co., the latter being an Ohio corporation, and exempt itself from all liability for the acts of the lessee, had it given the latter the exclusive possession and right to control the operation of the road, reserving to itself no right or voice in the management. The statute only continues the liability of such lessors in case their lessees are foreign corporations, that is, corporations not created by or under the laws of this state.

The question then is what this defendant did do by the terms of its lease to the C. C. C. & I. R. R. Co. It is contended that the clause of the lease above stated, and partly contained in the charge of the court to the jury, was merely intended to enable the defendant to prevent the possibility of the lessee and the Lake Shore road from diverting travel and
470 freight from the *Cincinnati and Springfield road, and sending through Indiana to Louisville, Ky. The lease does not say that such is the limited meaning of that clause, though the clause undoubtedly secures that object. The lease provides that the road shall be "operated in an *efficient and economical* manner under the direction and management of an advisory committee of three competent railroad men, one member of which said committee shall be appointed *by each party hereto;*" not only for the purpose claimed, but to so operate it between Cincinnati and Springfield for the "*common benefit of all the parties hereto;*" and the lease then further provides as follows:—"and the gross earnings and receipts on *local* freight, after deducting two cents per hundred pounds, which shall be allowed and paid to either party receiving and loading, or unloading and delivering the same, shall be divided between the first and second parties in proportion to the distance carried over the railway of each party; and the gross earnings and receipts on *local* passengers shall be divided between the first and second parties in proportion to the distance carried over the railway of each party." It will thus be seen that the entire amount paid by the plaintiff, Sleeper, as fare on that trip, was to go to the defendant. It reserved to itself expressly the

right and authority, by means of a committee-man to be named by it, to direct and control the operation of the road in an efficient and economical manner. Surely, then, if the road should be operated by careless and reckless *employees*, which would directly injure its success, this company reserved the right to itself to interpose and change the method of conducting the business. This makes it a principal as well the C. C. C. & I. R. R. Co.; and, the case being one of tort, the plaintiff had the right to sue it alone, or to sue both it and the leasing company. If the defendant never exercised such power, of appointing a committee, that cannot release it from liability. It might and ought to have done so. We think the court did not err in its action in respect to this branch of the case.

The next question is, whether the court erred in charging the jury that the plaintiff might be awarded by them exemplary damages is they found that he had been injured in consequence of *gross negligence* on the part of the conductor and those employed in running the train.

This question has never been decided by the supreme court of Ohio.

It is agreed by all text writers, that what the law permits to be recovered as compensatory damages in ordinary cases falls short of really remunerating the the plaintiff entitled to recover them. His loss of time, labor, anxiety of mind, and expense in preparing and prosecuting 471
his suit, the injury to his feelings, his *counsel fees paid, etc., etc., he can be awarded nothing for. In view of this state of the law, courts, under certain circumstances, in some classes of cases, have permitted juries to take them into consideration in making up the amount of their verdicts, and also to give something more to insure the public against the recurrence or continuance of such objectional acts or course of conduct.

All allowances by juries of damages upon such considerations were, by Mr. Sedgwick, in his work upon damages, classed as *exemplary* in contra-distinction to *compensatory* damages, in the legal sense of those terms. Mr. Greenleaf strongly combatted this view of Sedgwick; but, finally, in view of the numberless decisions in favor of the position of Sedgwick, claimed that when such damages are allowable they are to be awarded as compensatory and not as exemplary damages, thus reducing the discussion to one of the use of a mere word. And it is clear that allowances for time and money expended in litigation, injury to feelings, reasonable counsel fees, etc., are not what the law terms compensatory, but they are exemplary damages as certainly as damages awarded by way of example are.

It is now too late to question the right, in a proper case, to recover such damages. In Day v. Wentworth, 13 How., 363, Grier, J., in announcing the decision of the court, says: "It is a well established principle of the common law that in actions of trespass and *all actions of tort*, a jury may inflict what are exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument." And Perley, C. J., whose language is quoted by the supreme court of this state, in At. & G. W. R. R. Co. v. Dunn, 19 O. S., 172, says: In Hopkins v. At. & St. L. R. R. Co., 36 N. H., 9, "that this

is perhaps in accordance with the legislative policy which has given pecuniary penalties in numerous instances to private prosecutors of public offences. "In cases of wilful or malicious injuries the right to recover such damages is settled in this state. Roberts v. Mason, 10 O. S. 227; Pittsburg, Fort Wayne and Chicago R. R. Co. v. Slussor, 19 O. S., 157, Atlantic and Gt. Western R. R. Co. v. Dunn, 19 O. S., 162; Smith v. Pitts. Ft. Wayne and Chicago R. R. Co., 23 O. S., 10.

In the last two cases the dissenting members of the court did not controvert the rule when applied to an individual for his own acts, as in
472. Roberts v. Mason, but, they held that a corporation *ought not to be made to pay damages for the *wilful* or *malicious* acts or conduct of its agents, it not having affirmed them as wilfulness and malice were the agents only, for which he and not his principal should suffer in damages. But whether gross negligence, or, if so, what *kind* of gross negligence will authorize the application of the rule has not been decided by the supreme court of this state, no such case having been before it. Sedg., Meas., Dams, 38 Marg. lays down the rule as follows: "Thus far we have been speaking of the great class of cases where no question of fraud, malace, gross negligence, or oppression intervenes, where either of these elements mingle in the controversy, the law, instead of adhering to the system, or even the language as compensation, adopts a wholly different rule. It permits the jury to give what it terms punitory, vindicative, or exemplary damages; in other words, blends together the interests of society and of the aggrieved individual and gives damages not only to recompense the sufferer, but to punish the offender."

This rule was laid down in the case of Whipple v. Walpole, 10 N. H. 130, where exemplary damages were held to be warranted in the case of an injury resulting from a defect in a bridge, the defendant having been guilty of gross negligence in not repairing it.

In Byram v. McGuire, 3 Head's Rep. (Tenn.) 530, the court held that exemplary damages may be awarded in cases of gross negligence. There the defendant or his slaves had hitched the plaintiff's jack, which had escaped from his owner, to a tree and let him remain over night, during which time the jack strangled himself to death. The court says, however, that the damages awarded were not too great, being scarcely the value of the animal. In Cram v. Hadley, 48 N. H. 191, the court expressly affirms the above quoted text of Sedgwick on damages.

In Frink & Co. v. Coe, 4 Iowa, (Greene) 555, the court held that "if a stage proprietor or carrier is guilty of gross negligence, it amounts to that kind of gross misconduct which will justify a jury in giving exemplary damages, even where the intent to do the injury does not appear." The court say, "the reason and necessity for this rule is becoming yearly more apparent. The consequences of such negligence on the part of carries is becoming more and more appalling. The alarming increase of railroad, steamboat and stage disasters, the frightful destruction of human life and limbs, and property, call loudly for the strict enforcement of the most exemplary rules in reference to common carriers." In that case, the stage driver was drunk and upset the stage and injured the
473 plaintiff. He was a known drunkard; but it *did not appear that the stage owner knew that fact. The court held him grossly negligent for being so grossly negligent as not to know that he was so, and liable to pay exemplary damages.

In Cochran v. Miller, 13 Iowa, 128, it was held that in an action for damages against a physician for malpractice in the treatment of a disease which he had undertaken to treat, exemplary damages could be recovered for his gross negligence.

In Bowler v. Lane, 3 Met. Ky. R. 311, the court held, that, in an action against the proprietor of a railroad for injuries sustained by a passenger through the carelessness or unfitness of the servants or agents of the company, exemplary damages may be given by the jury. The case was one for causing death, but under the Kentucky statute, the jury in such cases is not limited to the pecuniary injury resulting to the wife or next of kin.

It is again expressly decided in the case of Taylor v. Grand Trunk Railway, 48 N. H. 304, the opinion is a very able one. It is held, that, " when an injury upon a railroad is caused by the gross negligence of the corporation, the jury may, if they think proper, award exemplary damages." The court say, at page 320: "That doctrine which allows a jury to award exemplary damages to the sufferer by wrongful acts which the public is strongly interested to punish, stands upon the same footing, so far, at least, as the damages are merely punitory, and it is quite obvious, we think, that this furnishes the most efficient, if not the only means of correcting many very serious social abuses; and among these, that gross negligence which puts at unnecessary hazard the life and limbs of large numbers of passengers must take a high rank. It is not, therefore, to be regretted that the law has established an exception to the ordinary rule in respect to damages, and armed the sufferer in such cases with the powers at administer a corrective which can not or will not be efficiently applied at all."

We are aware that some cases make this gross negligence to mean such entire want of care as *to raise a presumption* that the person in fault is conscious of the probable consequences of his carelessness, and is indifferent, or worse, to the danger of injury to the persons or property of others; or that it must be so great as to amount to recklessness, that is, to a degree,where a *generally malicious or malignant* purpose, careless of consequences, might be *presumed*, although no hostile purposes were entertained against an individual.

Now, the nicety of the distinctions between the established and well organized degrees of care, or its want, and the difficulties the juries experience in understanding and applying them correctly ought not to require a new sub-division to be made of *one of those degrees, 474
gross negligence, unless practical justice imperatively required that to be done. How is a jury to ascertain when satisfied that there was no willfulness or malice, in fact the carelessness was so gross as to amount, or be equivalent to them, or to *presume* them as legal fiction when they did not in fact exist? It has always seemed to me that this distinction is too metaphysical and abstruse to be practical in the administration of the law. If willfulness or malice must in fact exist, then the act ceased to be properly classed as a negligent one, but one of intention or malice and governed by the rules of law applicable to them, and not to mere negligence or carelessness.

And when the conduct of the agent or servant amounts to willfulness, or is malicious, we know that it is his own personal will or malice that is exercised, and there would be unanswerable objections, *public policy aside*, to punishing his principal therefor, the latter never hav-

ing sanctioned or approved of such conduct on the part of his agent. This was the ground of the dissents in the cases cited above in 19, and 23 O. S. R. It is solely by force of a recognized rule of *public policy* that courts have punished with damages a principle for the intentional, willful or malicious acts of his agent in the prosecution of his business. Dangers arising on railroads from the gross negligence of those operating them, are of far more frequent and probable occurrence, than such as happen from malice or wilfulness. And in such cases the same rule of public policy ought equally to apply. Negligence of all grades on the part of employees is the negligence of the principal and he is liable therefor upon universally established and recognized principles of law. Should the principal and the agent both escape exemplary damages for injuries inflicted by the latter in consequence of his having been so grossly negligent as not to be aware that he was conducting the business with gross negligence? Yet this would be the effect of the attempted refinement; for it can scarcely be said to amount to a distinction. But in this case, the company and the conductor were bound to know where that culvert was situated, as it was a part of their road; the road was new and its cars peculiarly liable therefore, to mishaps. This alone required great care in running its passenger trains. If there was a light at the proper place at Mound Station that night, the conductor should have stopped the train at the proper place; if there was not that was negligence and the conductor should have been certain that he had stopped at the proper point before he permitted passengers to leave the train. He was surely a hundred yards short of the proper stopping place, with the platform of the car on which the plaintiff was riding and which he got off, over this culvert, which it was too dark to see. The plaintiff, in getting off, fell in it and was injured. *Surely
475 this manner of running a passenger train is reckless, grossly negligent under such circumstances, and would be, in those states where the court determines whether the facts claimed amount to negligence or not, held such recklessness as to authorize exemplary damages. In this case, however, the court giving the charge, myself, felt that the plaintiff rather than the defendant had the right to complain of it. And the principle of allowing exemplary damages had been adopted in this state, and as the supreme court had indicated that in permitting juries to do so they should be cautioned, the court told them that they must be cautious: "for in but few cases ought a defendant to pay more than a plaintiff is justly entitled to receive." This is the very essence of Greenleaf's argument against the allowance of such damages at all, and is embodied in his work on evidence. But the supreme court of Connecticut, 15 Conn. p. 236; Linsley v Bushnell. "But every case in which the recovery of vindictive damages has been justified stands opposed to this argument." And Sedgwick, in his work on the measure of damages, says substantially the same thing.

Besides the verdict, upon the evidence, would not have appeared to us strikingly large if no charge upon the subject of exemplary damages had been given.

We do not think that it was necessary to aver in the petition the gross negligence of the conductor to warrant the charge on the subject of exemplary damages.

Upon a full consideration of the whole case we are of opinion that judgment should be affirmed.

Judges Tilden and O'Connor, concurred.

A. Taft and Sons, and M. C. Shoemaker, for Plaintiff in Error.
Samuel F. Hunt, Jordan, Jordan and Williams, for Defendant in Error.

SETTLEMENT OF ESTATES.

CATHARINE G. GUIOU, EXRX. v. ELIZA JANE GUIOU.

[Superior Court of Cincinnati.]

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 the year's support, and does not mean the amount the widow would have had, had the husband died intestate, when other provisions of the will are inconsistent with such construction.

The constitutional provisions relating to the jurisdiction of the probate court, does not exclude a court of equity from enforcing a trust, and the court in so doing can investigate the accounts of the estate to determine the adequacy of the personal fund.

Legacy taxes are payable out of the legacies, and are not a valid charge in determining the sufficiency of the personality to respond to the requirement of a will as to payments after discharging legacies.

A court may render judgment in the alternative that the executor shall execute the trust, and that in default execution shall issue against him personally.

ERROR.

In October, 1868, David B. Guiou, of Cincinnati, made his last will and testament which, after his death, and in November, *1868, was 476
proved and admitted to probate in the probate court of Hamilton county, and in and by which, in item 4, he stated that he had in his iron safe $30,900 in stocks and bonds, and declared it to be his desire that the children of his first wife, that is to say, Eliza Jane Guiou, William Rogers Guiou, Elmira Guiou Mills and Caroline Guiou Swales, should have $4,000 each in lawful money of the United States. He further declared it to be his desire, (item 5) that his executor should redeem certain real estate on Pearl street, in Cincinnati, with any funds of his estate "not excepting any bequests afterwards made" in his will, and directed that after the property should be redeemed, and at the time his youngest daughter by his second marriage, (Ida Bell Guiou) should come of age, should be sold, and then that distribution should be made as provided in the 4th clause. In clause 6 he directed that all his household furniture should be retained and used by his wife for life; by the 7th that his family should be kept together until his youngest child, Ida Bell, should come of age, and by the 8th he gave all the residue of his estate to the children of his second wife, providing, however, for his wife and youngest child, Ida Bell, an allowance out of his original estate, such as made by the laws of the state of Ohio in such cases made and provided. He appointed his wife as executrix, dispensing with bond and surety, and she caused the will to be proved, and accepted office, and proceeded in the discharge of its duties.

The real estate referred to in the will consists of a lot and storehouse fronting twenty-five feet on the north side of Pearl street, and extending

north about sixty-five feet, and held by the testator under a lease from Davis B. Lawler, whose title has become wasted in the defendant Harbeson. The fee was formerly in the testator, and by him conveyed to Lawler upon a loan of money, and it is agreed that the transaction is to be treated as a mortgage, and Harbeson, on repayment of the loan ($10,000), is willing to reconvey. The executrix, since the death of the testator, has been in the receipt of the income of the property, and has paid taxes, and the interest, under the denomination of rents, reserved in the lease from Lawler. But the property has not been redeemed as directed in the will, and of course not sold, and the specific legatees, except Mrs. Swales, have not been paid. The other legatees, Eliza Jane, and Wm. R. Guiou, and Mrs. Mills and her husband, brought their action in this court against the executrix, and Harbeson, to compel the redemption and sale of the property and the payment of the legacies. Harbeson has answered, submitting to a redemption of the property, and Mrs. Guiou has answered, contesting the claim made by the petition and setting up new matter to which there is a reply. The issues were tried by the court and found for
477 the plaintiff in * the action, in whose favor final judgment was rendered, directing a redemption, and default of such redemption, the payment of the legacies with interest from January 1, 1872. Exceptions were duly taken, and the assigments of error raised various questions, which have been elaborately argued by counsel. We have carefully examined the case and considered these arguments and will briefly state the conclusions to which we have been brought.

1. The objection which has been taken to the authority of the court to adjucate upon the case is founded upon the assumption that the subject matter is one of a probate nature, and by the constitution and laws of the state, vested exclusively in the probate court of the county. We cannot accept these premises as sound. The authority of the court originates in a trust. A trust may be effectively declared by will duly executed and proved. Proof of a will, and the probate of it, are matters of probate; but the enforcement of a trust declared by will can be obtained only in equity. On the settlement of the accounts of the executor the probate court may direct the payment of legacies; but if further proceedings become necessary to compel compliance with the order, resort must be had to the ordinary courts. The probate court also, may under the same limitation, direct the performance of ascertained specific legacies; but if the legacy is also pecuniary it cannot create the fund for its liquidation by enforcing the execution of a trust, for an execution by means of which the fund is to be produced. The will then, having declared a trust, accepted by the executrix, imposing upon her the duty to redeem the Pearl street property, and then to convert the property into money, and out of the personal estate, formed in part by the fund produced by such conversion, to dispose of it in a particular way, we are not merely of opinion that it is entirely competent for the court to entertain the case, but we feel warranted in adding that the jurisdiction of this subject is one of the earliest in equity and applied as extensively, and with as little doubt or hesitation as any other branch of it.

2. Similar reasons appear to us to require us to reject the argument that we are not authorized, so far, certainly, as required with a view to complete relief, to take an account of the assets. The case does not make it necessary to inquire how far the general and acknowledged jurisdiction of equity to marshal assets, and take an account of the estate

under a will, has been impaired by the legislation, referred to by counsel and strongly insisted on in argument. For here the inquiry objected to is merely incidental to the relief sought by the action, and which as before stated, the court has full authority to award. It being contended, and in fact, on the other side conceded,* that the duty to redeem can only arise on proof of the existence of an adequate fund for that purpose, and investigation of the accounts of the estate is necessarily, though collaterly, involved; and therefore the objection is really one not of jurisdiction, but of the competency of evidence. The investigation is not an administration of the estate in equity, but is incidental to the administration of a trust, and made with a view solely to ascertain the truth of a disputed question of fact. 478

3. And, if the court at special term decided correctly in holding that, upon the facts, the executrix was under a present obligation to redeem, we are of opinion there was no error in the alternation clause in the judgment, directing personal execution in default of redemption. A court having jurisdiction of the subject matter and of the parties, and deprived of authority to enforce obedience to its judgments and decrees would be an anomaly and a reproach. And a court of equity, which certainly has this power, is not confined to the process of contempt, and may mould the forms of its orders and decrees so as to adapt them to the facts and circumstances of each case, and so as to effectuate in the most prompt and beneficial mode, the equitable relief to which the complaining party is ascertained to be entitled. The clause objected to, in the present instance is entirely warranted by this course of practice and by all the decided cases, from which the general rule has been extracted by Mr. Perry, and stated by him in his work on trusts, (sec. 576), as being that, when a trust is created in lands for the payment of legacies, and the trustee or executor accepts the trusts, he will become personally liable to execute the trust and pay the legacies.

4. The rule applied by the court with regard to the payment of interest on the legacies was, we think, the correct one; at least it was one of which the residuary legatees had no reason to complain. Ida Bell Guiou attained full age September 2, 1871, and then, by the will, the legacies became payable. The court allowed until the first of January following, a little more than three months, during which period the court thought, the property ought to have been converted, and directed interest to run from that time. The will required the redemption with reasonable diligence after the death of the testator, and provided means for that purpose. The conversion was not to take place until the youngest child reached her majority, and then some time would be required to effect the conversion and place the executrix in funds to pay the legacies; and at the end of that time the legacies were payable. The rule in equity is well settled and clear that when a testator names a time for the payment of legacies, they will bear interest from that time (Perry, sec. 575). The time named by the testator in the present case was a *reasonable time after the majority of the youngest child, and according to this rule, the court ascertained the first of January to be the day of payment, and properly directed interest to be reckoned from that day. 479

5. It is manifested, that it is essential, in order to support the judgment of the court at special term, that it appears from the bill of exceptions, that the executrix was provided under the will with means sufficient in amount to redeem as required by the will. It is also apparent

that the amount was thus sufficient, unless the executrix was entitled to reduce the amount, admitted to be in her hands by certain charges against the fund, appearing in her accounts in the probate court, and insisted on here. In the view we take of the case, it will be necessary to examine only some of these items.

1. The legacy tax is not in our judgment, a valid charge. It is a tax, not upon the general estate, or on the trust, but upon the legacy, and is payable out of the legacy, and to be deducted out of it on settlement between executor and legatee.

2. Another charge made by the executrix, and contested in the case, presents the claim made by her as widow and distributer. This claim is placed by the argument on two grounds:

First. It is contended that the right thus insisted on, is conferred by the 8th clause of the will, in which the testator says, "there shall be allowed my wife and minor child, heretofore mentioned, out of my original estate, all that is allowed by the laws of the state of Ohio, in such case made and provided." We are of opinion, that this clause was intended to refer to the province of the law for an allowance by the appraisers for the year' support of the widow and children. It connects the wife and child in the same provision as the joint object of the testator's bounty, and the will contains no words indicating an intention to give the clause a more extended operation, than we have here assigned it. But independently of the construction of this clause, it is manifest, even supposing that the intention was that the widow should take an amount equal to that to which she would have been entitled had the husband died intestate, still her claim, so far as it is founded on the will, if she claims by way of bequest, her claim must be satisfied in the order prescribed by the will. And the claim under consideration is wholly inconsistent with the provision contained in the 5th clause, directing the redemption of the Pearl street property with "any funds of the estate," notwithstanding "any bequests hereafter in this my last will and testament made." Here is a clear indication of a purpose to make the bequest in the subsequent, or 8th clause, yield to the provision contained in the 5th, and, under the will the executor had no right to diminish the amount
480 appropriated for the redemption *of the property by charging against it her claim as legatee.

Second. The other ground on which the claim is placed, is, we think, even less tenable than the one just considered. It is that the widow was entitled as distributer under the statute and notwithstanding the will. The statute of distribution is, however, confined to the widows of persons dying intestate, and in the present case, the widow, by electing to take under the will, must be held to have renounced the legal benefits, which would otherwise have accrued to her, and to be bound by the will throughout.

A computation on the basis here indicated, will show, that the executrix had in her hands a fund more than sufficient to perform the trust imposed upon her by the redemption of the Pearl street property; and it becomes unnecessary therefore to consider the other items objected to in the account.

Third. It further appears that the defendants in error obtained an order in the probate court, directing the payment of the legacies to them. From this order an appeal was taken to the court of common pleas, and in that court the case was heard, and it was found that the appelees were not en-

titled then to require payment, and the proceedings were dismissed, but without prejudice. These proceedings were set up in the answer as a bar to the action and the question whether there was such a bar is renewed here. To render the record of an order or judgment a bar to a subsequent action, it is necessary among other things, that the order or judgment should purport to have been final between the same parties and upon the same subject matter. The dismissal of a bill in equity, or of summary proceedings like those of the court of common pleas in the present case without prejudice, like a non-suit at law, can not. we suppose, be regarded as in any sense final; and for this reason, without considering the other reasons suggested by the special facts of the case, we hold the defense on this branch of the controversy not to have been sustained.

Judgment affirmed.

*CONVEYANCES TO DEFRAUD CREDITORS. 522

[Superior Court of Cincinnati, General Term, January, 1875.]

Tilden, Yaple and O'Connor, JJ.

†D. T. WOODROW v. SAMUEL A. SARGENT, ET AL.

1. When a person largely indebted and insolvent. for the purpose of concealing his property from his creditors, purchases land from a stranger, pays the purchase price thereof, and has the deed made to a third party, also a stranger, in trust in fact, for himself, enters into possession of the premises, he and his wife and family residing thereon for some years, and afterwards has the holder of the legal title convey the same to his, the debtor's wife, "as a gift and settlement by himself to and for her use and benefit," though not so expressed in the deed to her, such real estate will be held to have been conveyed by such debtor for the purpose of hindering, delaying and defrauding his creditors, within the meaning of the second section of the statute of frauds.

2. Such conveyance, if there are at the time of suit brought any creditors who were such at the time of the purchase and first conveyance, is under the 17th section of the statute of assignments by insolvent debtors, an assignment for the equal benefit of all the debtor's creditors, both prior and subsequent, the property being assets to be administered according to such statute.

*3. Any creditor, prior or subsequent, by judgment or contract, may institute and maintain an action to set aside such conveyance and have the property administered according to the statute; for if this were not so, such non-judgment and subsequent creditors would necessarily be postponed to prior judgment creditors, as they could not come in before a judgment, setting aside such conveyance and assist in the prosecution of such action which such 17th section expressly authorizes and requires them to do, or be postponed. 523

4. Such a conveyance is good as against all the world but creditors, especially as against the debtor, and the property can not be subjected in equity by any creditors of his under the 458th section of the code, as the debtor's equity can only be established and appropriated by first setting aside such conveyance as fraudulent. Because of such conveyance and its effect under the law governing insolvent debtors, it being, in effect, an assignment to the fraudulent grantee for the equal benefit of creditors, the property so conveyed is not subject to attachment or execution against the debtor, nor can any creditor acquire a lien thereon by the commencement of an action to set same aside, as fraudulent against creditors. Valid proceedings to reach and appropriate such property must be begun for the equal benefit of all creditors.

† This case was reversed by supreme court in Shorten v. Woodrow. See opinion 34 O. S., 645; also Shorten v. Drake, 38 O. S., 76. The supreme court opinion is distinguished, 37 O. S., 222, 226 and cited 38 O. S., 76, 84; 42 O. S., 168, 171.

The wife, in such case having the legal title as a gift and settlement upon her, is deemed, in law, since the statute of 1866, to be in possession.

5. The wife of the debtor, in such cases, receiving and holding such conveyance, may be declared, and is by construction, a trustee for the benefit of her husband's creditors.

6. Where in such a case, McM., a creditor, prior to the original purchase and first conveyance to such stranger, sues the debtor, after such conveyance to the wife of the latter, and attaches the fraudulently conveyed land as the property of the debtor, obtains a judgment and order of sale of the property, and G., a subsequent creditor, obtains a judgment against the debtor and has an execution issued and levied upon such land; and S., subsequently to the conveyance to the wife and to the attachment and the levy of the execution, without knowing the facts in relation to such fraudulent conveyance, to secure a pre-existing debt of the debtor to him, takes from both the debtor and wife, a mortgage upon such property: *Held*, that none could have priority over the others, but that the proceeds of the sale of such property should be equally divided between them in proportion to the amount of their respective debts, they all being properly in court and asserting their rights. And that all other creditors of the debtor have the right now to come into court and share in the fund, *pro rata* with them, they being allowed the cost incurred by them in making such fund available to creditors. No notice of the pendency and object of such suit having been published as required by statute.

524 * YAPLE, J.:

This case comes before us on reservation from special term upon a special finding of the facts. The plaintiff, Woodrow's rights are not involved, the controversy being between McMillan and wife, Grant and Shorten, in relation to the distribution of a fund arising from the sale of certain real estate described in the petition of Woodrow.

McMillan and wife have a judgment against Samuel A. Sargent, with an attachment upon such real estate, for $11,595.70 with interest from November —th, 1872, and $45.18 costs.

Grant has a judgment against Samuel A. Sargent, and a levy by execution upon such premises for the sum of $1,161.64 with interest from March, 1870, and costs.

Shorten holds a mortgage on the premises, executed to him by Samuel A. Sargent and Mary A. Sargent, his wife, to secure the sum of $6,000 with eight per cent. interest, from May 24, 1871, the mortgage being given January 4, 1872, to secure such pre-existing debt.

The facts found are:

First—That, on November 4, 1865, one Asa Clark, by deed duly executed, conveyed said premises in fee simple to one Thomas N. Drake; that the purchase money was wholly furnished by Samuel A. Sargent; that Sargent was then largely insolvent; and that the intent with which such purchase money was furnished and the conveyance so taken in the name of Drake, was, on the part of Sargent, to conceal his interest in the premises from his creditors, and to hinder and delay them in the collection of their debts.

Second—That Sargent, upon the execution of the conveyance to Drake, entered into the possession of the premises and continued to occupy the same as a residence for himself and family until July 2d, 1868, without accounting or being required to account by Drake for the use or occupation of the same.

Third,—That on the 2d day of July, 1868, said Drake, by direction and at the request of said Sargent, by deed duly excuted, conveyed the premises in fee simple to said Mary A. Sargent, wife of said Samuel A. Sargent; that no valuable consideration passed upon the last named con-

veyance, as between Drake and Mary A. Sargent, or as between her and her husband, and that the transfer of the title by Drake to Mrs. Sargent, was wholly voluntary, *and made and received by way of gift and settlement by Samuel A. Sargent to and for the use and benefit of his said wife*, which deed of transfer was recorded May 6th, 1871.

On the 12th day of April, 1870, Grant sued out and had levied upon the premises, his execution. On May 27, 1870, McMillan and wife levied their attachment, and on January 4th, 1872, pending such attachment and execution levies, Sargent and wife *executed their mortgage to Shorten to secure a prior indebtedness 525
from Sargent to him, Shorten having no knowledge, in fact, of the fraudulent character of the deeds to Drake and to Mrs. Sargent.

It is expressly found that the conveyance by Drake to Mrs. Sargent, in July, 1868, before the levy of the attachment and execution, and before the execution of the mortgage, was "made and received by way of gift or settlement by Samuel A. Sargent to and for the use and benefit of his said wife." The finding is silent as to who was actually in possession of the premises after July 2d, 1868, but as Mrs. Sargent then became invested with the legal title by a deed made to her by Drake, who held such legal title when he conveyed, the law, since the passage of the act of March 23, 1866, (S. & S. p. 391,) will presume Mrs. Sargent to have had such possession, it being her separate property, and under her control. Markley, in his "Elements of Law," well illustrates, by an example, the drawing of the possession of real estate to the legal title. He says, that if a lodger in a family buys and pays in full for the house and grounds, but take no legal conveyance therefor and continues as a lodger, the landlord is in the legal possession of the property; but that, if the lodger takes a legal conveyance and remains in the same relation the law makes him the possessor and not the landlord.

It is clear that the settlement upon and gift to Mrs. Sargent of this real estate was valid and binding as against him and all subsequent creditors of his. The findings do not show that any of these parties were prior creditors, but the record, the amended answer and cross petition of McMillan and wife, show, and such fact is not disputed by any one, that their claim against Sargent accrued prior to 1868, to-wit, in the year 1864, before the execution of the deed from Clark to Drake. The other claims against Sargent seem to have arisen subsequently to 1868.

The first question presented for determination is whether Samuel A. Sargent had an equitable interest in this real estate, which McMillen or Grant could reach or bind without setting aside the conveyance of July 2d, 1868, to Mrs. Sargent from Drake. If he had, and if an equitable interest in real estate can be attached, or levied upon on execution, then, McMillen and Grant could acquire priority the one over the other and over other creditors by diligence in first obtaining a lien.

When the attachment of property is authorized, or levy by execution, or an action, under section 458 of the code, by a judgment creditor to subject the equities of his debtor in property, may be brought, the law favors the diligent creditor, and by such levies, or by the bringing of such an action, the creditor obtains a prior lien upon the property thus sought to be subjected, *and will be entitled to have his debt satisfied be- 526
fore subsequent lien or other creditors.

But, since the act of April 6, 1859, (1 S. & C. 713) and the act of February 12, 1863, (S. & S. 397,) in relation to insolvent debtors, all trans-

fers, conveyances or assignments made with intent to hinder, delay or defraud creditors, are void as to the grantees, and have only the effect of making the same conveyances in trust for the equal benefit of all creditors, none of whom can obtain a preference, by any diligence, over the others, if the latter comply with the requirements of the statute in the assertion of their claims, the proceeds of such property must be divided, *pro rata*, among all the creditors, (see section 17, S. & S. 397) Stanton v. Keyes, 14 O. S. 443;) Jamison v. McNally, 21 O. S. 295.)

There has long been two theories of justice urged for adoption. One is that the law ought to favor the vigilant creditor by allowing him to obtain a preference over those who are tardy. The other is that equality is equity, and that a failing debtor's property ought to be distributed, *pro rata*, among his creditors.

In the matter of judgment liens, levies by execution and attachment, and by filing bills to reach equities of the debtor, our law adopts the first rule as the just one, in this respect changing the law of attachment as it existed prior to the code. In relation to the setting aside of fraudulent conveyances and distributing the proceeds of such property, we have changed the former law, which gave him filing a bill to set aside such a conveyance, a lien from the time of filing it, and require the proceeds of such property to be equally divided among all creditors, in proportion to the respective amounts of their claims.

But, it is claimed in behalf of McMillan and wife that Sargent, the debtor, never had title to this real estate and never conveyed it, that he merely furnished the money to pay for it, for which money Clark conveyed it to Drake, and Drake afterwards conveyed it to Sargent's wife, and that, therefore, the case cannot come under section 17 of the insolvent law.

This was originally the law as declared under the statute of 13 Eliz. C. 5, as will be seen by referring to May on the Law of Voluntary Conveyances, etc., pp. 17-22, because, money, bonds, promissory notes and choses in action were not liable to execution, and hence, the gift or settlement of them by a husband upon his wife, or by a father upon his child, was not within the statute, and by giving them and they purchasing lands with the same, could not hinder or delay creditors, as the purchase price of such lands never could have been reached by creditors. From time to time, the law subjecting personal effects to the claims of creditors was enlarged, and the statute held applicable to such enlargements. In 1838, money, bonds, and choses in
527 *action were made subject to the payment of debts, and since then where the insolvent debtor furnishes the money to purchase land and has the title made to a wife or child, the conveyance has been held to be fraudulent under the 13th Eliz. C. 5. See French v. French, 6 D. M. & G. 95; May, p. 20, note 1. There have been similar rulings in this country, Crozier v. Young, 3 Mon., 157; Gowing v. Rich, 1 Ired, (Law) 553, 559. But, in courts of equity, where only creditors can reach such property, the principles applied have been essentially the same as if within the letter of the statute.

1 Amer. Ld. Cas., 5th Ed. p. 50. Taylor v. Exr. of Heriot, 4 Dessans, 227, 234. Doyle v. Sleeper, 1 Dana, 531. Whittlesey v. McMahon, 10 Conn. 138, 141. Botsford v. Beers, 11 id. 370, 374.

In this state, money can no more be settled on a wife and child by an insolvent debtor to the prejudice of his creditors than lands. The

right to attach, as prescribed in sec. 194 of the code, authorizes the taking of "lands, tenements, goods, chattels, stocks, or interest in stocks, rights, credits, moneys, and effects of the defendants, etc."

There can then be no doubt, that, in Ohio, where an insolvent debtor furnishes money to purchase lands and has the title thereto taken to another, or to his wife or child, to conceal the same, or to hinder, delay or defraud his creditors, such conveyance is fraudulent and may be set aside by creditors under the 17th section of our insolvent act.

In fact, but for the purpose of declaring how property so fraudulently conveyed should be distributed among creditors, there would have been no need to enact the 17th section of our insolvent law, we having already in our statute of frauds a similar section, (1 S. & C., 656, sec. 2,) and one substantially the same as the 13 Eliz., C. 5. Of this latter statute, Lord Mansfield said in Cadogon v. Kennett, Cowp. 434. "The principles and rules of common law, as *now* universally known and understood are so strong against fraud in every shape, that the common law *would have* attained every end proposed by the 13 Eliz. C. 5, and 27 Eliz. C. 4," an opinion generally assented to, 1 Amer. Ld. Cas. 5th Ed. p. 38, (vol. 4.)

It would seem to be clear, that, as Samuel A. Sargent never had the legal title to this real estate, that such title was in his wife when this attachment and execution were levied, which title, by legal presumption, vested her with the possession, and that as against her husband and all the world, except his creditors, she held and owned both the legal and equitable estate and property, there was nothing of his that creditors could reach by attachment or execution, but only by action under the 17th *section of the insolvent law, to have such conveyance to her declared 528
fraudulent and void as against them, and to subject it to the payment of his debts as an assignment for the benefit of creditors. This 17th section is only the mode prescribed to obtain redress under the second section of the statute of frauds, and does not differ substantially from that section or from the 13 Eliz. C. 5. Nor does the amended section 17 of 1863 differ substantially from the original section 17 of 1859.

The first was as follows: "All transfers, conveyances, or assignments, made with the intent to hinder, delay, or defraud creditors, shall inure to the equal benefit of all creditors, etc., and the probate judge, after any such transfer, conveyance, or assignment shall have been declared by a court of competent jurisdiction to have been made with the intent aforesaid, on the application of any creditor, shall appoint an assignee," etc.

This like the amended present 17th section, simply provided the remedy for rights arising under the second section of the statute of frauds.

The present section provides: "All transfers, conveyances, or assignments made with intent to hinder, delay, or defraud creditors, shall be declared *void* at the suit of any creditor, and the probate judge of the proper county, after any such transfer, conveyance, or assignment shall have been declared by a court of competent jurisdiction, to have been made with the intent aforesaid, shall, on the application of any creditor, appoint an assignee, etc., who * * shall * * administer the same as in other cases of assignments to trustees for the benefit of creditors."

It then requires the plaintiff to publish notice of the pendency, etc., of the suit for four weeks in a newspaper, and gives to all creditors who shall come in within fifteen days after such publication, and execute bonds to bear their proportions of the costs of prosecution, etc., an equal right

with the plaintiff, and postpones those who do not, to such prosecuting creditors.

The case of Jamison v. McNally, 21 O. S., 295, was under this amended 17th section of 1863. There one Jacob Bush conveyed his lands to two of his creditors for the sum of $10,000, his wife not joining him in the deed, and retaining her contingent right of dower therein. Though the report of the case does not so state, the lands were his home farm, and he and his family continued to reside in the mansion house with his son-in-law, one of such purchasers and creditors. The parties attacking such conveyance had first caused executions to issue and be levied upon the premises, though this is not stated in the report of the case. The court found that such conveyance was not made with actual intent to defraud the creditors of Jacob Bush, but was constructively fraudulent in this, that in fix-
529 ing *the price of the land, the contingent right of dower of the wife of Jacob Bush had been over estimated by $4,000, and required the purchasers to pay that sum, with interest, or that the premises be sold to pay the same, with costs.

Jamison, a creditor of Jacob Bush, individually, (the plaintiff's being creditors of a co-partnership of which Jacob Bush was a member) applied to the probate court and was appointed assignee of Bush under the amended 17th section of the insolvent law. The supreme court held that this section applies to conveyances constructively fraudulent as well as to such as are actually fraudulent; that the only change it works in the old section, is to give such creditors as come in after notice published and assist in the prosecution of the suit, a preference over such creditors as fail to do so, but that such notice must be published to give the plaintiff creditor a preference over other creditors; that after decree, it is too late to make such publication, as the rights of the parties are fixed by the decree; and that the court before paying such moneys over to the assignee will provide for the payment of the costs and the expenses of the creditor prosecuting the suit by which the fund was obtained.

Bush had an equity in the premises to the amount of $4,000; but it could not be reached by creditors by attachment or execution except through the constructively fraudulent conveyance, which had first to be set aside, and then the 17th section, as amended, of the insolvent act applied to the fund.

That is the case here; McMillan and Grant must set aside the deed of settlement to Mrs. Sargent, under that section, before they can reach the equities of Samuel A. Sargent in the land. Then the fund is for the equal benefit of creditors, to be administered by an assignee appointed by the probate judge, or in default thereof, by the court setting such conveyance aside.

McMillan and wife were creditors of Samuel A. Sargent prior to this settlement upon Mrs. Sargent, and that conveyance to her being fraudulent as against prior creditors, was an assignment to her for the benefit of the creditors, such property being assets, and hence, subsequent as well as prior creditors became entitled to participate in the distribution of the fund. It would seem that any creditor, whether prior or subsequent, may bring or join in an action to set aside such a conveyance, otherwise he would necessarily be postponed to judgment and to prior creditors, which would defeat the declared purpose of the law, to-wit, to make such fraudulent conveyances assignments for the equal benefit of all creditors.

When, then, Sargent and wife mortgaged this property to Shorten to secure a prior debt due to him from Sargent, she held the property as trustee for the equal benefit of all Sargent's *creditors, and they could 530
not, by such a mortgage, give one creditor a preference over others. There is no difficulty in holding Mrs. Sargent a trustee, by *construction*, of the creditors of her husband; she might be a trustee for her husband, 1 Perry on Trusts, sec. 51. A judgment and decree may then be taken declaring that this deed to Mary A. Sargent was made to hinder, delay, and defraud the creditors of her husband, Samuel A. Sargent, that the same is void, and inures to the equal benefit of all his creditors; and that if no assignee be appointed by the probate court, or any other of Sargent's creditors appear within — days and asked to set up their claims, first allowing these parties their reasonable costs and expenses for obtaining the fund, and do set up the same by answer, then, that the fund, after the payment of costs, etc., be divided between these three parties in proportion to the respective amounts of their several claims.

Mathews, Ramsey & Mathews for Alex. McMillan and wife.
Collins & Herron for Wm. S. Grant.
John F. Follett for Samuel Shorten.

---

*LIABILITY OF CITY FOR NEGLIGENCE OF SCHOOL TRUSTEES. 542

[Superior Court of Cincinnati, General Term, October, 1874.]

†MARY DIEHM v. CITY OF CINCINNATI.

REVERSED ON GENERAL DEMURRER TO PETITION.

Tilden, Yaple and O'Connor, JJ.

A pupil attending a common school, in a common school house, in the city of Cincinnati, who is injured in consequence of the unsafe and dangerous condition of the house, a temporary wooden door frame negligently put up and kept, having fallen upon such pupil and broken its leg, without negligence or fault on its part, can not maintain an action against the city for such injury. The common schools in Cincinnati stand upon the same legal grounds as common schools do in several school districts throughout the state. The act of January2 7th, 1853 — 51 O. L., 503—does not vest the care and control of common schools and school houses in the city of Cincinnati *as a municipal corporation*, but merely as a fit and appropriate agency of the state. *Whether the legislature, under 543
art. 6, sec. 2, of the Constitution, which requires the state to "secure a thorough and efficient *system* of common schools *throughout* the state," could divest itself of such duty in a city by casting the burden and responsibility of maintaining the same, *as a corporate duty*, upon such city—*Query?*

YAPLE, J.

The petition alleges, that, on the 14th day of March, 1872, the plaintiff, Mary Diehm, was a scholar attending the eleventh district school in the city of Cincinnati, she having the legal right so to do; that there was a temporary wooden structure or door frame leading into and out of the school house in that district which house was undergoing large additions, improvements and repairs, and was dangerous, the wooden door frame being negligently placed and kept there; and that the plaintiff, in passing through the same, without fault or negligence on her part, but by the direction of the agents of the defendant, was injured by this door frame falling upon her, breaking her left leg; for which she asks a judgment against the city for $10,000.

It appears sufficiently from the petition that the school house in question was a common or public school house, and the school, which the plaintiff was attending,

†The judgment in this case was affirmed by the supreme court. See opinion 25 O. S., 305.

a common or public school in the city of Cincinnati. To this petition a general demurrer is interposed by the city.

The plaintiff's counsel concede, as the law most unquestionably is, that public, or common school districts, generally, in this state are but *quasi* corporations, and that the school authorities in such districts are not liable to persons injured from the insufficiency, or dangerous character of school houses within such districts, or from the careless construction, or negligent keeping or control of the same, Mighels v. Com'rs. of Hamilton County, (7 O. S., 109, Cooley's Const. Lims., 240, 1 Dillon's Munic. Corps., Second Ed., sec. 10 and notes,) Wharton v. School Directors, (42 Pa. St., 362).

But, the plaintiff cites (7 O. S., at p. 118,) as establishing with equal certainty, that, had the defendants, in that case, "been the agents of a *municipal* corporation proper, and had the plaintiff been injured through like negligence and under like circumstances, the corporation might have been held to answer for the injury." This, we think, would be true in the case of a city building for a city purpose.

She then claims that common school houses in the city of Cincinnati are owned and the common schools kept therein by the city, and, hence, that it is liable in this case.

It is true, that, in accordance with the provisions of section 32, of the general school law of the state, passed March 14, 1853, (2 S. & C., 1346, 1358,) the city of Cincinnati is not governed by those provisions which relate to schools in cities and villages; *but it is governed by the act of January 27, 1853, (vol. 51 O. L., 503.)
544 This act, in the first section, enacts, that the city of Cincinnati, is authorized and required, at the expense of the city, to provide for the support and regulation of the common schools of the city in the manner prescribed by the act. The second section of the act requires the election, in each ward of the city, of a trustee and visitor of the common schools of the city, which trustees and visitors shall compose a board of education for the city, to be denominated "The Board of Trustees and Visitors of Common Schools."

The third section requires this board to meet every week.

The fourth section commands such board, on or before the second Monday of May, annually, to cause to be certified to the city council of Cincinnati an estimate of the amount necessary to be raised in said city for school purposes, not exceeding *two* mills on the dollar upon all taxable property in the city, valued and appraised, and liable or subject to taxation for state and county purposes, corporation, school house and school taxes, and the city council *shall* certify the said amount, so to be raised, to the county auditor, etc.

The sixth section provides that such *trustees and visitors* shall have authority to purchase in *fee simple* (subject to the confirmation of the city council,) or receive as a donation for the use of *said city*, such additional lots of land or sites for school houses as may be required for the several districts, and *shall*, by the concurrence of the city council, cause to be erected thereon *good and substantial school houses;* the purchase money of said lots, and the expenses of erecting buildings thereon, *shall be paid out of the common school funds provided for in the fourth section;* and all property so purchased and all other property therefore purchased for school purposes, *shall be held exempt from the general debts of the city*, and only liable for debts *contracted* for common school purposes.

The seventh and eighth sections require the trustees and visitors to cause to be paid the school bonds and school debts; and all moneys raised in any way for school purposes, are to be kept as a separate and distinct fund, and not applied, paid over or pledged, under any pretense whatever, to any other use than that for which it was levied and collected, nor upon any other order or authority than that of the board of trustees and visitors, as certified to by their clerk; and no money shall be paid out of the city treasury for school purposes, except on a vote of a majority of all the members of the board. No where is power given to the board to levy taxes and pay out moneys for damages sustained by persons injured under circumstances similar to those complained of by the plaintiff. Another act was
545 *passed March 30, 1857, (54 O. L. 73—2 S. & C. 1530,—Sec. 118, xii,) giving city councils, in addition to the foregoing powers, the right to borrow money to purchase the necessary grounds and for erecting suitable school buildings for the use of public schools; and the necessary grounds shall be procured and such school buildings constructed, "under the direction of and in accordance with a plan or plans furnished by the board of education of said corporation."

At present, the city council has no control over the subject of school expenditures, the legislature having, in 1873, taken it entirely away and vested all powers in reference thereto in the board of education.

In view of this legislation and the nature of the subject, we do not think the city of Cincinnati, *as a municipal corporation*, owned and controlled this school-house, or that the city can be held liable in damages to the plaintiff for her injuries, received in the manner she alleges. The state, by its constitution is charged with the duty of establishing and maintaining a system of common schools throughout the state; and the system established in Cincinnati, by the legislature, was, we think, but a mode of performing such duty, the condition and circumstances of the city of Cincinnati, requiring, in the wisdom of the law-making power, provisions different from those governing the state at large, in order the more efficiently to carry out the ends designed by the constitution in reference to common schools. Common schools here as elsewhere are the agencies of the state, and not the mere property and creations of the city as a municipal corporation. As the state can not be held liable to the plaintiff, its mere agency, the city can not be.

But, if the state had undertaken to divest itself of the responsibility for schools in the city of Cincinnati, and to cast the same upon the city, it is a very grave question whether it could do so, under the constitution of the state, Art. 6, section 2.

"But it is believed that the legislature has no power, against the will of a municipal corporation to compel it to assume obligations not within the ordinary functions of municipal government," Cool. Const. Lim., 230 and note to 6th Ed.

But as the state has not, in our opinion, attempted to do so here, we merely mention this question without deciding it. We hold that all the instrumentalities in relation to common schools employed in the city of Cincinnati, under the legislation, applicable to it, are agencies of the state and not of the city as a municipal corporation. The demurrer is sustained.

judges Tilden and O'Connor, concurred.

Von Segern & Glidden, for plaintiff.

Warrington, Peck & Creamer, City Solicitors, for defendant.

---

*MUTUAL BENEFIT SOCIETIES. 546

[Superior Court of Cincinnati, General Term, October, 1874.]

MUTUAL RELIEF SOCIETY OF DRUIDS v. BILLAU.

ERROR.

Tilden, Yaple and O'Connor, JJ.

1. A benevolent society had a death fund derived from one dollar contributed by each member after each death. It was provided in the constitution, that, if a member should fail for ten days to pay in such dollar, his wife could have no benefit in such fund in case of his death; and if he failed for thirty days so to pay, he might be expelled. A resolution of the society provided for publishing notice of every death and assessment. And also that a collector should be appointed to notify members in arrears for such dues. A member died in April, 1873, and notice was published that dues on account thereof were payable April 30, 1871. B. was a member, but there was no evidence that he was aware of such death, or knew of the publication in the newspapers. The collector of the society did not call upon him for or notify him of the assessment. On May 11 or 12, 1871, while on a journey upon the river, B. fell overboard and was drowned; and on May 12, 1871, the collector called upon his wife for the assessment, which she paid, neither then knowing that B. was dead. Learning that fact before the money was paid into the treasury the officers of the society refused to receive it. And on the 14th of May, 1871, the next or second day after B. was buried, the collector called upon the widow, explained to her the facts, and she took back the money she had paid and gave up the receipt she had received of the collector for it.

**Held*, that B. did not lose his right to have this fund paid to his widow, as he had no knowledge of the death of the party on whose account he had been assessed, or of the publications in the newspapers; and until he had, or until after demand made upon him by such collector, his right to pay such due and preserve his rights in the fund continued. 547

2. That the widow taking back the money she had so paid and giving up her receipt therefor, was not a binding release by her of her rights—the consideration being grossly inadequate, the fund amounting to some $264.
3. The consideration of hardship to the society is entitled to no weight, as it only lost the interest on $1 for twelve days, which dollar it could have had sooner by asking for it.

YAPLE, J.

This is a petition in error prosecuted here to reverse a judgment of this court rendered at special term for $264 in favor of Eva C. Billau, the plaintiff below, and against the Mutual Relief Society, a corporation under the laws of this state, defendant in the original action.

The reversal is asked on the grounds that the finding and judgment are manifestly against the evidence and against law. The bill of exceptions sets forth all the evidence adduced at the trial.

The defendant in error is the widow of Adam Billau, deceased. He became a member of the society in February, 1868, the membership of the society being composed of members of a German Order of Druids. Every member upon the death of a brother is required to pay into the treasury one dollar for the benefit of the widow of the deceased if he shall have left a widow, or for the heirs at law in case he did not, which sum the society is bound to pay to the beneficiaries.

The constitution of the society, art. V, sec. 4, provides: "As soon as a member dies, every member is obliged to pay his contribution (dues) within ten days. If he has not paid at the expiration of this time, then he forfeits (looses) his benefits. But if he does not pay his contribution (dues) within thirty days, then he shall be expelled (excluded) from the society."

Section 6 provides that the beneficiary, if a widow, shall receive one dollar from every contributing member within five days after the death of any contributing member; and by a resolution passed by the society on June 13, 1866, it was provided that "the benefits are payable to the legal representatives of a deceased member in thirty days after an authenticated notice of such death has been received from his Grove."

On March 30, 1870, the society passed the following resolution:
548 "*Resolved*, that brothers in arrears with their dues after *the time of payment having been advertised publicly shall be *notified by a collector appointed by the board of directors*, and shall be bound to pay the collection fees of ten per cent themselves."

Under this resolution a Mr. Baenning was appointed collector and acted as such during all the time in which the facts involved in this transaction transpired. On April 15, 1871, Adam Birschler, a contributing member of the society died, and on the 19th day of April, 1871, the members, numbering with the plaintiff's husband two hundred and sixty-five, were notified by publication of an assessment upon each of them of one dollar to replace the money expended by the payment to Birschler's widow of the amount due to her. Such publication was made in the three German daily papers of the city of Cincinnati, where the society was located, and where Billau and his family resided. The notice specified that such dues would be received during the forenoon of April 30, 1871, from ten to twelve o'clock A. M. From the translation of these publications it appears that they purport to have been inserted on April 29th, and April 30th, 1871, and not on the 19th day of the month. And it nowhere appears from the record that Billau, the plaintiff's husband, had

actual notice or any knowledge of the death of his brother member, Birschler, or of the assessment upon him on account thereof, or of the publication in any of the newspapers. The court below did not find that he had, and, upon the testimony such fact was not satisfactorily established, if it was claimed.

On the morning of May 11, 1871, Billau, the deceased, being on a trip on a steamboat on the Ohio river, fell overboard near Rising Sun, Indiana, and was drowned. He had not paid his assessment on account of the death of Birschler, nor had it been demanded of him by the collector; and he owed the society nothing on any other account. On May 12, 1871, the collector, Baenning, called at the store of Billau, presented the assessment to his daughter and requested payment. The daughter went to her mother, procured the money and paid it to the collector, taking from him the receipt therefor. None of the parties then knew of the death of Billau.

The collector took the money to the secretary or treasurer of the society, who had then learned of the death of Billau, and he refused to receive it from the collector. On May 14, 1871, the collector went to the widow and explained to her the facts whereby she was induced to take back the money she had paid him, and to return the receipt he had given her. She afterwards sued and obtained the judgment complained of, first deducting from her claim one dollar owed by the deceased. The plaintiff in error insist that the judgment should be reversed, because,

*First, under the constitution and rules of the society the husband of the plaintiff was bound at his peril to ascertain when 549
Birschler died and to pay his assessment of one dollar on account thereof within ten days after that event, and that publication of the notice requiring the payment of such dues was equivalent to actual notice to him, he being bound to take notice thereof. Second, that though he was still a member of the society, he was precluded from the benefits of the life fund, because he had failed to pay his assessment within ten days from the publication of such notice, even though the society might have sued and recovered from him his assessment—such failure by the express provisions of the rules of the society precluding him therefrom; and third, by way of argument *ab inconvenienti*, if the proper construction of the constitution and laws of the society be doubtful, that to permit a recovery upon such a state of facts would destroy the possibility of the fulfillment by the society of the purposes of its formation. It is also submitted that the receiving back by the widow of the dollar which she had paid the collector, and the giving up to him of the receipt therefor, which he gave her, was a valid relinquishment by her of any rights real, or supposed, which she may have had in the premises.

The defendant in error claims that, as her husband is not shown to have had any knowledge of the death of Birschler, or notice in fact of the publication of the assessment, she, as his widow, had the right to pay the same within ten days after such knowledge was brought home to her, and to recover the fund due to her on account of his death, there being nothing in the constitution or rules of the society binding him to ascertain at his peril when a member died, and to pay within ten days thereafter, or that gave the publication of such notice in a newspaper the force and effect of actual notice, or knowledge of the same. She also claims that her husband was a member of the society, notwithstanding his failure to pay within the ten days, and could have been sued

for his dues and been compelled by law to pay them, and that, therefore, she had the right to pay them when she did and receive the benefit fund due her on account of her husband's death.

We think that the constitution and rules of the society should receive such a construction as to fairly and fully accomplish the ends for which it was formed; that on the one hand they should not be made a mere means to secure the money of members and then prevent their families at their death from realizing any benefits therefrom, nor should parties be permitted to knowingly refuse or neglect to pay their dues, and their families after their death be allowed to pay up delinquencies for the purpose of realizing large pecuniary benefits. The construction
550 should *be fair to both, requiring of each good faith and honest dealing, remembering that forfeitures are not to be favored, but only declared, when the provisions of an instrument or the failure to perform some condition precedent have clearly created them.

In the case of a society containing over two hundred and fifty members, it is not to be supposed that each can always know when any of the number dies, nor when notice of his death and the action required to be taken thereon is published. The exigencies of life, such as going from home on business or pleasure, etc., must always prevent that in many instances, and we ought not, in the absence of clear provisions to that effect, to hold that persons bind themselves to ascertain such facts at the risk of forfeiting valuable pecuniary interests—such as provision for their families in case of death. We think that section 5 above quoted, requiring payment in ten days after the death of a member, contemplates that those required so to pay shall have knowledge in fact of such death, and that ignorance thereof will excuse non-payment. This society evidently saw the justice and necessity of this rule, for it, by resolution, provided for publication as a means of communicating to members such knowledge, and realizing that such means might fail, it further provided for the appointment of a collector to collect dues unpaid after the time limited in such publication, which collector was to notify those not paying; and he was to receive from them ten per cent. additional for his fees for collecting. This is what was done in this case. We think the widow, the defendant in error, had the right to pay her husband's assessment as she did and to receive from the society the fund due from it to her the same as if her husband had paid it in his lifetime and within ten days after Birschler's death.

This makes it unnecessary to determine whether the due was a debt which the society could have recovered from the deceased by law after the expiration of the ten days, or not, and whether, if it could have done so, the right of the deceased to the benefit fund was not nevertheless taken away, it not having attempted to do so.

The fact that the widow took back the money which she paid and gave up the receipt, does not, in our opinion, bar her right of recovery, for, if she had a valid claim for two hundred and sixty-five dollars on payment of the dollar, the taking back of the one dollar so paid would be, it seems to us, a grossly inadequate consideration for the relinquishment by her of her right to the remaining two hundred and sixty-four dollars. Besides, the fact that her husband had just met an unexpected death, and been buried on the 12th or 13th of May, the taking back of the money and the giving up of the receipt by her on the 14th of the

same month ought to prevent the application to her acts *of any very strict technical rules of law. Lastly, we fail to perceive how 551
the enforcement of claims against the society under the circumstances of cases like the present can destroy the society or defeat the ends of its formation. Had the plaintiff's husband paid one dollar on April 30th, it is admitted that the society would have been compelled to pay the sum now demanded by the widow. It gets that one dollar twelve days afterward, so that all it has lost is the interest on one dollar for twelve days, and it could have had the money sooner, at any time, by asking. And even if the consequences claimed were to follow, as there is no ambiguity or doubt as to the proper construction of the rules of the society, that would furnish no legal ground for denying the plaintiff her rights against it.

The judgment will be affirmed, but without penalty.

Judges Tilden and O'Connor concurred.

Wm. T. Forrest, Attorney for Plaintiff in Error.

C. Von Seggern, Attorney for Defendant in Error.

---

*MUTUAL BENEFIT SOCIETIES. 589

[Superior Court of Cincinnati, Special Term, October, 1874.]

STADLER ET AL. v. BNAI BRITH.

ON DEMURRER TO PETITION.

1. 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; the proper tribunals of the order must administer its internal affairs.
2. The fund that is contributed by members of a mutual benefit society for the relief of members or families is not a charity to be controlled by equity.
3. All rights in the funds of a mutual benefit society are property rights, and equity will restrain a misapplication of them, and in such suit the secretaries of the subordinate lodges, instead of the lodges, may in proper cases be parties.

TILDEN, J.

This is a litigation growing out of certain measures which have been adopted, and are attempted to be enforced, for the creation and administration of a fund designed for purposes of charity. The body or order of persons who are affected by these measures are Israelites, and they are said to be divided in opinion upon their policy, and in their desire with respect to the execution of them. They have encountered much opposition from individual members of the order, and some of the questions involved in the controversy have been acted upon by its regularly constituted judicatories and other representative bodies. They are regarded by the parties to the present action, and other members of the order, as extremely important, and the conflicting views of the counsel for the opposing parties upon the manner in which such questions should be regarded and treated in a civil tribunal, and upon the principles to be applied in the determination of them, have been presented to the court with great clearness, and with all the fullness which could be desired. I have given them all the attention consistent with the claims of the other business of the term, and all which would appear to be required in a

subordinate court, and as a preliminary hearing; and for a reason apparent from a circumstance already referred to, I have reduced to writing the reasons, generally, which have conducted me to the conclusions which I have reached. The case as set forth in the petition is this:

The male adult Israelites of the United States, numbering about 30,000 individuals, many years since, I presume through delegates representing them in convention, formed and established a paternity or order called the "Constitutional Grand Lodge of the United States." They adopted a written constitution for the government of their order, dividing it into 225 lodges, distributed throughout the United States, and placing them under the jurisdiction of intermediate organizations called
590 "District Grand Lodges." In this purpose the territory composing the *United States is divided into districts named in numerical order, the states of Ohio, Indiana, Kentucky, Missouri, and Kansas, forming the second district. The government of the constitutional grand lodge is entrusted to an elective body composed of one member from each subordinate lodge; it assembles once in every five years; its constitution forms the supreme law of the order, anything contained in the constitution or laws of any district grand lodge, or of any subordinate lodge, to the contrary notwithstanding. And it contains in itself full and plenary authority, legislative, executive, and judicial, necessary to the complete control and supervision of all the lodges and communities inferior to it, and to the execution of the purposes and designs of the organization, the principle of which purposes is declared to be:

"To unite the sons of Israel in promoting the interests of humanity, especially to alleviate the wants of the poor and needy, to visit and attend the sick, and to protect and assist the widow and orphan."

The district grand lodges which are next in order in the descending series, whose governing body is composed of delegates representing the subordinate lodges and their members, are constituted under authority derived from the "constitutional grand lodge." And they are thus empowered to pass all laws, and adopt all rules and regulations for their own government, and for the government of the subordinate lodges within their respective jurisdictions, such as they shall judge to be necessary and proper, not inconsistent with the fundamental law of the superior order. They too are governed by a written constitution, and by this their governing body is limited only by the constitution itself and by that of the "constitutional grand lodge." With these limitations each district grand lodge is supreme throughout its district. By authority of the constitutional grand lodge, a tribunal has been constituted which is called a court of appeals; and it is endowed with capacity to entertain appeals from any decision of a subordinate lodge, and finally and conclusively to settle all questions of difference among the subordinate lodges and the brethern relating to the affairs of the order. "District Grand Lodge No. 2" is an incorporated benevolent society under the laws of the state of Ohio, and has its seat and place of business in this city. The declared purposes of its organization are:

"To unite the sons of Israel in promoting the interests of humanity, especially to alleviate the wants of the poor and needy, to visit and attend the sick, to protect and assist the widow and the orphan, to develop and elevate the mental and moral character of the Jewish race, to inculcate the purest principles of philanthropy, to promulgate the doctrines of Ju-

daism *among its professors, and to preserve and diffuse the faith of the fathers of the Jewish race in society at large." 591

At the last meeting of the Constitutional Grand Lodge, held in the city of Chicago in January, 1874, authority was given to all District Grand Lodges within its jurisdiction to "adopt and pass laws creating an endowment fund for the lodges of the several districts." Article fourteen of the constitution of District Grand Lodge No. 2, provides also for the creation of a general fund for the district by the levy of a uniform tax upon all members of the several subordinate lodges within the district, the concurrence, however, of two-thirds of the subordinate lodges being made necessary for that purpose. In pursuance of the authority thus derived, and at a special meeting held for that purpose in this city, "District Grand Lodge No. 2" adopted an ordinance or by-law "to create an endowment fund for the subordinate lodges within its jurisdiction;" and this ordinance has been ratified aud approved by two-thirds of the subordinate lodges. It provides for the creation of an endowment fund for the benefit of the widows, orphans, heirs, or designated beneficiaries of the brethren of the district, and this fund is called the "Covenant Endowment Fund," and those who are entitled to participate in its benefits are declared to be third degree members who contribute to form it; the object of the ordinance is expressed to be to secure, in case of the death of a third degree member, to his widow or children, or legatee, an inheritance of one thousand dollars; the contributions to the fund are to be two dollars as an initiation fee, and by an assessment of seventy-five cents at the death of a member; the administration of the fund is committed to a board of trustees of the District Grand Lodge, consisting of five past-presidents, members of lodges within the district; and this board is required to elect from its own body, annually, a chairman, who is to have general direction and superintendence of the fund, and who in conjunction with the secretary, and with the consent of the board, may make and change investments, etc. The obligation to make these contributions is devolved, not upon the individual members of the several subordinate lodges, but upon the lodges themselves in their representative character; these lodges forming therefore, in this respect, a confederation of lodges, owing a duty to the District Grand Lodge for the ultimate benefit of certain designated individual members, and enforceable by the direct authority of the subordinate lodges over the individual members themselves. It is accordingly declared that each subordinate lodge is responsible for all assessments according to the number of its members; but that the mode of collecting the same from its members, each lodge may determine for itself. It is further declared that should any subordinate lodge fail or *refuse for thirty days to contribute its dues and assessments, it shall be treated as delinquent, and 592 that so long as such delinquency shall continue, no endowment shall be paid on the death of a member, and if it do so continue for the period of three months, the fact shall be reported by the trustees of the endowment fund to the next session of the District Grand Lodge for its action. It is further required that each subordinate lodge, within thirty days after having been notified of the ratification of the ordinance by two-thirds of the lodges, and each new lodge subsequently organized and within thirty days after its organization, shall pay to the secretary of the endowment fund the sum of two dollars for each and every one of its members of the third degree, except such as are excluded under a clause

by which it is provided that a member who shall institute legal proceedings to protect himself from the payment of assessments, shall not be charged with such assessments, or entitled to share in the benefits intended by them.

There are in this city five of these subordinate lodges, with a total membership of 863, and they have an accumulated fund amounting in the aggregate to the sum of $41,680. The question of the ratification of the ordinance of the District Grand Lodge was submitted to these subordinate lodges. In one of them it was approved by a vote of 32 members to 31; in two, nine members only were present in each when a vote was taken, and all voted for it; in another the vote was 38 against and 14 for it, and the vote of the other was 27 for and 35 against it. This opposition, as also that manifested in other subordinate lodges within the district, was founded in part on grounds of policy, and in part on the objection that the ordinance was not in conformity to the organic law of the order as expressed in the constitution, both of the Constitutional and of the District Grand Lodge; and the question was carried before the court of appeals of the order, and there its validity was sustained.

Soon after the ratification of the ordinance, the secretary of the District Grand Dodge notified the subordinate lodges of that fact. The officers of the District Grand Lodge proceeded and are now proceeding to collect the endowment fund, and they threaten to assess again each member the sum of seventy-five cents on the death of all members hereafter to die, and generally, to carry into execution all the provisions of the ordinance. It is charged in the petition that under color of the ordinance, and by direction of the trustees of the Covenant endowment fund, and of the officers of the District Grand Lodge No. 2, three of the subordinate lodges in Cincinnati, that is, the Bethel Lodge, the Spinoza, and the Osterman Lodges, have taken and appropriated to the Covenant endowment fund from the funds belonging to these lodges a sufficient amount to
593 *pay two dollars as an initiation fee for all the members of these lodges, such amounts being, as a calculation will show: By the Bethel Lodge, $646; by the Osterman Lodge, $194; and by the Spinoza Lodge, $212; total, $1,052. And the members of these and of the other subordinate lodges have been threatened that unless they shall pay the two dollars initiation fee they will be treated as in arrears to their respective lodges. Two of these subordinate lodges, viz., the Jerusalem and Mt. Carmel, have, however, refused to comply with these demands, and are regarded as contumacious.

According to the ordinances and by-laws of the subordinate lodges, each member is required to contribute annually the sum of two dollars; and the fund thus produced is appropriated and set apart for certain specified charitable and benevolent uses.

The plaintiffs are Solomon Fechheimer, Joseph Hirsh, Moses Stadler, Samuel Althof, B. Weil, B. Lipman, M. Bing, Sr., S. Bloom, L. Bloch, W. H. Seligman, Max Meyers and H. Wachtel. They represent themselves as being members of a certain benevolent society called the Independent Order of Bnai Brith, and active members in good standing of Bethel Lodge, No. 4, of this city. They state that this lodge is a subordinate lodge of the Order Bnai Brith and of District Lodge No. 2, and that they bring their action for themselves and for all others who are

similarly situated, and who may come in and claim its benefits, it being stated that these are too numerous to be made parties by name.

The defendants are the District Grand Lodge and S. I. Lowenstein, president, and Abraham Abraham, secretary of said lodge, and Solomon Levi, the treasurer, I. Koperlick, the secretary, and Isidore Bush, Joseph Abraham, A. Jankau and S. Ullman, who, with Solomon Levi, are the trustees of the endowment fund; and J. Amberg, secretary of Bethel Lodge, Henry Hart, secretary of Jerusalem Lodge, I. Wilhelmsdorfer, secretary of Mt. Carmel Lodge, William Ornstein, secretary of Osterman Lodge, and Julius Fuchs, secretary of Spinoza Lodge.

The prayer of the petition is that the District Grand Lodge be restrained from enforcing upon any of the subordinate lodges or their members, the endowment law, so called; from collecting or paying out any money heretofore collected; from interfering with the rights, privileges, and duties of the members of the subordinate lodges; and that such District Grand Lodge be compelled to permit the members of the subordinate lodges to enjoy their rights and privileges as the same are defined by the organic law of the order, by the constitution of the District Grand Lodge, and by the by-laws of the subordinate lodges; that *the president of the District Grand Lodge be restrained from enforcing the endowment upon any of the subordinate lodges or their 594
members, and from interfering in any way with their rights and duties as they are defined by the laws of the order; that the secretary of the District Grand Lodge be restrained from corresponding with, or sending notices to, any of the subordinate lodges, or any of their members, in reference to the "endowment law;" that the treasurer of the endowment fund be restrained from receiving or paying out any money under the endowment law, and compelled to restore any money heretofore received by him; that the secretary of the endowment fund be restrained from receiving or paying out any money under the endowment law, from corresponding with the subordinate lodges or their members with respect to the endowment law, and from giving public notice of the death of a member with any view to enforce the endowment law; that the trustees of the District Grand Lodge be restrained from managing, controlling, directing or superintending any fund called an endowment fund for the subordinate lodges, and from making or changing any investment of such fund; and that the defendant secretaries of subordinate lodges be restrained from paying any money for the use of the endowment fund, and from corresponding with any of the officers of the District Grand Lodge, or of said endowment fund on the subject of such fund. The petition contains also a general prayer.

The grounds of the demurrer are, first, that the petition does not state facts sufficient to constitute a cause of action; and, second, that there is a defect of parties defendant. Other grounds were presented *cre tenus*, and insisted on in the argument; but as the code requires that the grounds of a demurrer should be specially pointed out in the demurrer itself, I have considered only such as are so presented.

OPINION.

1. From the description of the case thus given, it is apparent that one object of it, and the most important one in the estimation of the parties interested probably is to bring under the supervision of the court

the administration of the internal affairs of the organization referred to in the petition. Indeed, the court is, in terms, called upon to interpret their organic law and their ordinances and by-laws, and to ascertain the degree of conformity of the latter to the former, and specifically to restrain and direct their officers and agents, in the performance of the duties devolved upon them as such. This would amount to the administration of their internal affairs, and, in my judgment, there is no warrant for such an interference in the equity system in this country. In England such a jurisdiction
595 *does exist in equity; and it extends in the case of unincorporated charities, to their internal administration, as well as to the management of their estates. But the jurisdiction is a prerogative one which belongs to the sovereign power in the state, and courts of equity do not possess it unless it be conferred upon them by statute. But the petition does not present even a case of charity; and it has been more than once directly held that money contributed by the members of a club to a common fund, to be applied to the relief and assistance of the particular members of the club, when in sickness, want of employment, or other disability, is not a charitable fund to be controlled by a court of equity. Babb v. Reed, 5 Rawle., 151. Attorney-General v. Federal Street Meeting House, 3 Gray (Mass.) 44 Anon, 3 Atk., 277. There is, however, a distinction between a fund contributed by the members of a club, society, association, or lodge, to be employed and disposed of among themselves, as the members may agree, and a gift conferred as matter of bounty, upon such club, society, or lodge, in trust to be distributed in charity. The case under consideration belongs to the first class; and in such a case to authorize a court of equity to interfere, it must be shown that money or other property is the subject of the controversy, and that such property is distinctly impressed with the qualities of a trust.

As against the District Grand Lodge and its officers, and the trustees of the endowment fund, no such condition of things is alleged or pretended. The only complaint is, that in the adoption of the ordinance for the creation and dispensation of an endowment fund, the district grand lodge, as a legislative body, has acted irregularly, and in contravention of the fundamental law governing that body, and that its executive officers and agents are engaged in the execution of it, and the remedy invoked, consists in an injunctive restraint upon them. I am of opinion that this remedy cannot, under the circumstances, be applied, and that, to the extent here explained, the petition does not contain facts sufficient to constitute a cause of action.

2. There is another branch of this case, and the only remaining one presented by it on the merits, which admits, I think, of a very different consideration. The accumulated funds of the several subordinate lodges referred to in the petition, must, it is clear to my mind, be regarded as being held in trust for the special purposes expressed in their by-laws and ordinances. They were contributed for the exclusive benefit of their own members; and the fund thus formed can properly be applied only in that particular manner pointed out in the ordinances and by-laws, which, for this purpose, are to be treated as express declarations of trust. The appropriation, therefore, of any part of these funds for
596 the uses of the Covenant Endowment *Fund was a misapplication of them, and a distinct breach of trust, which, in the future, may in equity be restrained. To this extent, then, I conclude that the action must be sustained.

3. The objection with respect to the parties defendant, as expressed in the demurrer is, not as contended in the argument, that the secretaries of the subordinate lodges are improperly made parties defendant, but it is that other persons, not named, are improperly omitted. The parties thus referred to are the subordinate lodges themselves. It is their duty to preserve the fund entrusted to their keeping. Such of them as refuse to divest the fund in the manner complained of are in the strict line of their duty, against whom an action would not be supported, and to whom, therefore, the objection cannot apply. The others—those whose governing bodies have determined to comply with the requirements of the trustees and officers of the Covenant Endowment Fund would undoubtedly have been proper parties, and it may turn out that the relief sought by the action would have proved more efficacious had they been made so. But it does not follow that the objection of their absence will support a demurrer. The facts stated in the petition authorize the conclusion that the secretaries of these lodges directly and actively participated in the breach of trust complained of, and incurred a personal liability. But this was a several liability, and not a joint liability, with the lodges themselves. And under section 36 of the code, only parties jointly liable or united in interest *must* be joined; and it is competent for the court to determine any controversy between the parties before it when it can be done without prejudice to the rights of others, or by saving their rights: Code, sec. 40. The secretaries, therefore, may well be restrained from participating in any future breach of trust, and it is not a sufficient answer to the claim to have them so restrained that the funds withdrawn are to be restored by further levies. It is a breach of trust to use the funds by way of loan, and such breach may, I think, be corrected in equity. Nor, in my judgment, is the principle which authorizes this interference, at all brought in question by the case cited from the 13 Wallace, 680. The identity of a religious denomination with that for whose use the enjoyment property was intended, and made to depend upon its doctrines and tenets, is a question of fact, and, in this country the doctrine of the courts, contrary to that which prevails in England, is settled to be, that, on that question, the judgment and decisions of the authorized denominational tribunals are conclusive, and are to be accepted by the courts as being so whenever the question is raised. But the question here is whether a fund formed by the contributions of the members of a society has been impressed with a trust and so accepted. This fact is always open to judicial inquiry, and whether the *alleged trustee be an individual, or a collective body of individuals, 597
incorporated or otherwise, no act, declaration, or decision of such trustee will prevent such inquiry. If the terms of the alleged trust are contained in an instrument of gift, that instrument will be examined and the intentions of the donor carried into execution. If expressed in the articles of association of a voluntary society, these articles will be carried into specific execution for the purpose of enforcing the trust; and if, in the fundamental law, or in the ordinances and by-laws of a corporation on the faith of which contributions have been made, the court will adopt their own construction, and apply relief according to their own views of the law. It is not, of course, intended to be asserted that if the articles of association of a society provide for a tribunal of its own to which its disputes shall be referred, and they are so referred and decided, such decision might not be upheld, the proceedings being conducted in conform-

ity to the rules governing arbitration. That question, however, is not presented. I am to be governed by the facts stated in the petition and according to these, and so far as the action seeks to protect the separate funds of such of the subordinate lodges of which the plaintiffs are members, they are entitled to the relief demanded.

According to these views the demurrer is too broad. The facts contained in the petition are sufficient to constitute a cause of action, though not to the full extent claimed, or for all the causes set forth. But the defendants, if they desire to avail themselves of the results which I have stated, may take leave to amend so as to restrict the operation of the demurrer, and to answer; and the plaintiffs to amend their case if they think they can do so and escape a demurrer. With regard to the injunction heretofore allowed being unsupported in the law to the extent before explained, it will be modified so as to remain in force only so far as it relates to the case of the defendant secretaries of the subordinate lodges.

MUNICIPAL LAW—WATER WORKS.

[Superior Court of Cincinnati, General Term, June, 1874.]

LAWRENCE V. CITY OF CINCINNATI.

Tilden, Yaple and O'Connor, JJ.

Section 336 of the Municipal Code provides that the trustees of water-works shall appoint all necessary officers *and agents*, "and determine *the term of office and the amount of the salaries of the officers and agents so appointed; and section 343 provides that the council of any corporation in which water-works are or may be situated, or in progress of construction, shall be authorized to appoint a committee for the investigation of all books and papers, together with all matters pertaining to the management of the water-works, at least once a year, and oftener if necessary by reason of any *neglect of duty*, or *malfeasance* on the part of any *officer* of the works; and any *officer* of the works, found by said committee so offending, shall be liable to removal from *office* by the council."

598

In the exercise of the powers assumed to be conferred by section 336, the board of trustees of water-works in the city of Cincinnati, passed a resolution that the time for the election of officers of the water-works should be fixed on the first regular meeting of the board in December of each year, "and that the officers elected shall enter upon the discharge of their several duties on the first day of January following and continue in office for *one year, unless removed from office by order of the board during said period of election.*"

L. was elected by the board of trustees, at the first regular meeting in December, 1872, assistant secretary of the board, and duly qualified, and entered upon the discharge of his duties on January 1, 1873, the salary having been fixed by the board at $1,500 per year, payable monthly, $125 at the end of every month. On June 30, 1873, the board of trustees removed L., without any cause being assigned therefor, and without any charge of any kind having been made against him. He was ready and willing to perform the duties of his office and tendered performance, which the board refused, and in August, 1873, he brought suit against the city of Cincinnati to recover $125 for the salary of the month of July, 1873.

Held—That L.'s employment was not a contract with the city to serve one year, as he would have had the right to resign his position at any time; that the terms of the resolution of the board of trustees fixing the term of office, reserved to the board the right to remove the incumbent, L., at any time within the year, at their discretion, and without assigning any cause therefor—if the board had the legal power to make such condition a part of the tenure of the term of office—and that a court cannot control the exercise of such discretion by the board; that section 336 gave the board authority to make the term of employ-

ment dependent upon such condition, the office not being created for the emolument of the incumbent, but to subserve the public interests; that section 343, empowering the city council to remove any *officer* of the water works for the *offences* therein specified, is additional to the right inherent in the board, as the appointing power, to remove at discretion, and is not to be construed as taking away such full discretionary power from the board, that the provisions of the *municipal code relating, generally, to other classes of removals from office, have no application to removals of officers of water-works, the provisions as to the latter subject being to be read in the light of exceptions to the former; and that L. is not entitled to recover for that part of his salary which would have accrued to him after his removal had he continued in his position and performed its duties. 599

YAPLE, J.,

This case comes before us on reservation from special term, upon demurrer to the defendant's answer to the plaintiff's petition.

The plaintiff brought suit on August 22d, 1873, to recover from the city $125.00 with interest from August 1st, 1873, for his salary for the month of July, 1873, as assistant secretary of the board of trustees of the water-works of the city of Cincinnati, of which office he avers he was wrongfully deprived by the board on July 1st, 1873, by its removal of him without cause. He says that he was duly elected to such office by the board, on January 1st, 1873, for the period one year, that he gave bond as required by law, entered upon the discharge of his duties, and efficiently and properly performed them until his removal, which he claims was wholly without cause and illegal, since which time he has been ready and willing to discharge all the duties of his office and has tendered his services to the board, which has refused to allow him to perform such duties, and has put another in his place, etc., etc.

The defendant, by answer, admits the election and removal of the plaintiff as stated in the petition, and the election of another in his stead on July 5th, 1873; and that plaintiff's salary was fixed by the board at $1,500.00 per annum, payable at the end of each and every month, that is, $125.00 per month. By way of justification, the defendant pleads, among other things, the following resolution of the board of trustees of water-works adopted Jauuary 30th, 1862, and ever since in force, and under and subject to which it claims the plaintiff was elected to and accepted his said position of assistant secretary of the board:

"*Resolved*, by the board of trustees, that the time for the election of officers of the water works be changed so as to take place at the first regular meeting of the board in December of each year instead of as heretofore, and that the officers elected shall enter upon the discharge of their several duties on the first day of January following, and continue in office for one year thereafter, *unless removed from office by order of the board during said period of election.*"

The municpal code, passed in 1869, provides as follows: Section 336. Said trustees * * * shall manage, conduct and *control the works, furnish supplies of water, collect water rents, and appoint all necessary officers and agents, and determine the *term* of office and the amouut of the salaries of the officers and agents so appointed. 600

Section 337. Said trustees shall be authorized to make such by-laws and regulations as they may deem necessary for the safe, economical and efficient management and protection of the water-works, and such by-laws and regulations shall have the same validity as ordinances, when not repugnant thereto, or to the constitution and laws of the state."

Section 343. The council of any corporation in which water-works are or may be situated, or in progress of construction, shall be authorized to appoint a committee for the investigation of all books and papers, together with all matters pertaining to the management of the water-works, at least once a year, and oftener if necessary by reason of any neglect of duty or malfeasance on the part of any officer of the works; *and any officer of the works*, found by said committee so offending shall be liable to removal from office by the council."

The first question to determine is what construction is to be put upon section 336, above quoted, which confers upon the trustees the power to "appoint all necessary officers and agents, "and determine *the term* of office, salaries, etc."

This section is not restrictive but broad and general, confiding the whole matter to the judgment and sound discretion of the board of trustees.

The next question is what term of office or public agency have they prescribed for the assistant secretary? One year certain, or one year subject to termination at the will of the board at any time? The resolution of January 30th, 1862, is the latter in effect. We could no more strike out the words "unless removed from office by order of the board during said "period of election," than we could strike out the provision as to one year and leave only the last clause. If it is of no effect, provided the board had power to annex it as a condition of the term, then, the provision as to one year is nugatory, for the one qualifies and limits the other, and the result would be that the board had fixed no term at all by by-law or general regulation.

Without providing for the exercise of this power, the board might not have fixed so long a term, or they might have expressly fixed the term during the pleasure of the board; for we do not think that section 336 is to be so restricted in its construction as to require a definite period of time to be fixed for the continuance of a term. The intention of this section was not that offices should be created for the private emolument of the incumbents, but instituted and filled for the benefit and in the interests of the public.

601 *How often might it happen that in the matter of supplying a great city with so indispensable a thing as water, that the board might find incumbents of offices and agencies appointed by it, were, while not subject to any charge of dishonesty, want of industry or attention to their duties, and liable to removal on no tangible or provable ground, still far less suited to their positions and the discharge of their official duties, than others who happened to come to the knowledge of the trustees subsequent to the appointment of such incumbents, why, then, should the works and the business thereof be less efficiently managed for the general good by the board being compelled to retain the incumbents, not judiciously placed there, than such business could and would be by their removal and the appointment of others in their places? There is surely a necessity for this very power to exist somewhere, and it nowhere exists except in the trustees, for the city council cannot make any change without cause.

But it is said that such trustees are in danger of being influenced solely by political and partisan views and feelings in making removals. This is a danger incident to giving such power; and no such board, intrusted with the matter in which all persons of all parties and of every class are so

vitally and equally interested, should ever allow such a consideration to influence, much less determine their action. But party political removals from office are the necessary and natural consequence of partisan appointments. While the last is in vogue, the former will be practiced. Both should be avoided and abandoned; but it is impossible to give power without, at the same time rendering abuse possible.

Had, then, the board the right or power to annex as a condition to the term the provision that the incumbent might be removed at any time, at the pleasure of the board, we think there is nothing in section 336, which denies it to them.

Section 343, which gives the city council the right to appoint committees and investigate the water-works and to remove any of its *officers*—it does not say appointed *agents*, for *offences*—("so offending")—seems to be merely an additional safeguard given to the public to insure the proper administration and management of such water-works, and not the exclusive power to exercise the right of removal. It seems to have no power to remove mere agents appointed by the board, but that is left to the board exclusively. It is fair to suppose that section 336 was passed to render the board as far as possible independent of the city council, a body necessarily, like all other legislative bodies, unadapted to the proper and efficient management of works and a business so pre-eminently requiring administrative and executive abilities of a high order and necessary to be vested in a few *men. But as such board and officers 602
might become incompetent, corrupt, negligent of duty and guilty of malfeasances, it was obviously proper to give the council the right to remove them, on the report of a committee, for such causes.

The claim that the plaintiff was declared by the board to be elected to the office of assistant secretary at the annual election for such purpose, and therefore, that he was elected for one year, we think is to be construed with the resolution in force at the time declaring the right of the board to discharge him at any time at pleasure; that he accepted his position upon such condition.

The other sections of the municipal code cited by the plaintiff's counsel in argument, do not, we think, affect the sections we have specially considered. They apply to municipal officers and affairs, generally, while the sections referred to relate specially and exclusively to the water-works and the officers, etc., thereof.

The rule of construction in such cases is, that where a statute relates to matters, generally, and the same or a different statute provides for and governs a particular subject or matter, the latter is to be read in the light of an exception to the former. The general sections so referred to are sections 61, 62, 63, 64 and 94 of the municipal code. They cannot control section 336, etc., relating exclusively to the control and management of water-works.

We do not think that the plaintiff can maintain his action on the ground of contract with the city, for then the plaintiff would have been bound to serve for the period of one year, whereas, we think he had the right to resign at pleasure. We also hold that the removal or the retention of the plaintiff was vested by law in the discretion of the board of trustees, the exercise of which discretion a court has no right to control. And while, in the absence of a provision of law that an appointee shall not be removed except for cause, or specified causes, or that he shall hold his position for a definite and fixed time, or the power of removal

has been given to some other authority, the appointing power has, by implication of law, the right of removal, we hold in this case, that the board of trustees, in fixing the term of plaintiff's employment, as a condition and part thereof, made his occupancy of his place for the year dependent upon their pleasure.

Therefore, the demurrer to the answer will be overruled.

Hoadly & Johnson, for Plaintiff.

Warrington, Peck & Cramer, for Defendant.

---

648 SETTLEMENT OF ESTATES.

[Superior Court of Cincinnati, General Term, October, 1874.]

†PHEBE C. ROLL, ET AL. v. ELIZABETH C. RIDDLE, ET AL.

Tilden, Yaple and O'Connor, JJ.

1. Where an administrator, charged with the duty of selling the decedent's real
649 estate to pay debts, by proceedings in the probate *court, in form, sells such real estate to another, who pays no money therefor, but gives his three notes for such purchase money, secured by mortgage on the land, one payable in ninety days without interest and the others in one and two years with interest, the purchase not being intended by the parties to pass the ownership of such real estate to such purchaser, or to create a debt from him to the administrator, but to enable the administrator to dispose of the real estate as to him would seem best, such nominal purchaser to execute the required conveyances, and the administrator reports such sale to the probate court, stating therein that one-third of the purchase money has been paid, and such court confirms the sale and orders a deed made to the purchaser upon his securing the deferred payments, which he does by mortgage upon the land; and the administrator thereupon makes a deed to such purchaser, when the wife of the administrator, knowing the facts, comes to such nominal purchaser, pays him for his services in the transaction, assumes and pays his notes with her own separate means, and takes a deed from him to a trustee for herself to hold the same for her life, and thereafter for such of her heirs at law as are the children of herself and husband, such administrator, with power in her to dispose of the property in such manner as she may deem fit during her life, her trustee to execute the necessary conveyance; *Held*, that such administrator could not directly or indirectly purchase such property for himself, as the law will not permit a person to be both judge and party; and that he could not directly or indirectly sell the same to his wife, for he could not be a judge between her and others any more than between himself and them; *Held*, also, that her trustee being dead and none appointed in his stead, she would be held by construction a trustee for the heir of the original decedent to whom such lands descended in fee.
2. Where such lands, before and since such sales and conveyances, have been in the possession of a tenant for life in consequence of which such administrator's wife has had possession of them, she, in the absence of actual or intentional fraud on her part, will be entitled to receive from such heirs the amount with interest, that she advanced; for such amount was advanced to the creditors of their ancestor and discharged so much of the burden cast by law upon their estate. But she will not be entitled to receive what she paid to such middleman who deeded to her the property, as that money was not received by the estate. And upon such payment to her she will be decreed to convey such real estate to such heirs of the decedent, her husband, as well as her trustee being dead.

---

†The judgment in this case was affirmed by the supreme court in Riddle v. Roll, 24 O. S. 572. Riddle v. Roll is cited 27 O. S. 159, 196; 198; 39 O. S., 365, 368; 45 O. S., 512, 523.

3. In such a case, one of the plaintiffs being an infant, the rights of all are saved from the running of the statute of limitations.

YAPLE, J.

This cause comes before us for decision upon the evidence by *reservation, at special term. 650 The plaintiffs, except William W. Beresford, the husband of Elizabeth J. Beresford, are the children and only heirs at law of Edward C. Roll, deceased. The defendant, Elizabeth C. Riddle, is the widow of Adam N. Riddle, deceased, the sole administrator of Edward C. Roll, deceased, at the time the facts transpired which are involved in this action. Edward C. Roll died insolvent, leaving, among other parcels of land, the real estate involved in this suit the real estate now involved was assigned to Edward C. Roll's widow, Eliza Jane Roll, now the wife of E. W. Langdon, as her dower, and of which she has ever since been and now is in possession.

To pay the decedent's debts, it became necessary for Adam N. Riddle, as such administrator, to sell this real estate subject to such life estate of Edward C. Roll's widow, the real estate particularly described in the plaintiff's petition, being what are known as lots Nos. 7 and 8, in sections 27 and 33, township 3, fractional range 2, Miami purchase, these being in Millcreek township in Hamilton county, Ohio, since annexed to and now within the city of Cincinnati.

Adam N. Riddle, who died before the bringing of this suit, regularly, as such administrator, instituted proceedings in the probate court of this county to sell such real estate to pay the debts of the decedent. Upon an order of sale and appraisement, having caused notice of such sale to be published for the period required by law, in the weekly Cincinnati Enquirer, the administrator, on September 6, 1860, upon the premises, in form struck off and sold the same to the defendant, Alvah Parker, at two-thirds of the appraised value of the lots, respectively, amounting in the aggregate to $3,333.34. The terms of the sale were to be one-third cash, and one-third in one year, and one-third in two years from the sale. The administrator returned his proceedings to the probate court, reporting the one-third as paid to-wit, the sum of $1,111.11, and on September 19, 1860, the probate court confirmed the sale and ordered the administrator to execute a deed to the purchaser upon his properly securing the unpaid purchase money.

During all this time Adam N. Riddle and the defendant, Elizabeth C. Riddle, were married, lived together as husband and wife, had children living, who still survive, and she had a large separate estate and property. Adam N. Riddle was a lawyer and Alvah Parker was his client, and they were members of the same church and congregation. The house in which Parker resided was deeded to and owned by his wife, was worth about $3,000; but there was a mortgage upon it for $1,000. He owned about $1,000 worth of real estate in Covington, Kentucky, and had some money owing to him, how much does not *appear, but it was not shown to have exceeded $500. He had no cash on hand. 651 He did business as a real estate agent but had never dealt in lands in the vicinity of the real estate in question. Shortly before the alleged sale, the day before, or the same day, Riddle proposed to Parker that he should purchase it. Parker said that he had no money. Riddle replied that that would make no difference, he would fix that. Parker said he had no way of getting to the sale; Riddle said he would take him there, and did call with his buggy and take him. There was no one there but the two. Riddle took the bid of two-thirds of the appraisement, and struck off the property. Parker knew nothing about the land and did not know there were two parcels, but supposed there was but the one tract. For the first payment Riddle took Parker's note at ninety days, without interest, and his two notes with interest for the deferred payments. To secure these notes he took from Parker a mortgage on the land, which bears date Sept. 20, 1860, is acknowledged Sept. 22, 1860, and was left with the recorder for record Sept. 26, 1860, at 11 o'clock, A. M. Riddle, as such administrator entered satisfaction upon the mortgage, Sept. 28, 1860. Riddle, as administrator, made a deed to Parker for the land, which bears date Sept. 20, 1860, and was acknowledged Sept. 21, 1860. It was left by Parker for record on Sept. 25, 1860, and he swears that he left it for record immediately after he received it.

The defendant, Elizabeth C. Riddle, with John Reeves, an acquaintance of herself and husband, a member of the same church and an estimable man, who acted as and became her trustee, but who is dead, he having died before the bringing of this suit, and no other trustee having been appointed, went to Parker, paid him $100, assumed the payment of his three notes, and took a deed from him and his wife to Reeves as trustee of Mrs. Riddle for the premises. This deed bears date

on Sept. 24, 1860, the day before the deed of Parker was left for record. The date of its acknowledgment is left blank. This deed was prepared in the law office of Messrs. Fox and Harris, who were employed in the transaction by Mrs. Riddle and her trustee, John Reeves. Adam Riddle seems to have carefully refrained from taking any visible active part in this transaction between Parker, Reeves and Mrs. Riddle.

The three notes were then paid in full to Adam Riddle by Reeves, with the money of Mrs. Riddle and the mortgage cancelled as above stated.

This deed was one in trust to John Reeves to hold the title of the estate conveyed for Mrs. Riddle, during her life, and after her death "to and for the use and benefit of her heirs at law by her present husband, Adam N. Riddle;" and power was therein
652 expressly given to her to sell, mortgage, or otherwise dispose *of the same at any time during her life, the trustee, in such event, to execute, at her request, the proper conveyance or conveyances.

Adam N. Riddle was the brother of Mrs. Eliza Jane Roll, the widow of Edward C. Roll, deceased. Mrs. Roll testifies that she called upon her brother, the administrator, in relation to the sale of the land and informed him that she wished to purchase it, (she then being married to Langdon), and desired to know when it would take place. He informed her that he would go then and advertise it. She also swears that she never heard of the time and place of the sale; that the weekly Enquirer, owing to the daily being chiefly read, had but few readers in the county, and that she did not see the paper. And other evidence abundantly shows that no one upon the premises or in the vicinity knew of the sale, and it is certain that no one but Parker, whom Riddle took out with him, and Riddle himself were there. Both Mr. and Mrs. Langdon swear that they told him that they wished to buy the property. Mrs. Langdon says that she called upon her brother again and learned from him that he had sold the property to Mr. Parker. She complained because he had not advised her of the sale, and he said she ought to have read the papers. Mr. and Mrs. Langdon state that they supposed the purchaser was a Mr. Parker, who resided in Cumminsville, near the property. Learning from him that he was not, Mr. Langdon testifies that he called upon Mr. Riddle and asked him where Parker, the purchaser lived, that he wished to see him to get the property; and that Mr. Riddle told him he did not know the man; when a lady in Riddle's office said that if the man he wished to see was Mr. Alvah Parker, he lived on West Seventh street, and Mr. Riddle then remarked that he need not go there as Parker had an office on Third street. Langdon states that he went there and saw Parker, who informed him that he had called too late, as he had parted with the property. The land has since that time greatly increased in value.

The plaintiffs, in their petition, charge that the entire transactions between Riddle and Parker, and Mrs. Riddle were fraudulent as against them. They offer to pay Mrs. Riddle the amount of money she paid to her husband with interest, and ask that the deeds to Parker and to Reeves be declared fraudulent and void, and set aside by this court, and for other proper relief.

The answers of Parker and Mrs. Riddle deny all fraud, and claim that the sales and deeds from Riddle to Parker, and from Parker to Reeves, as trustee, were in good faith, for full value, lawful and valid. They also aver staleness of the plaintiff's claim, and plead the statute of limitations.

653 *Upon this state of facts, and all the evidence in the case, considering the relations of the parties and their circumstances, we have no difficulty whatever, in coming to the conclusion that Alvah Parker, in this transaction, was but a mere "man of straw," employed as an instrument by Riddle to procure this real estate for his wife. It is obvious to us that Parker would never have made this purchase of a stranger, dealing with him at "arm's length," but that he simply meant to oblige Riddle, to whom he looked to protect him against liability. He would hardly, with his means, have sought an investment of that amount of money in a lot of land encumbered with the possessory life estate of a lady not over forty years of age. Such property would have been comparatively unsalable, not such as a buyer and seller of real estate would be likely to buy. All the facts and circumstances show that the transaction with Parker was for some purpose, understood or expressed, of Riddle's; and the subsequent occurrences indicate very plainly what that purpose was.

It may be, and remembering the high character and standing of Mr. Riddle as a man, and as a member of this bar, we are inclined so to believe, that he thought that these plaintiffs would not be able to purchase this estate, that it would be lost to them in any event, and that, the creditors of the estate getting its then worth, he would secure its retention in the family. But this, as we shall

presently see, could not be done by him, he being the administrator of the deceased and charged with the duty of protecting the rights of these plaintiffs as well as creditors, which relation forbid him from deriving directly or indirectly, any individual benefit from the sale of the property. And his wife, Mrs. Riddle, the defendant, knew his relations to the land and to the parties interested. Her acts show that she was fully advised in the premises. The sale and conveyance to Parker were mere forms. She assumed and paid the whole purchase money, becoming, really, the purchaser from the administrator, her husband, and taking a deed to her trustee, Reeves, from Parker, instead of the administrator for whom Parker really held the title in trust. In fact, it is very questionable if Parker ever received his deed until he had deeded the property to such trustee. He deeded it September 24. His own deed he left for record September 25, and he swears he did this at once upon receiving it.

Mrs. Riddle was doubtless actuated by the same motives as her husband, to-wit, to keep the property in the family, and not designedly to wrong the plaintiffs.

Mrs. Riddle testifies that she did not know, at the time, that the deed from Parker to Reeves was one in trust for her life only, the remainder, if she failed to dispose of it during her life, to * such of her heirs at law as were the children of Adam N. Riddle; and that she was surprised when she learned such were its terms. 654

Had it been as she thought, her husband would have had a contingent right to a life estate as tenant by the courtesy, which would have been clearly fatal to the wife's purchase. This is an important circumstance to show that Adam N. Riddle, himself, moulded and controlled the transaction. But, as the deed was made, it secured a contingent provision for his children, always an important consideration with a parent, and admitted of the possibility of his wife giving it to him, or its proceeds, in case she should sell it.

It is too well settled now to admit of any question, that the administrator had no right to so dispose of this property, or his wife to so purchase it from him. To allow them to do so would be a fraud in law, however honest their intentions might have been.

Davoue v. Fanning, 2 Johns. Chy. R,. 252. Glass v. Greathouse, 20 O. R., 503. Barrington v. Alexander, 6 O. S., 190. Dundas Appeals, 64 Pa. St., 325. Kurze v. Steffens, 47 Ill., 112. Miles v. Wheeler, 43 Ills., 123. Litch v. Wells, 48 Barb., 637. Bunnel v. Stoddard, 2 Amer. Law Rec. 145 and 202, in U. S, circuit court opinion by Justice Swayne. Oberlin Col. v. Fowler, 10 Allen, 545.

An administrator's duties toward and relations to his own wife will prevent him from selling his *cestui qui trust's* estate to her as fully as to himself. It is the same in principle as being judge and party. He cannot be a judge between his wife and another any more than between another and himself.

The principle of public policy governing such cases is essential to the very existence of society, and to business and property rights both private and public. At a very early period in the history of the Roman people, patrons having charge of the interests of their clients, were punishable with death for betraying or sacrificing them; See Ortolan's Hist. Roman Law, p. 22. This principle, with modified penalties for its violation, incorporated itself with the administration of public affairs, no one being allowed to employ his trust for private gain. When this came to be disregarded on account of rulers becoming too powerful to admit of its enforcement, the empire began to decline and then fell. The rule as to the sacredness of trusts was, however, enforced in the affairs of private life; and our system of equity has taken it and adopted it from that source the sanction of the law being the inability of the trustee to make *for himself, gainout of his trust, is the very christianity of the law. 655

In their argument in the York Buildings Company v. Mackenzie, 8 Tomlins Brown, 42, Messrs. Dundas, Mansfield and Mackintosh explained the reasons and operations of this principle in language, which it has been well said, successive judges have only been able to vary and impair. They say: "The ground on which the disability or disqualification rests is no other than that principle which dictates that a person can not be both judge and party. No man can serve two masters. He that is entrusted with the interests of others can not be allowed to make the business an object of interest to himself; because from the frailty of nature, one who has the power, will be too readily seized with the inclination to use the opportunity for serving his own interest at the expense of those for whom he is entrusted. The danger of temptation, from the facility and advantages for doing wrong, which a particular situation affords, does, out of the

mere necessity of the case, work a disqualification; nothing less than incapacity being able to shut the door against temptation where the *danger is imminent*, and the *security* against discovery *great*, as it must be where the difficulty of prevention or remedy is inherent to the very situation which creates the danger. The wise policy of the law has therefore put the sting of a disability into the temptation, as a defensive weapon against the strength of the danger which lies in the situation."

Nor, do we think this claim is stale or the action barred by any statute of limitations. One of the plaintiffs is yet a minor. The estate is one not in possession. It can not become such until the death of the widow of Roll, Mrs. Langdon, to whom it has been assigned for her dower, and also is in possession for life. By section 36 of the code all these plaintiffs are required to join in the action, because they are "united in interest." Their interest in the title is joint, and while a right of action is saved to one, it is saved to all.

Ang. on Lims., sec. 434; Sturges v. Longworth, 1 O. S., 544; Massie's Heirs v Matthews, 12 O. R, 351; Meese v. Keefe, 10 O. R., 364; Wilkins v. Phillips, 3 O. R. 50

And for myself, though my brethren may not concur with me, or may reserve the formation of an opinion thereon, I should hold that this is an action "for the recovery of the *title*" of lands, which as well as an action for the recovery of the possession thereof, may be brought within twenty-one years after the right to bring the same shall have accrued; Code, sec. 9. It is not an action to destroy title, as an action by creditors to set aside a fraudulent conveyance is. Combs v. Watson, 2 Supr. Rep., 523.

656 *The deeds to Parker and to Reeves, deceased, in trust for Mrs. Riddle, need not be set aside, the petition praying for other proper relief. "It has been held in a great number of instances, that whenever the legal title to an estate is procured through the means of an actual or constructive fraud, equity will give relief to the party defrauded, not only *negatively*, by setting aside the devise or conveyance, but *affirmatively*, by giving the estate the direction which it would have taken, had the fraud not been committed." 2 Ld., Cas. Eq. 715, note to Woollam v. Heam, and cases there cited. "The better opinion would seem to be, that, when a benefit intended for one man is wrongfully intercepted by another, the remedy should not stop short of full compensation to the injured party, which can only be afforded by giving the transaction the effect it was originally meant to have, and *decreeing a trust in his favor*. In other words, the intervention of fraud is a reason not for the cancellation of all that has been done, but of so much only as the fraud has vitiated, and for putting the residue in the shape it would have assumed, had no fraud been committed." (*ib, id.*) Now, suppose the deed to Parker had been one in trust for these plaintiffs, subject to Parker's right to reimbursement, principal and interest, for such moneys as he might advance to pay the debts which were a lien upon the land, and that he not being able to pay off any such liens, had conveyed to Mrs. Riddle, upon the same trust conditions, and that she had paid $3,333.34 of such debts, it is clear that on payment to her by the plaintiffs of that sum, with interest, she never being in possession, and, therefore entitled to interest, they would have been entitled to a conveyance from her. This, we think, is the proper relief. The amount paid to Parker, $100, for his services in the business, not having gone to discharge the lien of debts upon the land, can not be allowed against the plaintiffs. They may take a judgment, with costs, against the defendant, Elizabeth C. Riddle, in accordance with the principles above indicated. And if, after a short day to be fixed in the judgment from the payment or tender to her of the above sum of $3,333.34 with interest from the time she advanced it for the benefit of the plaintiffs, she fail to convey the same to them by deed, the judgment shall stand and operate as such conveyance, she still being entitled to the money from them if tendered to her and not accepted.

Findings and a final judgment and decree may be entered for the plaintiffs accordingly.

NOTE.—The supreme court refused leave to file a petition in error in this case. See Riddle v. Roll, 24 O. S. Rep., 572.

Cox & Follett and *Cochran*, and *A. W. Watters*, Attorneys for Plaintiffs.

Mallon & Coffey, Attorneys for Defendants.

*PLEADING—DEFAULT. 657

[Superior Court of Cincinnati, General Term, June, 1874.]

† THE PEOPLE'S INSURANCE COMPANY V. GEORGE HART.

O'Connor, Tilden and Yaple, JJ.

The common law rule that a pleading is to be construed most strictly against the pleader has no application to code pleadings. They are to be construed most favorably in behalf of the parties pleading; and though the failure to aver in a petition a fact essential to constitute a cause of action, will not authorize a judgment in favor of the plaintiff by default, yet, if by a fair and liberal construction such petition can be held to import such averment, such judgment by default will not be reversed on petition in error.

The defendant in error, George Hart, brought his action against the plaintiff in error, the People's Insurance Company, to recover the sum of $2,000 and interest, upon a policy of insurance dated June 15, 1871, insuring against loss or damage by fire the Ensign Handle Company, for one year, as follows: "$667 on the two-story frame building occupied by assured as a plow handle factory, situate on the corner of Broadway and Bourbon streets, Blanchester, Clintonlcounty, Ohio, and $1,333 on machinery, tools and fixtures contained therein,loss, if any, payable to George Hart. Privilege of $4,000 additional insurance, 3½ per cent., $65."

The property insured was totally destroyed by fire on April 20, 1872, after which the insured, the Ensign Handle Company, duly assigned the policy to Hart. The petition avers that all the conditions precedent to entitle the plaintiff to such insurance money were duly complied with and performed, and that by reason of the premises the defendant was justly indebted to him in the before mentioned sum of money; and it is clear that the policy purported that the insured was in possession of the premises and property, and had therefore a possessory interest. One condition of the policy was, that, in case of loss by fire, the insured should give immediate notice thereof and furnish the insurer with proof of loss within a reasonable time thereafter.

The insurance company demurred to the petition, the ground *of demurrer 658
assigned being that it did not state facts sufficient to constitute a cause of action, in this, that it did not show that the insured had an insurable interest in the property. This demurrer was overruled; and thereupon the insurance company filed its answer, setting up the following defenses: First, that the Ensign Handle Company had no insurable interest in the premises and property insured; that the premises were used as a saw mill and turning shop, in violation of the terms of the policy; and denied all other allegations of the petition, except the payment to it of the premium, the issuing of the policy, and the destruction of the property and premises by fire.

The case went to trial at special term upon these issues, whereupon the defendant asked leave to withdraw its answer, and to permit the case to stand as in default, which leave was granted and the answer withdrawn. Thereupon the court heard the case upon the evidence, and rendered judgment for the plaintiff for the sum of $2,196.66 and costs.

This petition in error was filed here to reverse such judgment, the error assigned being that the petition stated no cause of action, it not averring that the insured had an insurable interest in the property.

Were this action governed by the common law system of pleading, which required every averment to be taken most strongly against the pleader, the question might admit of much doubt and difficulty; but, under the code, every pleading is to be construed most favorably to the pleader, and, therefore, the petition is to receive a liberal construction.

"Section 2. The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. Its provisions and all proceedings under it, shall be liberally construed, with a view to promote its object and assist the parties in obtaining justice.

†The judgment in this case was affirmed by the supreme court. See opinion, 24 O. S., 331.

"Section 138. The court, in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

Proper and sufficient proof of loss is averred in the petition to have been made by the insured, and furnished the insurer. This ought to have shown, and presumably did show, what property belonging to the insured was destroyed. If the petition is objectionable, it is simply because of a want of definiteness and certainty, which defect could only be reached by motion and not by demurrer, the demurrer having, as we think, been properly overruled.

The petition in this case is copied from the form given by Swan in his Code Pl. and Prec., pp. 387, 388, which contains no special allegation of an insurable interest in the insured.

659 *The judgment will be affirmed without penalty.

Penalty remitted. Judgment affirmed.

Matthews, Ramsey & Matthews, for Plaintiff in Error.

Teeter & Cole, for Defendant in Error.

745*AUTHORITY OF COUNTY COMMISSIONERS TO SUE.

[Superior Court of Cincinnati, Special Term, March, 1874.]

† Com'rs of Hamilton County v. Edward F. Noyes.

Demurrer to Reply.

1. In this state there are but two classes of political corporations, one of which is the state of Ohio, and the other municipal corporations, counties, townships, road and school districts, and their officers are but ageucies and agents of the state to enable it, as a corporation, the better to discharge its duties and perform its functions.
2. In the absence of express enabling statutes, or necessary or fair implication from statutes, neither the state nor any of its agencies, or agents acting within the scope of their powers, can be sued by any person; nor can such agencies or agents sue any one, as plaintiffs, concerning any matter falling within the limits of their delegated duties, for they are not principals. All such actions must be brought by and in the name of the state, the principal. But the state, acting by and through its legislature, may, by statute, prescribe for what, and in what classes of cases, it or they, may be sued, or in which they may sue in their own names or by their proper designations. And, in the same manner, the state may prescribe who may be authorized to represent it by using its name and bringing and carrying on suits for it in courts of justice, for the use of whom it may concern.
3. There is no statute, expressly or by necessary or fair implication, authorizing the board of commissioners of a county to sue and recover against, in their own designated name, any person who may have wrongfully or fraudulently, *without contract*, obtained moneys from the county treasury applicable solely to county purposes, and converted the same to his own use. Such action can only be brought and maintained by and in the name of the state of Ohio, in which action it may be stated that such action is "for the use" etc.
4. Upon the principle of law settled by the supreme court, in the case of the State of Ohio, for the use, etc. v. Piatt, et al., 15 O. R., 515, the board of commissioners of the county have authority from the state, to institute and carry on, *in its name*, an action against any such person for such cause of action, as is last above stated, there being involved, strictly speaking, no state funds, such as for schools, raised by state levy, etc.

† The judgment in this case was affirmed by the judges of the superior court at general term See opinion, 4 Rec., 216. The latter judgment was affirmed by the supreme court. See opinion 35 O. S., 201.

*5. Where a petition in the name of the board of commissioners as plaintiffs in the case, states a case of *trover*, purely, of such county funds belonging in the county treasury, and the defendant answers, setting up the lawful reception of such moneys by him for the performance of work for the county under a lawful and valid contract made between himself and the commissioners; and the board by reply, deny the existence of any such contract or the right to such funds under it, claiming the pretended contract to be null and void, and insist that the facts are as stated in the petition. On demurrer to such reply, *Held*, that the demurrer should be sustained, as the petition and reply taken together constitute no cause of action in favor of the plaintiff, but show the right of action to be in the state. 746

6. Such demurrer is not a mere objection to the legal capacity of the plaintiff to sue the ground of which was waived by answer, but it is an objection to the merits of the plaintiff's case, on the ground that such plaintiff shows that it is not entitled, and has no right to recover against the defendant, but that another plaintiff has, if any one be so entitled.

YAPLE, J.

The petition in this case is filed by the plaintiff, the board of commissioners of Hamilton county, to recover of the defendant, Edward F. Noyes, four several sums of money, with interest, amounting in the aggregate, exclusive of interest, to the sum of $13,526.55.

The averments in each of the four counts of the petition, excepting dates and amounts, are the same. The substance of each count is that the defendant, while holding the office of probate judge of Hamilton county, Ohio, and under color of his said office, with intent to deceive the auditor of said county and defraud it, falsely and fraudulently represented to the auditor that he, the defendant, was entitled to a warrant upon the treasurer of said county for the sum of $; (the amount of each sum drawn) that by reason of said false and fraudulent representations of the defendant, the auditor was induced to and did illegally draw and deliver to the defendant the said warrant or order, and on the same day, the defendant wrongfully, illegally, and fraudulently drew from the treasury of said county said sum of money, no part of which sum was then or has since become due or owing to him from said county on the warrant so illegally issued and drawn as aforesaid, and that the defendant received and wrongfully, unlawfully, and fraudulently converted to his own use, such money, and has neglected and refused to refund the same or any part thereof to the plaintiff or to the treasurer of said county, whereby the defendant became and still is indebted to said county in said sum, with interest, etc., for which judgment against him is prayed by the plaintiff.

*To the action founded upon such petition which was filed on October 1st, 1873, the defendant, on the 8th day of October, 1873, waived the issuing and service of process against him, entered his appearance to the action and filed his answer. 747

The answer expressly admits that the defendant was such probate judge at the several dates mentioned in the petition, but denies each and every allegation of fraud and misrepresentation contained in the petition, or in any paragraph thereof, and every other allegation except as thereinafter expressly admitted. It is averred that the defendant received from the auditor of Hamilton county, as he was lawfully entitled to do, upon the orders of the board of commissioners of the county, lawfully issued to him, warrants upon the treasurer of said county for sums of money corresponding in dates and amounts with the warrants mentioned in the petition, in payment to him for work done by him on account of said county in pursuance of contract lawfully entered into by the said board of commissioners with him; and prays to be dismissed with his costs.

The reply denies that the defendant was lawfully entitled to the warrants on the treasurer of said county, which he admits having received from the auditor' or that the auditor *lawfully* issued said warrants upon orders of the board of commissioners of said county. It also denies that the defendant received said warrants for work done on account of said county, in pursuance of a contract *lawfully entered into* by the said board of commissioners with the defendant.

It is then averred that such pretended contract was illegally entered into; that the Board of Commissioners were not authorized by any law to contract for the said services, that the work was unnecessary and uncalled for and of no value to the county after its completion; that the rate paid for the work done was outrageous and unconscionable, and contrary to public policy, being seventy-five times what said work would have been worth *if legally entered upon*; that the said contract was

let without competition, no advertisement for proposals to do the work having been made; the pretended contract, therefore, being by law null and void, the defendant taking no rights whatever thereunder, and that the sums of money so drawn by the defendant, *as alleged in the petition*, were illegally and fraudulently drawn from the treasury, the statements of the petition being true, and the plaintiff entitled to judgment as therein prayed for.

To this reply, the defendant demurs upon the ground, that, if it and the petition were true, the board of commissioners of Hamilton county are not entitled to recover any judgment against him, but that he would be liable only to the state of
748 *Ohio in which a right of action is alone vested in such a case. (See syllabus for points decided in brief.)

It will be at once obvious to the legal mind that the single question presented by these pleadings is, by whom must, or may, *an action of tort* be brought against any one who is alleged to have wrongfully converted to his own use, moneys of a county, belonging in a county treasury, and illegally drawn by such person therefrom and by him retained.

These pleadings, in no way, advise or inform the court of the nature or subject matter of the contract spoken of in the answer and reply; or of its terms, or under what, if any statute at all, it was entered into and executed, so that statute, if any such there was, the court cannot, upon this demurrer, construe or even notice, but must confine itself to the record, by which the plaintiff insists that the defendant is liable to it in what, under the common law system, would have been an action of *trover* for wrongfully converting to his own use moneys in, and belonging to, the county treasury for county purposes. Have the commissioners the legal authority, power, and right to recover such moneys in such a case, or is the state the party that must sue for and recover them for the use of the county?

In this state, we have but two classes of political corporations, the state of Ohio constituting the one and municipal corporations the other. The subdivisions of the territory of the state into counties and townships, and into road and school districts are for the mere convenience of the state in order that it may the more practically, efficiently, and usefully carry out and discharge its corporate duties and functions. It alone, among them all is a *legal person or entirety;* they are not legal persons but mere state agencies, having in and of themselves no legal rights, duties or obligations.

Boards of county commissioners, county auditors and treasurers, township trustees, clerks, supervisors and boards of education, are also but mere state agencies, not legal or corporate personages, and they can have no inherent property rights, or pecuniary liabilities. By the common law, the state cannot be sued, being presumed incapable of doing wrong, and always ready and willing to do right; and no mere agent for it can sue in its own name for matters within the scope of the agency, as the principal and not the agent must always sue; for the legal right is vested in the former and not in the latter.

All taxes that are levied, and all taxes collected, are levied, collected, and kept in the treasury only by the direct and specific authority of the state. Municipal corporations being made persons by law, have property rights, duties, and liabilities
749 concerning which they may sue and be sued upon any *state of facts that would autzhorie a natural person to sue or be sued.

While, by the common law, the state cannot be sued, it may, by statute, give persons the right to sue it; and in the same manner, it may authorize any of its agents to sue in their own names, or by their proper designation, for that which it would otherwise be the only party capable of sueing. And where it reserves to itself the right to sue, that is, has not delegated such right to any agency, it may, by legislation, expressly, or by necessary or fair implication, authorize or designate any of its agents to institute and carry on suits in its name, and by and through them it will be held as acting in every such litigation.

Then, assuming the moneys in question in this case to have been moneys raised by taxation for county purposes, and to belong alone to the general county fund proper, is the board of county commissioners expressly, or by necessary or fair implication, authorized by any statute to sue for and recover this money?

There are statutes prescribing how and by whom suits shall be instituted for and in the name of the state upon county and township treasurers' bonds; and in behalf of the state where it is directly and beneficially interested; how and for what boards of education may sue and be sued by name; and how and for what boards of county commissioners may sue and be sued as such. Because of such conferred statutory rights and liabilities, and suits involving them, which began early in the history of the state, (See 3 Chase Stats., 1799) and the direct management and con-

trol of county affairs by boards of commissioners, men—even lawyers—often very naturally fall into mistakes, and assumed them to be *legal persons* having legal rights and liabilities as broad and extensive as the scope of their legal duties. This mistake it seems, repeated decisions by the supreme court, have been unavailing to correct. The leading statutory provision on this subject is the seventh section of the act establishing boards of county commissioners, 3 Chase Stat. p. 1799, sec. 7; 1 S. & C., 244, Sec. 7; and S. & S., 89. The last of these statutes was in force at the time the transactions now in question occurred. It is as follows:

"That the board of commissioners in the several counties in this state shall be capable of sueing and being sued, pleading and being impleaded, in any court of judicature within this state; and they are hereby authorized and required to ask, demand, and recover, by suit or otherwise, any real estate or any interest therein, whether the same be legal or equitable, belonging to their respective counties, or any sum or sums of money, or other property due to such coun y, on account of advances made by them on *any contract* with any person or *persons for the erection or repair of any public building or bridge or other work, *i. e.* public work, or any other *contract* or obligation which, by the provisions of *any law* of this state, they are *authorized to enter into;* and in like manner to sue for and recover in money for any damage that may be done to the property of the county; or the value or amount of any labor or article of value subscribed instead of money to aid in erecting or repairing public buildings or bridges, where such labor or articles of value, upon their requisition, shall not have been performed, delivered or paid in a reasonable time, and the money so recovered in any case shall be by them paid into the treasury of the county, and they shall take the treasurer's receipt therefor, and file the same with the auditor of the county." Prior to the act of March 30, 1868, no express statutory power was given commissioners to sue for and recover damages for injuries done to the property of the county; and it was held in the case of the Commissioners of Gallia County v. Holcomb, 7 O. R. pt. 1, p. 232, that "the commissioners of the county can not maintain an action in their capacity as commissioners against individuals who may carelessly or willfully destroy roads or bridges," the bridge in that case being a county bridge. And until the passage of the last mentioned act, commissioners had no authority to sue for or recover lands belonging to their county. In the case of the Commissioners of Hamilton County v. Mighels, 7 O. S. a. p. 115, the supreme court say of the above quoted section: "but it clothes the board with one corporate capacity—that of sueing and being sued; and this is followed immediately by a specification of the matters in reference to which the board may sue. * * * * And it is worthy of notice that this statutory enumeration of the matters in respect to which the board of commissioners may sue, is confined to matters of *contract*." This case expressly overrules commissioners of Brown County v. Butt, 2 O. R. 348, where it was held that the commissioners were liable for the escape of an imprisoned debtor by reason of the insufficiency of the county jail. The law as announced in the Mighels case has again been affirmed in Grimwood v. The Commissioners of Summit County, 23 O. S. 600, a case arising under the present statute.

750

Spanklin v. The Board of Commissioners of Madison County, 21, O. S. p. 575, is relied on as sustaining the right of the commissioners to sue in this case. There the treasurer had misused the funds of the county, by having deposited them in bank. The commissioners settled with him as such treasurer, taking for the deficit the banker's certificate of deposit, giving him for such embezzled money. The court says: "By law they constituted the auditing board to which the treasurer was bound *semi-annually to render his account. It was their province to ascertain, pass upon and *settle* his liability." In a word, the court held that the commissioners were expressly authorized by statute to make such contract of settlement and take the certificate of deposit in satisfaction of the treasurer's liability. Then their right to sue upon the certificate was expressly given by the very words of the act above quoted; "or any other *contract* which, by the provisions of any law of this state, they are authorized to enter into." Here also, the Code of Civil Procedure came to their aid, sec. 27, * * "a person with whom or in whose name, a *contract* is made for the benefit of another or a person *expressly authorized by statute*, may bring an action without joining with him the person for whose benefit it is prosecuted." Again it is claimed that the case of the State of Ohio, for the use of the Commissioners of Hamilton County v. Piatt, et al., 15 O. R, 15, will support the right of the commissioners to sustain this action. That was an action by and in the name of the State of Ohio against Piatt and his sureties, on his official bond as clerk of the court, to recover moneys collected for fines, belonging to the county. It was in no legal sense an action by the commissioners, but was an action by the state. The

751

terms "for the use of," etc., were a mere designation of how the money was to be paid. The case decides this: That where county funds, in which the state at large has no direct interest, have to be sued for, the commissioners have the authority from the state to use the state and its name, to bring suit to recover such funds. That was the case and the court could decide nothing more. And if this case had been brought by the state of Ohio, at the instance and upon the sole authority of the board of commissioners, for the use of such board or the county, I should hold that the state had properly authorized the bringing of the suit in its name. I should not require the authority or appearance of the attorney general, as provided in section 4, 1 S. &. C. p. 88.

I have sought in vain for any statute or decided case authorizing a board of county commissioners to sue an individual in their own name, for wrongfully converting the county funds in the county treasury to his own use, on the contrary every authority and the nature and reason of the subject point to a contrary conclusion. The researches of the learned county solicitor among statutes and cases, which he has taken great pains to search out and present to the court, do not, in my judgment, furnish a decision or an act of the legislature, which even tend to support such a right of action.

The argument as to the right to recover as for money had and received, cannot, as I think, aid the plaintiff. First, that action is always one of *contract*, express or implied. The petition * and reply in this case, ignore any contract, at all, but insist that the money was acquired by the defendant by his *tort*. Second that action lies, broadly, where one has money of another, which, in equity and good conscience, he ought not to retain but to pay to the *plaintiff*. But here the *plaintiff* has no legal right to recover the money; that right is in the state of Ohio. If A. sues B. for money had and received, he cannot recover it if it be payable to C.

752

This is not a case of mere want of legal capacity to sue on the part of the plaintiff, which is waived if not taken advantage of by the demurrer to the petition, code, section 88, 89. It is a case of want of any legal right or title to the thing sued for, which right and title are in another. Mount v. Lakemon, 21 O. S., 643.

Assuming then that the allegations of the petition and reply are true and those of the answer untrue, as claimed by the plaintiff, the court both upon principle and authority is constrained to hold, that the board of commissioners have no right to maintain this action against the defendant; that the state of Ohio alone can sue upon such a state of facts, the commissioners having authority to make use of the name of the state in such action.

The demurrer to the reply will be sustained, and this will reach back to the petition, which states no cause of action against the defendant, in favor of the plaintiff, none which the defendant need to have answered, and one which his answer, as we sometimes find to occur, does not aid.

Counsel can prepare the entry sustaining the defendant's demurrer.

L. W. Goss, County Solicitor, for Plaintiff.

A. Taft and Sons, for Defendant.

---

1 *LIFE INSURANCE—EVIDENCE—CHARGE TO JURY.

[Superior Court of Cincinnati, General Term, June, 1875.]

New York Life Insurance Co. v. La Boiteaux.

Tilden, Yaple and O'Connor, JJ.

1. Where a policy of life insurance contains a warranty clause, that if the death of the insured shall be caused by the use of intoxicating drinks, or opium, the policy shall be null and void, such clause only covers the voluntary use by the assured of such drinks, or opium, or both, to a degree that shall cause his death; and does not apply to a case, in which alcoholic liquors, or opium, or both are administered by a physician to the insured, in treating him in sickness, and they or either cause death, though such sickness may have been occasioned by their excessive voluntary use by the assured.
2. If the assured, by a policy containing such clause, voluntarily used intoxicating drinks to such excess that *delirium tremens* is produced, and medical aid

and nursing become necessary, and he dies, from the sickness in consequence of neglect, or not being properly attended to, or from acts, or conduct of his own while sick and crazed, or in consequence of not being skillfully treated by his physician, his death will be caused by the use of intoxicating drinks, within the meaning of such clause in the policy, and no recovery can be had against the insurer.

*3. But if, in such case, the sickness resulting from such intoxication, be not fatal, and the assured is able to recover from it, and the physician or others, in endeavoring to effect a cure, administer opium or other drugs, from the immediate effects of which, and not of such sickness, he dies, such death is not covered by such clause in the policy and a recovery can be had against the insurer. The *intention* with which the agency immediately and proximately causing death, is employed, is immaterial. It is the fact only that controls. 2

4. What an attending physician in such a case told others were the medicines he had been prescribing and causing to be administered to the insured, is hearsay, and not admissible in evidence to prove that such medicines were prescribed or administered. Nor can such statement be introduced in evidence to impeach the testimony of the attending physician, if he has not been properly interrogated concerning them. But, where he called in a consulting physician, during the sickness of the patient, and the testimony of the latter is taken to prove the cause of death—the symptoms and condition of the patient, what in his opinion, caused them, what course of treatment he recommended, to-wit, the same as the attending physician had theretofore pursued, it is competent, to prove by him, on cross-examination, what the attending physician told him the medicines theretofore administered, were. This is proper in order to test the grounds and value of the witness' opinions as an expert, and his knowledge and skill in the treatment of cases of the kind.

5. When the law casts the burden of proof, in the trial of an issue, upon one of the parties, such burden does not shift or change from one party to another during the progress of the trial, or as the might of evidence alternates. In making such proof, there may be matters of fact upon which the party need offer no evidence, as the law will presume them, which gives the weight of evidence to such party as to such matters, and the other party will be bound to overcome such presumptions by evidence, or they will be held established by his adversary. But this pertains to the weighing of the evidence, and not to ascertaining upon whom the burden of proof rests.

YAPLE, J.

This is a proceeding in error prosecuted here to reverse the judgment of this court rendered in special term in favor of Harriet La Boiteaux, the defendant in error and plaintiff below, against the plaintiff in error and defendant below, for the sum of $22,711.35, and costs, upon three policies of life insurance issued by the New York Life Insurance Company upon the life of Lafayette La Boiteaux deceased, the husband of the said Harriet La Boiteaux, the insurance having been made payable to her.

The first policy is for $700, and was issued on January 5, 1871, in consideration, among other things, of the surrender by Lafayette La Boiteaux of a policy issued by the company to him for $10,000 about September 9th, 1865.

The second is a twenty-year policy for $5,000, issued on June 5th, 1871.

And the third is a policy insuring the life of Mr. La Boiteaux, for one year, from October 4th, 1871, at noon, in the sum of $15,000.

*La Boiteaux resided in the city of Cincinnati, but he died in the city of New Orleans, where he had gone upon business, on the evening of the 17th day of October, 1871. 3

All the policies contain this clause: "If his death shall be caused by the use of *intoxicating drinks* or *opium*, then this policy shall be null and void," etc.

The only defense relied on at the trial was that the death of the assured was caused by his use of intoxicating drinks, or by that and the use of opium.

There is no question but that at the time of his death La Boiteaux was under the care and treatment of physicians for sickness produced by the excessive voluntary use of intoxicating drinks, which excess had produced in him *delirium tremens* or a condition bordering thereon, as the result of a hard "spree" indulged in by him after he reached New Orleans, which was about October 5th, 1871.

The law cast upon the defendant the burden of proof, requiring it to establish its defense, *prima facie*, and to convince the jury by the fair preponderance of evidence, after that adduced by both parties should be fairly weighed and considered of its truth, and, while we think the jury, upon the evidence, would have been justified in rendering a verdict for the defendant, we are not able to say that they were not warranted by the evidence in finding that the defendant had failed to prove *prima facie*, and by the preponderance of the testimony, that the assured died from the use of intoxicating drinks, or opium, voluntarily taken by himself, or taken by himself while out of his senses from their voluntary use.

If, then, there was no error committed by the court in the admission of improper evidence, or in its charges to or refusals to charge the jury, we would not be justified in reversing this judgment, setting aside the verdict, and in granting a new trial, the testimony being so evenly balanced as it was in this case.

La Boiteaux's attending physician, during his sickness, was a Dr. Scott; and he called in a consulting physician—a Dr. Bruns—on the day La Boiteaux died, Bruns seeing him with Scott during the afternoon, and the death taking place during the early hours of the night.

Scott and Bruns were examined as witnesses by the defendant, the insurance company.

Scott testified to the symptoms and treatment of the patient, what medicines he prescribed and the cause of his death. Bruns testified to the symptoms and condition of the patient when he saw him, what course of treatment he recommended Scott to pursue, to wit: *the same course he had been pursuing*, and his professional opinion of the cause of death. Both he and Scott *attributed it to opium poisoning occurring while laboring under severe and dangerous sickness from alcoholism. On cross-examination, in answer to a question put by plaintiff's counsel Bruns desposed as follows:

Question: "When you first visited Mr. La Boiteaux at about half-past two o'clock, what did Mr. Scott, in stating the condition of the patient to you, say was the medicine he had already administered to him?"

Answer: "As far as I recollect, Dr. Scott informed me that he once or oftener, during the same day, prescribed opium for him. I think in the form of liquor, *Battly's Sedative* opium of liquor."

Battly's Sedative, we may here say, was proven to be two or three times stronger than laudanum.

To this evidence the defendant excepted, upon the grounds that it was hearsay merely, and not competent to impeach the testimony of Dr.

Scott, who swore that he did not prescribe any opium, but that the patient told him, during his delirium, that he had taken Battly's Sedative, because Dr. Scott was not asked about such conversation with Dr. Bruns. The court overruled the objection and permitted the evidence to be read to the jury, to which the defendant excepted.

A Mr. Sausser, who accompanied La Boiteaux from Cincinnati to New Orleans, was his friend and nursed him most of the time during his sickness, was also a witness. He was asked on cross-examination by the plaintiff's counsel, his deposition having been taken by the defendant:

"What did he (Dr. Scott) on the occasion of his first visit, say to you regarding La Boiteaux's condition, and what were his instructions as to his treatment? Please state as fully as possible."

Answer: "Well, Dr. Scott stated to me that he found him in a very critical condition, a very self-willed and uncontrollable man, but he thought that with care and proper medical treatment he could bring him out all right; but, at different times during his visiting, he expressed fears as to the result. At his first visit, the doctor said he had been drinking excessively and that the liquor had got control of his system and he would have to carry out his instructions to the letter to relieve him. Those instructions to me were to see that he took his medicines at the right time. He said it was necessary to let him drink a little occasionally, it would not do to stop off suddenly. He did not tell me how often to let him drink nor how much; he said, give him a little when he is determined to have it and you can't control him, but manage him as well as you can.

"What the other medicines were, he did not tell me, I think *they were powders, and my recollection is that I would put them in water and give them to him, but I can't now remember how often. 5

"*He evidently gave him something to make him sleep, for he slept more than before, after the Dr. came.* The Dr.'s instructions were given more particularly to the man that he brought there as a nurse for him."

This evidence was objected to for the same reasons as the portion of Dr. Brun's testimony above stated; the objection was overruled, the evidence read to the jury, and the defendant excepted.

The defendant then asked the court to charge the jury.

1. "You can not presume that opium was administered by the physicians, or either of them. That fact must be established by the testimony to your satisfaction before you find that is a fact."

This charge the court gave as asked.

2. "You can not consider the testimony of Dr. Bruns, in his deposition or the testimony of N. W. Sausser in his deposition as to statements made by Dr. Scott to him, to the effect that he had prescribed opium to La Boiteaux, the assured, as evidence either to impeach Dr. Scott's testimony, or as tending to prove that he, Dr. Scott had prescribed opium. This testimony of Dr. Bruns or Sausser cannot be used to impeach Dr. Scott's testimony, because, Dr. Scott was not asked whether he made any such statement, and it cannot be used to prove the fact, because, for that purpose, it is only hearsay and amounts to nothing as proof of the fact."

This charge, as asked, the court refused to give but said:

"The statements given to Dr. Bruns by the attending physician Dr. Scott, at the time Dr. Bruns was called by Dr. Scott to examine the patient as to the course of treatment and the medicines administered, are competent evidence to go to the jury, in connection with Dr. Bruns' testimony

explanatory of his statements as to the condition and symptoms of the patient. Of themselves, such statements of Scott would not be evidence that such medicines had been administered, but Bruns' testimony as to the condition and symptoms of the patient is to be considered as to whether or not medicines of the kind stated by Dr. Scott had been administered or not."

This refusal and charge were both excepted to.

Nothing stated by Scott to Sausser about the condition of the patient, or about medicines, was material to the case, and could not prejudice the defendant. In fact, they make for, rather than against the defense. The instructions by Dr. Scott to Sausser and the nurse as to what they should
6 do, while attending *the patient, is part of the very fact of the actual treatment of the case—part of the *res gestæ*. If wise or unwise, skillful or unskillful, what was directed to be done did not, by being done, produce the death instead of the effects of the intoxicating liquors voluntarily taken by the assured, the defense could not be affected thereby. This will fully appear from the main charge given by the court to the jury. As to Dr. Bruns, he was called in as a consulting physician; he could properly speak of his condition and symptoms, as observed by himself, and what treatment in his judgment as a physician, should be adopted and pursued; what facts he observed, which seeing and comprehending any witness could testify to, and as a medical expert, to give his opinion of the causes of his sickness and critical condition. Now, he stated that he found the assured suffering from opium poisoning. This was a medical opinion. It was competent to show by himself on cross-examination that such opinion was based upon what Dr. Scott told him he had prescribed. He gave it as his opinion that Dr. Scott's treatment had been proper, and that he recommended the continuance of the same treatment. What treatment? Why, the treatment that Scott told him had been pursued, and which he thought a proper course of treatment. Surely, what Scott did tell him was properly called out on cross-examination, to get at the value of his opinion, assuming that Scott had stated the facts to him.

The charge asked by the defendant and refused by the court was misleading, as it wholly ignored this view of the case. There were certain symptoms which he saw and described, and which he attributed to certain causes. Was that opinion founded in whole, or in part upon what Scott said had been administered, or was it wholly from the symptoms themselves. What Scott did tell him was proper to be shown to get at the correctness and value of his opinion. This was the purpose for which the court told the jury they might consider Scott's statements to him, but not as evidence that such medicines had, in fact, been prescribed or administered.

Sausser's testimony that the medicines actually administered upon Scott's prescriptions, of the names of which he was ignorant, tended to make La Boiteaux sleep, was of a fact which he observed, and from which the jury might infer that opiates were prescribed by Dr. Scott. This was a very important item of evidence in the case.

We do not think there was error in the admission of the testimony objected to, or in refusing the charge asked, or in giving in lieu of it, the charge which the court gave.

The jury were expressly told that such statements of Dr. Scott to Dr. Bruns were not evidence of the facts; and when

*we consider that several statements of Scott to other witnesses, not experts, in substance the same as those made to Dr. Bruns, were ruled out in the trial as being mere hearsay and not competent to impeach the testimony of Dr. Scott, it is difficult to conceive how the jury could possibly have been misled. 7

Numerous exceptions are taken to the charge of the court to the jury, and the shortest way to dispose of them will be to give the charge. Its material parts are as follows:

"All the policies contain, among others the following condition in relation to the person whose life was insured: 'If his death shall be caused by the use of intoxicating drinks or opium * * * then * * this policy shall be null and void.' * * * The only ground of defense now insisted upon is the *second* one contained in the defendant's answer, the other, or *first* defense stated in the answer having been abandoned at the trial in open court by the defendant's counsel. This *second* answer avers that the death of La Boiteaux was caused by the use of intoxicating drinks and opium, and thereby said policies were, (and so was each of them) rendered null and void."

"The legal effect of the plaintiff's reply is a denial of every material allegation contained in this defense. Upon this state of the pleadings, the defendant would fail and the plaintiff be entitled to judgment for the amount she claims, if no evidence were introduced; and hence, to the defendant has been given the opening and closing of the case; and upon it, the law casts the burthen of proving the defense it has set up; that defense it must make out *prima facie*, by the evidence, and upon all the evidence in the case, you must be satisfied by the preponderance of such evidence, that the defense is true, or it will be your duty to render a verdict in favor of the plaintiff for the full amount of her claim, with interest from June 19, 1872. If you are so satisfied, then your verdict will be for the defendant."

"To aid you in determining whether the defense is made out or not, I deem it my duty to state to you generally, such rules of law as are applicable to the facts as claimed by each party, and by which rules of law you will be governed. In doing so, it is not my intention to be understood by you as expressing or intimating any opinion of mine as to any fact involved in the case. You alone are to find what the facts are, and it would not be proper in me to intimate to you, in the slightest degree, my opinion as to any fact involved in the issue joined between the parties, even if I should, at this stage of the case, have permitted myself to form an opinion.

"Now, in relation to habits of intemperance from the use of intoxicating drinks, generally, in reference to this clause of these *policies, I charge you that 'it is not enough that the insured may have been addicted (regularly or periodically) to habits of intemperance; indulged in for a considerable period prior to his death. Such habits doubtless have a tendency to shorten life, but if on this ground, payment of a loss may be resisted, no insurance, though knowingly taken, upon life the of an intemperate man, would be of any value. 8

"'To warrant such defense it should appear that intemperance was the *cause* of the *death*, so recently prior to the death, and having such an obvious connection with it, that the death may be clearly traceable to it, and fairly be said to have been produced by it. If intemperance is only a *contributory* cause and not the *sole*, or, at least, *paramount* cause

of death, the defense can not avail. * * * Neither intemperance combined with other causes, nor intemperance as a secondary, remote, and predisposing cause, will avoid the policy. In a word—If a policy of life insurance is, by the provisions, to be void when the insured shall die, by reason of intemperance in the use of intoxicating liquor, it must appear that intemperance is the paramount and proximate cause of death.' May on Ins. p. 332.

"Saying nothing, in this connection, about the claim of the defendant, that the death of La Boiteaux was caused by the use of opium, of which I shall speak hereafter, I may say, that the chief question upon the evidence in this case is whether the insured's death was caused by the use of intoxicating drink. And I charge you, in this connection, that 'If the disease under which the insured was suffering was *delirium tremens*, or *mania a potu*,' 'or something bordering thereon,' 'resulting from the use by him of intoxicating drink, and that sickness, though not necessarily mortal, yet, from want of helpful application, nor neglect of proper care and treatment, produced such a state of body and mind, that death resulted, the death, would properly be considered as resulting from the use of intoxicating drink, even if the disease were not so mortal in itself, but that with good care and treatment, and under favorable circumstances the insured might have recovered,' *i. e.* 'got well.'"

"And if, in such case, death happened because the most efficacious mode of treatment was not adopted, still the death would be caused by the use of intoxicating drink, and the plaintiff can not recover. And I further charge you, that, if the insured became sick or delirious from the use of intoxicating drink and while so sick and crazed and in consequence thereof, *himself*, took over doses of opium or alcoholic liquors or both, and that joined to his previous immediate intoxication,
9 *caused his death, the plaintiff can not recover; for, then all were the direct consequences of his use of intoxicating liquors." May on Ins. 519; 34 Iowa R. 222.

"But, you must observe and bear in mind that it is the mere *want* or *lack* of proper care, attendance and medical treatment, etc., that will not avail the plaintiff if the insured's sickness from intoxication was not necessarily or most probably fatal, but became so by reason of such *lack* or *want;* and that it must have been the getting *himself* of such opium or alcoholic liquor, in consequence of his intoxication and delirium caused thereby that can avail the defendant, if that, with his previous immediate intoxication caused the death. If being sick and delirious from intoxication, a *physician*, however competent and skilled in his profession, generally, prescribed for the insured opium or alcoholic liquor, or both as *medicine*, and the administration of them, or either, by physician, or attendants caused such death, then the insured, Lafayette La Boiteaux, did not die from the use of intoxicating drink or opium within the meaning of these policies. In a word, if the insured gets drunk and dies from it, though by proper attendance and medical skill, he might have recovered, he dies from intoxicating drink. Being neglected does not any the less make him die from that cause; but, if he gets drunk *and would recover* but for medicines administered, which, instead of helping, kill him, in his condition, then, he does not die from the use of intoxicating drink, but *from another cause.*

'A proximate cause of that effect is that which immediately precedes and produces it, as distinguished from the remote, mediate, or predisposing

cause. When several causes contribute to death as a result, it may be difficult to determine which was the *remote* and which the *immediate* cause, yet, this difficulty does not remove the necessity of such determination. May on Ins. p. 519.'

'If the death of the assured was caused by any drug administered to him in the course of medical treatment for the purpose of *cure*, in sufficient quantity to produce death, and death was *the effect of the drug* and not of the *disease*, then, in such case, the death could not properly be considered as resulting from intemperance in the use of intoxicating liquors and the plaintiff upon that branch of the case would be entitled to recover.' "You are, then, to consider, whether the insured caused his own death by the use of intoxicating drinks, or whether the physician, or nurse, or attendants, caused the death by the use of narcotic drugs, or the administration of alcoholic liquor, or both, as *medicine* administered for the purpose of attempting to *cure* the disease; whether the death *resulted from such cause or causes alone, or whether the insured was in such a condition, caused by his voluntary intoxication, that such administered medicines simply *failed* to relieve him from the disease and left it to cause the death itself; whether such treatment was of itself the active and immediate cause of the death, and that the man, *but for that*, would have recovered.' 10

May on Ins. p. 334; Ramsey v. Mut. Ben. L. Ins. Co., Cir. Ct. U. S. 1st. Dist. of Mass.

"These are the questions you are to determine upon the evidence before you, the burden being upon the defendant to prove by the preponderance of such evidence that the insured *did* die from the use of intoxicating drink or opium, and if it has failed to do so, in your fair, candid, unbiased judgment, after weighing carefully and impartially all the testimony, you should find for the plaintiff, and if it has, for the defendant.

"The 'use' of intoxicating drink or opium contemplated in these policies, is the *voluntary* use thereof by the insured to such excessive degree as to cause death, and has no reference to the administration of either or both to the insured, when sick from *any cause*, as *medicine*, though such medical administration may cause death. This use is within the *letter*, but not within the spirit or meaning of that clause"

The *plaintiff* asked and the court gave the following charge, to which the defendant excepted, there being evidence that very shortly before deceased's death, the attendant, by direction of the physician, gave him coffee, which he poured into his mouth from a cup, and which, in the patient's, then condition, was liable to go into the lung instead of the stomach, and produce death by strangulation, similar to drowning.

The charge was this:

"I charge you, that if you find that La Boiteaux's death was caused by strangulation whilst in the act of drinking coffee or liquid of any kind administered by *another*, your verdict must be for the plaintiff, and that it makes no difference whether or not he was, at the time, under the influence of opium or alcohol."

If what the court said in relation to death being caused by others than the deceased, in the way of administering medicines to him was correct, there was no error in this charge.

The court, as before stated, gave one charge asked by the defendant —"that the jury could not presume that opium *was* administered by the

physicians, or either of them; that that fact must be established by testimony to your satisfaction before you can find that it is a fact."

But the court refused to charge, as asked by the defendant:

11 *"Q. The burden of proof upon the point last above stated" (the preceeding charge given) "is upon the plaintiff."

We may here say, once for all, that the above charge was properly refused. The *burden of proof* never shifts or changes during the trial of an issue, but is upon the party from first to last, upon which the law casts it at the beginning. The burden of proof was upon the defendant; but the jury were told that it need offer no evidence as to this fact. It was not bound to prove a negative, on that matter the *weight of evidence* was with it until the plaintiff proved the fact of such fatal administration.

We find no error in the charge of the court. Surely the policy does not cover the fatal administration of alcohol or opium to the insured by a physician with the intention of curing him of any sickness or ailment resulting from any cause whatever, but relates only to death caused by the voluntary use of the one or the other, or both.

And, if the insured becomes sick from the excessive use of intoxicating liquors, and a physician has to be called in to treat him for his sickness, and nurses and attendants have to be employed to take care of him, and his sickness is not of itself fatal; but the physician, with the best of intentions, and in the hope and expectation of a cure, administers a drug as medicine which is the immediate cause of his death, surely death cannot be the proximate result of the sickness. The intention with which the act causing death is done is immaterial. If an attendant had become impatient with La Boiteaux while waiting upon him in his sickness caused by intoxication, and, to keep him quiet, had struck him a blow upon the head with a bludgeon and thus killed him, that would have been the cause of his death, not the use of intoxicating drink. And if he was killed by the opium administered to, not voluntarily taken by himself, that and not the liquors, was the cause of his death. In ascertaining the cause of death the intentions of those causing it, are wholly immaterial.

Upon the whole case we feel constrained to affirm the judgment, which will be done without penalty.

Tilden and O'Connor, JJ., concurred.

Sage & Hinkle for Plaintiff in Error.

King, Thompson & Longworth for Defendant in Error.

---

12 ***PARTITION.**

[Superior Court of Cincinnati, General Term, June, 1875.]

†AZARIAH COMPTON v. MARY BRUEN, ET ALS.

All securities received by a sheriff, on a sale of lands under proceedings in petition for deferred payments on trust funds belonging to the parties in interest in lieu of the land sold, and the sheriff is not authorized by virtue of his office, to receive the money secured thereby and give acquittances that will operate to release the purchaser from liability.

†The judgment in this case was reversed by the supreme court, January 22, 1879, on authority of Preston v. Compton, 30 O. S., 299. No further report was made, 3 B, 1152. Preston v. Compton is distinguished, 39 O. S., 610, 614.

ON ERROR.

The action was brought in February, 1874, by the defendants in error to foreclose a mortgage. The facts presented by the record are as follows:

In October, 1863, Mary Bruen one of the defendants in error, together with her then husband, filed their petition in partition in the court of common pleas of Hamilton county, making the remaining defendants in error and others defendants. Partition was ordered by the court and the lands ascertained to be incapable of division, and, in January, 1865, sold by the sheriff to Azariah Compton, the plaintiff in error. Two-thirds of the purchase money was paid to the sheriff at the time of the sale, and the balance after the payment of costs, was, by order of the court, paid over by the sheriff to the attorneys of the demandants in petition. For the balance of the purchase money the order of confirmation of the sale, made in February, 1865, directed the sheriff "to take the note" of the plaintiff in error payable in two years with interest to be secured by mortgage. That order contains, among other things these words:—"It appearing to the court that said purchaser desires to pay two-thirds of the purchase money in cash, and that said defendants are willing to receive the same, it is therefore ordered that the sheriff receive said two-thirds of said purchase money, and take a note secured by mortgage for one-third payable in two years with six per cent., and the said sheriff is ordered, by deed duly executed, to convey said premises to said purchaser in fee simple. And it is further ordered that said sheriff, out of the moneys in his hands, pay first the costs of this suit including a council fee to O. & T. Brown of $300 * * * and the residue to said attorneys to be distributed to said parties in the proportions set forth in the former order of this court, and that said attorneys file the receipts for said moneys paid to said parties in this cause." No such receipts were ever filed, nor does it appear that the court was subsequently called upon to take any further action in the case. But in pursuance of the order, the plaintiff in error, in order to secure the deferred purchase money, *made and delivered his promissory note, dated January 21, 1865, payable to the order of Richard Calvin, the sheriff, payable two years after date, with interest, at the Commercial Bank of Cincinnati: and having received a deed from the sheriff, at the same time executed to Calvin as sheriff and his successors in office a mortgage to secure the payment of the note and interest. At the maturity of the note Calvin was still in office, and full payment of the note was made to him by the plaintiff in error, and the mortgage was duly satisfied of record. He paid over the money to the attorneys of record before referred to, but they did not distribute it to the parties entitled, and none of them have received any part of it. 13

These facts are contained in the pleadings, and, at the trial they were admitted to be true; the court found the equity of the case to be against the plaintiff in error, and that the amount of the deferred purchase money to Calvin was a valid and subsisting lien on the land, rendered judgment accordingly, to reverse which this petition in error is prosecuted, upon the general assignment that the judgment ought to have been in favor of the plaintiff in error.

TILDEN, J.

The plaintiff in error claims, that the payment of the money to the sheriff, and his cancellation of the mortgage, operated to discharge his personal liability, as maker of the note, and to satisfy the mortgage given to secure it: that, having made the payment in strict conformity to the terms of the note and mortgage, he had no longer any control over the money, and was under no obligation to see to the application of it: that it was the duty of the sheriff, under the orders of the court, to distribute the money to the parties entitled, according to their respective interests, and that if he failed in his duty in this respect, by an unauthorized payment to the attorneys in the case, he and his sureties are the parties bound to make good the loss. It is, on the other side, contended that, under proceedings under the statutes providing for the partition of real estate, the sureties received by the sheriff, at a sale under the order of the court, belong to the parties entitled under the statute in lieu of the land, and that the sheriff is not authorized, by virtue of his office, to receive the amount secured, nor to discharge the purchaser from liability to the parties to whom the money is due, nor to cancel the mortgage.

The right of the owner of the land to pass over the sheriff, who, according to the theory of the claim, has wrongfully paid out the money, and thus occasioned the loss sought to be repaired; to subject the purchaser to a compulsory liability, to repeat the payment of the purchase money, already paid on the *faith of the order of a court of competent jurisdiction, and to fix a lien on the land in his hands and in the 14

hands of his grantees, is one whose existence, in the absence of an express and positive statute, would on principle it is believed, be promptly and unhesitatingly rejected in any court proceeding according to the rules of equity. It is the policy of the law to encourage public confidence in judicial proceedings, and in titles depending upon them. If a court has jurisdiction of the parties and of the subject matter, purchasers of property under its orders and decrees not being parties to the suit are authorized to expect that they will obtain an unimpeachable title or such a one as the court offers to them and ought not to be required to watch the proceedings to see that the court, or its officers acting by its direction, does not commit some error or mistake in the exercise of its jurisdiction which will defeat the title which they intend to acquire by their purchase. The principle, so far as there can be said to be any, which originates an obligation on the part of the purchaser such as is contended for and as explained to us at bar, is that which is embodied in the rule in equity which imposes upon the purchaser under a trust the duty to see to the application of purchase money. Strictly, however, it appears to us that the rule has no application to judicial sales. It has, indeed, been directly determined in two cases cited by Perry with approval that "a purchaser under a decree of the court need not look to the application of the purchase money whatever may be the purpose for which it may be applied." Sec. 797, Coombs v. Jordan. 3 Bland, 284-329. Wilson v. Davisson, 2 Rob. (Va.) 385 412. The only cases in which a purchaser is bound to see to the application of the purchase money are when a trust has been raised by deed or will for the sale of an estate, and the trust so raised of defined and limited nature. But a purchaser under a decree can have no concern with the disposition which the court may make of the purchase money, nor can his right, as purchaser, be in any manner affected by any irregularity in the case or misapplication of the purchase money. When he pays the whole of the stipulated amount he is entitled to a conveyance of the entire right of all the parties to the suit, whatever that may be, and is not bound to look to anything beyond the express terms of his contract with the court as reported by the trustee appointed by the court, or authorized by law, to make the sale. Bennett v. Hammel, 2 Sch. & Lef. 577, 581. Burke v. Crosby, 1 Ball & Beatt, 501. Lloyd v. Jones, 9 Vesey, 65. Curtis v. Price, 12 Vesey, 105. Proceedings in partition under the statute should undoubtedly conform to the statute, and any material deviation in this respect would be error to be corrected in the usual way.

15 *But they are still judicial proceedings importing all the verity, and possessing all the conclusiveness of the proceedings in any other case. A sale under them is as much a judicial sale as a sale under a decree of foreclosure in chancery, and all the reasons for the rule which affords protection to purchasers equally apply.

But it has been supposed that in this state a different doctrine has been adopted, and the case of Welsh, adm., v. Freeman, (21 O. S., 402) is said to be an authority to this effect. On page 433 the court say:

"The case is clearly one where, if the purchaser pays to the trustee, he is not discharged until the money is received by the parties entitled thereto, and to whom it was his duty to pay it. He (the purchaser) was responsible for its proper application. For he entrusted the money to the sheriff; the parties entitled thereto did not." This was said in a case in some, but not, we think, in some other essential particulars like the present. It is not easy to see how a sheriff, acting professedly in his official capacity, under the mandate of the law, can be treated as the trustee or appointee of a party from whom he receives money, not upon the terms of any agreement between them, but under the express authority of the mandate itself, which as a general rule of law, affords full protection to all persons acting in obedience to it. It is material, then, to consider what the exact case was which the supreme court held to be "clearly one when the purchaser of lands sold under an order of sale in partition was bound to see the application of the purchase money paid to the sheriff, and to compare, or more strictly to contrast that case with the one before us."

For we have no disposition to question the authority of that case, or to disregard any rule or decision fairly deducible from it. We only desire not to be led by a false analogy into the adoption of a rule which the supreme court did not intend to lay down, or which, we have reason to think, that court would not, itself, apply to the special conditions presented by the case before us; and if it shall turn out that we are mistaken in our interpretation of it, we shall have the satisfaction of remembering that our decision was not final.

In that case, then, the order of the court did not direct, as here it did, any personal security to be taken, and did not authorize the sheriff to receive or distribute the money. The requirement in the order of a mortgage from the purchaser did not specify in whose name it should be made. It should have been made in the

name of the parties entitled to the money. Brobst v. Skillen, 16 O. S., 382. Griffin v. Underwood, 16 Id.

The declaration on the face of the mortgage, namely, that it was made and intended for the benefit of the parties entitled *gave to the mortgage the same operation as if it had been made in their names. The mortgage, then, was 16
made in the form amounting to a substantial compliance with the order and with the statute; and the order itself was in its nature and consequences a final order of distribution. Nothing further remained for the court to do, and its jurisdiction was at an end. All that was done afterwards was done merely in execution of the order and it is manifest that all persons acting under the order understood that no further action would be had by the court, and they were dealing on their individual responsibility. And the purchaser, being bound to know who would be entitled to the money under the statute, in his mortgage inserted an express provision, amounting to an undertaking, that they should receive it. The provision was intended for the benefit of the owners of the land, and may be fairly treated and must have been treated as an express declaration of trust by the purchaser, carrying with it an obligation on his part on payment of the money to see that it should reach the hands of the parties entitled to it. In the present case nothing of the kind appears; and to hold the sheriff to have acted, not under the order of the court, and in his official character, but as the trustee of the purchaser, would be to make him such without any color of authority derivable from the contract or acts of the purchaser whose trustee he is assumed to be.

In that case the notion of a trust was exactly that which would reconcile the interest of the instrument with the intent of the statute. The statute requires the securities to be made to *i. e.* in the *name* of the parties, agreeably to their respective interests. Act of 1851, sec. 1, 1 S. & C., 901. Had that been done the direct means of collection would have been in the hands of the beneficial owners, and it would not have been in the power of the sheriff to defeat their equitable claims by a collection in his own name. The order of the court in this instance did not require that, and the mortgage was taken in the name of the sheriff simply. But the clause contained in it in that case namely, reciting that it was intended for the (benefit of the parties entitled to the) beneficial interest, was treated as an express declaration of trust, by which the mortgagor appointed the money to be paid to them, and *assumed* to make such payment *directly* to them agreeably to their respective interests. He thus became, in the contemplation of equity, their debtor, and the sheriff thus became his trustee to receive and distribute the money. The delivery of the money to his trustee did not discharge his obligation; for the substance of that obligation was that he would make payment to them through the agency of the trustee, in whom the legal estate was vested as a security that he would do *so. The sheriff became the mere custodian of the security. He acted, not in 17
his official character, but in his character of trustee which was conferred by the trust itself, and not by any act or order of the court. He could receive the money in no other character. He could not by receiving it devolve any liability upon his official sureties; and he could not substitute his personal responsibility for the security taken in "lieu of the land."

But how stands the case now before us? The order of the court conferred on the sheriff express and full authority to receive a note and by implication to receive payment of it, and a mortgage to secure such payment. It did not require the securities to be taken in the name of the owners of the land "agreeably to their respective interests;" but if this was wrong the wrong was the act of the court, and its consequences can not be rightfully visited upon the purchaser. But it is by no means clear that this was wrong. The last clause of the amendment of March 24, 1851, (1 S. & C., 901,) provides for taking securities for the deferred payments. Sec. 10 of the original act requires that these securities shall be such as "satisfies" the court, the court, and not the sheriff, being thus clothed with authority to determine their form. And the same section then declares that the moneys shall be distributed and paid *by order of said court* to and amongst the several parties entitled to receive the same in lieu of their respective parts and proportions of the estate or estates. The provisions, then, invest the court with a discretion to determine in what form the securities shall be taken, and with sole authority to direct their distribution. From these premises two conclusions would appear inevitably to result; one that the sheriff, in taking the secureties and in receiving the money, acted in his official character, and that character was not so changed by any provision in the securities by which the mortgagor constituted him a trustee for him to distribute the fund to the parties entitled. The other conclusion is that the subject of distribution is still

pending and unacted upon in the court of common pleas. An application in that court by the parties entitled for an order of distribution would undoubtedly be successful; and until such an order is obtained it is not obvious how the several parties in interest can be considered as having any perfected right whatever. Each has an undivided interest in the securities or the produce of them, and it is as necessary, in order to consummate the separate right of each to divide the money as it was to divide the land. The sheriff had no authority to make that division and did not attempt it. Such authority is, by statute, exclusively vested in the court, and it remains unexecuted, and the parties in interest are tenants in common of the estate in
18 the money as they formerly were *of the estate in the land. The important consideration, however, to the determination of the case is that the payment to the sheriff was in legal effect a payment into court. It was as distinctly so as a payment of money, under an order of court, to the clerk, or to a receiver, or to a sheriff under an order of sale in chancery. The effect of the payment was to place the money in the custody, and under the control of the court, for the purposes of a distribution remaining to be made by an order of court, "to the several parties entitled to receive the same in lieu of their respective parts and proportions of the estate or estates." The money paid at the time of the purchase was paid out by the sheriff as required by the order of the court. Suppose the sheriff had failed to comply with this order can there be any doubt but such failure would be an act of official delinquency for which he and his sureties would be liable? And yet the intent of the order of the court which authorized the securities, and according to which they were taken, was to produce and bring into court and distribute money the control and authority of the court over which was full and as much requiring to be exercised as in the first instance.

With these views two of the members of the court, being of opinion that the case of Welsh v. Freeman, (21 O. S., 402) is not a parallel case to the one before us and that it does not furnish the principle on which it should be determined, unite against the other, in concluding that the judgment below ought to be reversed with costs.

YAPLE, J.

Believing that this case is governed by the case of Welsh v. Freeman, 21 O. S., 402, decided by the supreme court in 1871—all the judges concurring, I am compelled to dissent from the conclusion of my brethren. What is this case, and what was that? Both were proceedings in partition *under the statute*. In this class of cases, the proceeding of the court and its power, are prescribed by statute; it can exercise no general chancery jurisdiction or power, but is limited, governed and controlled by the provisions of the statute.

The defendants in error were the owners, as tenants in common of certain shares of the lands partitioned, and the plaintiff in error was the purchaser of the same, at the sale in partition, under the order of the court. The court confirmed such sale; and, after providing for the cash part of the payment, the two-thirds, made the following order in relation to the one-third unpaid—for the non-payment — of which the defendants in error sued
19 *the plaintiff in error and recovered the judgment below:

"It is therefore ordered that *the sheriff* * * * *take a note*, secured by mortgage, for the one-third payable in two years with six per cent. And the sheriff is ordered by deed duly executed to convey said premises to said purchaser in fee simple." This is all the court ordered in reference to the unpaid purchase money, which order is distinct from that portion of the order relating to the cash payment.

The sheriff and the purchaser, Compton, *out of court and wholly upon their own responsibility*, construed this order to mean and to authorize, that the note might be made payable to the sheriff, and the mortgage taken payable to him also, and not to the parties to whom such money was to become due and payable. Under the partition statute, hereafter to be noticed, this construction was a mistaken one on their part. The cases of Brobet v. Skillen, 16 O. S. 352; and Griffin v. Underwood, *id.* 389, show that it is the duty of the sheriff to take and the purchaser to make such notes and mortgage payable to *the parties* entitled to the money, and the sheriff is bound to deliver the same to them, and if he should fail to do so, he and his sureties are liable upon his bond. In the case at bar the purchaser made and executed his note and mortgage to the sheriff, the note being made payable in bank, and the sheriff received the same—both no doubt supposing that they were complying with the order of the court, which is to be construed in the light of the provisions of the statute, providing for and governing the same.

When the note fell due the purchaser paid it to the sheriff, who then cancelled the mortgage upon the records in the recorder's office, and paid the money to the attorneys who had conducted the partition proceeding, who have kept it. The single question is, whether such payment discharges the purchaser from liability to these parties whose lands were so sold and conveyed under the proceedings in partition.

In Welsh v. Freeman, above cited, and decided unanimously by the full supreme bench in 1871, the order confirming the sale in the statutory partition proceedings was, that, "the sheriff require said purchaser to execute and deliver *to him* a mortgage on said premises to secure the two-thirds of the purchase money remaining unpaid, with interest thereon from date, and payable one-half in one year, and the residue in two years from this date; which said mortgage shall become absolute in case said purchaser fail to pay any portion of the residue of the purchase money, when and as the same becomes due."

The sheriff and purchaser, out of court, as in the present case, construed the order of the court to authorize the mortgage to be *made to the sheriff, 20
as sheriff, and to his successors in office, for the use of the former owner of the land, and his heirs and assigns, and they so framed the mortgage. The notes were duly paid by the purchaser to a successor of the original sheriff, and the mortgage was duly cancelled of record by him. The purchaser, before payment and cancellation in some cases, and afterwards, in others, conveyed the lands to different parties, who paid therefor.

The court held that such purchasers from the purchaser in partition are chargeable, in law, with notice of the former land owner's rights, and that he could subject all such lands to the payment of the mortgage.

This was held by virtue of the provisions and force of the *tenth* section of the partition statute of 1831 (S. & C. 897,) and the act as amended in 1851 (S. & C. 901).

The 10th section provides, among other things, that in orders confirming such sales, the "said money or securities shall be distributed and paid by order of said court to any amongst the several parties entitled to receive the same, in lieu of their respective parts or proportions of said estate or estates, according to their just rights and proportions."

The last statute further provides: "The deferred *payments* to be secured *to the parties*, agreeably to their respective interests, according to the section of the act afore mentioned."

Whereupon the supreme court, say: (Welch v. Freeman, 21 O. S. pp. 411,412) "From these provisions it is clear, that, whether the sale be made for cash down, or in part on deferred payments, the amount paid at the time of sale may be received of the purchaser *by the sheriff*. It is equally clear that the deferred payments are to be *secured to the parties*, and that such securities are to be taken *by the sheriff*, to the satisfaction of the court, and with the money received, are to be distributed *to and amongst the several parties* entitled to receive the same, in lieu of their respective parts and proportions of the estate. The plain object and purpose of the statute is, when the parties are divested of their land by the sheriff's deed, to give them, in lieu thereof, the money and securities received therefor. This obvious intent excludes the idea that the sheriff is *to collect* and *receive* the money secured to be paid to the parties. Clearly the statute does not cast upon him this duty. At most it but makes him the *custodian* of the securities, with the *duty* of delivering them to the parties entitled to receive them. If he might *collect* the amount due, and thereby *discharge the securities* he could convert *the statutory security taken*, in lieu of the land, to that of his *official responsibility only*."

*Here, there, it is distinctly held that the sheriff, under these statutes, has 21
no power or authority to collect the money due upon such securities, or to give any acquittance of them. He is, by statute, unauthorized to do either. A purchaser must be held to know this and pay the sheriff at his peril, for he is bound to know the law.

And the court further say, in that case, "there is nothing in the *order of the court*, or the frame of the mortgage directly, or *by implication*, changing the statutory liability of the purchaser *to pay* the deferred payments to the parties entitled thereto."

Now, look at the order in this case simply requiring the sheriff to take the note and mortgage for the deferred payment, and in that requiring the purchaser to execute the mortgage to *him*, such sheriff, and I think it is obvious that there can be found no substantial difference between the two orders Yet, the court held that *such order* did not authorize the sheriff to receive payment of and release the security. How could he be authorized to do so under the present order? The

manner of giving and taking the note and the mortgages in both cases was simply the act of the parties out of court, and was so done by an unauthorized construction which they, themselves, put upon the orders of the court.

The court say, too, "the authority of an attorney, under a general employment to procure partition of lands, to make the payments other than as provided by statute, may well be doubted."

This disposes of the claim, that the attorneys, who received this money from the sheriff and kept it, were the attorneys employed by the plaintiffs below to conduct the proceedings in partition.

The court then say; "the case is clearly one where, if the purchaser pays to the trustee, he is not discharged until the money is received by the parties entitled thereto, *and to whom it was his duty to pay it.*"

In opposition to this holding of the supreme court upon such an order in a partition case under the statute it is said: "But a purchaser *under a decree of the court* need not look to the application of the purchase money, whatever may be the purpose for which it is employed." 2 Perry on Trusts, section 787; Coombs v. Jordan, 3 Bland, 284, 329; Wilson v. Davisson, 3 Rob. (Va.), 385, 412.

It will be observed that these are cases where, after sale, the money was brought into court and distributed by the court. Clearly, the party paying his money would
22 have the right to rely *upon the court to see that it was distributed to the parties properly entitled to it. But, in partition cases, in this state, under the statute the order confirming the sale, finds the rights of the parties, fixes the amounts due them, and orders the purchaser to secure and pay to them. That is done not in, but out of court, after its final action, and the court, when such order is made by it, never has anything more or further to do with the case. No report of such payments is ever made to the court, and it never can take any action in reference to them in such cause in partition.

The rule is well stated in Snell's Equity, 3 Ed., 1874, p. 89. A *cestui que trust* is the peculiar favorite of courts of equity, "and equity has sought by the most stringent rules to protect a *cestui que trust*, against the *mala fides* or carelessness of his trustee. In furtherance of this object, the doctrine was early established in equity, that if a trustee for sale *had to pay over the purchase money* to other persons *in given shares, the purchaser was bound to see that the trustee applied the purchase money accordingly*, unless the instrument by which the trust was created contained a declaration that the trustee's receipt should be a good discharge."

"In the absence of such declaration the trustee was considered as not to be trusted, and the purchaser, unless he looked after him, was himself responsible for the misapplication of the money." The 23 and 24 *Vict.* (1860) has to some extent, changed the rule, as has also Ld. St. Leonard's Act, 22 and 23 *Vict.* of 1859; so do our Executors' and Administrators' Acts. The rule always was that in a sale by a trustee to pay debts, generally, the purchaser was not bound to see the application of the purchase money; otherwise in the case of scheduled debts, and the rule never applied to the purchaser of personal property.

But the rule even now is, in England: "If the trust directs lands to be sold for the payment of certain debts, mentioning in particular to whom those debts are owing, or if there is a trust for payment of legacies or annuities only, the purchaser is bound to see to the proper application of the purchase money." Snell, p. 90.

To the same effect is 2 Sug. on Vend, Marg., pp. 835; 7 Amer. 11 Lond. Ed. and Dait on Vend.

The supreme court, then, would seem to be right in saying, in this class of cases, under the partition statutes: "The case is clearly one where, if the purchaser pays to the trustee, he is not discharged until the money is received by the parties entitled thereto, and to whom it was his duty to pay it."

The fact that an estate is sold under a decree of a court of equity, or by virtue of an act of parliament, unless the money is to be paid into and distributed by the
23 court, (2 Sug. Vend. *Marg., p. 835, pt. 6, and note 2), does not relieve the purchaser from looking to the application of the purchase money.

I regard the present case as one equally hard upon both plaintiffs and the defendant, but think that the supreme court, whose authority I do not feel at liberty to disregard, has settled the law to be, that, in such cases the plaintiff may recover the purchase money from the purchaser, where the latter has paid it to the sheriff and the sheriff has failed to pay it over to the party entitled.

I think the judgment of the court at special term should be affirmed.

Cole, for Plaintiff in Error.

Cowan, for Defendant.

* DEEDS—RECORDING ACT. 101

[Superior Court of Cincinnati, General Term, June, 1875.]

CHARLES MOULTON ET AL. v. MARIAN L. BASSETT.

Tilden, Yaple and O'Connor, JJ.

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 he pays the securities, and before the grantor has negotiated them is not a *bona fide* buyer as to whom the older deed is fraudulent by the statute.

ON ERROR.

On the 6th of October, 1873, Charles Moulton filed his petition, in an action in this court, against Marian L. Bassett, claiming to be in possession, and the owner in fee simple of a tract of land containing 41 acres, and situated in the 21st ward of this city, and stating that Marian L. Bassett claimed an estate or interest in the land, or a portion of it, adverse to him. The petition concludes in these words: "By reason of the premises the plaintiff brings this action for the purpose of determining such adverse estate or interest, and prays that the said defendant may be required to exhibit the same, and that said title may be adjudged null and void as against the title of the plaintiff; that said plaintiff's title may be quieted in him, and the defendant be forever barred from setting up any claim of title to said premises or any part of the same, and that said plaintiff may have such other relief as he may be entitled to receive."

To this petition Marian Bassett, in November, 1873, filed an answer, denying the facts stated in the petition, and a counter petition, setting forth in substance: That she was the widow of Samuel N. Bassett, the son of Jonathan Bassett; that Samuel N. Bassett departed this life in January, 1873, leaving no surviving children, and seized and possessed of a lot of land and a dwelling thereon, the lot being part of the tract of land described in the petition, and containing 2 acres and 18 poles of land; that the title to this lot had been acquired by deed from Jonathan Bassett, to his son Nathan, and this deed had not been recorded; that Jonathan, after the death of Nathan, desiring to make a better provision for the widow than that which would be offered under the former deed, caused to be conveyed out of the larger tract, a lot containing 12 acres, and embracing the dwelling and smaller lot before referred to, and executed a deed for delivery, but which was not, in fact, delivered; that the deed for the smaller *lot was delivered to Jonathan Bassett at his request, and on his promise to deliver the deed for the 12 acre tract, 102 on the next morning, but it was not so delivered, and that both deeds were destroyed; that Moulton, the plaintiff, had full notice of all these facts, notwithstanding which, and confederating with Jonathan Bassett, he procured to be executed to himself a deed of the entire tract, at the price of $32,000; no part of which was paid at the time of the purchase. On these facts the prayer of the cross petition is, that Moulton and Jonathan Bassett be required to execute and deliver a conveyance, in fee simple, of the 12 acres, or that they be compelled to convey to Mrs. Bassett, as the representative and sole surviving heir at law of her husband,

Samuel N. Bassett, deceased, the smaller lot. In January, 1874, Mrs. Bassett filed a further answer and cross petition stating, in addition to the facts above recited, that in February, 1873, she demanded a delivery of the deed for the 12 acre tract from Jonathan Bassett, but that he refused to comply with such demand, on the ground that he was insane when he made the deed. This pleading contains other statements which we regard as immaterial. Its prayer of judgment is the same as that before given. Jonathan Bassett filed an answer, and Moulton a reply, putting in issue the facts contained in the cross petition.

The case of which the above is an abstract, stood on the docket of the court, at special term, as No. 29,925. Moulton had previously brought an action in this court against Mrs. Bassett (No.29,830,) to recover possession and for use and occupation. To this action Jonathan Bassett was not made a party. Mrs. Bassett filed an answer and cross petition, and in November, 1872, on motion of her counsel the two actions were consolidated. After the consolidation, and on December 19, 1873, Moulton, under an order of the court, requiring a repleading, filed a further petition, to which Mrs. Bassett filed her answer and the cross petition of January, 1874, before referred to.

On the trial to a judge at special term in March, 1875, of the issues deducible from the pleadings here abstracted, a bill of exceptions was taken, containing the evidence and exceptions to certain rulings of the court upon it. The court, upon the evidence before it, made the following findings:

1. That Jonathan Bassett, in September, 1872, made, executed and delivered to Samuel N. Bassett, in his lifetime, a conveyance of this 2 acres and 18 poles.

2. That the deed of conveyance was never recorded and was not in existence.

3. That the consideration expressed in the deed was natural love and affection and other considerations, but the real consideration was the
103 maintenance and support of Jonathan Bassett *during his life, by Samuel and Marian Bassett, or the survivor of them, and that the deed was a deed of purchase.

4. That Samuel N. Bassett left no children, and that Marian L. Bassett inherited said land in fee as sole heir at law, said land being charged, however, with the support and maintenance of the said Jonathan Bassett, from the death of said Samuel for the natural life of said Jonathan.

5. That the said Charles Moulton purchased said land from Jonathan Bassett, May 2, 1873, for the sum of $33,000, of which not exceeding $3,000 was paid in cash, and for the balance said Moulton executed to Jonathan Bassett promissory notes, payable to his order, secured by mortgage on other lands of Moulton, that said notes being unpaid, and Moulton holding in his hands, by reason of the premises ample means to secure himself against loss or damage resulting from said prior conveyance from said Jonathan to said Samuel N. Bassett, he, the said Moulton, is not entitled to the protection of a *bonafide* purchaser, without notice of said prior conveyance, and the court, therefore, finds it unnecessary to determine the question of notice.

On these findings, the court directed an entry referring the case to a special master, with directions to him to ascertain and report to the court the exact boundaries of the 2 acres and 18 poles of land, as also what sum of money to be annually paid to Jonathan Bassett, commencing

from the date of the entry, would be a fair and reasonable equivalent for his support and maintenance during the remainder of his life. The amount so to be found was declared to be a lien on the 2 acres and 18 poles of land into whose hands soever it should pass. It was further declared that, "the said Jonathan Bassett having waived his support, and the said Marian L. Bassett having been ready and willing to afford the same, the said Marian, upon the approval of the master's report of the boundaries, and the annual amount to be paid to Jonathan Bassett, *shall* be restored to the possession, and forever quieted in her title, and Moulton and Jonathan Bassett be forever enjoined from setting up any claim against Marian Bassett, except such support of Jonathan Bassett." It was finally adjudged that the costs be paid by Jonathan Bassett.

To all these findings and rulings, Moulton and Bassett excepted. They then submitted a motion for a new trial, on the ground:

1st. That the findings and judgment were against the weight of the evidence. 2d. That they were against the laws of the case. 3d. That upon both the law and the testimony in the case the findings and judgment should have been for Moulton and Bassett. This motion being overruled, an exception was taken, and now Moulton and Bassett, who join in the petition, assign eleven grounds of error on which the proceedings below ought to be set aside.

OPINION.

*TILDEN, J.

Of the various errors assigned, two present questions of practice merely, depending much upon the discretion of the judge trying the case, and, as they have not been insisted on in the argument, need not be further noticed. 1st and 2d assignments. 104

Six of the assignments are but varying statements of the particulars in respect to which it is supposed the court, in its conclusion of fact, was not warranted by the evidence, and the others are, that the findings were against the weight of the evidence, that the rulings were contrary to law; that the judgment was contrary to law; that for these reasons the court erred in its refusal to grant a new trial; and finally, that the court erred in its refusal to find and determine the question of notice to Moulton of the claims of Mrs. Bassett.

1. The objection to the conclusions of fact, do not appear to us to be tenable. We have examined and considered the evidence, and we concur fully in opinion on that subject with the judge who tried the case. There is, we think, strong reason to believe that Jonathan Bassett made and delivered a deed of the smaller lot, including the homestead, in the lifetime of his son, and that this was upon consideration of an undertaking for his support and maintenance. Aside from the direct evidence, that suggested by the nature of the transaction is very strong. The argument considered in reference to the existing state of things, was most natural and most reasonable. Jonathan Bassett was very old. He had but three children, two of whom were daughters who were married and settled in life. He had recently lost his wife and was alone the occupant, save a servant, of the old homestead. His other child, Samuel N. Bassett, an only son, and himself the head of a family, was living and maintaining a separate establishment. It was most natural that he should be requested and expected to break up his own homestead and occupy that of his father, and so as to afford for him a home satisfactory to him. Beyond the share to which

Samuel would become entitled in the ultimate division of his father's estate, it was obviously just, and it must have been thought so to be, that Samuel should receive an interest in the division of the estate larger than the others in some proportion to the exclusive burthen he was to assume. There can be little doubt but both parties were influenced by these ideas, and Samuel changed his plans of life on the faith of the arrangement which was made, whatever it was. The proof is clear that a deed was executed in due form of law. The circumstances that it was retained in the possession of Jonathan Bassett, if it was so, and not placed on record, is perfectly explained by the fact that Samuel was embarrassed by debts, and
105 *it was natural and not censurable, that his father should desire not to expose the property to the claims of creditors. The only question about which there can be any serious dispute, is whether there was a technical, manual delivery of the deed, so as to pass the estate at law. And, upon that question, we have to say that if the circumstances here referred to were not sufficient even to authorize the presumption of a delivery, they are almost irresistibly strong in confirmation of the positive testimony that a delivery did, in fact, take place. The subsequent conduct of the parties further sustains this conclusion. The death of Samuel Bassett, which occurred within the first year, was an event which introduced entirely new relations and motives. He left no children; having acquired the estate by deed, he was a purchaser, and, by the statutes of this state, the inheritance, instead of reverting to Jonathan Bassett, and then reverting to his other children, passed out of the family and vested in the widow. At the first he appeared to have regarded the widow with sentiments similar to those, we may suppose him to have entertained for his son, and he lived on in the family, apparently in conformity to the arrangement. In the end, however, influenced by the reasons just stated, or by others not explained, he abruptly terminated the arrangement, and went to live in the family of Moulton. He did not then deny the interest of the widow. He even offered her $3,000 for it. This she declined; he then proposed to convey to her a life estate in a larger tract, and even executed a deed, but this he recalled, at the same time cancelling the deed.

The statement of Mrs. Bassett as to what occurred at the supper table soon after the execution of the deed, when, if ever, a delivery must have taken place, is positive and explicit. So also is the further statement, that when Jonathan Bassett came to prepare the deed for the larger tract, the deed in question was in her possession, and by her delivered to Jonathan Bassett. At the time she gave her evidence, this occurrence was a recent event, and one almost certain to be remembered, if true, and if not true, she was not mistaken merely, and must regard the statement as wilful fabrication. As to our means of judging of her veracity, and of that of the witnesses who contradict her, they are, of course, much less satisfactory than those of the judge who saw and heard the witnesses testify on the stand, and if the case depended on that question, we should feel obliged to adopt his conclusion, and that was precisely the same to which we are led, by considering the evidence as it appears on paper. We hold, then, that a deed was duly executed by Jonathan Bassett, purporting to convey to Samuel N. Bassett, an estate in fee simple, in the 2 acres and 18 poles of land; that it was formally delivered by
106 the former to the latter, so as to take effect and pass *the legal estate; that the deed was wrongfully destroyed by Jonathan Bassett,

after the estate had descended to Mrs. Bassett; that the consideration in consequence of which the deed was executed and delivered, was the agreement of Samuel N. Bassett for the support and maintenance of the grantor, and this agreement was executed and kept until the death of Samuel N. Bassett, and afterwards by Mrs. Bassett, until its further execution was suspended and prevented by the voluntary act of Jonathan Bassett.

2. We proceed then, to consider the law arising upon the facts, and it is evident, in the first place, that unless some statute intervenes to defeat the claims of Mrs. Bassett, she was entitled to the relief awarded by the judgment rendered in the case, because the rule of legal priority follows the order of time. The legal estate became vested in her husband by the delivery of the deed, and no estate remained in the hands of the grantor, which he could afterwards convey to Moulton. His title as purchaser was limited to that of his grantor. One cannot convey more than he owns, and the purchaser cannot acquire what the person from whom he buys has not got to sell. A bad title cannot be made good by being passed from hand to hand, and must, of necessity, remain the same after each transfer as before.

4. Leading Cases in Equity, 72. In such a case the prior grantee has an equity to be protected against the consequences of the accidental loss, or the fraudulent destruction of his evidence of title; and the principle which gives him this equity is the same as that which deprives the subsequent grantor of any claim in equity. The first grantee for value has an equity in itself equal as well as prior in point of time, and his claim, therefore, to retain the legal estate, which is coupled with the equity, is superior to that of a subsequent purchase, however perfect his claim as against the common grantor of both. In England, in which there is no general system of registry of deeds, the statute of 27 Eliz. for the protection of subsequent purchasers, was intended to disturb the legal order of conveyances only in cases of fraud, and had no operation as against a prior purchaser *bona fide* and for value. And the local registry acts only were intended to provide means of notice. In this country, in which statutes have been generally enacted to provide for the recording of deeds and other instruments of writing, some modifications have been introduced of the rule which formerly prevailed in equity. Our own statute requires deeds to be recorded within six months from their dates, and if not so, declares that the same "shall be deemed fraudulent, so far as relates to any subsequent *bona fide* purchaser having, at the time of making such purchase, no knowledge of the existence" of the former deed, 1 S. and C., p. 467, sec. 8.

*These provisions were manifestly designed only for the protection of the purchaser. The unrecorded deed is to be deemed fraudulent merely, "so far as relates" to the purchaser. The relations between the vendor and his former grantee were not intended to be affected. As between them the deed was not required to be recorded, nor was the unrecorded deed to be deemed fraudulent. The title passed by the due execution of the deed, and was not divested by its subsequent distinction. Having so passed, it was against conscience and a fraud in the grantor, to attempt, in derogation of his former deed, to convey to another. So far, then, as Jonathan Bassett is concerned, it is too clear for argument, that he has no legal or equitable ground of complaint. Even were Moulton entitled to retain the land, still Mrs. Bassett would have a right to treat 107

Jonathan Bassett as a trustee, and to sue for compensation for the loss of the land, and to charge the amount recovered upon the securities taken from Moulton.

As to Moulton, we must necessarily hold that at the time he received his deed, he had no knowledge of the existence of the former one. The question of notice the court did not consider to be one which it was material to determine, and if it were to be held to be open for consideration now, we should regard the possession of Mrs. Bassett, the only circumstance in the case tending to prove notice, as having been of a nature too equivocal to authorize us to act upon it. Had the purchase money been paid, therefore, at the time of the execution of the deed, Moulton would be clearly entitled to claim the protection afforded by the statute. But when the action was brought and he made a party to the cross petition, he became bound to know, and did know the nature of the claim made by Mrs. Bassett under the former deed. He knew that a fraud was being attempted by Jonathan Bassett upon those claiming under that deed; and he knew that the completion of his purchase would aid in the consummation of that fraud. He knew that this would deprive them of the land, who, as against Jonathan Bassett, had both the equitable and legal title. Then, he had paid but a very small part of the purchase money, and then he had in his hands full means of indemnity. Then the question arises whether he is entitled in defending himself against the claims of Mrs. Bassett under the legal title vested by the first deed, to disregard her rights and complete his equitable title, by completing the payment of the purchase money. This his counsel, in an exhaustive and unusually able argument, contends he is entitled to do, because at the time he took his deed, he had no knowledge of the existence of the former deed. That his purchase was complete by the delivery of the deed, and no longer *in fieri;* that the delivery of the notes on account of the credit given for the
108 *purchase money was, in law, a payment of it, and that the transaction thus operated substantially, though indirectly, as an investment of the purchase money which Jonathan Bassett had a right to make. We are of opinion, however, that the protection intended by the statute for subsequent purchasers can not be pushed so far. We do not think the purchase money was paid by giving a credit for it, unless the notes were bone fide negotiated before notice, and this does not appear, and the fact is inconsistent with the argument, that the purchase money was left in the hands of Moulton as an investment. Nor do we think a "*bona fide* purchase" was consummated by the mere delivery of the deed within the meaning of the statute. These expressions were drawn from the language of equity, when they were used to define the relations of conflicting equities, and the right of the claimant of one to fortify himself by getting in the legal estate. We think they were intended to be employed by the legislature in their established legal sense; and that it was not designed to break in upon the rules of equity in any case, in which the subsequent purchase is not *bona fide*, in contemplation of equity; as we think it is not where notice of the prior deed is received, before payment of the money which forms the consideration of the subsequent one. The act only applies in favor of parties who have acted in good faith, and cannot be made the means of fraud or oppression. Accordingly it is well settled, that, notice given at any time, before the completion of a purchase, will invalidate all steps taken to complete it. We hold that the payment of the purchase money is one of the steps; and that security

for the payment of it is not payment. This is the English doctrine. We are aware, however, that the courts of this country are divided in opinion; some of them refusing to consider anything short of full payment sufficient, others holding that partial payments entitle the purchaser to reimbursement, and one or two to be sustained in the purchaser. The cases are collected and criticized, in the American note to Bassett v. Norseworthy, in two leading cases in equity. The question has never been before our supreme court, and we have been controlled, by what we consider to be the decided weight of authority; and especially by what we suppose to be the principle to be had in view, in the construction of our own statute.

The judgment below will therefore be affirmed with costs.

L. M. Hosea, for Plaintiff in Error. *Follett, contra.*

---

*LIFE INSURANCE—CONTRACT. 109

[Superior Court of Cincinnati, General Term, June, 1875.]

†UNION CENTRAL LIFE INS. CO. v. POETTKER AND WIFE.

Tilden, Yaple and O'Connor, JJ.

1. Ordinarily, the insurer of a life contracts to insure, during the whole period of life, in consideration of the payment by the insured to the insurer, at specified periods of time, of a stipulated premium, which premium remains at the same fixed rate, notwithstanding the increase in age of the insured, or of his contracting permanent disease, or suffering accident, materially shortening his chances of life. The insurer cannot compel the insured to pay the stipulated premium to continue the risk from year to year, but has a remedy in the right to retain as forfeited all previous premiums paid; but the insured has the right to compel the insurer to receive each premium as it becomes due, and continue the risk during the insured's life, unless the insurer quits business and goes into liquidation, which it has the right to do, making equitable compensation to the insured for the premiums he has paid, and he making due compensation to his insurer for the time the risk was carried.
2. Where an insurance company does not go into liquidation, but continues in the business of life insurance, and *wrongfully* refuses to continue its risk taken upon the life of one it has insured, the insured may tender his premiums as they become due, keep such tenders good, and compel the insurer to specifically perform the contract of insurance; or he may sue the insurer for damages and recover, at least, the amounts of the several premiums he has paid, with interest, and the insurer will not be entitled to deduct anything for the time the risk was carried, as the insurer breaks the contract after only part performance, and will be entitled to nothing for such part performance; and, if the insured, after the risk was taken, has met with an accident, or has lost his health, so that he cannot obtain insurance in another company equally as good as the first, and upon the same terms, or can obtain insurance in none, he may recover, in such case, full damages from his insurer, though such damages exceed the amount of the premiums paid, with interest, but are not greater than the sum in which he was insured. Any other rule would enable life insurance companies to terminate their risks whenever it might become their interest to do so and gain money in hand by so doing.

YAPLE, J.

This is a petition in error prosecuted here to reverse the judgment of this court rendered in special term, in favor of Poettker against the insurance company.

---

†This case was affirmed in part and reversed in part by the supreme court. See opinion, 33 O. S., 459. The latter is cited with approval. 39 O. S., 240, 244, and cited 44 O. S., 19, 30.

110 *A full statement of the case is contained in the written opinion of the court deciding the case below; and as we see no reason to differ from the arguments drawn from, and the conclusions of law upon, the facts as stated in that opinion, we content ourselves with adopting it, and affirm the judgment without penalty.

The opinion reads as follows:

STATEMENT.

On October 14, 1871, the defendant insured, jointly, the lives of the plaintiffs in the sum of $1,000, the loss payable to the survivor, for an annual premium of $51.37, payable on or before the 31st day of October in each and every year, with the privilege of paying one-third of such premiums in promissory notes bearing interest, payable yearly. The ages of the plaintiffs were then as follows: the husband forty-one and the wife thirty-eight years of age. They were first jointly insured at that rate of premium, and upon the same terms as to payments, in the sum of $1,000, payable to the survivor, on October 28th, 1868, in the Home Mutual Life Insurance company, which company transferred this, among other of its life risks, to the defendant, which assumed them, and, with the assent of the plaintiffs, gave its policy to the plaintiffs, who surrendered to it their policy in the Home Mutual.

The plaintiffs, at this time and ever since, resided, and have continued to reside in Newport, Kentucky, and transacted all the business with the company with one of its authorized agents, who always visited them for such purposes at their residence in Newport. W. Holtman was such agent; and it was agreed between him and the plaintiffs at the time they took their insurance that the annual premiums were to be collected by an agent of the company at the residence of the insured, who never knew where in the city of Cincinnati the office of the defendant was located until after the attempt of the company complained of, to forfeit the policy.

At the time, October 31, 1868, of receiving the policy in the Home Mutual, the plaintiffs paid to it in cash $34.37, and gave their note for $17. On October 31, 1869, the plaintiffs paid to the Home company $51.37 in cash. On October 31, 1870, they paid it $51.37 in cash. On October 31, 1871, they paid it $34.37 in cash, and gave their note for $17. The interest on the credit notes then paid amounted to $5.10. On October 31, 1872, the plaintiffs paid the defendant, it then having assumed and issued its policy for the risk, the sums of $34.37 and $3.06 in cash for cash portion of premium and interest on premium credits, and gave their notes for $17, interest on which was prepaid to
111 *October 31, 1873. All these payments were made by the insured at their residence in Newport, to such agent of the companies in pursuance of the original understanding and agreement between them; the agent in the last receipt styles himself agent of the deft. at Newport, Ky. On the 31st day of October, 1873, the plaintiffs were ready, willing and able to pay their premium in full in cash, as they had paid the former ones, at such their residence. No one came to receive the same, and they had received no notice to pay otherwise than as formerly, or elsewhere. In a few days thereafter the plaintiff, Bernard Poettker, saw Holtman, such former agent, and inquired of him why he did not call and collect the premium, when he was advised by the latter that he was no longer agent; that the company had adopted a plan to forfeit a number of its risks without notifying the policy holders, and as such plan involved a number with whom he, as such agent, had dealt, he had resigned, as he did not desire to offend them. The plaintiffs then sent the amount of such premium payment to the office of the defendant in Cincinnati, but the same was refused upon the alleged ground that the plaintiffs had forfeited their policy.

Thereupon the plaintiffs brought this action to recover back the amount of all the premiums they had paid to both companies, with interest from the several dates of such payments, because of such wrongful forfeiture.

OPINION.

Upon these facts in evidence in this case, I feel clear that the defendant wrongfully refused to receive the premium tendered it after October 31, 1873—the original agreement and the course pursued in calling for and collecting the five annual premiums, from 1868 to 1872, both years inclusive, by the agent at the residence of the plaintiff in Newport, Ky., where they were ready, willing and able to pay the premium for the year beginning October 31, 1873, to October 31, 1874, gave the defend-

ant no right to forfeit the policy for the failure of the plaintiffs to call at the office of the company in Cincinnati and pay that premium when due, it not having notified them that no agent would call upon them as formerly to receive the same.

And had these plaintiffs instituted a suit for specific performance, bringing into court the amount of the premiums due, with the interest accrued thereon, I see no reason why they would not have been entitled to compel the defendant to receive the same and continue the risk and the policy.

Had the plaintiffs acquiesced in the cancellation of the policy, and elected to stand upon the same ground that they would have done had this company gone into liquidation on the 31st *day of October, 1873, then they would not be entitled to recover back the amount of the premiums paid, with interest, but they would 112
have been entitled only to such a sum as would be required to purchase a policy of the same amount at the same premium in another and solvent insurance company. The rule would then be as laid down by Lord Romilly, M. R., *in re* English Assurance Company, Holdick's case, L. R. S., 14 Eq. Cas., p. 72; S. C. 3 Big; L. Ac. Ins. Rep., 272, and in Bell's case by Lord Justice James, V. C. in L. R. S., 9 Eq., 706, to-wit: "Select another company, of perfectly solvent reputation, with premiums the same as those of the company in course of liquidation; find for what premiums that company would *now* insure the life of the person assured in the company in course of liquidation; the person whose life is assured is to be at liberty to show that his then state of health is such that the new company would require a higher premium than that which would have been required merely from the lapse of years, and then, having ascertained the increased premium which the person seeking to prove would have to pay to the new company, at the present time, take the difference between the two premiums and capitalize that difference, having regard to the expectancy of life of the person in question; and that will give you the amount which ought to be paid to him to put him into as good a position as he would have been in if the company in course of liquidation had not been wound up."

Or, as stated in the opinion of Lord Cairns, in his arbitration on the Albert Life Assurance Company, in Lancaster's case, which opinion is appended to the decision of Lord Romilly, who dissents from it, and follows Lord James in Bell's case, which Lord Cairns dissents from and refuses to follow. Lord Cairns held the rule to be this: "There must be determined on the one hand the present value of the reversion in the sum assured at the decease of the life, and on the other, the present value of the future annual premiums. The difference between these two sums represents the value of the policy. But the annual premium payable is divisible into two parts—first, the part which is calculated will provide for the risk, called the pure premium; and secondly, the addition of office expenses and other charges, which is sometimes called *the loading*. The pure premium only is to be taken into account. The value of the policy, therefore, will be the difference between the value of the reversion in the sum assured and the value of the life annuity of an amount equal to the pure premium."

Lord Cairns bases his opinion largely upon the construction of the 158th section of the English Company's Act and the 25th rule thereunder, which, of course, have no application in Ohio. *He does, however, effectually dispose of the claim put forth in this case 113
by Mr. Harris, the secretary of the defendant, in his testimony, that the present worth of this policy is to be affected by the "loading" of the insurance guarantee fund which the defendant has to keep on deposit with the secretary of state. No such guarantee funds deposited by any company affects the present worth of any policy it may have upon the life of any person assured; that must be determined by the amount of the "pure" premium, etc. In this respect the holding of Lord Cairns, has nowhere been denied or doubted. In reference to the main point of Lord Cairns' decision, Lord Romilly says: "The contract I take to be this: A. insures his life with the company for payment of a given sum at A's death, without profits, in consideration of A. paying an annual premium to the office of a given amount. A. on one side to entitle himself to the sum assured, has to pay as long as he lives, the annual premium to the company; the company, on the other hand, contracts that when A. dies they will pay the amount insured, and that *no accident or disease which may curtail the chance of the living of A. shall entitle the office to increase the premium.*"

"The conclusion at which Lord Cairns has arrived appears to me to overlook this point in the real contract, which is made between a person who insures his life and the assurance company. If there were no such things as diseases or accidents, but all men lived to an age when the body decayed by age, more or less rapidly, according to the strength and nature of the constitution, a pure premium valuation

would appear to be an easy mode of solving the difficulty; bnt it is obvious and notorious that most if not all persons who insure their lives do so expressly to guard against the contingency that an unexpected disease or an unforeseen accident may shorten their life, and prevent it from running what, without the occurrence of such contingency, would be the probable term of its duration. It is obvious also that such diseases and such accidents are taken into account by the assurance office upon an average of the lives assured, and form an item on the scale of mortality on which the company calculates the amount of the premium to be paid. You deprive the assured of the benefit of his contract if you do not give him compensation for accident which has made his life uninsurable, and consequently his policy more valuable, at the time when the company is wound up. Suppose such a case as this, and see how it would work under Lord Cairns' plan: Two persons of the same age insure their lives, each for the same sum in the same office at the same premium. The company is wound up, one dies a month before liquidation begins;
114 the other, whose health has become seriously *impaired, died shortly after the liquidation has begun. One is entitled, according to every rule, to prove for the whole amount of the sum insured; the other must submit to a reduction which, according to Lord Cairns' plan, will deprive him of the greater part of the sum assured, while according to Lord James, he is entitled to such sum as would be sufficient to induce a new office to give the assured a policy for the same amount at the former premium.

The plaintiffs, in this case, paid the defendant as premiums during the five years, including interest on the three notes for $17 each, $212.99. The present worth of the policy according to Lord James' and Lord Romillys' plan, is only $46.43, which the defendant asks the plaintiff's recovery to be limited to, as if the contract were mutually rescinded, or the company had gone into liquidation.

But the plaintiffs claim that they are seeking to recover *damages* from the defendant for its *wrongful* breach of its contract; that they do not ask to rescind and be made whole, allowing the defendant a consideration for the time it carried the risk, and that the defendant has not gone into liquidation.

In relation to this subject, Lord Cairns, in his opinion above referred to, (found at p. 73 L. R. S. 14 Eq. Cas.) says: "It is also to be observed that we have here to deal, not with the case of a *going* company, which is being sued for a breach of contract. Indeed it is very difficult to see, in a case of a policy of insurance, how there can be any breach of contract short of a refusal to pay upon the falling in of the life. I know it has been suggested that a refusal to receive the premiums from year to year would be a breach of the contract, and that thereupon an action might be brought. *I do not desire to express any opinion upon that point*, but it is somewhat difficult to see how such an action could be maintained, and certainly, so far as I know, no such action has ever been brought or maintained. But all that may be set aside here, etc." He seems to intimate that such would be his conclusion in a case presenting the question from his definition of the contract of life insurance. He asks: "What is the nature of the contract of insurance? It is a contract by which the *insured* is under no obligation to pay premiums; it is a contract by which the *company* insuring is under no obligation to continue its business, but the company undertakes that if the person insured will pay the fixed premiums from year to year, the funds of the company for the time being, including the unpaid capital, shall be answerable in proper order to pay the sum insured on the falling in of the life, upon proper proof," etc. For the incompleteness of this definition, it is only necessary to revert to the definition and remarks of Lord Romilly above given.

115 *This court, in general term, in the case of Mut. Ben. Life Ins. Co. v. French, 2 Supr. Ct. R., at p. 326, which is quoted with approbation by May, in his late work on Insurance, at p. 408-9, defined such contract thus: "It is an agreement on the part of the insurer to insure the life from year to year during the insured's life, on the payment to the insurer each year of a certain amount of money as a premium for the risk taken. The insured's failure to pay such premium at the beginning of each year, unless waived by the company, *ipso facto*, will cause the policy to cease and determine. It is a contract that can only continue from year to year, at the option of the insured, who may let it drop at any time. The insurer can not compel the insured to pay the next year's premium at the end of any year, or sue for or recover that or any subsequent year's premium. Its remedy is provided in the policy, to-wit, the forfeiture of all moneys previously paid and of all rights under the policy."

Another qualification should be added to both this and Lord Romilly's definition, to-wit: subject to the insurer's right to wind up and cease the business of insurance at any time. In such case, I think, the insured's rights would be ascertainable ac-

cording to Lord James' and Lord Romilly's plan, and not according to that of Lord Cairns. Upon Romilly's definition of the contract of life assurance, and that of this court, it is clear that the insured, the insurer still continuing in the business, can maintain an action for damages for breach of contract, in not accepting an annual premium tendered, and for refusing, in such case, to continue the risk.

The right to maintain such action is expressly held in McKee v. Phœnix Ins. Co., 28 Mo., 383; Helme v. Phil. Ins. Co., 61 Pa. St., 107; 1 Phil. on Ins., 5th Ed., sub. sec. 505; Bliss on Life Ins., p. 673, sec. 425; May on Insurance, p. 531, sec. 425.

The last author says: "If a life insurance company improperly refuse to accept the premiums, under a plea that the policy is void, an action may be maintained against them for damages; and it seems that the rule of damages would not be confined to the amount of the premiums paid with interest. If the person whose life is insured, though alive, should be laboring under a disease that must speedily result in death, the insurers ought not to be permitted to escape the payment of the amount for which the life was insured by putting an end to the contract." Bliss speaks to the same effect.

The defendant, however, insists that it carried the risk for five years and carried the premiums paid, because, if either of the insured had died, the survivor would have been entitled to recover the amount of the policy, to-wit, $1,000.

*Were the plaintiffs seeking to rescind the contract this claim of the defendant would admit of no answer. The rule as laid down by Lord Cairns 116
would perhaps apply.

Or, if the company, when the premium had become due in 1873 had ceased to do business and gone into liquidation, the rule as claimed by Lord Romilly would, as it appears to me, apply to and govern the case.

But neither of these is this case. The plaintiffs do not seek to rescind the contract, but to recover upon it damages for its breach by the defendant; and the defendant has not ceased to do an insurance business, or gone into liquidation. Its contract with the plaintiffs was that it would receive from them the stipulated annual premium, until one of them should die, and then $1,000 to the survivor, in case it should not cease to do business and go into liquidation, if the plaintiffs should choose to pay such annual premiums; and if not, then they should forfeit to it all they had paid. This was its indemnity and its only indemnity in case they should neglect or refuse to continue the risk with the defendant; and the converse would seem to be just, that if the defendant, while still engaged in the business of life insurance should wrongfully refuse to receive the premiums and terminate the contract against their will, that it should forfeit what the insured had paid to it as premiums; that it had voluntarily relinquished to them what it had earned in carrying the risk in the past. Its obligation was entire lasting till one of them should die, and it ought not to be allowed for part performance of a contract which it voluntarily abandoned. The principle settled in Withrow v. Withrow, 16 O. R., 238; Allen v. Curles, 6 O. S., 505, and in Larkin v. Buck, 11 O. S., 561, ought to apply to it in such a case

If the doctrine contended for by the defendant be correct, a harvest, indeed, will be presented for life insurance companies to reap. All they will have to do will be to ascertain whose health and chances of life have been impaired by disease or accident since insurance, and refuse to continue their risks upon such lives. The latter would have to take the present worth of their policies, upon the basis that they were as insurable as if no such disease or accident had intervened—allowing the companies, of course, for having carried the risks in the past—and receive in cases like the present one, for $212.99, with interest on the respective premiums from the dates of the several payments, the sum of $46.43. The insured, too, in such cases would be compelled, by reason of their infirmities, to pay greatly increased rates of premium in other companies, if insurable at all. The sting of damages, to the extent of total prevention, must be, by the law, placed in such temptation on the part of life *insurance companies. The business is too important to tolerate such a 117
course of business.

Upon reason and the justice of the case, and upon the authority of McKee v. Phœnix Ins. Co., above quoted, I shall allow the plaintiffs the sum of $212.99, with interest on each premium paid, which goes to make up that amount from the date of its payment. The plaintiffs have asked for no more, nor have they sought to prove a greater amount of damages, though it was apparent to me, from his appearance when on the stand as a witness, that the lungs of the plaintiff, Bernhard Poettker are weak and diseased, and that he is now no fit subject for insurance at any reason-

able rate of premium. But I disregard that as the plaintiffs offered no special evidence on that subject, and made no claim on that account.

Judgment accordingly.

Matthews, Ramsey & Matthews, for Plaintiffs in Error.

J. Crentz and *J. T. Crapsey*, for Defendant in Error.

---

155 *LIFE INSURANCE — AGENCY — MISREPRESENTATIONS.

[Superior Court of Cincinnati, General Term, June 1875.]

†EMMA A. CHEEVER v. UNION CENTRAL LIFE INS. CO.

Tilden, Yaple and O'Connor, JJ.

1. Where, to an action upon a policy of life insurance, the defense is that certain material representations contained in the written application were untrue, and it is replied denying such untruth and also that the insurer knew the real state of the facts about which such representations were made and induced the assured to believe that such facts would not be deemed to render such representations untrue, the plaintiff will not be required to elect between the replies, the party being entitled to make every reply to such answers that he may have, so as to insure a full and fair trial of the entire merits of the case, and not be limited to a partial trial of only a portion thereof. Such reply in the nature of confession and avoidance, giving color merely to the defense. To compel an election of different defenses or replies must be inconsistent; that is, if one be true the other by no possibility, can be so. Such misrepresentations might not exist and the party seeking to avail himself of them may have known all the facts which he insists constitutes them and have waived their importance.
2. Where a person, upon a written application, insures his life in one insurance company, and thereafter, by mutual consent of the three, the policy is surrendered to another insurance company, and it gives the insured its policy in lieu of the first, the insured making no new application, and it is stipulated in the new policy, that it is issued in consideration of the representations made in the first application, and the new policy contains a condition "that the statements and declarations made in the application for *this* policy, and on the faith of which it is issued, are in all respects true, and without the suppression of any fact relating to the health or circumstances of the insured affecting the interests of the insurer." *Held:* That the consideration is the *truth* of such representations at the time they were made to the original insurers, and that such application is to be deemed the applicatiou, upon the faith of which the new policy was issued.
3. Where a general agent of an insurance corporation (that is an agent having power to and who does, in fact, consummate the contract of insurance takes the application, receives the premiums and receipts for it, and delivers the policy to the insured) knows the real state of facts about which the insured makes representations in his application, and leads the latter to believe that, notwithstanding such facts the answers made will be taken as true, such knowledge and conduct upon the part of such agent will *estop* the company
156 from setting up such facts to *establish the untruth of such representations. If the agent has acted fraudulently, the principal should look to him for damages and not be permitted to visit the consequences of his conduct upon his victim. And it is also observable that, in too many instances insurers receive premiums for years without discovering that they have been defrauded, but are able to learn the fact within a very short time after the insured's death. A little of the diligence, if exercised before, that is pursued after death, would be commendable.

---

†The decision of this case on proceedings in error, affirming this judgment are found 2 B, 19. The decision in a subsequent trial is found 6 B., 196, and the judgment of reversal by supreme court, 36 O. S., 201. The latter is cited 45 O. S., 470, 484.

4. Warranties are part of the contract of insurance and their truth is a condition precedent to the right to recover upon the policy; and they must be strictly true. Representations are not part and parcel of such a contract, but are collateral to it and may form the basis and inducement upon which the same was entered into. They must be material and untrue in *substance* to defeat a recovery by the insured upon the contracts of insurance.
5. Where an insurance company puts written or printed questions to an applicant for insurance, and he answers the same and signs his name thereto, and the truth of such answers is made by the policy, the basis of the contract, such answers are made material by the stipulation of the parties, and their materiality can not be left to the jury, but only their truth or falsity; but they differ in their effect, from a warranty in this. A warranty must be strictly and literally true, while such representation need only be true in substance.
6. Where such a written application shows that a question contained the names of many diseases, and the answer of the applicant, signed by himself, is that he had never had any of them, the law presumes that he comprehended the question and answered with reference to each disease; but it may be proved that the insurer, by its duly authorized agent, read the questions, keeping the paper in his own hands, and wrote down the applicant's answers, and that he did not know what diseases were named in such questions.
7. Such evidence does not violate the rule that parol testimony can not be received to add to or vary a written instrument. Such application, when not especially made so by the policy, is no part of the contract sued upon; that is contained only in the policy, and misrepresentation is allowed to be proved to *estop* those claiming the amount of the insurance from enforcing the policy, and when it is shown that, without fraud or collusion, the applicant was misrepresented by the agent of the insurer into making an apparently false answer, when, in fact, he did not do so, or make any answer at all. Such facts will *estop* the insurer from insisting upon his *estoppel* of material misrepresentation.
8. Where such written application contained the question: "Are you in good health, and (as far as you *know*) free from any symptoms of disease?" and "Have you ever had any of the following diseases or, (as far as you *know*) any symptoms thereof?" *Cancer.* * * * The first of which questions the applicant answered "Yes," and the second, "No." *Held:* That the inquiries did not relate so much to the fact, as to the applicant's knowledge or belief, and that the truth of such knowledge or belief was what the parties had rendered material.
9. But, where the same application contained the further questions: "Have you had, during the last seven years, any sickness or disease? If so, state the particulars and the name of the physician or physicians who prescribed, or who were consulted?" and the applicant answered "No." *Held:* That the substantial truth of this question and answer was made material by the parties; and if the answer was not so, the *insurer can not be held liable upon the policy, even though the applicant honestly believed that his answer was true, substantially, when he made the same. This question relates to the truth of the fact and not to the applicant's belief. 157
10. Though there may be a fraudulent concealment of some collateral fact or facts by an applicant for insurance, which will release the insurer from liability, where the application, prepared by the insurer, is both full and specific, yet, if the matter undisclosed be not obviously fraudulent and vital to the risk, the insurer, in such cases, will generally be held to have inquired as to all the facts he desired to know, and that he deemed everything not asked about immaterial, and the insured will be justified in so believing, and in acting accordingly.

YAPLE, J.

This is a motion for a new trial reserved from special term for decision here. The plaintiff obtained a verdict against the defendant below for $3,129.50, upon a policy of life insurance for $3,000 upon the life of plaintiff's husband, Charles E. Cheever, deceased, the loss payable to her. Insurance upon the life of the same person for the benefit of the plaintiff, in the same sum, was originally taken in the Cincinnati Mutual Life Insurance Company, and evidenced by a policy dated July 21, 1871. To obtain this policy the insured signed a written application in which he stated as follows:

"5. Are you in good health and (as far as you know) free from any symptoms of disease?"

"Answer. "Yes."

"9. Have you ever had any of the following diseases, or (as far as you know) any symptoms thereof? * * * Cancer."

"Ans. "No."

"14. Have you had during the last seven years any sickness or disease? If so, state the particulars, and the name of the physician or physicians who prescribed, or who were consulted?"

"Ans. "No."

"On the 27th day of November, 1872, the insured, with the cousent of both companies, surrendered his policy in the Mutual and took, in lieu thereof, the policy sued on, thus making a *novation*. This last policy, among other things, provided that: In consideration of the representations made in the application for policy No. 5351, (the said Mutual Policy) issued by the Cincinnati Mutual Life Insurance Company, and of the surrender of said policy by Charles E. Cheever, and of the semi-annual payment of thirty eight and 67-100 dollars, (the amount and rate of premium stipulated for in the Mutual policy). * * * "Do insure the life of Charles E. Cheever," etc.

158 *Among the conditions of the present policy sued on is this: 1st. That the statements and declarations made in the application for this policy, and on the faith of which it is issued, are in all respects true, and without the suppression of any fact relating to the health or circumstance of the insured, affecting the interests of said company.

The answer set upon (1st) that Cheever misrepresented the fact as to his being in good health, and (as far as he knew) free from any symptoms of disease, alleging that he had symptoms of a tumor or cancer, of which he was well aware, and, by reason thereof, was not in good health:

2nd That Cheever answered on the 9th question untruly, as he had cancer! and had, to his knowledge, symptoms of cancer.

3rd. And that Cheever answered the 14th question in the application untruly, averring that Cheever, prior to said application, had had upon his neck a malignant tumor or cancer; that his regular physician operated upon it, and called a consulation of physicians, who pronounced the tumor a cancer; that it was agreed that a surgical operation should be performed for which Cheever advanced the fee, $125; that he did not have the operation performed, but went to a "cancer doctor," who, by remedies external and internal, healed up the sore, leaving a scar; that while the sore remained so healed, and between one and two years after it became so healed and apparently well, the insured made such application and gave his answer to the above mentioned questions, the companies being ignorant of the facts and remaining so until after Cheever's death; that, subsequent to the last insurance the malignant tumor, or cancer, reappeared upon Cheever, and after undergoing treatment for some months, and having a surgical operation performed upon it, he died, his death being caused by the tumor, or cancer. The date of his death was March 23, 1874.

The answer also avers that Cheever fraudulently concealed the facts from both insurance companies. The reply denied having made the representations alleged in the answer to the defendant insurance company; denied all concealment alleged on the part of Cheever; denied that he had cancer or malignant tumor when so insured, or symptoms thereof to his knowledge; denies that he was not in good health at that time, or that he had ever previously had any sickness or disease. The reply further set up that both companies, at the times they respectively took their risks, knew the facts in relation to such alleged tumor, or cancer, and should be estopped from now insisting upon the materiality of the same.

159 The defendant asked the court to compel the plaintiff to elect whether she would rely upon this last reply or upon the others, *claiming that they were inconsistent, which motion the court overruled and the defendant excepted, and such refusal is made one of the grounds of the motion for a new trial.

We think the court did not err in refusing this motion. The reply is by way of confession and avoidance, merely giving color to the alleged defenses. This was allowable under the old system of pleading; and surely the code is not to be made more technical than the former system, which has changed mainly on account of its over technicality. The parties may plead as many defenses or replies to defenses as they may have, the only restriction being that, if one be true the other, by no possibility, can be. Now, the alleged ailment of Cheever may not have been what the defendant alleged it was; and the defendant may hav known all the facts in regard

to it. The design of the code is to insure a full and fair trial upon the entire merits of a case, and not a partial trial upon a mere portion or branch of a case. The plaintiff claimed at the trial and still claims, that no representations whatever were made by Cheever to obtain his insurance in the defendant company; that the representations to obtain insurance in the Mutual, whose policy was surrendered for this, can not be taken as an application for the last insurance. If this be so then the verdict should have been for the plaintiff. But we think that the very terms of the last policy and its conditions make the application for the first insurance the application for the last. But, Cheever can only be held to have represented that the answers were true in substance—substantially true—when made that is, at the date of the written application, not at the date of the last, or insurance with the defendant. The court below so charged the jury.

The application is not made by either policy, part of its terms as was the case in Jeffries v. Economical Mutual Life Insurance Company, recently decided by the supreme court of the United States and reported in the "Spectator," an "American Review of Insurance," May, 1875, per 275; nor as was the "declaration" in the case of Holterhoff v. Mutual Benefit Life Insurance Company, 3 Amer. Law Rec. 272, S. C. 4 Big L. and Ac. Ins Rep. 395, decided by this court in general term, in June, 1874. Such application is not a warranty, and therefore, need not be literally true. But, such answers in the application by being in response to questions put, and reduced to writing and signed by the applicant, are mutually made material by the parties. They will be so held as matter of law; and their materiality need not be proved to the jury. This was held as to the application, it not being part of the declaration in Holterhoff v. Mutual Benefit Life Insurance Compauy, and see May on Insurance, page 194, and cases cited in note 1. The *difference between a warranty, which 160
is part of insurance, and a representation (which is the inducement to making such contract) made material by the parties, is this: A warranty is a condition precedent to the right of recovery, and must be literally true, while such material representation is no part of the contract, but only its inducement, and is only required to be true *in substance*. There was then, we think, no error in the charge of the court stating this distinction.

Another alleged ground of error is that the court permitted evidence to be given to the jury by the *general* agent, who took the application, that he read the questions to the applicant and wrote down his answers; and that of the list of diseases named in question 9, he did not ask, but only asked if he had ever had the measles or small pox, and the applicant answered "No," whereupon the court charged the jury that if such was the fact the insured would stand on the same legal ground as if a list of diseases were given and answered, and it should be claimed that the insured had had some other disease about which no inquiry had been made; or as if the answer to a question were not insisted upon or given, and the insurer should afterwards insist upon its materiality. In such cases the insurer will be held to have waived the materiality of the matters embraced in such an answered question. It is true that there may be cases of fraudulent concealment of facts by an applicant for insurance where the application contains full questions covering everything of which the insurer can think as material, and all of which have been answered truly. For instance, if a policy does not make it a cause of forfeiture to die for crime at the hands of the law, and a person under sentence of death were to procure and forward an application answering every question truly, and the insurer should take a risk upon his life, not knowing the fact of his being condemned to death, it could not be held, that, after execution, the insurer would be liable upon the policy. Other instances might be given, but these are *concealments* not *misrepresentations*. The first must be material and fraudulent; the other need not be made in bad faith, if material and untrue. But, in cases of alleged concealment, where there is a full written application prepared by the insurer, great care should be taken as to heeding alleged concealments, for insurers will be ordinarily held to have inquired about all that they desired to know, or deemed material. We say this as a necessary explanation of what is said briefly on the last clause of our decision in the case of the Mutual Benefit Life Insurance Company v. Holterhoff, 2 Cincinnati Superior Court, page 379, decided in October, 1872, citing Bunyon, page 45; Bliss, page 167.

The doctrine in *Bunyon* was probably laid down when applications *pre- 161
pared by insurers, themselves, had not become so specific and minute as they now usually are. But, it is urged that the allowance of that evidence violates the rule that parol evidence cannot be received to contradict a writing. The court charged the jury, that where a party signed a writing he was presumed to have known and understood all its contents, and it rested on the plaintiff to prove that the word "*cancer*" was not read to or seen by him when he answered the question

and signed the application. To answer this objection made by the defendant, it may be asked that, as all previous negotiations are merged in the contract when executed, and as representations are no part of the contract, that being contained only in the policy, why can they be proved untrue and material and thus avoid the contract? It is because such proof will *estop* the insured from enforcing his contract. So when the insurer has not, in fact, asked about a matter which he insists shall *estop* the insured from recovering, or when he knew the facts about which the representation was made, and with such knowledge, he still insured, he will be *estopped* from setting up misrepresentation in order to *estop* the insured from recovering upon the contract, of which mere representations are no part, especially if the insured was thereby led to believe the matter not insisted upon. But, it is claimed that the court erred in charging the jury that, if the agent taking the application was the *general* agent of the insurer, a corporation, and had the authority and power to collect the premium and to deliver the policy and did so, the company in no way notifying the insured *before* the delivery of the policy that his application was accepted by it, then such agent had power to consummate the contract, and the company was bound by his knowledge and acts in the premises.

We think that such charge laid down the true rule of law. We think the doctrine announced on this subject in Rowley v. Empire Insurance Company, 36 N. Y., page 550; Miller v. Mutual Benefit Life Insurance Company, 31 Iowa, page 216; Wilkinson v. Insurance Company, 13 Wal., page 222; Continental Life Insurance Company v. Goodall, 3 American L. Rec., page 338, decided by this court during the last year, the more correct one, and should be applied rather than what is known as the Massachusetts rule, followed, generally, in New England and in some other states.

The business of life insurance has become one of great magnitude. There is sharp rivalry among insurance companies, and all or nearly all, seem too active everywhere in obtaining risks and premiums. Too often they employ unscrupulous agents, and it is not right that the persons insured should bear the loss and
162 the insurance companies who employ them, reap all the *gain arising from their acts and conduct. Otherwise, such void risks will become the most lucrative part of the insurer's business. He will thereby receive much money and incur no liability. It will be far better to adopt such a rule of law as will compel insurers to employ responsible and honest agents, and if loss be entailed by the acts and conduct of those who are dishonest, to require the principals to look to them for damages, and not visit the loss of premiums and the sum insured upon their victims. We, however, seldom, or never hear of an action by an insurance company against an agent for damages for involving it in loss by taking improper risks and fraudulently imposing them upon it.

The evidence in the case entirely fails to establish that part of the reply which sets up that the defendant or its agent taking the application, was aware of the facts in relation to the alleged tumor which the insured once had; and much less does it show that the insured was led, by the conduct and acts of the agents, to believe that such circumstance was deemed immaterial, which would be necessary to work an *estoppel* on that ground against the defendant. The agent testified that, while he had been very intimate with Cheever prior to the latter's marriage, and had seen and visited him occasionally afterwards, he was entirely ignorant of his having had such tumor, or of his treatment therefor, and there was no other testimony adduced on the subject. It was for the plaintiff to prove such knowledge of the agent. If the jury even disbelieved the agent, who was introduced as a witness by the plaintiff, there was simply no evidence upon such fact before them, and they could not infer it without any proof whatever. It is also very clear upon the evidence that the insured did not *fraudulently* conceal anything from the agent. He was a very hopeful man. His general health had always been good, and he was ever able to attend to and carry on business efficiently. His general good health was what induced the physicians, at the consultation for the tumor, who did not think it cancer, to believe it was not such. When he applied for insurance in the Mutual Company, he clearly believed that he was well, and some of the physicians, who had been at the consultation, seeing the sore healed, leaving only a scar, had informed him that it was not cancer which he formerly had. He was then in apparently perfect health, and doubtless believed himself so to be.

He evidently answered the 5th question: "Are you in good health, and (as far as you *know*) free from any symptoms of disease?" truly. The 9th question: "Have you ever had any of the following diseases, or (as far as you *know*) any symptoms thereof?" He was so far as cancer is concerned, never

*asked at all. The agent said he thought the examining physician was the party to ask these questions, and he never did. These questions depend upon 163
the *knowledge* or *belief* of the applicant. He neither believed nor knew to the contrary of what he answered, and it was such *belief* and such *knowledge*, and not the *fact* that was made material by the parties. But, the material part of the case arises upon the answer to the fourteenth question, written down by the agent as answered by the applicant, in which the fact and not merely belief or knowledge was called for: "Have you had, during the last *seven years*, any sickness or disease? If so, state the particulars and the name of the physician or physicians who prescribed, or who were consulted?" He answered, "No."

The court charged the jury that this representation was material, and if untrue *in substance*, the plaintiff could not recover, and that the jury, from the evidence, were to determine whether or not, within that period, the insured had had any sickness or disease, and whether he had called physicians to attend him therefor, or whether he had consulted any physician in reference thereto. The point for the determination of the jury really was whether or not the recurrence of the tumor or cancer was the reappearance of the old trouble, or whether it was a new and distinct ailment occurring after the insurance was effected. If the former, there should have been a verdict for the defendant; if the latter, for the plaintiff. The court instructed the jury, in effect, that if the party had once supposed and been told that he had cancer, and in alarm had engaged physicians to treat it as such, and they did so, but that after it healed they advised him it was not cancer, or a serious ailment, and he believed them, and in fact it was not what he and they once thought and feared, he was excused from stating the facts, the same as he would have been had he, from eating green fruit or vegetables during the prevalence of *cholera*, been attached with acute *cholera morbus*, and, in his alarm, called in several physicians to treat him, and who, at the time, thought his disease was cholera, but that all afterwards ascertained the trivial nature of the complaint. But, we think that the evidence established clearly that the insured had been, prior to his application, afflicted with a malignant fibroid tumor or cancer; that treatment had simply arrested it for a time without removing it from his system; and that it reappeared and caused his death. If we are right, he misrepresented the fact, though, as we think, innocently, under the belief that his ailments had been trivial, producing more of fright than danger. But, the effect of a misrepresentation of a material and positive fact, upon which an insurer relies, does not depend upon the good faith, or honest belief of the applicant making the *representation. Such represen- 164
tation must be true; and if not so, substantially, the liability of the insurer will be avoided where the truth of such representation is made the basis of the contract of insurance. Duckett v. Williams, 2 Cromp. and M. (Exch.) page 345; Vose v. Eagle Life Insurance Company, 6 Cush., R., 42; Campbell v. New England. Life Insurance Company, 98 Mass., R., 381; Davenport v. New England Insurance Company, 9 Cush., page 341; Holterhoff v. Mutual Benefit Life Insurance Company above cited.

We feel constrained, therefore, to sustain this motion and grant a new trial upon the ground that the verdict is against the evidence adduced at the trial. The motion will be granted the defendant. New trial, Judges Tilden and O'Connor concur

Pugh, Throop, Brannan and *C. D. Robertson*, for Plaintiff.

Matthews, Ramsey and *Matthews*, for Defendant.

---

*WILLS—PARTITION—CONFLICT OF LAWS. 199

[Superior Court of Cincinnati, General Term, June, 1875.]

SAMUEL CRAIGHEAD ET ALS., EXECUTORS, v. ELLEN M. PIKE ET ALS.

Tilden, Yaple and O'Connor, JJ.

DEFENDANTS ALL IN DEFAULT.

S. N. P., residing in the state of New York, and owning much valuable real estate in Ohio, and also in the states of New York, Virginia Kentucky and Illinois, and a large personal estate, made his will in Ohio, in 1866. He, after providing

for his widow, devised his real estate to his executors to be held in trust for his four children, one son and three daughters, and directed his executors, three of whom are residents of Ohio and one of New York, *when his youngest child should come of age*, to partition his real estate among his children, and convey their respective portions, which were to be equal, to them for life. He died in New York in 1872, where he and his family then resided, and where his widow and all his children have ever since resided and still reside. His youngest child, a daughter is more than eighteen, but under twenty-one years of age. By the statute law of New York, a female is not of age until twenty-one years old, while in Ohio she is of age at eighteen.

1. *Held:* That the Ohio lands may be partioned and conveyed at present, under the will. As the testator specified no number of years at which such child should be held to be of age, the law will presume that, as to Ohio lands, he intended the age at which the daughter would be capable of controlling and disposing of them by the laws of the state, it not being the policy of our state to postpone the right to dispose of lands longer than the time at which their infant owners arrive at an age at which they are capable of disposing of them by the laws of the state, and the statute of another state or country will not be recognized or enforced so as to defeat such policy.

The same will provided that all the testator's debts should be paid out of his personal estate, and the residue divided equally among his four children, subject to his widow's rights by law—she having dower also in all his real estate. Upon one portion of the real estate, there exists a mortgage, due from the testator, amounting to $125,000. By a statute of New York, where encumbered lands are devised, the devisee must discharge the encumbrance out of his own means,
200 the estate not being liable to discharge the same, unless the will expressly provide to the contrary.

2. *Held:* That such mortgage debt is a debt of the decedent, and under the law of Ohio, is, by the terms of the will, to be paid out of the personal estate.

YAPLE, J.

This case comes before us by reservation from special term upon the pleadings, the petition in the case—filed by the executors of the last will and testament of the late Samuel N. Pike, deceased, praying for a construction of his will.

Samuel N. Pike, then and thereafter, until, and at the time of his death, a resident of the state and city of New York, on the 12th day of October, 1866, at the city of Cincinnati, Ohio, where the largest portion of the real estate, then and at the time of his decease, owned by him was situate, made his last will and testament, which the court is now called upon to construe.

He left, besides his Ohio realty, a large real and personal estate in New York, and real estate in Virginia, Kentucky and Illinois.

By the law of Ohio, since long before the date of the will and ever since a female who has arrived at the age of eighteen years, is of full age and competent, if sole, to contract and to convey real estate. In the state of New York she is not of full age until she is twenty-one years old, and, until of full age, is not competent to contract or convey her real estate.

All the defendants at the time of his decease, which occurred on December 7, 1872, were and still are residents of the city of New York. His youngest child, Laura A. Pike, became eighteen years old in January, 1875, and she is, therefore, over eighteen and under twenty-one years of age.

Also, by a statute of the state of New York, (Rev. Stats. Pt. 2, c. 1, Tit. 5, Sec. 4, Marg. p. 749) it is provided, that, "whenever any real estate subject to a mortgage executed by any ancestor, or testator, shall descend to an heir, or pass to a devisee, such heir or devisee shall satisfy

and discharge to such mortgage out of his own property, without resorting to the executor or administrator of his ancestors, unless there be an express direction in the will of such testator that such mortgage be otherwise paid."

A part of the real estate of the deceased, situate in the city of Cincinnati, known as the "Burnet House" property, was, at the time of his death, and is still encumbered by a mortgage, executed by one A. B. Coleman to August Belmont for $125,000, which mortgage was assumed by Mr. Pike, as part of the purchase money of the property, when he purchased it. It is still outstanding.

*The will of Mr. Pike, which has been duly probated in Ohio as well as in New York and elsewhere, is as follows: 201

"I, Samuel N. Pike, do make and publish this as my last will and testament.

"I. It is my will as to my personal estate, that after the payment of *my debts* and funeral expenses, and alloting to my wife her share as provided by law, the residue shall be equally divided among my children.

"II. I devise all the real estate of which I may die possessed, whatever and wheresover the same may be, after assigning to my wife her dower therein to my executors hereinafter named, in trust, to manage and control the same; and after paying all proper charges and expenses, to apply the profits and proceeds to the use and benefit, support and proper education of my children, *until the youngest shall or would come of age*, and then to convey all said real estate, including any part assigned to my wife for dower, or subject to said dower, *in equal parts* to my children, share and share alike, for his or her natural life; and the part or share so conveyed to each of my said children, after his or her decease, leaving a child or children; to convey to such child or children, his, her or their heirs and assigns in fee.

"III. It is my will, in event either my children shall die before the youngest shall or would come of age, leaving a child or children, that such child or children shall represent his, her, or their ancestors, in the benefit of the aforesaid trust, and surviving said period so fixed for a conveyance, shall be entitled in like manner as if such ancestor had lived to the same period and then died. But, if either of my children shall die before such period fixed for conveyance to them, leaving no children, the division shall be made without reference to such child among and to those then living.

"IV. It is my will, in theevent either of my children shall die leaving no child or children, or descendants, then, the part or share conveyed to him or her for life, shall be conveyed to his or her brother or sisters, or their descendants, in equal shares in fee, the descendant or descendants representing his, her, or their ancestor.

"V. But it is my will, in the event either of my children shall die leaving no child or children, or descendants, but leaving him or her, surviving a wife or hnsband, that then shall be conveyed to such wife or husband, *one-half* of the part or share of such child to have and hold during the natural life of such wife or husband, and any conveyance as directed in *third* and *fourth* clauses above shall be subiect to such life estate.

"VI. It is my will, and I direct that my executors, *when my youngest child shall or would come of age*, shall make, or cause to 202 be made a partition or division of my real estate into equal parts or

shares, and so convey the same as above directed, and if such partition or division cannot be made so as to convey specific portions to such child, then it is my will and I direct that my executors sell such portion of my real estate as may be deemed necessary and proper to secure such a partition and division, and reinvest the proceeds in other productive real estate which can be partitioned in kind. It being my will and desire that productive real estate shall be conveyed in the manner I have above directed.

"VII. It is my will, and I direct that my executors pay to my brother, Solomon M. Pike, one thousand dollars, annually, during his natural life.

"VIII. I bequeath to Henry Pike the amount he is indebted to me—about thirteen thousand dollars—and I direct said debt to be released and cancelled.

"IX. I appoint Samuel Craighead, of Dayton; Emanuel J. Miller, of Cincinnati; Joseph Tilney, of New York, and William R. Williamson, of Cincinnati, executors of this, my last will and testament, and I direct and request that they shall not be required to give bond and security for the execution of their office or trust."

(Duly signed and witnessed.)

All the persons named in the will as executors, having accepted the trust, and all the children of decedent being over twenty-one years of age, except said Laura A. Pike, who is over eighteen years old, this action was brought by said executors to obtain a construction of the will in relation to the following matters:

1st. "Whether said plaintiffs have the power under said will to postpone the partition of said real estate of said decedent, *until the youngest child attains the age of twenty-one years?*"

2d. "Whether said plaintiffs, said executors, have the power to make, and said defendants the right to demand partition of that portion of said real estate of said decedent, lying and being in the state of Ohio, *upon said youngest child attaining the age of eighteen years?*"

3d. "Whether, under the fourth provision of said will, in the event of the death of either of the said children of said Samuel N. Pike, leaving no lawful child or children, or descendants, him or her surviving, the part conveyed to such deceased child for life shall be conveyed by said executors to his or her brothers and sisters, or their descendants, in equal shares *for life or in fee?*"

4th. Whether, upon effecting said partition provided for in
203 *the will, it is proper that said executors should convey to each child of said Samuel N. Pike then living, his or her share, *in severalty for life*, remainder to his or her child or children, or convey to each a *life estate only*, retaining the fee to such share for subsequent conveyance on the death of such child or children, or descendants, or otherwise, as provided by said will?"

5th. "Whether said executors have power and authority, under said will, to sell any part of the real estate of said decedent for any purpose *other than to effect a partition* amongst *said children*, as provided in said will?"

6th. "If said executors should find it necessary to sell part of said estate lying in said state of Ohio, to effect an equitable partition amongst said children, are they required by said will and the law to invest the proceeds of such sale in real property *within the state of Ohio?*"

7th. "In effecting such partition, have said executors power to sell, at their discretion, any of the decedent's property, productive or otherwise?"

8th. "Whether, under the provisions of said will, to effect partition of said real estate of said decedent amongst said children said executors have the power and right to assign and set apart to *two or more* of said *children* any portion of said property to be held by them as joint tenants against the objections of *both or either* of said parties?"

9th. "And whether, under said will, and the law of New York, it is the duty of said executors to partition said real estate of said decedent *subject to said mortgage* on said Burnet House property, leaving it to be paid by the child or children to whom it may be assigned, *to pay it off and discharge the same* as a *debt* of said decedent, as provided in the first provision of said will?"

In relation to the *first* and *second* matters of construction prayed for, we are of opinion and so hold, that Laura A. Pike, though a resident of the state of New York, by the laws of which state her majority is fixed at twenty-one years of age can, she being more than eighteen years of age and sole, convey, or otherwise dispose of all her lands and real estate in Ohio—eighteen years being fixed in this state as the period of full age in the case of a female. As to all her rights in lands situate in this state, she is of full age; and as to such lands, the time has come when the executors may make partition under the will, and when the devisees (the children of the testator) may require such partition to be made. In the nature of things, partition could not be effected simultaneously of the lands in all the states were the executors to defer it until such youngest child should arrive at the age of twenty-one years. And, as the will contemplates *an equal division among the children, share and share 204
alike, we can see no practical reason for deferring partition of the Ohio lands for three years. The law of another state, as, New York, cannot prescribe that any person shall be disabled to convey lands in Ohio; the laws of the latter state alone can provide who may be capable of conveying lands within its limits, and they have made a single woman over eighteen years of age, whether residing in or out of the state, competent to so convey, whether she be or be not competent to do so in the state where she resides. We think that if Laura A. Pike, being eighteen years of age and sole, were to come to Ohio and institute a suit to compel these executors to partition to her, her interest in the Ohio lands, on their refusal to do so, she could compel such partition. The testator must be held to have intended that the period of the devisees' right to have and control their Ohio lands, should be governed by Ohio laws, he not having said to the contrary. It is the policy of our law to enable females eighteen years of age to control and dispose of their real estate, and will presume this testator so intended, he having failed to express himself otherwise, but left the time to legal construction.

As to the *ninth* matter for construction, we hold that the mortgage on the Burnet House property is *a debt* of the estate of Samuel N. Pike, the deceased, and as such is, under the laws of this state, required by the first item of his will, to be paid out of his personal estate, if that shall prove sufficient. The statute of New York can have relation only to devised mortgaged lands situated in that state, and not to Ohio lands.

The rule in Ohio is, that if a decedent dies leaving his real estate mortgaged, the mortgage debts are personal debts, and must be paid by

the executor out of the personal estate. Real estate can only be subjected to the payment of debts when the personal estate is not sufficient to pay them.

The construction of the *fourth* item of the will, *thirdly* prayed for, we see no present need of determining. *The prayer is based upon no existing state of facts*, but upon speculative possible contingencies, not necessary for the proper execution of the trust. Neither of Mr. Pike's children has died "leaving no child or children, or descendants, him or her surviving," and it may, presumably, never be necessary to determine whether his or her portion shall be conveyed to the survivors, equally, or their descendant "for life or in fee."

In relation to the *fourth* prayer, we may say, that it will be necessary, when partition shall be made, to make deeds to the parties for their respective portions, and how such deeds shall be executed is proper to be now determined. The will provides for many contingencies, all of which cannot, and many of
205 *which will not occur; but if one or another shall happen, it will work a particular disposition of the estate. We, therefore, think that it will be safest for the executors to deed to each devisee his or her share *for life only*, upon the terms and conditions and in pursuance of the provisions of the said will and as fully and amply as the same is devised thereby. In case of the death, thereafter, of any such child or children of the testator, the state of facts may be such as to render the duties of the executors under the will obvious. To illustrate: if a deed were made to each child for life, remainderto heirs, etc., the terms of such deed would vest the remainder in the children of the devisee as born; yet, if they should all die and their fathers and mothers then die also, leaving a widow or husbands, the executors are required to deed the half of such deceased devisee's interest to such surviving widow or husbands for life. To enable them to do this, they should keep the remainder, in fee, in themselves. The will sufficiently vests such beneficial remainders in the children of the devisees, and the excutors should remain in such a position as to be able to convey such remainder where they can safely do so and avoid the possibility of complicating the title.

In relation to the *fifth* prayer, we do not think the executors have power to sell any of such real estate, unless necessary to pay the debts of the decedent, except to effect partition among the children as provided in the will.

Sixth. If the executors should find it necessary to sell part of said real estate lying in Ohio to effect such partition, they will not be required to re-invest the proceeds in lands in Ohio. They will be required to re-invest in real estate in or out of Ohio, which can be partitioned as required by the will, and which, in the exercise of their best judgment and discretion, will be likely to be most productive. The daughter, who is over eighteen but under twenty-one years of age, is capable of taking by deed lands lying in any state, and she will hold them separately though it might be necessary for her to have a legal guardian appointed to manage and control them during her minority in the state where purchased for her.

Seventh. The power of the executors to sell such real estate whether productive or unproductive, is limited by the will, to such of it

as can not be partitioned or divided, so as to convey specific portions of the same to each child or devisee.

Eighth. If two or more, or all said children of the decedent, agree to hold any given piece or parcel of real estate, *as tenants in common*—there being no *joint tenancy* in Ohio—subject to all the terms and conditions of the will, except that providing for the assignment to each of his or her share in severalty, we *see no reason why such portions of the property may not be so assigned and held. The husbands 206 of the married daughters should agree that to such an arrangement as well as their wives. And if the division is, in all other respects, equal and fair, we see no good reason why two or more of such devisees might not agree to and hold their double or triple portions in equal shares in common, subject in all other respects to the provisions of the will. We can not see how that could prejudice the rights of the others, who might desire their respective portions assigned in severalty, or upon what ground such others would have the right to object. Our decision has reference only to the lands in Ohio. The proper decree based upon and in pursuance of the above holdings, can be prepared by counsel and entered.

Judges Tilden and O'Connor concurred.

Wm. Craighead and *Jas. R. Murdock* for plaintiffs.

Defendants all in default.

---

*APPEALS—CONSTRUCTION OF THE JUSTICES' ACT. 213

[Hamilton County District Court, 1875.]

†Leonard & Cook v. The City of Cincinnati.

Under section 90 and section 111 as amended March 30, 1875, of the law relating to appeals from justices, if there was no jury before the justice, and a judgment was rendered for more than $100, a right of appeal existed, and if there was a jury trial and either party claimed more than $100, there was a right of appeal, although the judgment was for less than $100.

Burnet, J.

Petition in error to reverse an order of the common pleas dismissing an appeal from the judgment of a justice of the peace.

In April, 1875, the city of Cincinnati for the use of Lloyd, commenced a suit before a justice of the peace to recover the amount of a paving assessment against Leonard & Cook, being less than one hundred dollars. The defendants did not appear at the trial, and judgment by default for eighty-seven dollars was rendered against them by the justice. The case was appealed to the court of common pleas, and on motion of the plaintiff to dismiss the appeal on the ground that the court of common pleas had no jurisdiction, the appeal was dismissed. It is now claimed that the common pleas erred; that the amount of the claim before the justice having been more than twenty dollars, there was a right to appeal.

In determining the effect of the recent legislation on this question, it will be proper first to ascertain the true interpretation of the law as it existed before the amended sections were adopted. By section 90 of the code regulating the civil juris-

†The judgment in this case was reversed by the supreme court. See opinion, 26 O. S., 447. The latter is cited, 27 O. S., 669, 674, and distinguished 31 O. S., 424, 430. The decision of the district court covering another point in the case is found, 4 Rec., 668.

diction of justices of the peace it was provided "if either the plaintiff or defendant, in their bill of particulars, claim more than twenty dollars, the case may be appealed to the court of common pleas; but if neither party demand a greater sum than twenty dollars, and the case is tried by a jury, there shall be no appeal." By section 111 it was provided that "in all cases not otherwise specially provided for by law, either party may appeal from the final judgment of any justice of the peace to the court of common pleas of the county where the judgment was rendered. And
214 section 123 in enumerating the cases in which appeals *shall not be allowed, provides in clause 2, "that in jury trials where neither party claims in his bill of particulars a sum exceeding twenty dollars," there shall be no appeal.

The whole act, which was intended to define the jurisdiction of justices and the methods of civil procedure in their courts, is orderly in its structure, and divided into "articles," and these again into lesser subdivisions, according to the different subjects treated in its various parts. Section 90 occurs in article 7, relating to "the trial and its incidents," and in that part of the article which refers to the subject of juries and jury trials, given under the caption "Jury." Sections 75 to 93 inclusive are devoted to the various matters connected with trials by jury. Although the first clause of section 90, which provides that if either party claims more than twenty dollars there may be an appeal, does not in terms refer to jury trials, yet from its occurrence in that part of the code relating to jury trials, we understand that to be the meaning of it. And this, notwithstanding the latter clause of the section is in these terms: "but if neither party demands a greater sum than twenty dollars, and the case is tried by a jury, there shall be no appeal," in which the exception stated being the case tried by a jury, and that language being omitted from the former clause of the section it might be claimed from the mention in the one clause and the omission in the other, that the legislature intended in the former clause to include all cases, whether trial by jury or not.

It is to be observed that section 91 does not in terms refer to cases tried by a jury; and yet Judge Swan, in the edition of 1866, of his treatise, very properly speaks of that section as applying to appeals from judgments rendered by justices in cases in which jury trials were had, evidently so construing the section because it occurs in that part of the code that relates to jury trials.

Our interpretation of section 90 is strengthened by the fact that when the statute came to speak of appeals in that article of the code devoted to the subject of appeals, it said, in section 111, "In all cases not otherwise specially provided for by law, either party may appeal from the final judgment of any justice of the peace," etc. To give the right of appeal where the case was tried by a justice without a jury, whether the claim exceeded or was less than twenty dollars, section 90 was unnecessary. For under section 111 it was a matter of entire indifference what was the amount of the claim, and it included claims over twenty dollars as well as claims under that sum. But construing section 90 to apply to jury cases, harmonizes that section with the other portions of the statute relating to the same subject.

215 *The new statute passed March 30, 1875, prior to the commencement of this action, does not in terms repeal section 90. It, however amends section 111 so as to allow an appeal from a judgment rendered by a justice, in all cases not otherwise specially provided by law, where the judgment exceeds one hundred dollars, by implication forbidding an appeal where the judgment does not amount to one hundred dollars; except, of course, in the cases otherwise provided by law, to which neither the enabling provision nor the implied prohibition applies. And section 123, as amended, forbids appeals in certain enumerated cases, among which are jury trials where neither party claims a sum exceeding one hundred dollars, and the judgment exclusive of costs is less than one hundred dollars, leaving a right of appeal in no case where the claim and the judgment are both less than one hundred dollars.

If the first clause of section 90, as it stood in the original code, is to be interpreted as referring to all cases indifferently, whether tried by a jury or by a justice, and is to be considered as still in force, that section, together with section 111, as amended, will present this anomaly, that where either party claims more than twenty dollars, there may be an appeal, if the case is tried by a justice, and a judgment for more than one hundred dollars is rendered—a judgment that can only be rendered where the claim is more than one hundred dollars. Unless, indeed, we escape the absurdity by holding the amendment of section 111 to be inoperative. We do not think we are driven to that necessity, but section 90 refers only to jury cases, and the effect of the new legislation is to repeal the whole of that section.

It is noticeable also that the phraseology of section 111 is changed by omitting the word "for" in the first line, so that the amended section reads: "In all cases

not otherwise specially provided by law," instead of "In all cases not otherwise specially provided *for* by law," materially changing the effect of the sentence. As it stood before, it might, without violence, have been understood to mean, "In all cases not by some other part of the law, or by some other law specially provided for," an appeal should be had. As amended, it will hardly admit of that construction, but means rather that an appeal shall be allowed in all cases in which the special provision of the law is not different; or, transposing the words, "In all cases in which the law does not otherwise specially provide, either party may appeal from the final judgment of a justice of the peace to the court of common pleas of the county where the judgment was rendered, when such judgment, exclusive of costs, amounts to not less than one hundred dollars; "and, by implication, if the judgment is less than one hundred dollars, there shall be no appeal. In *this view 216
of the amendment of section 111, the first clause of section 90 is repealed, though it be understood to have included other than jury trials. But the majority of the court are satisfied without this additional consideration, that it is repealed, because they think it referred only to jury cases.

The conclusion to which we have come, from a comparison of the new sections with the old, and of the old sections among themselves, is, that where a case is tried by a justice without the intervention of a jury, and a judgment rendered for more than one hundred dollars, the right of appeal exists; but if the judgment in such case be less than one hundred dollars, there is no appeal. And where a case is submitted to a jury, the claim of either party to the action being more than one hundred dollars, the right of appeal exists, although the amount of the judgment may be less than one hundred dollars. This condition of the law makes the judgment of a justice, unaided by a jury, more binding in certain cases than if the claims had been submitted to a jury. The responsibility, however, does not rest with us.

The judgment of the common pleas dismissing the appeal is affirmed.

W. T. Forrest, for Plaintiff in Error.

J. C. Healy and *G. W. Cormany, contra.*

POWERS OF COUNTY COMMISSIONERS.

[Superior Court of Cincinnati, General Term, October, 1875.]

†COMR. OF HAMILTON CO., v. NOYES.

Yaple, O'Connor and Tilden, JJ.

The board of county commissioners is clothed with such powers only as are conferred upon it by statute, and the power to sue, or the liability to be sued, with the single exception of the power to sue for injury done to county property, extends only to actions arising upon *contract*, and not upon a *tort;* and the board of commissioners, therefore, cannot maintain an action to recover money alleged to have been wrongfully, and without authority of law, drawn from the county treasury.

O'CONNOR, J.

*This is a proceeding in error to reverse a judgment rendered at special 217
term, sustaining a demurrer to the plaintiff's reply and dismissing the action.

The plaintiff below, now plaintiff in error, filed a petition containing four causes of action, differing only in amounts and dates, to recover from the defendant, Edward F. Noyes, the aggregate sum of $13,526.55, and interest. The petition sets out that the defendant, while holding the office of probate judge of Hamilton county, Ohio, under color of his said office, with intent to deceive the auditor, and to defraud the said county, falsely and fraudulently represented to said auditor, that he, the said Noyes, was entitled to a warrant upon the treasurer of said county, for the sum of $——, (the amount stated in the first cause of action), and that by reason of said false and fraudulent representations, the said auditor was induced to, and did illegally draw and deliver to said defendant, on said day, the said warrant or

†For the opinion which is affirmed by this judgment see 3 Rec., 745. The judgment in this case was affirmed by the supreme court. See opinion 35 O. S., 201.

order, and on the same day the said defendant wrongfully, illegally and fraudulently, drew from the treasury of Hamilton county, Ohio, the said sum of money; no part of which sum was then or has since become due or owing to said defendant from said county, on said warrant so illegally issued and drawn; which said sum of money he received and wrongfully, unlawfully and fraudulently converted to his own use and has ever since retained for his own use and benefit, and has neglected and refused to refund the same, or any part thereof to the plaintiff, or to the treasurer of said county; whereby the said defendant became and still is indebted to the county of Hamilton in the sum of $———, and interest thereon, from November 28, 1868, for which the plaintiff prays judgment.

To this petition, the defendant waiving service of process, and voluntarily appearing, filed his answer, admitting that he was judge of the probate court of Hamilton county, Ohio, at the several dates named in the petition, but denying each and every allegation of fraud and misrepresentation therein contained, and denying each and every allegation in said petition, except as expressly admitted in his answer. The defendant says, he received from the auditor of Hamilton county, as he was lawfully entitled to do, upon orders of the board of commissioners of Hamilton county, lawfully issued to him, warrants upon the treasurer of said county, for sums of money corresponding in amounts, and in their dates, with the warrants mentioned in the petition, in payment for work done by the defendant, on account of said county, in pursuance of a contract lawfully entered into by the said board of commissioners of Hamilton county with the defendant. And he prays to be dismissed with his costs.

218 To this answer the plaintiff filed a reply in which it denies *that the defendant was lawfully entitled to the warrants on the treasurer of Hamilton county, which he received from the auditor, or that the auditor lawfully issued said warrants upon orders of the board of commissioners of Hamilton county, or that the defendant received said warrants for work done on account of said county, in pursuance of a contract lawfully entered into by said board of commissioners with the defendant. On the contrary, that said pretended contract was illegally entered upon; that the commissioners were not authorized by any law to contract for said services; that the said work was unnecessary and uncalled for, and of no value to the county after its completion; that the rate paid for the work done was outrageous and unconscionable and contrary to public policy, being seventy-five times what said work would have been worth if legally entered upon; that the said pretended contract was let without competition, no advertisement for proposals to do the work having been made, and that therefore said pretended contract was by law null and void, and the defendant took no rights whatever thereunder; and that the sums of money so drawn by the defendant, as alleged in the petition, were illegally drawn from the treasury. And the plaintiff says the statements in the petition are true and asks judgment as therein prayed for.

To this reply the defendant filed a demurrer on the grounds:

1. That the plaintiff has not legal capacity to bring the action.
2. That the matters set up by the plaintiff, in the reply, are not sufficient in law to enable it to maintain the action against the defendant.

The court sustained the demurrer and entered judgment for the defendant, to reverse which this proceeding in error is now pending.

The demurrer to the reply brings under review the petition, and the petition and reply, in appropriate legal terms, describe a *tort*, a wrongful conversion, *trover* at common law, as the foundation of the plaintiff's cause of action. The right to recover is not based on any contract, but on the conclusion that defendant cannot lawfully retain what was procured by his wrongful act, and therefore that there is an implied promise that he shall repay. But this implication is no more than the general obligation to make reparation for every wrong, and would apply as well to him who negligently or wilfully injures or destroys a county bridge, as to the defendant upon the case made in the pleadings. We are satisfied the petition and reply do not declare in *assumpsit* but on a *tort*. This brings us to the question: Can the commissioners of a county maintain an action for a *tort* such as this, the 219 wrongful conversion of money alleged to *be the property of the county? If they can, whence do they derive their authority?

The nature, powers and limitations of county organizations have been judicially determined by a number of decisions in our supreme court.

In the case of The Commissioners of Hamilton County v. Mighels, 7 Ohio St., 115, the court, in commenting on the statute, to which we shall presently refer, says: "This statute does not in terms declare or constitute either the county or the board of county commissioners a body corporate proper; but it clothes the board with

one corporate capacity—that of suing and being sued; and this is followed immediately by a specification of the matters in reference to which the board may sue. And it is worthy of notice, that this statutory enumeration of the matters in respect to which the board of commissioners may sue, is confined to matters of contract. As to all actions or subject matter of actions sounding in tort, the statute is silent." We may here remark that since this decision was made, and before the present action was commenced, the statute was amended March 30, 1868, as to authorize the board of commissioners in the several counties to sue for and recover real estate belonging to the county, and to sue for and recover for any damage that may be done to the property of the county.

In the same decision the court says: "Neither a county nor the board of commissioners of a county is a corporation proper; it is at most a local organization which, for purposes of civil administration, is invested with a few functions characteristic of a corporate existence. But it is an established rule, that a grant of powers to a corporation proper shall be strictly construed; and it seems to us that this rule is at least equally applicable in any inquiry into the powers and capacities of a *quasi* corporation, whose powers and functions are, from their very nature and object, more strictly limited than those of a corporation proper."

In the case of Hunter v. The Commissioners of Mercer County, 10 Ohio St., 520, the court says: "The county is not a corporation, but a mere political organization of certain of the territory within the state, particularly defined by geographical limits, for the more convenient administration of the laws and police power of the state, and for the convenience of the inhabitants. Such organization is invested with certain powers delegated to it by the state for the purposes of civil administration; and for the same purpose it is clothed with many characteristics of a body corporate. A county may not improperly be called a *quasi* corporation, for it is in many respects *like* a corporation. But a county can neither sue nor be sued, except by *express power conferred by statute, and in the manner so expressed. Nor 220
can any of the officers of a county, by virtue of such office, sue or be sued, except as provided by statute. It follows, therefore, that the only power to sue possessed by the board of county commissioners, is conferred upon them by statute."

The statute here referred to is the seventh section of the act of March 12, 1853, "establishing boards of county commissioners, and prescribing their duties," which section 7 is now in force as amended in 1868, the amendment merely enlarging the powers of the commissioners so as to authorize them to recover real estate belonging to the county, and to sue for and recover for any damage that may be done to the property of the county.

The original section 7 reads as follows:

SEC. 7. "That the board of commissioners, in the several counties of this state, shall be capable of suing and being sued, pleading and being impleaded, in any court of judicature, within this state; and they are hereby authorized and required to ask, demand and recover, by suit or otherwise, any sum or sums of money or other property, due to such county on account of advances made by them on any contract with any person or persons, for the erection or repairs of any public buildings or bridges, or any other contract which, by the provisions of this act, they are authorized to enter into; and, in like manner, to sue for and recover in money, the value or amount of any labor or article of value, subscribed instead of money, to aid in erecting or repairing public buildings or bridges, where such labor or article of value, upon their requisition, shall not have been performed, delivered or paid in a reasonable time; and the money so recovered, in either of the above cases, shall be by them paid into the treasury of the county; and they shall take the treasurer's receipts, and file the same with the auditor of the county."

In the case of The Commissioners of Gallia County v. Holcomb, 7 Ohio, 232, the supreme court, in giving a construction to this section of the statute before it was amended, held that "the commissioners of the county cannot maintain an action in their capacity as commissioners against individuals who may carelessly or willfully destroy roads or bridges." The court says: "The case made in this declaration, is not, in express terms, provided for in this statute. The inquiry there is, can it be necessary as an incident to the very existence of this *quasi* corporation, or to the complete discharge of all the powers, duties and obligations conferred upon it by law, that it should have the authority to sustain an action for the wilfull or negligent destruction of a public bridge; for where such necessity does not exist, a power not granted in express terms cannot be conferred by implication."

*In the case of the Board of Commissioners of Hamilton County v. 221
Mighels, 7 Ohio St. 109, this same section of the statute received a construction, and the court there held "that the board of commissioners of a county are not

liable, in their *quasi* corporate capacity, either by statute or common law, to an action for damages for injury resulting to a private party by their negligence in the discharge of their official functions." The action was brought to recover damages sustained by the plaintiff who was in attendance as a witness, and was injured by falling in the night time into an open space in this court house while being completed, which had been negligently left unguarded and without lights. He recovered a judgment in the superior court of Cincinnati, which judgment was reversed by the supreme court, on the ground that the statute in question conferred no capacity on the board of commissioners to sue or be sued for a *tort*, but only in certain enumerated cases of contract.

This case expressly overrules the case of the Commissioners of Brown County v. Butt, 2 Ohio Rep. 348, where it was held that the county was liable in damages to the sheriff for not providing a jail, where the sheriff had been compelled to pay damages for an escape of one arrested on civil process.

Following this same rule of strict construction as to the powers and liabilities of county commissioners to sue and be sued, it was held in the case of Grimwood v. The Commissioners of Summit County, 23 Ohio St. 600, that "the act of March 30, 1868, (S. & S. 89) amending the 7th section of the act of March 12, 1853 (Sw. & C. 244,) does not, by implication or otherwise, extend the liability of boards of county commissioners to cases for negligence in the discharge of their official duties." This amendment, as we have before remarked, authorized county commissioners to sue for an injury done to county property, but the court held that it did not render them liable in their official capacity for injury which they did to the property of others, by negligence in the discharge of their official duties.

See also the cases of Boalt v. The Commissioners of Williams County, 18 Ohio Rep. 16; and the Cincinnati, Wilmington, and Zanesville Railroad Company v. The Commissioners of Clinton, 2 Ohio St. 77.

These authorities render it clear that county organizations are mere agencies of the state for certain specified purposes; that such powers as they possess and such liabilities as they may create are given by statute; that these statutes are to be strictly construed in favor of the state, which reserves to itself all power not thus delegated; and that section 7 of the statute as amended, and which was in
222 force when this alleged cause of *action arose, limits the actions which may be brought by county commissioners, with the single exception of actions for injury done to the property of the county, to such as arise upon *contract*, authority being nowhere given in the statute, with the above exception, to maintain an action for a *tort*.

The cases of the State of Ohio v. Piatt, 15 Ohio, 15, and Shanklin v. The Commissioners of Madison county, 21 Ohio St. 575, cited by the county solicitor, do not effect these conclusions; the first deciding no more than that an action may be maintained in the name of the state of Ohio for the use of the county commissioners upon a bond of the county clerk, the state of Ohio being the obligee, and the action in the second case clearly arising on contract.

Nor do we think sections 25 and 27 of the code of civil procedure have any application; it not appearing that the statute has constituted the county commissioners either the real parties in interest nor the trustees of an express trust.

We have also been referred to the amendment of the "independent treasury act of 1858, passed April 7, 1863, (S. & S. 920). The original act provided penalties against any state, county or any other public officer who loaned any public funds. The amendment provides that nothing in said act shall be so construed as to prevent any state, county, or other organization from suing for and recovering any sums of money thus illegally loaned or advanced. It is argued for the commissioners that the money here in question may be regarded as a loan, and that the amendment authorizes the commissioners to sue for and recover it as money illegally loaned and advanced. But we think the manifest object of the amendment was to declare that although penalties had been provided against those who should loan the public funds, yet these penalties were not to effect any law then existing for the recovery of such funds, and that it was not the intent of the amendment to enact any new law. It gave no new or additional power to state or county officers to bring suits.

Upon a careful consideration of all the questions which have been presented in this case, and such as the case itself has suggested, we can not avoid the conclusion that the objection made by the demurrer to the plaintiff's capacity to sue was well taken, and that the demurrer was properly sustained by the court below.

Nor do we think that the objection, though valid, is merely technical. It goes to the substantial rights of both the plaintiff and the defendant. The treasurer of

Hamilton county is not the custodian of the money solely of Hamilton county. There are also in the county treasury funds for state purposes and belonging to the state. Assuming the allegations in the petition and reply in this case, 223 as to the way the defendant obtained the money in question from the county treasury, to be true, it does not necessarily follow that the money received was the money of the county. Indeed it is difficult, if not impossible, to understand how the money of the county could be drawn from the aggregate of moneys in the county treasury upon an illegal warrant, any more than it could be drawn on a forged warrant of the county auditor. In any event the county could lose no more than the proportion which her funds bore to all the funds in the county treasury.

Again, suppose after a long and expensive litigation the defendant obtained a verdict and judgment in his favor on the merits of the case, such verdict and judgment would constitute no legal bar to an action against him, brought by the state of Ohio, to recover the same amount of money. In the latter case the parties would not be the same, nor would their rights be the same as those in the present action. A recovery, however, by the state of Ohio, of a judgment for the defendant in an action brought by her, would conclude the rights of all the parties.

The judgment of the court below is affirmed.

L. W. Goss, for Plaintiff in Error.

Taft & Sons, and *Hoadley, Johnson*, and *Colston*, for Defendant in Error.

---

*FIRE INSURANCE—MORTGAGED PREMISES. 228

[Superior Court of Cincinnati, General Term, October, 1875.]

†OTIS B. LITTLE v. EUREKA INS. CO.

Yaple, O'Connor and Tilden, JJ.

1. Where a mortgagor procures a policy of insurance covering his interest as mortgagor only, containing a clause appointing the damages, in case of loss, to be paid to the mortgagee, and an action is subsequently brought against the mortgagor and a subsequent mortgagee, and others, to subject the mortgaged property to sale, and the prior mortgagee obtains satisfaction out of the proceeds of the sale of the mortgaged property, a clause in the final judgment, declaring the subsequent mortgagee to be subrogated to the rights of the former one under the policy, is conclusive, as against the insurer, of the title of such subsequent mortgagee, to sue upon the policy, and enforce all the rights of the prior *mortgagee conferred by the clause in the policy 229 appointing the payment of the loss to be made to him.
2. Such appointment does not effect any change in the terms of the policy, or in the obligations imposed by it. It does not become an insurance of the interest of the mortgagee; but continues to be an insurance of the intent of the mortgagor only. It is still a contract between the mortgagor and the insurer, and all the provisions of the policy continue in force. Any defenses, therefore, arising upon such provisions which would be available to the insurer in an action brought by the insured, are available also in an action brought by the appointee, or by those to whom he assigns, or who become subrogated to his rights.
3. The delivery in such a cause, of the policy to the appointee, and the subsequent acceptance by the insurer, of the promissory note of the insured for the premium, payable in bank, at a future day, to the order of the insurer, is a payment of the premium and a performance of a condition contained in the policy providing that the policy shall not become binding until the payment of such premium, if such be, as, in this case it was, the intention of the parties.
4. A clause in a policy of insurance, reserving to the insurer the power to terminate the insurance, in giving notice to that effect, and tendering a pro-rata

---

†The judgment in this case was affirmed by the supreme court. See opinion 38, O. S., 110.

proportion of the premium for the unexpired term of the policy, is a provision in the nature of a forfeiture, and its conditions must be strictly observed. When a promissory note is taken for the premium in lieu of money, it is incumbent upon the insured to offer to return the note, on payment of the amount due upon it, and until he does so, the policy continues to be binding.

5. The right of a mortgagor of chattels, or of real estate, to redeem against the mortgagee existing at the date of a policy of insurance, insuring the property is not so mortgaged, is a title to such property. and any subsequent change, occurring before the loss, which terminates the right to redeem, and takes away the possession and control of the mortgagor is a change of title within a condition in a policy of insurance providing for a forfeiture of the policy in the event of any transfer or change of title.

6. An assignment by an insolvent debtor, to trustees, in trust for the payment of his debts, executed in conformity to the requirements of the statute of this state, the assignee, or a substitute for him, appointed by the probate court, accepting the trust and filing and proving the execution of the assignment in the probate court, and taking upon himself the duties of the trust, is a transfer of the title of the assignor, operating as a forfeiture of a policy of insurance containing the condition above referred to.

7. At the time of the assignment, judicial proceedings were pending against the assignors and others for the foreclosure of mortgages having all the property included in the assignment, notwithstanding which, held that the assignment took effect and became operative as an alienation of the title of the assignors so as to terminate the policy.

8. When on error, it appears from the record that the law was correctly stated to the jury on a proposition co-extensive of the case and decisive of it, the judgment will not be reversed, although the court may be unable to concur in other points of the charge, such an error not being prejudicial to the party complaining of it.

ON ERROR.

TILDEN, J.

230 1. Otis B. Little and Robert and William Carson, partners as *Little, Carson & Bro., being the owners of buildings used for purposes of manufacture, executed a mortgage to the Charter Oak Insurance company, to secure the repayment of a loan of $8,000, and interest. and covenanted to keep the building and machinery insured, for the further protection of the mortgagee, in the sum of $7,500. Under this covenant a policy was obtained from the Eureka Insurance company, the loss, if any, being made payable to the mortgagee. Subsequently, Little sold out his interest in the property to his partners, and the partnership was dissolved. The Carsons continued to carry on the business under the firm name of Robert Carson & Bro. They gave to Little a bond to idemnify him against the liabilities of the former partnership, and to secure an agreed amount of indebtedness to him, a chattel mortgage, and a mortgage of the property described in the former mortgage. The policy of insurance having run out, a further policy was obtained in the name of Little, Carson & Bro., the loss, if any, being made payable as before, to the first mortgagee. Subsequently action was brought in this court for the foreclosure of both of these mortgages, and for the satisfaction of other liens. The Eureka Ins. Co. was not a party to these actions. During their pendency and before final judgment, the insured property was destroyed by fire. The prior mortgage was satisfied out of the proceeds of the sale of the mortgaged property; and by a clause in the final judgment, Little was declared so be subrogated to the rights of the first mortgage: *Held*, that this act of subrogation was valid, notwithstanding that the Eureka Ins. Co. was not a party to the action. It operated as an assignment would have operated from the Charter Oak Insurance company to Little, and entitled him to prosecute an action in his own name to enforce all the claims of the Charter Oak Ins. Co.

2. But the claim of Little was no better than that of the Charter Oak Co., and that was precisely the same as that of the parties insured under the policy, The appointment of payment of damages, in the event of loss, to the Charter Oak Co., did not convert the policy into a contract of indemnity to that company. It was the interest of those who were intended to be insured that was covered by the policy, and the Charter Oak Co., and then Little it took subject to all the conditions contained in the policy, of course including that against alienation. And if that was subsequently broken by the insured, no recovery could be had in favor of Little.

See: Grosvenor v. Atlantic Ins. Co., 17 N. Y., 391; Pupke v. The Resolute Ins. Co., 17 Wis., 378. The State Mutual Ins. Co., v. Roberts, 31 Penn. St., 438. Carpenter v. Residence Ins. Co., 16 Peters, 495. Loring v. Manufacturers Ins. Co., 8 Gray, 28. *Hall v. Mich. Ins. Co., 6 Gray 172. Macomber v. Cambridge Mut. Ins. Co, 8 Cush, 133. Foster v. Eq. Ins. Co., 2 Gray, 216. 231

3. Considering the plaintiff, then, as representing the parties who were insured under the policy, and as concluded by all defences arising upon the provisions contained in it, to the same extent as they would have been, but it does not seem at all material to consider, in this connection, in whose favor and for the protection of whose interest it was intended the policy should operate. The conditions where part of the policy and binding upon all claiming an interest under it.

4. The policy contained a clause by which it was declared that the policy should not become binding until the actual payment of the premium. The policy contained also a clause providing that the assured should have the right at any time to terminate the policy, and receive back the unearned premium at short rates, and by which further, the insurer reserved the right to terminate the insurance, on paying back the unearned premium at pro-rata rates. The policy was delivered to the Charter Oak Insurance Co. A few days subsequently, Robert Carson & Bro., made their promissory note for an amount including the premium under this and other policies, payable in sixty days in bank, to order of the Eureka Ins. Co. The note was not paid at maturity, and afterwards the Secretary of the Company endorsed as a payment upon it an amount which was reckoned as that of the unearned premium, and declared that the policy was cancelled, and gave notice of such cancellation. The amount endorsed on the note was less by $2 95 than the unearned premium; the note itself remained in possession of the company, no offer having been made to return it, and no demand was made for the return of the policy. *Held:*

1. That the delivery and acceptance of the note was a waiver of payment of the premium in money, and that of the clause just referred to, and that the policy took effect and became binding, and continued to be binding unless put an end to under the other clause.

2. That the right of the company under the other clause was optional. The circumstance of the non-payment of the note was immaterial. It was, however, conditional, and the conditions were such as were required to precede the cancellation. and they consisted in notice to the insured of the intention to cancel, and an offer to return the note on payment of the true amount due upon it. The provision operates by way of forfeiture, and its conditions should be, but have not been strictly observed.

May on Insurance Sec. 69. Franklin Ins. Co., v. Massey, 33 Penn. St., 221. Lyman v. State Mutual Ins. Co., 14 Allen, 329. *Hathorn v. Germania Ins. Co., 55 Barb., 28. Van Volkenburg v. Lexington Ins. Co., N. Y. Commission of Appeals, January, 1873, 2 Ins. Law Journal, 205. 232

5. The policy contains another clause in these words: "In the case of any transfer or change in the title of the property, insured by said company, or of any undivided interest therein," without the consent of the company endorsed on the policy, "then this insurance shall henceforth become null and void." The defendant contended at the trial, and the court charged that the assignment to Froome for the benefit of creditors under the statute was a transfer, and the assignment under the bankruptcy, both a transfer and a change of title, within the meaning of the condition. The transfer here referred to in the charge was, of course that of the Carsons, and the implication of the charge was that the Carsons were the owners of the property at the time of the assignment to Froome, and that it was their interest in it that was intended to be insured. For there could be no breach by them of any condition to which they were not parties, and they were incapable of effecting the transfer of the title to property not theirs within the contemplation of the policy. The policy was issued in the names of Little, Carson & Bro., but that firm had been dissolved, and these persons had no longer any joint interest in the property covered by the policy. Litte still remained liable, jointly, with the Carsons, for the payment of the debts secured by the mortgage of the insured property to the Charter Oak Insurance Company, and he and they had a joint and insurable interest in the preservation of the property. But this debt had been assumed by the Carsons, and, as between them and Little, the debt could no longer be said to be a joint one. Little had a special but separate interest in having the property preserved as a means of enabling the Carsons to perform their promise of indemnity to him, and the further special, but separate interest arising under the mortgage made by the Carsons to him. But this separate interest was not the thing insured. The Carsons were the owners of the equity of redemption, and had an interest in the property which authorized them to insure to the full extent of its value. This, according to the ex-

press words of the policy, is exactly what they did, and the record affords no indication that it was intended to insure any other interest. In fact the action was brought and conducted at the trial upon that theory. And it is in that respect that the case is presented by the pleadings; and, strictly, it is in that alone that it is now proper for our consideration. It was by a mere clerical mistake, as claimed, that the name of Little was written the policy, and the prayer of the petition was that the policy be reformed in this particular, and then enforced as one would be if made in the
233 * name of the Carsons, covering the specific property described in it, in which they had an interest as mortgagors, and so appointing the payment of the damages, in the event of loss, as to operate, consequentially, beneficially to Little. But it was not his interest, or that of the Charter Oak Insurance Company that was insured or intended to be, but that of the Carsons. If, therefore, the little which they had, at the date of the policy, was transferred by them or changed, subsequently and before the loss, the transfer or change was within the words and intent of the policy, and formed a defense to the action in the present case, as, at the trial, the Court charged it to be.

The clause under consideration has a settled meaning in the practice of insurance. It is, in its nature, a condition; and is, substantially, the language of the insured. It has no reference to the interest covered by the policy. That subject is regulated by law, independently of any special provision of the policy. The object of the condition is to guard against a diminution in the strength of the motive which the insured may have to be watchful and vigilent in the care of his property, and its observance should be strictly insisted on. May on Insurance, Sec. 273. Ayers v. Hartford Fire Ins. Co., 17 Iowa, 176.

The word "title," as used in the condition, has been held to have reference to that which is the subject of ownership. Property is a thing owned, that to which a person has, or may have a title. Both of the words ("title," "property,") are inappropriate to describe the insurable interests which exist solely by reason of the personal liability for the payment of a sum of money charged upon the property insured. When, therefore, the word "property" is used in the condition, reference must be understood to be had to the thing insured, and not to the interest of the insured in the thing. But when, as in the present instance, the word "title" is employed, we are to understand that the ownership, or the right of property is what is intended. May on Insurance, Sec. 283. Springfield Ins. Co. v. Brown, 43 N. Y., 389. Franklin Ins. Co. v. Coates, 14 Md., 285. At the date of the policy (May 17, 1869), the state of the title of the Carsons was this: As to the real estate, including the fixed machinery, they had a mere right to redeem against the two mortgages. They had the possession of the moveable property and were apparent owners; but they had made a chattel mortgage to Little, and the terms of this were such as to pass the legal ownership; still the Carsons had in the personal, as in the real property, a right to redeem. This right was a title, and we are of opinion that it was such a title against the transfer or change of which the condition was intended to guard. It is as distinctly recognized in law as such, as a legal title is, and it differs from a
234 legal * title only in the means of proving it. The condition is not expressed to be confined to the legal title, and, as the mortgages were matters of record, and in the absence of proof of express misrepresentations with regard to the state of the title, which would avoid the policy on that ground, it is fair to infer that the parties understood the condition to mean exactly what its words express. May on Insurance, Sec. 284 The equitable title represented a valuable, as well as an insurable interest. Had the loss occurred before the assignment and before the bankruptcy, the Carsons, supposing the policy to have been otherwise enforceable, would have been entitled to claim all the benefits promised by it. The money payable under it would have been applied by way of discharge of their personal liability, and of the incumbrances existing against the property insured, and it is apparent that these were the very objects had in view in taking out the policy. We must, then, regard the equitable title as being a title equally within the strict letter of the condition, and the actual intention of the parties to it, and inquire whether or not, before the occurrence of the loss, and in either of the modes set forth in the special defenses and in the charges of the court, the equitable title was transferred by the Carsons, or otherwise legally changed.

6. The assignment to Garly was made on the 4th of September, 1869, about eight months after Little sold out to the Carsons, and about three before the occurrence of the fire. At the time of the assignment proceedings were pending in this court for the foreclosure of the Charter Oak and the Little mortgages, and for the satisfaction of various liens; and these proceedings ultimately resulted in the sale of the mortgaged property, and in the distribution of the proceeds among the lien holders.

Meanwhile, and on the 21st of September, 1869, compulsory proceedings in bankruptcy were taken against the Carsons. They were adjudicated bankrupts on the 29th of October, 1869. On the 12th of November following, the Register in bankruptcy made an assignment of the bankrupts' estate to Wm. F. Irwin, and in November, 1870, the bankrupts received their final discharge. An attempt was made to withdraw from this court the property which was the subject matter of the proceedings, then pending in it, and to transfer its administration to the bankrupt court, and an injunction was granted in that court to stay the proceedings in this. But the injunction appears to have been disregarded, and was ultimately dissolved, as having been improvidently granted. The jurisdiction of this court, having attached and become vested long previously to the commencement of the proceedings in bankruptcy, was maintained to the end, and the property was finally disposed of under its orders and judgment as already stated.

*Garly declined to act under the assignment, and the probate court, acting under a provision of the statute made for that contingency appointed 235
Froome and Hand to act in his stead. These persons accepted the appointment, gave bond as required by law, filed and proved the execution of the assignment, and attempted the performance of the trusts created by it. They received from the Carsons the keys of the insured buildings containing the machinery and chattel property mentioned in the policy, but they left the Carsons in the actual possession, and took no further active steps in the execution of the assignment, considering, as one of them testified at the trial, thus much as being usually done by assignees in such cases. It is due to them to add, however, that at this point their functions were terminated by proceedings against them in this court for contempt, in interfering with its receiver of the property, the result of which was, that the property passed into the uncontested custody of the receiver, and so continued until finally disposed of by order of the court.

These facts are all that are necessary to explain the nature of the questions we are considering. They suggest, in the first place the objection raised in the course of the argument, that, at the time of the assignment and bankruptcy "the insured property had been withdrawn from the interference by the probate or bankrupt court," the exclusive jurisdiction for its administration having become vested in this court. We agree that this jurisdiction was ample and exclusive as claimed. Appleton v. Bowles, 3 N. Y. Sup. Court 568. Lennihan v. Harman, 55 N. Y., 652. But we are also of opinion that it does not necessarily, or even properly, result from this that the assignment did not operate to transfer or change the title. The pending actions imposed upon the assignors no disability, and the title being equitable and in action, the delivery of the possession of the property was not a necessary requisite to its transfer; and it appears to us that the only effect of the pendency of the actions was to transfer to this court the administration of the assignment. The assignees had a right to intervene and become parties, and to maintain the title vested in them, and, under it, claim the surplus of the fund to be applied for the benefit of the general creditors and the assignors, agreeably to the provisions of the assignment. Nor did the neglect of the assignees to pursue this course or otherwise to act under the assignment, operate to annul the assignment itself. The validity and effect of that must be determined upon the facts which existed previously. According to these we think there can be no doubt but the assignment was a technical transfer inducing a substantial change of title. No defect of form is suggested in it under the statute and in equity everything was done which was necessary to be done to perfect the title of the assignees. *They acquired under it a right to redeem against 236
the mortgages, or otherwise to subject the property for the purposes of the trust. And above all, they acquired the right to exclude the assignors from any personal interference in the care and management of the property, and thus defeat the only object of the condition. On the footing of authority the cases in principle appear to be all one way. In the case of the Phoenix Ins. Co. v. Lawrence, 4 Metc. (Ky.) 9, the act sustained by the condition was a transfer of the interest under the policy. In other cases the restraint was upon the authority of the insured to assign the policy itself. These conditions differ very widely in some respects, from such as prohibit the alienation, or a change in the ownership of the insured property. Some of the cases which have been referred to in the argument were of this class. Thus, when the policy insures real estate, the death of the insured effects a change of the title and breaks the condition. 58 Barb, 544 Supra. And so does bankruptcy. Perry v. Lorillard Ins. Co., 6, Lansing 201, 29 Maine 292. And the execution of conveyances in partition, 51 Maine, 110. And a transfer from one partner to another, 47 Penn. St., 204; and finally assignments for the benefit of

creditors. Hazard v. Franklin Ins. Co., 7, R. I. 429, and see Burbank v. Rockingham Ins. Co. 4 Foster 550; and see Young v. Eagle Ins. Co., 14 Gray, 152. Duncan v. Western Ins. Co. 11 Metc. (Mass.) 434. Lawrence v. Holyoke Ins. Co. 11, Allen, 387. The assignment, then, divested the Carsons of their title by an act amounting to an alienation of all the property covered by the policy. All they had left was a contingent interest in the fund to arise upon the conversion of the property into money and the payment of debts and charges under the assignment, and now that contingent interest was before the loss occurred, passed out of them, if not by transfer, then by operation of law, and vested in the assignee under the bankruptcy.

Hoadley, Johnson & Colston, for Plaintiff in Error.

Lincoln, Smith and Stephens, Contra.

---

257 *GUARDIAN AD LITEM—FRAUD.

[Superior Court of Cincinnati, General Term, October, 1875.]

GEORGE MARSH, ET ALS. v. ELBERT MARSH, ET ALS.

Yaple, O'Conner and Tilden, JJ.

1. A *guardian ad litem* has no authority or control over the person or property of the infant for whom he acts, and no right to receive or administer the proceeds of the minor's property, which may be sold in the suit or proceeding in which he acts as such *guardian ad litem*; all that he does it under the supervision and subject to the sanction or disapproval of the court. Unlike other guardians and ordinary trustees, a *guardian ad litem*, if he has fairly advised the court of the infant's rights and done all for him that the facts of the case required him to do, may purchase and hold, in his own right, the property of the infant soln under an order of court in the cause in which such *guardian ad litem* was appointed, *provided*, such purchase was in good faith and for a full valuable consideration paid by such *guardian ad litem*.
2. Where, in a proceeding by an administrator, under the act of 1831, to sell the real estate of the intestate, a *guardian ad litem* was appointed by the court, and appeared and answered for the infant defendants, there being in fact nothing to urge against the propriety of such sale, and an order of sale was granted according to law, and such lands were fairly purchased by such *guardian ad litem*, without fraud and in good faith, in his own name, for two-thirds of the appraised value, which sale was confirmed and a deed ordered to be made to
258 him for the premises *by the court, which was done.—*Held*, In an action by such infant heirs, after coming of age, to have such purchaser declared their trustee of such real estate alleging that he verbally agreed to purchase and hold the same in trust for them, that the fact of such agreement and its terms must be established with certainty and clearness, and if not so established, the petition of such plaintiff, ought to be dismissed.

YAPLE, J.

This case comes before us for decision upon the testimony and the law by reservation in special term.

All the parties, as heirs of one Thomas Marsh, deceased, sue interested adversely to the defendant. Elbert Marsh. On June 28, 1871, they brought suit in this court against Elbert Marsh, to have him declared a trustee for them of certain real estate situate in the city of Cincinnati, it being a lot on the corner of John and Sixth streets. They aver that in August, 1832, Thomas Marsh, Sen., residing in said city, died intestate, seized in fee of such real estate, and that his widow, Hannah Marsh, who died in April, 1871, before the bringing of this suit, became his administratrix; that his children and heirs at law were said Elbert Marsh, Ann a Marsh, Maranda Marsh, Dorothy Marsh, Jane Marsh, Zebulin Pike

Marsh, Thomas Marsh, Mary Marsh and George Marsh, the last four of whom were then and until after the sale and confirmation thereof by the court of such real estate by the administratrix, infants; that on the 5th day of March, 1833, the administratrix filed a petition in the court of common pleas, of this, Hamilton Co., for the purpose of obtaining an order for the sale of the premises to pay the debts of the estate, naming all the heirs parties defendant in the petition and joining with them the husbands of such of the daughters as were married; that no summons or other process was issued in such proceedings against any of the parties, "nor were they notified, *in the manner required by law*, of the fact that such proceedings had been instituted;" that Zebulon Pike Marsh was then only seventeen years old, Thomas fifteen, Mary thirteen, and George Marsh eleven years old; that, by the court, Elbert Marsh, the defendant, was appointed guardian *ad litem* for such infants, and, as such, that he appeared for them and filed an answer as such guardian *ad litem*, in which he admitted the facts stated in the petition to be true and consented to the sale of the real estate; that upon further proceedings had, the court duly appointed William Crossman, Oliver Lovell, and Richard S. Coleman appraisers of such reality, and directed them to set off and assign to the administratrix, Hannah Marsh, her dower therein, and to appraise the same; that such appraisers set off to such widow twenty feet front of such reality, it being forty feet front on John street, and appraised the entire property and estate at $1,350, and the *estate, subject to such dower, at $1,000, which assignment of dower and appraisement, the court duly approved and confirmed; that thereupon the court ordered the administratrix to sell the real estate according to law, to the highest and best bidder at not less than two-thirds of the said appraisement; that in pursuance of said order, on the 12th day of August, 1833, the administratrix sold such real estate to said Elbert Marsh, for $666.66, and the sale of the same was confirmed by the court and a deed ordered to be made to him, which was accordingly done. It is then charged that Elbert Marsh, at the time the suit was brought, was the confidential adviser of the administratrix, and was also the agent and adviser of the plaintiffs, and so continued to be until long after he purchased such real estate; that he induced and improperly influenced said Hannah Marsh to cause the real estate to be sold, and did so in order that he might purchase the same at less than its value; that he did not pay the administratrix the purchase money for the same, and that the attorney acting in the case for the administratrix also acted for and was paid by him; that he prevented other persons from bidding at the sale upon the property by informing them that he was purchasing for the plaintiffs, his brothers and sisters; and that the plaintiffs never knew, until a few months before suit was brought *that the defendant had acted as guardian ad litem in the case for them.* It is then, insisted, as matter of law, that the guardian *ad litem* could not purchase such real estate in his own right, but could only purchase it as trustee of the infant defendants in case they elect to hold him as such trustee. 259

The answer of Elbert Marsh avers that he bought said real estate in his own right and paid the full price thereof out of his own money and means; denies that he was confidential adviser of the administratrix in said business, or that he was the agent of the plaintiffs in the purchase, or that he prevented any person from bidding at the sale by telling them that he was buying the property as agent for the plaintiff or any of them,

or that he ever promised the plaintiffs that he would so purchase it, and he denies all other alleged acts of fraud or fraudulent conduct alleged against him, etc., etc. He then pleads staleness and the statute of limitations.

OPINION.

The record of the proceedings in the court of Common Pleas by the administratrix to sell the real estate to pay the debts of the decedent, which was under the act of 1831, does not show *affirmatively* that the heirs were *not* served with process as required by the statute; it is simply silent as to whether process was issued or served, or not. The heirs who
260 were of full age *filed their answer to the petition admitting the facts stated in it, and consenting to the sale; Elbert Marsh, as guardian *ad litem* for the four minors, filed an answer likewise admitting such statements and saying that no reason was known why such sale, etc., should not be made as prayed for.

Even in a chancery suit, such mere silence of the record or failure to speak upon the subject of the issuing and service of process, could not affect the validity of the proceedings in any collateral action, it could at most only afford a ground for writ or petition in error to reverse the original proceedings which were so silent. Moore v. Starks, 1 O. S., 369.

In proceedings by an administrator to sell the intestate's lands to pay debts under the act of 1831, such silence of the record as to the issuing and service of process cannot affect the validity of the sale when collaterally brought in question in any manner. Creditors have a lien on the real estate for the payment of their debts—the administrator, to some extent represents all parties, the proceeding being one *in rem* rather than *in personam*, 1 O. S., 373; Benson v. Cilley, 8 O. S., 604.

But the plaintiffs do not really base their case upon the ground that the sale was void as to them, but that the defendant purchased it as their trustee and holds it in trust for them. And this makes such facts important only when we come to determine whether the defendant has acted in good faith, fairly and honestly in the transaction, or fraudulently towards the plaintiffs. Then such facts may be considered and weighed for what they are worth in connection with all other facts and circumstances bearing upon the transaction. The plaintiffs do not deny but that they all knew of the sale, and that Elbert was the purchaser; it is clear that they all knew that. They only claim ignorance until just before the suit brought, that he had acted as the guardian *ad litem* of the minors. They had nearly forty years to ascertain that fact from the record of the case in the Clerk's office, and they give no excuse for their neglect to do so.

The next question is: Can a *guardian ad litem*, in such a proceeding, purchase and hold, in his own right, the estate of the minors for whom he so appeared and acted in the Court, or can they, at their option, hold him as their trustee in case he so purchases?

A *guardian ad litem* has no authority or control over the person of the infant, or over his estate, and can receive no part of the money arising from such sale; he acts in the presence and under the eye and control of the Court, which, by law, is invested, with the power and charged with the duty of protecting the infant's rights. The reasons, therefore, which disqualify ordinary trustees from acquiring the property of their *cestuis que trust*, do not seem to apply to *guardians ad litem*.

*Jackson v. Woolsey, 11 Johnson, 446. It is the duty of a *guardian ad litem* faithfully to present to the court every fact which 261
makes for the interest of the infant and to be diligent in ascertaining and representing such rights. His failure to do so might be fraudulent and subject him to liability, or deprive him of any purchase he might make, under the order and with the sanction of the court, of the minor's property; but if he has done in these respects, all that any *guardian ad litem* ought to do, he can not be deprived of such a purchase—one sanctioned by the court in which he so appeared and to whom his conduct was known and approved.

This raises the question, as to whether, in this transaction, the defendant was guilty of any act of commission or omission amounting to a fraud in law or in fact upon the plaintiff's or any of them?

When his father died, he was seized of the real estate in question, where the family lived and a tract upon Mill Creek, not then worth enough to pay the decendent's debts, amounting to some $600 or $800, but which tract has since increased to the value of near $100,000. The defendant was then the eldest child, was married and lived by himself, had little or no money, but had good credit. The deed to his father for the property in question was defective, and he procured a good deed to be made. His father had executed an absolute deed of the premises to a creditor, which debt Albert assumed, and thus released the property from such mortgage. His mother and his infant brothers and sisters lived upon this property. His mother feared losing their home, or being inconvenienced by some third party purchasing the property subject to her dower, and taking possession of what should not be assigned to her. Elbert advised her not to sell the Mill Creek property, as it would not pay the debts, but to sell this lot, which was prudent advice. At the sale there is no evidence that he induced or even requested any person not to bid, but it is very likely other persons did not bid, or may not have bid, because a member of the family was trying to purchase. This is usual. It is a matter of kind feeling and sympathy, but voluntary. If the member of the family buying does or says nothing to deter other bidders, the law can not lay its hands upon the purchase, after confirmation of the sale to him by the court, as fraudulent. The appraisement was made by men of exceptionally good qualifications, and Elbert bid and bought for two-thirds of the appraised value. He paid the creditors instead of paying the money to his mother, the administratrix, and putting her to the trouble of paying them. This was a matter concerning them and him and her alone. He paid the full amount of the purchase money for the estate, and it was all *his own money. There is no 262
question but what it was necessary to sell this real estate to pay such debts, and there was nothing that could have been shown to the court that ought or would have induced it to refuse to order the lot to be sold. We find, then, that the defendant did all as *guardian ad litem* that could have been required of him. We, therefore find that the defendant was guilty of no fraud upon the court, or as against the rights of the heirs, but that he acted honestly in the transaction and that such sale and purchase were, under the circumstances, proper.

It is next claimed that the defendant bought in the property for all the heirs, acting as their agent and holding it as their trustee. Is this fact sufficiently proved? The defendant paid his own money for the land, no part of the same being furnished by the other heirs. The court con-

firmed the sale to him individually, making no allusion to his being a trustee. The suit was not brought until after the death of the mother, Hannah Marsh, the administratrix, who had a knowledge of all the facts, and whose testimony would, in all probability, have settled the case one way or the other. There was ample time to bring the action before she died and to take her testimony. This is a circumstance of great weight against the plaintiffs. Thomas Marsh and Mrs. Mary W. Ward, by their evidence, sustain *prima facia*, this part of the plaintiffs' case; but all the facts they swear to are denied by the defendant, on his testimony. Thomas and Mary are not on friendly terms with the defendant; and all three are interested witnesses. Such a trust as this is claimed to be, must be established with clearness and certainty, both as to the fact of such trust and its terms. Stall v. Cincinnati, 16 O. S., 169. In this case the court, at page 174, lay stress upon the fact that the trust was only proved by two witnesses and they directly interested parties. In Crowell v. Western Reserve Bank, 3 O. S., p. 412, the court say: "No class of testimony, perhaps, is more unreliable, and a more frequent cause of error in courts of justice than the narration of conversations, real or pretended. The meaning and intention of a person in a conversation, often depends much upon gesture, attitude, mode of expression or *peculiar attending circumstances*, known, perhaps, to but few present. A conversation may not be fully heard by the witnesses, imperfectly recollected, or inaccurately repeated, when the omission or addition of a single word, or the substitution of the language of the witness, under color of bias or excitement, for the words actually used, might change the sense of the entire conversation."

Now, the fact doubtless was, and all the parties must have so perceived it, that by Elbert becoming the purchaser, his mother *would be
263 rendered more comfortable by not being annoyed and hemmed in by a stranger, and she would be able the better to keep her children together, which was an obvious benefit to them all. This was probably frequently talked over by all the members of the family, and from such facts and conversations, the brothers and sisters, after the lapse of forty years, may have come to believe there was a trust. But, if a trust, why was not the trustee called on to render an account during this long period? We do not think such trusteeship is sufficiently made out by the evidence of an oral agreement between the parties.

This renders it unnecessary to press upon the defense of staleness, or the statute of limitations, as we should have had to do if the plaintiffs had proved the material facts alleged in their petition with sufficient clearness and certainty.

A judgment will be entered for the defendant, Elbert Marsh, with costs.

Judges O'Connor and Tilden concur.

Jordan, Jordan & Williams, for Plaintiffs.

Snow & Kumler, for Defendant, Elbert Marsh.

*ASSESSMENTS—ROADS. 312

[Superior Court of Cincinnati, General Term, June, 1875.]

†WILLIAM B. DODSON, ET AL. v. CITY OF CINCINNATI, ET AL.

Yaple, O'Connor and Tilden, JJ.

1. Where an assessment for the improvement of a street is regular, except in that it includes the cost of the removal of a landslide caused by the grading of the street, which was included in and contemplated in the resolution and ordinance making the assessment, the city is not compelled to reassess, but the court may correct the assessment by directing the cost of removing the earth in such landslide.
2. The mere failure of not keeping open a road to its full width for a term of eighteen years, does not vacate the unused part under a statute that any part of a county road unopened for seven years shall be vacated, and a city becoming the owner of the road, may improve it to the full width and assess the abutting property owners for the same.

O'CONNOR, J.

This is a petition in error to reverse a judgment against the plaintiffs in error, upon an assessment upon their lands abutting on the Walker Mill Road, in the city of Cincinnati. for the improvement of the said road.

It appears from the record that the proceedings were irregular in the advertisements for bids, and the court, under section 550 of the municipal code, found that the contract prices, as fixed in the agreement between O'Brien and Barton, the contractors, and the city, were the fair and reasonable costs and expenses of the improvement. The court also found that there had been included in the assessment the sum of $126 92, being the cost of removing the earth contained in two slides of the land, situated on the west side of the road as improved, and that the said slides occurred while said road was being graded under the contract, and that said grading caused the land to slide; and that it was necessary to remove said slides to enable the contractors to make the improvement under their contract. That under the power reserved in said contract, the city contracted with said O'Brien and Barton, for the removal of said slides, at a reasonable price, but that at the time of the passage of the resolution declaring it necessary to improve said road, and of the ordinance to improve the same, and assess the cost on the abutting property, the sliding of said land was not contemplated by the city council, nor the assessment of the same upon the abutting * lands, and the court held that the entire cost 313
of removing said slides should be paid by the city of Cincinnati.

This sum of $126.92 was therefore deducted from the assessment. It is claimed by the plaintiffs in error that this amount having been erroneously included in the assessment, not only makes the assessment void, but disables the court, under section 550 of the municipal code, to find the true value of the work done, and to charge any part thereof on the abutting property.

Section 550 provides that: "If * * it shall appear that by reason of any irregularity or defect, whether in the proceedings of the board of improvements or of the council, or of any other officer of the corporation, or in the plans or estimates, the assessment has not been properly made against any defendant, or of any lot or parcel of land sought to be charged, the court may, nevertheless, on satisfactory proof that expense has been incurred which is a proper charge against such defendant, or the lot or parcel of land in question, render judgment for the amount properly chargeable against such defendant, or on such lot of land."

It would seem under the comprehensive language of this curative section, that whenever the council has the authority to make any special assessment to be collected by the contractor in part payment for the improvement made, and where the expense of such improvement is ratably charged upon all the property abutting on such improvement, such assessment is void only to the extent that it is not conclusive as to the value of the amount of the work performed. When the assessment is of this character, it does not fall under section 551 which provides that " Whenever

†Leave to file petition in error to reverse this case was denied by the supreme court. See opinion 34 O. S., 276. The decision is cited 45 O. S., 309. 320 See also 3 B., 560 and 4 Rec., 325.

it shall appear to the council that any special assessment is invalid by reason of informalities or irregularities in the proceedings, or when any court of competent jurisdiction shall adjudge any such assessment to be illegal, the council, whether the improvement has been made or not, shall have power to order a reassessment."

The case of Upington v. Oviatt, 24 O. S. R., 232, referred to by council in support of the position that the judgment of the court at special term ought to have been for the plaintiffs in error, without perjudice to the right of the city to make a reassessment, was an action to enjoin Oviatt, as treasurer of Summit county, from collecting an assessment on certain lots for the improvement of a street. The assessment had been placed upon the county duplicate for collection, and the defect was the omission to include in the assessment other property abutting on the line of the same improvement, thus increasing the rate on the lots assessed. The court
314 *held* that "When it appears that the * assessment placed upon the county duplicate for collection was made upon a wrong basis, by omitting property which ought to have been assessed, the collection of the assessment will be enjoined, but without prejudice to the right of the city to make a reassessment, and collect the same in accordance with the provisions of the statute."

We think that that case and the one at bar are clearly distinguishable, and that the court did not err in reducing the assessment to the extent of the cost of removing the said slides, and rendering judgment against the several plaintiffs in error, on the basis of the assessment thus reduced.

It is also claimed on behalf of the plaintiffs in error that "the city did not improve the Walker Mill Road as it was laid out, fenced in and traveled from 1832 to 1872, but another and entirely different road surveyed by Rickey in 1854, but never occupied as surveyed. That the road was laid out and its boundaries defined in 1832 by J. Gest, and occupied up to 1854, when a survey was made with the intention of relocating the road, or a part of it, but that no change was made in the road until 1872 when it was improved by the city.

Section 10, of the act of January 27, 1853, "An act for opening and regulating roads and highways," (2 Sayler, 1293,) provides "That when the place of beginning or true course of any state or county road shall be uncertain, * * * from * * any cause, the county commissioners of the proper county may appoint three disinterested landholders of the county, to review and straighten said road, * * and a competent surveyor to survey the same: and said reviewers and surveyors * * shall view and survey said road and the same correctly mark throughout, as in the case of new roads, and shall make return of said survey and a plat of said road to the commissioners, who shall cause the same to be recorded as in other cases, and from thenceforth said road surveyed as aforesaid, shall be considered a public highway."

A survey was made under this act by Rickey, in 1854, of the Walker Mill Road, but it is said the city had no authority to improve within the lines of this survey because section 19 of the same act provides: "That any county road or part thereof, which has heretofore or may hereafter be authorized, which shall remain unopened for public use for the space of seven years after the order made or authority granted for opening the same, or the part thereof remaining unopened, shall be, and the same are hereby vacated, and the authority granted for erecting the same barred by lapse of time."

The evidence tended to show that the road, under the survey of 1854, was not
315 taken possession of and improved by the public *within and according to the lines of said survey, until 1872, the time of the present improvement, or for a period of eighteen years; but that during all that time the road throughout its entire length was an opened and traveled road, agreeing in some parts with the lines of said survey. The evidence further shows that by the consent of all the lot owners, at the north end of the road, the lines of said survey were there changed, but that the cost of the improvement was thereby lessened.

In Fox v. Hart, 11 Ohio Rep., 414, it was "held that a partial encroachment upon a traveled highway by an adjacent owner, though continued for eighteen years did not work a forfeiture, as for *nonuser*, of the part so encroached upon, and that there was nothing to authorize the presumption, that any portion of it had been abandoned, or would not be opened, as soon as the public convenience should require."

In Lane v. Kennedy, 13 Ohio St. Rep., 42, where "L being the owner of lands adjoining a public highway, regularly laid out and used by the public, extended his fence so as to enclose a portion of the ground within the surveyed lines of the highway which portion was not then used nor required for the public travel, and kept up said fence without any objection, for upward of twenty-one years, it was

held that such partial encroachment upon the side of a surveyed and traveled highway, was not *necessarily adverse* to the public, nor *inconsistent* with its easement, and therefore, constituted no bar to its reclamation by the supervisor, when required by the public travel."

We do not think therefore, that the road authorized by the survey of Rickey, in 1854, was vacated, or that the authority granted for erecting the same, was barred by the lapse of time.

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

Pugh, Throop & Brannen, and *Wm. H. Pugh*, for Paintiffs in Error.

J. C. Healy, for Defendant in Error.

---

*PHILIP GRANDIN'S WILL. 321

[Superior Court of Cincinnati, General Term, June, 1875.]

†BATES, ET ALS. V. ZINSMEISTER, ET ALS.

Yaple, O'Connor and Tilden, JJ.

P. G., who left several children and grand children, they still being alive, willed to his daughter, Mrs. H. M. B. and her decendants, certain real estate. She has living three daughters, all over the age of twenty-one years, who, with herself and her husband, sold and agreed to convey a part of such real estate to Z., and have duly tendered him a warranty deed therefor. Z. refused to accept the same, or to complete his purchase on the alleged ground that such vendors can not make him a perfect title. They have sued him for specific performance, and have made the other children of P. G., the testator, parties defendant; the latter have failed to answer, waiving all claims to the property, but are *in default. The will devised such real estate to H. M. B. during her life, 322 and, *on her death*, her said share to go to the child or children of her; and, in case of her death, *without surviving issue*, the share to go to her *surviving* brothers and sisters in equal parts, * * * And should she die, *leaving issue*, and should such issue die *under the age of twenty-one years without issue*, such property to pass and vest, in fee simple, to such of his children, as may then survive.

Held, That H. M. B. and her brothers and sisters, and her children all being alive, and she having but a life estate, her said children have not an absolute and unconditional fee simple title to said realty, subject to such life estate, but only a *base* fee, which may be determined by their and their issues' deaths *before* the death of their mother, H. M. B.

Held also, That if she should die *before* all her children or their issue shall die, they will then become vested with the fee simple absolute, as they are all over twenty-one years of age, whether they have issue or not—issue being only important if they should die *after* their mother and under the age of twenty-one years.

Held further, That there is a possibility that H. M. B. may out-live all her said children and their issue, in which event her surviving brothers and sisters, children of the testator, would take the fee; and, therefore, a court of equity will not compel such purchaser specifically to perform his contract of purchase, and accept title created only by the deed of H. M. B., her husband and children, all of whom are of full age. The will does not attempt to create a perpetuity, as the fee is to vest absolutely on the death of Mrs. H. M. B.

2. The brothers and sisters of H. M. B., who are all in default for answer, have the right to rely upon the court to enter the proper judgment upon the admitted facts before it, and to protect legal rights in the premises, and they admit no legal rights in the plaintiffs other than such as the law creates upon such facts. A judgment of the court against them by default would not change their legal rights existing by virtue of such admitted facts. They could maintain hereafter that the court erred in its judgment upon such facts, were it to render a judgment not warranted by the law upon the facts as admitted by the default.

---

†The judgment in this case was affirmed by the supreme court. See opinion, 26 O. S., 461.

3. Where the testator devises to the devisee an absolute estate in fee simple, and prohibits the sale by such devisee of the lands, such prohibition is a nullity. The power and right of disposition are necessary incidents of absolute ownership.

YAPLE, J.

This cause comes here for decision upon the evidence and the law by reservation from Special Term.

The plaintiffs sold and contracted to convey to the defendant, Zinsmeister, by a good and sufficient deed of general warranty, certain real estate, situate in the city of Cincinnati, described in the petition, and have tendered a deed, duly executed and acknowledged therefor. The only question, is, whether they have such a title as the defendant is bound in law to accept. The land came to Mrs. Hannah M. Bates and her three daughters, her co-plaintiffs, by devise from her father, Philip Grandin. The other defendants are the heirs at law of Philip Grandin, and are in default for answer. The will was made in January, 1850, and
323 *the testator deceased and his will was probated after the year 1856. The will contains the following provisions: "My executor shall convey by proper writing to each of my three daughters, Hannah (the plaintiff), Lucy Ann and Susan Adeline (they being of full age or married), the portion of real estate that may be assigned and set apart to them severally, so that each of them may have secured to her own use, and subject to her own control the share of my estate that may be allotted to her, to be used and enjoyed by them respectively, *during their lives*, and on their death or the death of each of them, the share of each shall go to the child or children of each; and, in case of the death of either of my daughters, *without surviving issue*, the share of such daughter shall go to the *surviving brothers and sisters* in equal parts, to be held by each under the same limitations as the residue of my estate is held by them respectively; and I hereby forbid any sale of any portion of my real estate that may be set apart to my daughters or either of them, or the incumbrances thereof in any way whatever. * * * As a considerable portion of my real estate is unimproved, and it may not be convenient for my children to improve the same immediately, I hereby authorize either of my three daughters above named, jointly with their husbands, if they have any, to lease their unimproved lots for short periods, not exceeding ten years. I advise that the lease should be short and that improvements should be put on the vacant lots as early as convenient; (and should either of my children die, leaving issue before they receive their portion of my estate, such issue shall receive from my estate the same amount and share of personal and real estate as would have been due to the parent, had the parent have lived to receive his or her share of my estate as is provided for in this will, to be held under the same rules and limitations as is provided for the residue of the estate)." This contingency can not happen as the devisees have all received their respective portions, none of them being dead. "And should any one or more of my children die, leaving issue, and should such issue die *under the age of twenty-one years without issue*, then I direct hereby that the property, that *by the terms of this will, would have passed to such child or children or their issue*, shall pass in fee simple to such of my children as may them survive; and to the heirs of such as may then have deceased in the same way, as by this will, it is provided in cases when such child or children should die without issue."

The executors, in pursuance of the requirements of the will, conveyed the real estate now in question to the said Hannah M. Bates and her said children, to have
324 and to hold the same by *and under the terms of the will. All the said children of Hannah M. Bates are over the age of twenty-one years, the youngest being about twenty-three years old, and Mrs. Bates, herself, over sixty years of age.

Construing the whole will, considering and giving due weight to all its provisions, we hold that the last clause providing that, "should any one or more of my children *die, leaving issue*, and should such issue die, *under the age of twenty one years*, without issue, then I direct," etc., relates to the contemplated case of a daughter of the testator dying *before* her child or children, in which case her child or children on arriving at the age of twenty-one years, *or* having issue under that age, will be vested with the fee, and not merely a base fee; but, if such children (daughters) of the testator, shall outlive their child or children, the latter dying, at any age, without issue, then such daughter of the testator will have died "without surviving issue," and the fee will vest in her brothers and sisters and their representatives. So then there is no conflict between the two vesting clauses of the will, but they simply provide for two states of things—the first, that of the daughter out-

living all her children, they dying without issue; the second, of her dying before them; then if they live until of age, or have issue, the fee will fully vest in them. I do not see how this purchaser can be compelled to specifically perform his contract, when, if Mrs. Bates' children should all die before her, leaving no issue, the fee, subject to her life estate, will vest in her brothers and sisters and their heirs.

Mrs. Bates' children have but a base fee, as there is a possibility of her outliving them all. If she should do so, they leaving no issue at the time of her death, the fee will vest in the other children of Philip Grandin and their heirs. If she should die before her children, or their issue, then those that survive her will have a fee simple absolute, for they are now all over twenty-one years of age; and had she died before any of them came of age, and they then died minors, leaving issue living, such issue would have taken the fee simple absolute. There is no inconsistency in the two clauses of the will, each provides for a different state of facts—one if she outlives issue, the other, if issue survives her.

I do not think there is one chance in a thousand million that this purchaser's title will be defeated by the happening of any such contingency. I believe he would be perfectly safe with a deed of general warranty; but, I do not see how we are to compel him to take this title and pay for this lot. The will does not attempt to create a *perpetuity*, for the estate in fee is to vest absolutely in somebody at the death of Mrs. Bates. In the meantime, fee is vested, in trust, in the executors.

*Further, until such fees vest absolutely, the will forbids the sale of such real estate. Of course, when the fee does so vest unconditionally, any attempt 325 by a testator to restrain the selling of the property by its full and absolute owners, would be simply nugatory. Ownership always includes and carries with it the right of disposition. I think that upon the existing state of facts, specific performance cannot be decreed.

O'CONNOR, J., concurs.

TILDEN, J., having been consulted as counsel in a case upon the will before going on the bench, did not sit.

MUNICIPAL CORPORATIONS—TURNPIKES.

[Superior Court of Cincinnati, General Term, June, 1875.]

†C. & W. TURNPIKE CO. v. CINCINNATI, ET AL.

Tilden, Yaple and O'Connor, JJ.

The extension of the city limits does not extinguish the rights of a turnpike company without appropriation, and a change of grade by the city is enjoinable.

MOTION TO VACATE AND CROSS MOTION TO CONTINUE RESTRAINING ORDER.

1. I am inclined to believe, and, in the present state of the evidence, must hold, that the road of the plaintiff was located and improved, and subsequently occupied down to the Lower River road, at or near the Two-mile house. Whether it was rightfully so, may, perhaps, not be entirely clear; but the fact itself appears to me to be made out sufficiently for the purposes of the present inquiry. I will refer to the evidence which appears to me to require the conclusion just stated:

In 1820 a country road, called the "Walker Mill road," was laid out and established by the county commissioners. This road began at a point near to "Evan Price's barn, on the west side of Mill creek, near its mouth," and extended north on the west side of the creek to a state road which crossed Mill creek at a point near to Walker's mill. It may be assumed that this state road was the same as that afterwards known as

†A decision in an action brought to compel the city to condemn a portion of this road is found 2 B., 126.

326 the " Harrison turnpike," now "Harrison avenue;" and I infer *that the southern terminus of the road, " near the mouth of Mill creek," was as far south as the " Lower River road." The " Walker Mill road" was surveyed and replatted in 1832, and it appears that this survey was made matter of record, but this record has not been put in evidence. The lines of the Walker Mill road became uncertain, and in 1854, under authority of an order of the board of county commissioners, the road was again reviewed. The survey was made by the county surveyor (Rickey), and the lines were marked and the road was straightened. According to this survey the road began at the south end, at a point distant about thirty-seven feet south and west from a brick tavern, " on the road next to the White Water canal." I infer that this was the Lower River road, and the tavern the " Two-mile House." The road was again surveyed in the fall of 1872; this time by a city civil engineer (Maj. Wallace). This survey agreed with that made by Rickey in 1854, and was made from his field notes, and according to the marks and witnesses referred to him by him; and according to the last survey, too, this road terminated in the Lower River road. Mr. Welsh, another city civil engineer, sustains Maj. Wallace, and in a diagram filed with his affidavit, gives the levels of the road and of the street as proposed to be improved. It is not disputed that the road was a legally established county road, so far as it extended; and I think the evidence requires me to conclude and hold that it did extend to the Lower River road, and did include the roadway from the point of intersection north to German street.

The " Cincinnati and Warsaw Turnpike Company," the plaintiff, was organized in August, 1857, under the general laws of this state, on that subject. Its line of road was described in the certificate as " commencing at the foot of the hill in Storrs township, at the intersection of the plank road with the river road, and to pass through Storrs and Delhi townships, to its terminus at Gazlay's corner." The company, in October, 1857, on the recommendation of certain citizens, some of whom appear to have been corporators, obtained from the board of county commissioners authority to enter upon and take possession of part of a county road, then known as the plank road, and that part of the road is described in the proceedings before the commissioners substantially as in the certificate for incorporation of the company, the south end being designated as the river road. The company did take possession, and has continued to occupy down to the present time; and the evidence, showing the character and extent of that possession, appears to me sufficient to remove any doubt growing out of the terms of the written description, and to fix, definitely, the
327 *Lower River road as the "River Road" intended; and this possession included that part of the road extending from German street to the Lower River road, at the "Two-mile House." That part of the road was included in what was formerly called "The Old Hill or Ferry Road." It was improved as a plank road in 1850, and was then called "The Cincinnati, Warsaw and Cleves Plank Road and Turnpike Company." The first planks on this road were laid at its intersection with the Lower River road, at the Two-mile House, and the improvement was continued north and above German street. This fact is abundantly proved by the affidavits of Clermont, the two Wilders, Strickor, Lott, Schnell and Witz, who, together with Schiff, prove that on the failure of the old company, the Cincinnati and Warsaw Turnpike Company took possession, removed the planks and improved the road, by laying down broken stone. The

affidavits filed by the defendants certainly do tend to induce some distrust and doubt, and all the more from the evident sincerity and known good character of the witnesses. But it is to be borne in mind that the events and circumstances testified to occurred many years ago. Some of them were such as not to be well understood, or such as to be easily misunderstood, or not to impress the mind strongly. Mr. Schnell refer to one circumstance, which he thinks, may have caused some confusion. He says that the old plank road had two branches, one of which was afterwards the road of the plaintiff, running from the Lower River road at the Two-mile House, and the other the Gest street branch, which afterwards became the Storrs township turnpike. The truth is that this territory appears to have been, at one time, peculiarly favored with a multitude of badly defined roads, and it is not so remarkable that there should have been some confusion and misunderstanding, as it is that there should not have been almost endless litigation. At least it would seem so at this day. Another circumstance is entitled to notice in this connection. It appears from Rickey s survey, that the Walker Mill road, instead of continuing on a nearly straight line from German street, as now located, and instead of intersecting the Lower River road west of the Two-mile House, was so continued only to a point nearly midway between what is now German street and the Lower River road, and there made an angle of about 45 degrees east of the north and south line running south and terminating at or near the Two-mile House. From the Lower River road at this point to the angle, the road was occupied formerly by the "Old Hill or Ferry Road," and then by the old plank road, in 1850, and then in 1857, and thenceforward by the road of the plaintiffs; and, at the angle, these roads successively crossed the *Walker Mill road, which did not, I think, as some of the witnesses seem to suppose, terminate in them. Until 1854 the route of the 328
Walker Mill road, from the angle south, was either disputed or unknown, or not regarded, and it was supposed that it terminated in the Old Hill or Ferry road. But the survey of Rickey ascertained the true route of the former, restored its witnesses, and made it apparent that the link which had been supposed to be part of the Ferry road was, in fact, part of the Walker Mill road as established in 1820 and recognized in 1833. It was simply not improved, occupied and called such. There is no evidence that the Old Plank Road Company took any steps to vacate this section as a county road, and for anything which appears, this company may simply have laid down its planks and occupied the Ferry road without objection. It is certain that in 1854, it was still regarded as part of the county road, and the plaintiff, in 1857, succeeding to the rights of the old Plank Road Company, obtained a cession of all the rights of the county, thus indicating, it would seem, an impression that the county still had jurisdiction.

Col. Moore, who says he was familiar with these old roads, confirms Maj. Wallace, and states that the Walker Mill road is the same as that delineated in his survey, and that the road extending from the Lower River road to German street, was part of it. He states also, that this section was part of the public road, and not of the old plank road, (*i. e.* the Ferry road). This, he says, was the plank road of the Cincinnati, Delhi & Cleves Turnpike Company, and that it commenced at or near the present intersection of Gest street and Mill creek, and ran across the Walker Mill road, and that the plank road subsequently

commenced at the same point and ran in the same direction. He says further, that in 1857 the plank road was changed so as to run southerly to a point named, to the Walker Mill road at its intersection with German street, and there, I understand him, it ended, and in this he is sustained by Mr. Jenkins and by Mr. Seil, and impliedly by Mr. Price, who says he knows of the road south of German street having been repaired by the city. If Mr. Schnell is correct in stating that the old plank road had two branches, one extending from the Two-mile House to Gest street, and which afterward became known as the Storr's township turnpike, it is not impossible but Col. Moore and the other witnesses whose recollection agrees with his, supposing the other branch formerly called the Ferry road, but which proved to be the Walker Mill road, was a free road, have compounded the old plank road with the Gest street branch, and which as the Storrs' township turnpike, may have crossed the Walker Mill road at or near the point described by
329 *Col. Moore. If this supposition does not explain the differences in the recollection of the witnesses, I am not aware of any thing in the testimony that will. And if the testimony is to be regarded as contradictory and irreconcilable, I must adopt the theory suggested by the evidence given by the plaintiff's witnesses. There are seven or eight of them, most of them actual residents in the immediate neighborhood for a period extending back of all the events involved in the inquiry, and directly interested to observe and understand them. All are trustworthy, and all concur, substantially, in remembering that the actual possession of the section of road in controversy, was in the old Plank Road company, and then in the plaintiff for a period of about twenty-five years.

2. At the time when the rights of the plaintiff, such as they shall be ascertained to have been, became vested, and for a considerable period subsequently, the entire line of its road was without the limits of the city of Cincinnati, and its toll-gate was distant more than eighty rods. At a subsequent period, but at what time does not appear, the west line of the city was removed west, so as to include a considerable part of the plaintiff's land on the south end, but not so as to include the toll gate. The authorities of the city assuming, apparently, that the act of extending the city limits had the effect of legally terminating the rights of the plaintiff in that part of the road included by the extention, have taken the necessary preliminary steps to improve it as a street, and, before this action was brought, had entered into a contract for that purpose, under which the contractors were about to change the grade of the road and to improve it.

It is, certainly, sufficiently clear that the effect of the extention of the city limits was *ipso facto*, to bring all the territory included within its limits, as extended, under the operation of the municipal laws governing the corporation in general, including those vesting in the authorities of the city exclusive jurisdiction for the purpose of police regulation of its streets and public grounds. It is, perhaps, true also, that it would be competent for the state, in the case of a road owned by a corporation organized under the existing constitution and laws, to take from such corporation its control over its road, if brought within the limits of a municipal corporation, and that without making compensation for the injury inflicted. And, as matter of construction, it may be contended with much plausibility, that the absence from a statute of an express affirmative provision affording such protection, is, in effect to withhold it. Ap-

parently such was the condition of things in the village of Riverside v. the Lower River Road, referred to by counsel as having been decided in the *district court of this county. I see no reason to question the correctness of that decision on the fact; but as I understand the facts 330
presented by that case, the decision is not in point. The object of that action was to abolish a toll gate in a village; and of this, it is to determine the right of property in a toll road extending within the limits of a city of the first class, and the question presented is one depending upon the construction and application of the provisions of the statute relating to that particular subject. These provisions are contained in sections 510, 597, 598, 599, 600 of the Municipal Code. Walker's Code, pp. 152, 183.

It is the duty of a turnpike company to maintain its road in a good state of repair, and the due performace of this duty is an implied condition of the grant of the right to take toll and be a corporation; and this obligation was not, in the present instance, discharged by the extension of the city limits. That this was so, and so considered by the Legislature, is apparent from section 598 above referred to, which, contemplating a condemnation of the city portion of a road, as authorized by section 510, gives to the directors of the Turnpike Company, in case the municipal corporation shall fail to keep the city portion of the road in as good a condition as required by the charter of the company, a remedy by mandamus, to compel the city so to do. This provision very strongly implies that it was intended to maintain not only the duty to repair, but also the property of the Turnpike Company in the road. This purpose is further shown by the provision made, in Section 599, for the case in which "the road of a turnpike company shall pass through or into a municipal corporation," and by which power is vested in the municipal corporation, to make "any improvement or repair of the road such as shall be additional to the improvement or repair required by law of the company, and as, in the opinion of the council or trustees, will better adapt such road to use as a street;" but this power is expressly coupled with, and made to depend upon a condition which requires the consent of the Turnpike company, and when such consent is obtained, and improvement or repairs are made in pursuance of it, section 597 provides that the cost of the improvement or repair shall be paid for in the same manner as in the streets and other highways of the municipal corporation. These views of the intention and effect of the provisions which have been referred to, are entirely consistent with the construction required to be given to section 510. The first clause of this section declares that when a turnpike road terminates within the corporate limits, the portion of the road included within such limits, "shall become a public street of the corporation, and shall be maintained and kept in repair as other streets." The *second and last clause is in these words: "And the council may 331
cause the same to be condemned and appropriated for use as such." Thus the words of the first clause are imperative and mandatory, whilst those of the second are permissive merely. But it is within the recognized province of construction to accept imperative words in a statute as permissive, and permissive words as mandatory when on such a construction is necessary to execute the intention of the legislature, and the general purpose and spirit of the statute. To take the words of the first clause, then, in their literal and absolute sense, would be to make the clause utterly repugnant to section 599, as also to section 600, which expressly saves and protects the right to take toll even at a gate established in the

corporation of a town or city. If these sections are to have effect according to their plain words, it is impossible to suppose that it was the intention of the legislature, either by the first clause of section 510, to vest in the city an absolute and unconditional control, or by the second, to make it optional, in claiming such control, whether to appropriate or not. It is obvious, then that the second clause was intended as a qualification of the first. The power to appropriate is limited by section 511, by which, to the due execution of the power, the concurrence of two-thirds of the whole number of the members elected to the council, is required. So long as the power remains unexecuted, the relations of the company and city were, obviously, intended to be regulated under section 599, and it was not intended that, at any time before an appropriation was made, the first clause of section 510 should operate as a dedication of the road as a public street. It was the clear purpose of the statute not to release the Turnpike company from its obligation to keep its entire road in repair and, at the same to preserve the property rights of the company. This purpose the statute has completely accomplished, if I am right in the construction which I have given to the provisions to which I have referred. The city authorities have taken a different view of the case. It may turn out at the final hearing, and upon a more full presentation of it upon the evidence, that they were right in supposing that the title of the plaintiff does not embrace the section of road in controversy. But I am obliged now, and for the purposes of the present occasion, to hold differently; and on this conclusion of fact, the plaintiff is entitled to the relief demanded. The extension of the city limits did not *ipso facto*, extinguish, and the municipal code has preserved the rights claimed in the case.

3. Objections have been made to the application on these facts, of the remedy by injunction. A brief statement of the principles governing the question will determine the validity of these objections.

332 *The authority of the courts, at the final trial of an action, to award the judicial injunction, is included in the general grant of judicial power, and its exercise is regulated by the rules and principles governing courts of equity. The provisional or temporary injunction is specially provided for by statute, and the grounds upon which it may be granted and continued until the trial, are pointed out and defined in section 238 of the Code. Besides the cases in which an injunction is specially authorized by statute, which it is unnecessary now to consider, there are but two instances or occasions in which the application can be sustained. In all cases it must appear by the petition that the plaintiff is entitled to the relief demanded. If the petition is demurable, that, of itself, is an answer to the application. But if the facts stated in the petition are sufficient to constitute a cause of action, and to show that, if proved at the trial, the plaintiff will be entitled to the relief demanded, then, as a provisional measure, and with a view, during the pendency of the litigation, to preserve the rights of the parties in *siatu quo*, a temporary injunction is authorized either, first, when the relief demanded, or any part of it, consists in restraining the commission or continuance of a wrongful act, the commission or continuance of which, during the litigation, will be productive of great or irreparable injury, or, secondly, when, without regard to the nature of the relief demanded by the petition, the defendant, during the litigation, is doing, or is about to do, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to

render the judgment ineffectual. In cases of the first class, the two first conditions are to be determined upon an inspection of the petition. Resort must be had to that to determine the nature of the relief demanded, and to ascertain if such relief consists in a restraint upon the defendant. The requirement, that the threatened act be one productive of injury to the plaintiff, either great or irreparable. is one which involves the nature and tendency of the threatened act. The expressions used in the statute have a settled, legal meaning, according to which, an injury is considered as irreparable, or not so, as the result of a comparison of the remedy by injunction with that by action or the recovery of damages. The question always is, whether the purposes of justice will be the best subserved by compelling a wrong doer specifically to abstain from doing an act which his duty forbids him from doing, or by giving him the option to violate his obligation and inflicting an injury upon another, not in the wrong, upon the terms of making uncertain compensation after the injury is inflicted. The former is the nature of the remedy which it is the aim of courts of equity, as it should be of all courts, to afford, for that which is most con-
*formable to justice in the abstract, is, necessarily, at the same
333 time, most politic and most salutary. The tendency, therefore, in the courts, has been gradually to extend the range of equitable remedies, and especially of injunctive relief. To authorize its refusal in any case, therefore, the legal or other remedy with which it is compared, must, as a general rule of equity, be shown to be plain, and not open to doubt and uncertainty; it must be adequate, *i. e.*, it must be such redress as, under the circumstances, the justice and equity of the case requires, and it must be complete and co-extensive with the entire controversy. If the legal remedy be in either particular defective, then, a *prima facie* right being shown, it is considered as being irreparable. Cases of inadequacy, on either ground, arise in practice, in a great variety of forms, and each case must rest largely upon its own circumstances, and, necessarily, in the discretion of the judge. In a controversy respecting property, between a private person and a public corporation, or official body having compulsory powers, the mere character of the defendant is a circumstance alone sufficient to render the injury irreparable by an action for damages. In other cases the same conclusion results, if damages, owing to the nature of the property or the character of the injury, appear not to be a just and adequate mode of redress; or if the injury be continuous or constantly recurring, or if damages are uncertain or insusceptible of computations by the rules of law.

In the present case it is not claimed that the petition is defective, and the sole relief demanded is a final judgment perpetually restraining the acts threatened to be done. The plaintiff is a private corporation, and therefore a private person, asserting private rights respecting property. The defendants are acting under color of authority conferred upon them by law in behalf of the public, and, for all the purposes of the pending motions, are to be regarded as intending to proceed in a manner transcending the powers conferred on them by law. If they should so proceed the effect would, to take property belonging to the plaintiff, imperil its right to take toll, as also, by deprivation of the possession, and therefore of the means of keeping the road in repair, its franchise as a corporation. The redress which an action for damages would afford would, in my judgment, be wholly inadequate, and I hold the injury threatened to be, therefore, irreparable.

372 *EVIDENCE—EMINENT DOMAIN—JURISDICTION.

[Superior Court of Cincinnati, General Term, October, 1875.]

KOHL ET ALS. V. HANNAFORD ET ALS.

Yaple, O'Connor and Tilden, JJ.

1. Where the evidence, on a trial to a jury, is wholly documentary, and the court, upon a construction of such evidence, is of opinion that the party offering the same and having the affirmative of the issue, is not, in law, entitled to a verdict, it is competent to direct a verdict to be returned against him.
2. The power of eminent domain of the government of the United States is a legislative power, and acts, done by direction of an executive officer, subversive of the property rights of a citizen, can be justified only under an act of congress conferring authority to such acts.
3. Neither the act of March 12, 1872, authorizing the secretary of the treasury to purchase lands for a custom house and post office at Cincinnati, nor the provision in the general appropriation act of June 10, 1872, authorizing him to purchase such lands "at private sale or by condemnation," convey the authority required.
4. A purchase by condemnation is a purchase through the medium of a judicial proceeding, to ascertain the compensation to be paid to the owner of the property, and to transfer the title to the government.
5. The circuit courts of the United States are courts of record and of general jurisdiction, and in all cases in which their judgments are collaterally called in question, the existence of such jurisdiction will be conclusively presumed.
6. By the eleventh section of the judiciary act of the United States, the circuit courts of the United States are vested with jurisdiction, etc., over all civil suits at common law and in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and the United States are plaintiffs. The finding of that court, implied by its judgment, namely, that proceedings to condemn property for a public use are within that provision, was the exercise of jurisdiction, and the judgment which followed was binding upon the parties, and will continue to be so until set aside by the court having appellate jurisdiction.
7. A final judgment in a suit for the condemnation of private property for a public use, which provides for the payment of the ascertained compensation *to
373 the former owner, and adjudges the title and ownership to be in the public, is a judgment *in rem*. It establishes the status of the property, and until it is reversed such status or ownership must be regarded as being such as it is so adjudged to be.
8. Proceedings in error for the reversal of such judgment, accompanied by a supersedeas, operate only to stay execution. They have no effect on the status of the property. Until the judgement is reversed, such status is precisely that which the judgement declares it to be.
9. The tearing down of permanent buildings is a destructive trespass, and an injury to the inheritance, and the reversioner, the possession being in a tenant, is entitled to an action in respect to such injury. But the action is founded on the ownership, and evidence disproving such ownership will defeat the action.

This was an action to recover damages for a forcible and wrongful entry upon the lands in the possession of and belonging to the plaintiffs, and for the subsequent destruction of the buildings standing upon such lands. The defense, out of which the controversy has arisen, was that of justification and the grounds of justification, as stated in an amended answer, were these:—That in the year 1872 the congress of the United States authorized the secretary of the treasury of the United States to select, and to purchase or condemn, a suitable site, in the city of Cincinnati, for a custom house and post office: that in pursu-

ance of such authority, the secretary of the treasury did select a tract of ground described in the answer, of which the ground of the plaintiffs was part: that, in further pursuance of such authority, the secretary of the treasury authorized the district attorney of the United States to institute proceedings to apropriate and condemn, for the public uses above stated, the tract of ground above referred to: that, thereupon, and in due course of law, the district attorney, in the name and behalf of the United States, on the 24th day of July, 1873, filed a petition in the circuit court of the United States for the southern district of Ohio, against the plaintiffs and the remaining owners of the lands proposed to be appropriated: that process was duly issued in the case and served upon the plaintiffs; and that they appeared by their attorneys and guardians *ad litem*: that afterwards such proceedings were had in the cause that the value of the interest of the plaintiffs as to which they offered evidence at the trial before a jury, was ascertained to be six thousand dollars, upon the verdict finding which the court entered a judgment declaring the land of the plaintiffs duly appropriated by the United States under the right of eminent domain and declaring that plaintiffs had appeared and claimed, and been awarded a full compensation, and adjndging that upon payment, or deposit in the registry of the court, of the amount of the compensation so ascertained, the title of the plaintiffs should vest in the United States, and a writ of possession should be awarded therefor: that *subsequently the sum so awarded, the plaintiffs having refused to receive the same, was paid into the 374
registry of the court for their use, and thereupon the court, finding that the United States had become entitled to the possession, made a further order that a writ issue to the marshal of the United States to deliver such possession to its authorized agent. It is further stated that the defendant, Hannaford, became such agent: that on the 5th of January, 1874, he took possession peaceably and without opposition, and remained in possession until the 12th of January following, when he was wrongfully dispossessed by the plaintiffs: and that on the 19th of January possession was restored to him by the United States marshal under a writ issued upon the judgment: that the buildings were afterwards torn down under the directions of Hannaford, the defendant, Jordan, assisting therein, and that these were the acts of trespass complained of in the petition.

In their reply the plaintiffs deny that any acts of congress authorized the condemnation of the property; and they deny the jurisdiction of the circuit court, and then, as a conclusion from these premises, they further deny that there is, in law, any such record as that set forth in the amended answer. By way of special reply they further state, on the 13th of January, 1874, and before the writ of possession was issued to the marshal, the record of the recovery was removed, by writ of error, into the supreme court of the United States; and that the execution of the judgment of the circuit court was suspended by bond duly executed and approved, according to law and the course and practice of the court.

At the trial to a jury evidence was offered by the plaintiffs, and received, proving their title, which consisted in a perpetual leasehold estate, and to prove the acts of trespass complained of and the damages sustained. The defendants then put in evidence an authenticated transcript of the record of the proceedings of the circuit court, and other evidence tending to prove that the acts complained of were done by the

defendants by direction of the secretary of the treasury. It was agreed that the writ of error was duly returned into the supreme court of the United States on the 28th day of January, 1874, and that, at the time of the trial, the cause was still pending in that court. The plaintiffs requested the court to charge the jury that the circuit court had no jurisdiction in respect to the matters set forth in the record of the proceedings in that court; and, second, at the judgment in that court had been suspended by the writ of error bond. These charges the court declined to give and the plaintiffs excepted. And thereupon the court, being of opinion that upon the law the case was with the defendants, directed
375 *the jury to return a verdict in their favor, and this the jury did, the plaintiffs duly excepting to the direction so given. A motion was then made for a new trial, and, all the facts having been reduced to writing and duly certified, the motion was reserved to general term upon all the questions presented by the case.

OPINION OF THE COURT.

TILDEN, J.

The plaintiffs having at the trial, proved their ownership and possession, and the acts of trespass and injury complained of, were, on the conclusion of their evidence, clearly entitled to a verdict, and had the inquiry ended there, the withdrawal of the case from the jury, and the subsequent refusal of the court to grant a new trial would have been manifest error. But if the justification, being sufficiently presented by the answer, was maintained by the evidence, the right to a verdict was with the defendant; and, if such evidence was exclusively documentary, raising only questions of law, the defendants had the further right to call upon the court, and the court itself had power, *sua sponte*, to direct a verdict in their favor. Such, we may suppose, was thought to be the character and effect of the evidence by the judge who tried the case in special term, and, if he was right in that opinion, it will hardly be contended that he was not so in withdrawing the case from the jury.

In the argument submitting the case to us, our attention has been called to two general propositions, both of which have been insisted on by the counsel of the defendants. One is that the defendants may claim protection under the direct authority of the government of the United States, acting through the secretary of the treasury, without the judicial intervention of any court, state or national; and the other is, that the required means of protection are, at any rate, afforded by the record of the proceedings in the circuit court.

1. In considering the first proposition, it may be safely assumed that the power of eminent domain residing in the government of the United States, is a legislative power vested in Congress by the Constitution. No executive officer of the government, not even the President himself, in a time of peace, can rightfully seize upon the property of a citizen. Such an act would be a manifest violation of rights, declared by the constitution to be inviolable; nor would it be rendered at all less clear, in a legal sense, by the plea that the seizure was for a public use, or by being accompanied by an offer of compensation. The power, then, to make private property subservient to the public welfare, being a legislative one, the success of the defense founded upon the proposition now under discussion, requires that it be made to appear that the authority which has

been imputed to *the secretary of the treasury, has been conferred upon him by act of congress. The only acts supposed to have any bearing on the question was the act of March 12, 1872, to authorize the purchase of a site, 17 U. S. Stat. at large 39, and a provision contained in the general appropriation act of June 10, 1872— 17 id., pp. 352–3. The first act simply makes it the duty of the secretary to "*purchase*;" and the other provision, by an implication which we assume to be correct, authorizes the secretary to " purchase at private sale, *or* by condemnation." There is, certainly, nothing in these words which can, without pervertion, be construed as a grant of the authority in question. An authority to purchase, as given by the act of March 12, 1872, is not the same thing as an authority forcibly to seize and take. An authority " to purchase at private sale," as granted by the act of June 10, 1872, is an authority to purchase at private sale only; and the next succeeding words, giving the further power to purchase by condemnation," do not necessarily, or even properly imply that the act of condemnation should be performed by the secretary, or under his direction. The word had a well-known signification, derived from the invariable practice in the several states, and it is fair to presume that it was used by congress in that sense. What renders this conclusion still more clearly a correct one is the circumstance that the legislature of this state, in act relating to grants of jurisdiction to the United States, had adopted a provision assuming to impose upon the general government, in the exercise of its own right of eminent domain, the duty to conform to the provisions of the laws of this state on that subject. These provisions are, in themselves, entirely just, and were of course known to exist, and it may well be presumed that congress, without recognizing their authority as laws, intended to prescribe to the courts of the United States, otherwise having jurisdiction, these provisions as containing convenient and just rules for the regulation of their practice. We conclude, then, that the authority ascribed to the secretary of the treasury has not been vested in him by law, and we must, therefore, reject the first proposition. 376

2. The second proposition raises the question, first, of the jurisdiction of the circuit court, and, second, of the effect of the proceedings in error in the supreme court of the United States.

First. The facts which are material to the consideration of the question of jurisdiction are, that the secretary of the treasury, under authority of law, had selected the land of the plaintiffs, with other lands, as a site for certain buildings, for the use of the United States, and over the district formed by this site the state of Ohio had ceded to the United States exclusive power of legislation. Congress had authorized the secretary to *purchase these lands "at private sale or by condemnation;" and had provided a fund with which, in the court of condemnation, to make compensation to owners of the land. The secretary having been unable to purchase at private sale, elected to purchase " by condemnation." The objects of a condemnation, when sought through judicial forms, are to ascertain the amount to be paid, as a compensation to the owner of the land, and to condemn, that is, to appropriate the land and pass the title out of the owner and vest in the public. These were the objects of the suit in the circuit court, as stated in the petition filed in the case. The suit was brought in behalf of the United States, and in their name, as plaintiffs, and against the present plaintiffs and others as defendants. The present plaintiffs were served with process, and appeared and contested the case on the merits. And the court, upon investigation, ascer- 377

tained the amount of compensation to be paid to the plaintiffs and secured its payment, and, by a judgment, condemned the land, and ordered delivery of the possession to be made.

1. It will be conceded that an act done under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject although it should be erroneous. The circuit courts of the United States have general jurisdiction over all civil suits, at common law or in equity, where the matter in dispute, exclusive of costs, exceeds the sum of value or five hundred dollars, and the U. S are plaintiffs.* The objection which has been made is that a proceeding to condemn is not a civil suit at law or in equity; and one question is whether, assuming that the circuit court committed an error in supposing that it was so, the error was merely one in the exercise of jurisdiction, or one fatal to the jurisdiction itself. In *ex parte* Watkins the return of the writ of *habeas corpus* was accompanied by a copy of the indictment under which the prisoner was held in custody. It was objected that the indictment did not state facts such as constituted a criminal offense; but the court said: "To determine whether the offense charged in the indictment is punishable or not, is among the most unquestionable of the powers and duties of the court. The decision of this question is the exercise of jurisdiction."—3 Peters, R. 203. And (page 205), "The question whether any offense was or was not committed, that is, whether the indictment did or did not show that an offense had been committed, was a question which that court was competent to decide. If its judgment was erroneous, still it is a judgment, and, until reversed, cannot be disregarded." The *cases are numerous which
378 decide that the judgments of a court of record having general jurisdiction of the subject, although erroneous, are binding until reversed. The judgments of the courts of the United States, although their jurisdiction be not shown in the pleadings, are yet binding, and an apparent want of jurisdiction can avail the party only on writ of error. This principle appears to us to settle the question now before the court. The circuit court has general jurisdiction, other conditions concurring, of all suits at common law and in equity, and its decision that a case before it is of this nature, is an exercise of jurisdiction. The judgment which follows that decision is evidence of its own legality, and requires for its support no inspection of the grounds on which it is founded. So long as it remains unreversed, it is conclusive in every collateral inquiry.

These principles had been already affirmed in Kemp's Lessee v. Kennedy, et al., in 5th Cranch, 173, and in Skiller's Executors v. Armroyd, et al., 7 Cranch, 423. And they have been reiterated in many cases in the state and federal courts, and are believed to have become settled. We shall specially refer to one of them only, and it is the case of *Ex parte* Bushnell and *Ex parte* Langston, 8 O. S. 599. In that case the relators were in the custody of the United States marshal, under indictments pending in the circuit court of the United States for the northern district of Ohio, charging them with the rescue and the aiding and abetting the rescue of a fugitive from service, under the act of congress of September 18, 1850. One of them had been convicted, but not sentenced; the other had not been tried. Their liberation was sought by writ of *habeas corpus*, on the ground that the act of congress was unconstitu-

*Sec. 11 of the Judiciary Act of the U. S.

tional. The writ was dismissed, the court observing that the federal court then having possession of the case had "the legal capacity to hear and determine for itself the question of its own jurisdiction and right to act in the premises. The legal presumption in such cases always is, that a court thus assuming to act will determine the question of its own jurisdiction correctly until it has acted finally." From these premises it appears to us necessarily to result that if the court, being one of general jurisdiction, has finally acted, and acted incorrectly, its proceedings are still binding and conclusive between the parties for all purposes, except for the single one of revision in an appellate tribunal. The principle of comity, to which the supreme court refer, is certainly the controlling one, when acting upon the proceedings of a court of foreign jurisdiction. But the courts of the several states, and of the United States are not foreign in their relations to each other in any sense, and as to them the principle is one of authority, and not of comity, when involved *in the mode in which it is now presented. The rule is derived 379
from the constitution of the United States, and can not be disregarded. As to these courts being courts of record and of general jurisdiction, it may be considered as settled that each court is the exclusive judge of its own jurisdiction; and that in any proceeding to enforce it, and whenever the record is offered as an instrument of evidence, or insisted upon by way of estoppel, or in bar, it is conclusive on the question of jurisdiction, as on any other question brought before the court by the case. The law trusts the court with the whole subject, and no other court, except it be an appelate one, has the power of revising its decisions. Coming before us, therefore, as the record of the circuit court does collaterally, we must, with these views, hold that the record is of itself a full answer to the objection made to the jurisdiction of that court. 2 Am. L. C., 639–42.

2. We have, however, out of deference to the apparant wishes and to the able arguments of counsel, considered the question in the abstract. We have looked into most of the reported decisions which have been cited, and have formed an opinion. In the view we have taken on the other point, it would not be useful to state the grounds of this opinion at length; but we think it very proper to say that our investigations have led us to precisely the same result as that reached by the learned judge of the circuit court.

Second. The taking of possession by the defendant, Hannaford, with the consent and acquiescense of the tenants in possession, can in no view be regarded as having been a trespass. If it was a trespass, it was a mere injury to the possession, and the tenants, and only the tenants, were the persons to bring an action. The subsequent restoration of the possession of the United States marshal was also a legal injury, if unauthorized, to the possession, and conferred a right of action upon the tenants only. And even in an action by them, we are of opinion that the writ would be a full protection to the marshal, and to all who were acting with him in its execution. We must assume, as we have already held that the court had jurisdiction. It was not necesary, therefore, to look behind the writ, and the defendants were not bound to know, assuming such to have been the fact, that execution of the judgments had been suspended.

The subsequent destruction of the buildings was, however, a destructive trespass, and a legal injury to the reversion, for which, in a

proper case, an action will lie. Such an action involves the title and ownership; and if, at the time the buildings were torn down, the title was in the plaintiffs, it is clear that they have a right of action. By the very words of the judgment, however, the title which was formerly in them,
380 was taken from them and *vested in the United States; and it is manifest that the title continued to be in the United States down to the time of the destruction of the buildings, unless the effect of the proceedings in error was, by the mere force of the supersedeas bond, to vacate the judgment and restore the title to the plaintiffs. A writ of error does not, as an appeal does, vacate the original judgment or decree, and until superseded, the judgment may be enforced by execution. 1 O. S. 511 and 270, 7 O. S. 129, 10 O. S. 617, 9 Casey, 45; 28 Conn., 433; 5 Adol. & Ellis, 239; Am. Lead. Case, 652. Notwithstanding the proceedings in error, the judgment was still a binding adjudication, and so continues to be until reversed, for all purposes except for the purpose of execution when execution has been superseded.

The office of a supersedeas is not to impeach or impair the validity of the judgment, as an adjudication, but it is to prevent the enforcement of the judgment during the pendency of the proceedings in error; and, in this case, it is impossible, in the very nature of things, that it should have operation at all, in the manner insisted on. The judgment, so far as the title of the property was involved in the case, was a judgment *in rem.* It pronounced upon the status of the property condemned; and such status was pronounced by a court having competent authority for that purpose. Such an adjudication, being a declaration from the proper and accredited quarter, that the status, ownership, or title to the property, adjudicated upon, is as declared, concludes all persons, and certainly those who are before the court and parties to the adjudication, from saying that the status of the thing—the ownership of the property —was not such as declared by the adjudication. Hull v, Williams, 6 Pick, 323; Grum v. Van Buskirk, 7 Wallace, 139, and 30 Georgia, 440; 8 Maryland, 271; 2 Am. L. C., 618, note. The effect of the supersedeas was to stay execution for the delivery of the possession, but it could not modify the judgment, or change the ownership, or alter the fact pronounced by the judgment. That fact, as so ascertained and declared, was that the title was in the United States; and that fact must necessarily continue to be a fact until, by the vacation of the judgment it ceases to be such. To inquire into the truth of the fact would be to reinvestigate a question already conclusively settled by the judgment. It would be to exercise an appellate jurisdiction, which only appertains to a tribunal which has power to vacate the judgment which establishes the truth of the fact; and it would be to withdraw the subject of the inquiry from the courts having the first possession of it, and in every way competent to adjudicate upon it. We must hold, therefore, that, at the time the buildings were torn down the plaintiffs had no reversionary
381 *estate; they were not the owners of the land, and were not entitled to bring the action. The whole subject is now properly before the supreme court of the U. S., where full justice will undoubtedly be done. See 2 Am. Lead. Cases, 619.

*LIFE INSURANCE—SEALS—DIRECTING VERDICT. 395

[Superior Court of Cincinnati, General Term, October, 1875.]

†JOSIAH C. GATES v. HOME MUTUAL LIFE INS. CO.

Yaple, O'Connor and Tilden, JJ.

1. Where a policy of life assurance, in the body of the instrument, styled it "this *nonforfeiting* policy," and in a subsequent provision expressly stipulated that the policy should become null and void for the nonpayment of the annual premium when the same should become due:

Held, that whatever effect the word "*nonforfeiting*," so used, might be in preventing the forfeiture of the policy for the nonperformance, by the assured, of conditions precedent on his part, generally, such word could not have the effect of preventing a forfeiture in case of the nonpayment of the stipulated premium by the assured.

2. The ancient rule of law that a corporation can only make a binding contract by attaching to it its corporate seal, is not in force in Ohio. Nor is there any law of this state requiring a policy of life insurance to be sealed; and, therefore, the life insurance company which has executed a policy by its corporate seal, as well as by the signatures of its proper officers, can modify the policy by adding a stipulation in writing, not under seal, if it receive the consideration therefor, and thus bind itself to perform such new written stipulation. And where an original *policy is made forfeitable for nonpayment of the premium by 396
the assured, and the company receive it back from the assured, indorse upon it, that if two full annual premiums shall be paid while it remains in force, the insured shall be entitled to a paid-up policy, re-deliver it to the assured so indorsed, and the insured thereafter, while the policy is in force, pays the second annual premium in full, he need pay no more, but may demand a paid-up policy, or recover damages in case of the refusal of the company to give him a paid-up policy,

3. When the plaintiff offers evidence tending in any degree to prove all the issues upon his part required to be proved to entitle him to recover, it is error for the court to instruct the jury to return a verdict for the defendant, even if the court, upon such evidence, would grant a new trial to the defendant in case the jury should find a verdict against him. To grant such new trial would still leave the plaintiff's cause in court for retrial, thus giving him the power to adduce further evidence upon such retrial. Nor can it be said, that in such a state of case substantial justice has been done the plaintiff. To so hold would be to substitute the court for a jury, and thus deprive the party of his constitutional right of trial by jury.

YAPLE, J.

This case comes before us by reservation of a motion for a new trial in special term. Gates was the plaintiff below, and a verdict was rendered against him by the jury and in favor of the defendant, in obedience to the instructions of the court to render such verdict. The instructions so given are the grounds of the motion. The plaintiff sued the defendant to recover the sum of $351.88, with interest on $175.94 from December 31, 1867, and on the like sum from December 31, 1868.

The foundation of his claim was that on December 31, 1867, he insured his life in the defendant company, a life insurance corporation, incorporated under the laws of Ohio, in the sum of $2,000, for an annual premium of $175.94, which premium he duly paid in 1867 and 1868; that, by the terms of the policy, by reason of such payments, he became entitled to a paid-up policy on which no premiums were to be payable,

† For decision of this case at superior court in special term, see 1 B., 78.

for $456.64, due when he should arrive at the age of forty-five years, or upon his decease before that time, he being thirty years of age at the time of making such insurance; and that, upon his demand for such paid-up policy, the defendant refused and still refuses to issue the same, or to repay such premiums paid by it to him. A copy of the policy is attached to and made part of the plaintiff's petition.

The policy witnessed that "By this NON-FORFEITING policy of assurance, in consideration," etc., "do assure the life of Josiah C. Gates of Monroeville, Huron county, Ohio, in the amount of *two thousand dollars* for the term of life, or until the age of *forty-five* years, with participation in profits." * * * "Provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is granted by this
397 *company and accepted by the said assured upon these express conditions; * * * Or in case the said assured shall not pay, or cause to be paid, the premium as aforesaid on or before the day herein mentioned for the payment thereof, or any note or notes which may be given to and received by said company in part payment of any premium, on the day or days when the same shall become due, except the premium note given for part of the annual premium, or shall not renew such last mentioned note when the same shall become payable, and pay the interest or discount thereon, * * * this policy shall cease and be null, void and of no effect."

Subsequently, but without date, the following indorsement was made upon the policy, which is attached to and made part of the petition and copy of policy: "After two annual premiums have been paid, and while it continues in force, this policy will be exchanged for a paid-up policy as large as the net premiums paid will purchase.

"GEO. MASTERS, Secretary."

The defendant's answer denied that two whole annual premiums upon said policy were paid, but that, on the contrary, the same expired December 31, 1868, for nonpayment of the renewal premium then due.

It then pleaded an off-set or counter claim, alleging that about March, 1874, the plaintiff represented to the defendant that he had held another of its policies, No. 1,032 (the policy about which plaintiff sued being No. 1,092), and had paid two full annual premiums upon it, upon which statement the defendant paid him $186 for the said policy, whereas the plaintiff, as he well knew, had not paid two annual premiums thereon, etc. This offset does not seem to have been insisted upon by the defendant at the trial.

The fact put in issue by the petition and answer, was, whether or not the plaintiff had paid two full annual premiums upon this policy, and the court held the plaintiff had given no sufficient evidence upon such issue of fact to authorize him to have the jury consider it.

Gates held three policies upon his life in this company—one No. 873, for $1,500, one No. 1,032, for $1 500, and the policy in question, No. 1,092, for $2,000.

On the first mentioned policy, No. 873, it was admitted that Gates had paid two full annual premiums and one full premium upon each of the other two. It was also clear that he had never paid a single dollar in cash, or directly to the company; but the first year's premium on all the policies, he paid to J. B. McConnell, the company's general agent at
398 Detroit, Michigan, and he *paid in personal services rendered to such general agent, or to the company, he being employed as an

under agent at a stated salary, from which such premiums were all deducted. McConnell was made actuary of the company, and came to Cincinnati, the location of the company, leaving due to Gates for his services a balance of $——. J. H. Fraser succeeded McConnell as the general agent of the company at Detroit, and he re-engaged Gates as such subordinate agent at a salary of $—— per year. Out of the amount due him for such services Gates allowed Fraser to deduct the amount of the second year's premium on policy No. 873, for which Fraser gave him a receipt duly signed by himself and the president and secretary of the company. Gates testified, also, and as to this there was no contradictory evidence, that he also deducted from his salary in proper time, and credited Fraser therewith, on his account, the amount of the premiums upon the other two policies, for which Fraser promised to send him the proper receipts. Fraser did not settle promptly with the company, and finally became in arrears to it for a large amount of money, some $6,000 or $7,000, and this gave rise to the present trouble and litigation. The company after claiming that policy No. 1,032, for $1,500 had become forfeited for non-payment of the second premium, paid Gates $186 on account thereof, which was not shown to have been by way of compromise, and which was entitled to be considered by the jury for what it was worth, as an admission by the company, that Gates had the right to pay his premiums to the company by paying Fraser in such services. At some time, for it is not dated, but probably after the time fixed for the payment of the second premium on the disputed $2,000 policy, Gates received from the hands of Fraser a receipt for the payment of such second premium in full, $175.94, to carry the risk to December 31, 1869, which receipt is signed by the president and secretary of the company and by Fraser, general agent. Now, in determining whether or not Gates had paid the second premium, it was material to ascertain whether the company had agreed with Gates and Fraser, or with Gates, that Gates might pay his premiums to the company to Fraser in services as such under agent, and whether Gates did so pay them to him. Such an agreement could be made out by direct evidence, or by the proof of facts and circumstances, and the course of dealing between the parties, of the sufficiency of which circumstantial evidence, the jury was primarily the judge. We think that, upon the issue of such payment there was evidence which entitled the plaintiff to have it weighed and considered by the jury.

But as only two, and no subsequent premiums, were claimed to have been paid, the court virtually held that the policy was *presumably forfeited for non-payment of the premium due in December, 1869, and 399
that the indorsement upon the policy, that the payment of two full premiums, while the policy subsisted, should entitle the holder to a paid-up policy, could not be received in evidence or considered by the jury, and hence, that the payment of the second premium gave the plaintiff no right of action, he having paid nothing more or further, the action not having been brought until April 17, 1874. The exclusion, by the court, of such indorsement from the jury, is assigned as one of the grounds of the motion for a new trial.

Presumptively, such indorsement by the secretary of the company, was made while the policy was in force, for it requires such second premium to be paid "while it continues in force" to entitle the holder to a paid-up policy. After forfeiture or claimed forfeiture by the company,

it is not to be presumed that the officer would have received the policy from the plaintiff, so indorsed and returned it to him. In fact, the plaintiff's testimony in the policy was requested at the office for the purpose of making such indorsement, that he sent it for that purpose and received it back so indorsed.

There surely can be no question that if the policy was so redelivered with such indorsement upon it, and the plaintiff *afterwards* paid his second premium, it became a new contract of insurance, differing in its terms from the original, and as binding upon the company as any other provision contained in the policy. No law specified the policy should be executed under seal, and if there had been such legal provision, it would be held to "merely specify *one* sufficient mode of making the contract, and would afford no just inference that this mode is *exclusive*, or that contracts *not in writing* are invalid." May on Ins., 15. "The ancient stringency of the common law required that corporations should execute their contracts under their corporate seal, and held that they could only thus contract. But this *doctrine is now exploded*," *ibid.* It is only contracts required by law to be under seal, that cannot be changed or modified by a writing not under seal.

Was this modification by the secretary made by authority of the company? He testified that it was made by authority; but it is argued by the defendant's counsel that such statement was a mere legal conclusion. Grant it, and yet in its own answer in the case, pleading a set-off for paying the defendant on account of policy No. 1,032, issued in the same year of 1867 and prior to No. 1,092, it is admitted that two payments, had they been made, would have entitled the plaintiff to a paid-up policy. The company issued a paid-up policy because two premiums had been paid by the plaintiff on the eldest of his policies, No. *873, **400** issued in the same year, 1867. McConnell, the actuary of the company, in his several letters to Gates, recognizes the terms of that indorsement as a general rule of the company, and the books of the company, gotten up at a later date, give such as the rule with all policy-holders. Surely, these facts were competent to go to the jury to enable them to determine whether that indorsement was made with the authority of, or was afterwards sanctioned by the company.

It is not necessary for the purposes of this motion for a new trial, that such evidence may not have been sufficient to establish such facts, or even conclusive enough to have precluded the court from granting a new trial to the defendant had the jury rendered a verdict upon it for the plaintiff. Granting that such new trial would have left the plaintiff and his cause still in court, on such new trial he could bring any additional evidence he might have, and which might clearly entitle him to a verdict.

We are not permitted, by law, to hold that, in the opinion of the court, the verdict upon the evidence, ought to have been for the defendant, and that, therefore, no injustice has been done plaintiff by the verdict. To so hold would be to substitute the court for a jury, and to deprive the plaintiff of his constitutional right to have the facts of his case tried by a jury instead of the court.

It is argued by counsel for the plaintiff that the word "non-forfeiting" in the policy rendered it non-forfeitable by the company for any cause. We think that, by express provision in the body of the policy, it was made forfeitable for non-payment of premium; and even if the word

"non-forfeiting" rendered the policy non-forfeiting for any cause other than the grounds of forfeiture expressly provided for in the policy, yet, it was forfeitable for every such express cause of forfeiture.

New trial granted without costs.

C. D. Robertson, for Plaintiff.

Matthews, Ramsey and Matthews, for Defendant.

---

*PARTIES—RECEIVER—REPLEVIN. 401

[Superior Court of Cincinnati, General Term, October, 1875.]

ROBERT PARKINSON V. OHIO NATIONAL BANK, ET ALS.

Yaple, O'Connor and Tilden, JJ.

ERROR.

1. Where personal property is in the state of Ohio, and a receiver for those who own it is appointed by a court of another state, with power to sue for and recover the debts due to, and assets owned by, the parties, such receiver can not, in his own name, sue for and recover such personal property in the courts of this state. Such action must be brought in the names of the owners.
2. Whether, if properly objected to, a *third* person can be allowed to make himself a party to an action of *replevin*, and, by cross petition claim the right of property and of possession in the goods replevied, or whether he must bring an original action of replevin. Query?

STATEMENT.

YAPLE, J.

This is a proceeding in error to reverse a judgment rendered in special term in favor of Shannon as the receiver of the firm of Parkinson & Co., composed of Parkinson and Russell against Parkinson.

The original action was replevin, brought by Parkinson against the Ohio National Bank to recover possession of ten Wabash county, Illinois, eight per cent. coupon bonds of $500 each, dated March, 1859, payable in 1879, to the Illinois Southern Railroad Company or bearer. The bonds were taken by the sheriff on the order of delivery, appraised at $2,000, and delivered to Parkinson upon his executing the required undertaking in the sum of $4,000. The bank held the bonds as collateral security for indebtedness to it from Mr. Sargent of the city of Cincinnati, who obtained them from Mr. Russell. The claims of the bank being otherwise satisfied, it ceased to have any further interest in them, and took no steps to *defend the action. On his motion and without objection, 402
Russell was permitted to file a cross petitoin in which he claimed to be entitled to the possession of the bonds. Parkinson and Russell, former partners under the name of R. Parkinson & Co., failing to agree, had previously dissolved their co-partnership, and Russell instituted a suit in chancery in the circuit court of Wabash county, Illinois, against Parkinson for a settlement of the firm business, and in which action Shannon was appointed receiver with power to sue for and collect the assets of the firm. On his motion and without objection, Shannon was made a party to this action and allowed to file his cross petition claiming to be entitled to the possession of these bonds as such receiver of the firm composed of

the two litigating parties. The firm is solvent. There was and is no dispute but what these bonds and two others of like amounts were delivered to Parkinson, or to Russell, or to the firm of R. Parkinson & Co., which they composed, by the Illinois Central Railroad Co., *in trust* to pay to Parkinson & Co., out of the proceeds of the sale of the bonds, at not less than eighty-five cents on the dollar, a debt which S. Freeman & Co., owed to Parkinson & Co., amounting to some $3,400 or $3,500 for advances made to them as contractors in the construction of the railroad, the railroad company being indebted to Freeman & Co., in a large amount not then liquidated, for work upon its road. If, after paying Parkinson & Co. and Freeman & Co., anything should remain of the proceeds of the bond it was to be paid to the railroad company. The firm of Freeman & Co. was composed of Samuel Freeman and E. S. Russell. Russell being a member of both the creditor and debtor firms.

The cause was submitted to and tried by the court. The court found that the firm of R. Parkinson & Co., was entitled to the possession of the bonds, that Shannon was the receiver of the firm appointed by the circuit court of Wabash county, Illinois, and as such entitled to them as against both Parkinson and Russell and the firm, and ordered Parkinson to deliver the bonds to Shannon as receiver, or enough of them to satisfy the indebtedness of Freeman & Co. to Parkinson & Co., and in default thereof, that such receiver recover of Parkinson the amount of the Freeman & Co. debt; and also adjudging the costs of the action against Parkinson. The value of the bonds is found to be $4,650. The judgment then provides that it shall not prejudice any action or claim brought by Freeman & Co. against Parkinson & Co., or any claim or action by the Southern Railroad company, "if it appear there is any excess due to either or both of them after payment of the debt due from Freeman & Co. to Parkinson & Co." To this decree both Parkinson *and Russell excepted, and
403 Parkinson brought and prosecutes this petition in error to reverse such judgment and proceedings.

OPINION.

Without expressing any opinion as to the correctness or incorrectness of the practice adopted in this case of permitting third persons in a replevin suit to come in and claim the property replevied on cross petition, instead of compelling them to resort to replevin, we have concluded to consider the case upon its merits as such new parties were made and new pleadings filed by consent.

The judgment in favor of Shannon *as receiver* against Parkinson, the plaintiff in error, was excepted to at the time by the latter; and this raises the question as to whether such judgment was authorized by law.

Shannon was such receiver by appointment of the circuit court of Wabash county, in the state of Illinois, in the case of Russell against Parkinson, for a settlement of affairs of their co-partnership. Can he obtain a judgment in that character, in a court of another state? Or must the parties for whom he is receiver seek and obtain the proper relief in such other state? We think the rule is laid down by the supreme court of the United States in Booth v. Clark, 17 How., 322, is the settled law.

It is there held that "a receiver is an officer of the court which appoints him, but cannot sue in a foreign jurisdiction, for the property of

the debtor. The proper course would be to compel obedience to the injunction by a coercion of the person of the debtor, obliging him either to bring the property in dispute within the jurisdiction of the court, or to execute such a conveyance or transfer thereof as will be sufficient to vest the legal title as well as the possession of the property according to the *lex loci rei sitæ*." And the court say: "Our industry has been tasked unsuccessfully to find a case in which a receiver has been permitted to sue in a foreign jurisdiction for the property of the debtor." * * "We think that a receiver has never been recognized by a foreign tribunal as an actor in a suit."

The case was an action by a receiver appointed by the chancellor in a court of the state of New York brought in the circuit court of the United States for the District of Columbia to recover money awarded one Clark, for whom Booth acted as receiver, by the same circuit court of the United State, and which money was then in the treasury of the United States, and the receiver's bill was dismissed for the reason above stated.

Prior to our statute enabling him to do so an administrator *appointed in another state could not sue in Ohio. This rule of law requires the reversal of the judgment below, which was in favor of 404 the receiver, and which was, at that time, excepted to by Parkinson.

The only question in the case was one of fact: Who were the trustees? When that was ascertained such trustee or trustees became entitled to the possession of these bonds, and liable to the beneficiaries for the due execution of the trust according to its terms. The firms of Parkinson & Co., composed of Parkinson & Russell and of Freeman & Co., composed of Samuel Freeman and Russell, and the railroad company were the beneficiaries. To have made the firm of Parkinson & Co., the trustee would have been to constitute that firm both trustee and *cestui qui trust*, or judge and party, an unusual proceeding.

The evidence is all contained in depositions, and Parkinson testifies that he individually was made the trustee, the bonds being delivered to him and he giving his personal receipt therefor. Wilkinson, the president of the road at the time, swears the same; so does Freeman, the partner of Russell; and R. H. Hudson, the distributing agent of the Wabash county bonds states that he paid the bonds to Parkinson on the order of Wilkinson, president of the railroad company; Russell was not named and was not present.

Russell merely proves that he had a negotiation with Martin, a previous president of the road to get these bonds on such trust terms, but he did not get them, and Wilkinson, Martin's successor in office, consummated whatever arrangement was made, and what that was has been stated, and is not disproved by any witness. The bonds were sent east by Wilkinson, to sell at not less than eighty-five cents on the dollar. He gave them to an agent to sell, who failing to do so, sent them by express to Parkinson & Co., and Russell obtained possession of them, and claimed and made use of them for the firm and for himself. But, neither the railroad company nor Freeman & Co., ever consented to any change in the trustee or the terms of the trust; and neither Parkinson or Russell or both of them, could make any change without the consent of all the parties.

The evidence seems clearly to establish that Parkinson was the

trustee and entitled to the bonds to fulfill his trust. He is proved to be solvent, and the respective beneficiaries can compel him to carry it out. The bonds are not the property of the firm of Parkinson & Co., but trust property.

Upon the whole case, we think the judgement below should be and hereby is reversed.

Judges O'Connor and Tilden concur.

David M. Hyman, for plaintiff.

Perry & Jenney, for defendants.

---

449 *CORPORATIONS—INTEREST.

[Superior Court of Cincinnati, General Term, January, 1876.]

KILBRETH, TRUSTEE, v. WRIGHT.

Yaple, O'Connor and Tilden, JJ.

The Ohio Life Insurance and Trust Company, an Ohio corporation, had the right to own and buy and sell stocks of railroad companies. It was, by its charter, forbidden to loan its funds or means at a rate of interest higher than six per cent, per annum; and its charter further provided, that if it should, in any case, demand *and* receive more than *seven* per cent. per annum, as interest, its charter. should thereby be forfeited. It sold to W. & Co. certain railroad stocks for the sum of $6,000, for which it received from them $3,000 in cash, and their note, payable to it, at its office, for $3,000 in twelve months after date, with interest *after maturity* at *ten* per cent. per annum. To secure the payment of this note, the makers, by agreement with it, delivered the stock so purchased to a trustee of the parties, who took the note from the Trust Co. with a written pledge from W. & Co. to pay the note, *at maturity*, and, in default, the trustee should sell the stock and apply the proceeds to the payment of the note. The note fell due May 21-24, 1858, and not being paid the stock was sold by the trustee on December 24, 1864, for the sum of $2,818, which sum was credited upon the note.

450 In an action by the receiver of the corporation against the maker of *the note, upon the plea of the usury set up by the latter, claiming the note to be void on the authority of the Bank of Chillicothe v. Swayne, 8 O. R., 257.

Held: That the maker had the right, at his option, to pay the note at maturity, and thus avoid the payment of any interest whatever, and that the note could not, therefore, be usurious, as the interest was not to be paid absolutely and in any event; and not being usurious in its inception no subsequent event could make it so; the reservation of ten per cent. *after maturity* was in the nature of a conditional penalty for non-payment at maturity, which condition alone was unauthorized.

Held: also, that the basis of plaintiff's recovery is as follows: Calculate interest at six per cent. on $3,000 from May 21, 1858, to December 24, 1864, and from the amount deduct $2,818; and upon the balance reckon interest at six per cent. up to the first day of the present term, for the amount of which, with costs, the plaintiff is entitled to judgment.

YAPLE, J.

This is a proceeding in error instituted to reverse the judgment of this court in special term against the plaintiff in error, who was the plaintiff below, and in favor of the defendant in error, who was the defendant in the original action.

Kilbreth, as trustee of the Ohio Life Insurance and Trust Company, a corporation incorporated by a local act of the legislature of this state, found in vol. 32, O. L. L., p. 68, brought an action against Wright upon

a promissory note, of which, with the indorsements, the following is a copy:

"3,000. Cincinnati, May 21, 1857. Twelve months after date we promise to pay to the order of ourselves, at the Ohio Life Insurance and Trust Company, in this city, *three thousand dollars*, for value received, with interest, *after maturity*, at *ten* per cent. per annum, without any relief from valuation and appraisement laws.
JOHN W. WRIGHT & CO."

"Endorsed, JOHN W. WRIGHT & CO."

"April 12, 1865. Received on the within note twenty-eight hundred and eighteen dollars.

"$2,818. Date of receipt should be December 24, 1864."

The note was made and indorsed by one of the said firm, a copartner of Wright, not by Wright himself. Wright answered, first, that the note was executed and indorsed, without his knowledge or consent, by one of his copartners, in part payment for stock of the Eaton and Hamilton Railroad Company, which purchase was outside of the scope of the copartnership business, which the Ohio Life Insurance and Trust Company well knew. He also answered that the said Trust Company had no right in law to reserve ten per cent. interest; that, by its *charter, it was restricted in any case to seven per cent., and that the note was void for usury. 451

The case was tried by the court, which made a special finding of facts and of law separately. The court found that Wright's co-partner had authority to execute and indorse the note and thereby to bind all the members of the firm. The court also found that the note was given in part payment for stock of the Eaton and Hamilton Railroad Company (the residue of the price of such stock having been paid in cash), which was *sold* by the Trust Company to such firm of Wright & Co.; and that the note and stock, with a written pledge given to secure the payment of the note *at maturity*, were delivered to Samuel Fosdick in trust for the Ohio Life Insurance and Trust Company; and it appears from the record that the note was not paid at maturity, whereupon the stock was sold and the proceeds, amounting to $2,818, were credited upon it as part payment.

As a conclusion of law, the court found that the note was usurious and void as a note, and gave judgment for the defendant.

The petition in error is based upon the ground that such conclusion of law is erroneous. This is, substantially, the only error assigned. Section 23 of the act incorporating the Ohio Life Insurance and Trust Company, among other things, provides, "That the company shall have power to * * * and may *lend* the same" (its funds) "on notes or obligations, or such other securities, etc., at a rate of interest not exceeding *six* per cent. per annum. If said company shall * * * *demand and receive* a greater rate of interest in any case than *seven* per cent. per annum, its charter shall be thereby *forfeited*."

The single question before us is, whether this note, upon the facts found in regard to its calling for interest at the rate of *ten* per cent. per annum *after maturity*, and which, with the stock for which it had been given in part as a pledge, was delivered to Fosdick as trustee, with a written pledge to pay the note *at maturity*, is usurious and void as a note upon the authority of the case of the Bank of Chillicothe v. Swayne, 8 O. R., 257.

Sheppard's Touchstone, chap. 4. pp. 62–3, states the rule thus: "It is a rule, that if the original contract be not usurious, no matter *ex post facto* can make it so. If one borrow of me £10 and bind himself to pay

me *by a day*, and moreover bind himself that if he pay it not by the day, that he shall pay me £20 *for it*, this contract, and the deed for perfection of it, are good; and this is not usurious, for all obligations with conditions for payment of money lent are of this nature."

In Burton's case, 5 Coke's R., 70, the court held that "it was *in the election of the grantor* to have paid the £100 and to have frustrated the
452 rent, so that the grantee" (as the nature of *usury is) "was not assured of any recompense for the forbearance of £100 for a year, and the £20 *per annum* is but a penalty to the grantor, and assurance to the grantee, for the payment of the said £100.

"But it was resolved by the whole court, that if it had been agreed between the grantor and the grantee that, notwithstanding such power of redemption, the £100 *should not be paid at the day*, and that the clause of redemption was inserted to make an *evasion of the statute*, then it had been an usurious bargain and contract within the statute. For if in truth the contract be usurious against the statute, no color or show of words will serve, but the party may show it, and shall not be concluded or estopped by any deed, or any other matter whatsoever."

This last principle of law can not be applied to this case, which is before us upon the *facts found by the court*, as it is not found—that the agreement was that the note should not be paid at the time it should fall due; on the contrary, it is found that there was a written pledge that it should be paid *at maturity*."

"There can be no usury when the exorbitant interest may be avoided by a prompt payment of the principal *at the option of the borrower*."

The King v. Drury, 2 Lev., 7, 8, 23 Car., 2; and see Tyler on Usury, pp 204–229, specially p. 207, remarks upon Floyer v. Edwards. Here, by the payment of the sum of $3,000, the contract price of the stock sold to Wright & Co., which the Trust Company had the right by law to them (see Bank of Ashland v. Jones, 16 O. S., 145), when the note fell due the defendant could, by the very terms of the note, have prevented the Trust Company from receiving a single cent of interest. The reservation was conditional, depending on the non-payment of the principal when due, which the defendant had the right and option to pay at that time. The rate of interest reserved in case of failure to pay the note at the time agreed upon, is to be regarded merely in the light of a stipulated penalty, not as a right to such interest absolutely and in any event so the note, *upon the facts found*, is not usurious.

Upon such facts interest should have been recovered upon the note $3,000, at *six* per cent., from May 21, 1868, until December 24, 1864, and the $2,818 deducted from the amount. The balance, with interest at six per cent. from December 24, 1864, the plaintiff should have had judgment for, with costs.

This is so, because there was no power in this corporation to stipulate for a rate of interest at ten per cent. in case the contract should not be performed at the time stipulated.

453 *The judgment below is reversed with the costs of the proceedings in error; and judgment, upon the facts found, will be entered for the plaintiff against the defendant, with the costs of suit, the amount to be fixed according to the rule above laid down.

Judges O'Connor and Tilden concur.

Hoadly, Johnson & Colston, for Plaintiff in Error.

Irvin B. Wright, for Defendant in Error.

*BILLS AND NOTES—PARTNERSHIP—BANKRUPTCY. 501

[Superior Court of Cincinnati, General Term, October, 1875.]

WHITE, BONNER & WRIGHT v. H. D. FRANCIS.

ERROR.

Yaple, O'Connor and Tilden, JJ.

1. Three persons, partners, made a *joint* promissory note upon which they were all sued by the endorsee in a state court and all served with summons. Two of them became bankrupts, and received their certificates of discharge in bankruptcy They moved the court to stay further proceedings therein, under section 21 of the bankrupt law.

   Held. That the motion should be denied, as the action being joint and all the defendants served, no judgment could be rendered against the solvent defendant without the others remaining parties; and that the remedy of the bankrupt defendants would be to compel stay of proceedings against them after judgment.

2. Where the pleadings admit that the payee of a negotiable promissory note obtained it from the maker by fraud; and the note was indorsed, before due, to an indorsee, who sues upon it, the latter must prove, in addition to putting the note and written indorsement in evidence, that he obtained the paper without notice of the fraud, for value and in due course of trade. If he obtained it in payment of an antecedent debt, and without any notice of the fraud or the facts constituting it, he obtained it in due course of trade, and may recover.

3. Where, on the trial, such indorsee put in evidence the note and indorsement, and rested his case, and thereupon the defendants moved the court to instruct the jury to return a verdict for them, whereupon the plaintiff asked leave to withdraw his submission, and to be permitted to offer further evidence, to wit, that he gave full value for the note, taking it in payment of an antecedent debt due him from the indorser, and without any knowledge of the facts under which it had been made to the indorser, and the court granted the request, and permitted such evidence to be given:

   Held. That granting such request was an exercise of judicial discretion, not amounting to an abuse thereof, and could not be made the ground of error.

4. Where the verdict of the jury is reduced to writing, and signed by the foreman, stating that upon the issues joined they find for the plaintiff a specified sum as damages, but do not style the cause by giving the names of parties, plaintiff and defendant, or the court in which such action is held:

   **Held.* Such verdict is sufficient in law to warrant a judgment to be rendered upon it. 502

YAPLE, J.

This is a proceeding in error prosecuted here by White, Bonner & Wright to reverse a judgment of this court against them and in favor of H. D. Francis for $730.80, and costs, rendered in special term, in April, 1875.

Francis sued them as indorser of a promissory note, of which the following, with the indorsements thereon, is a copy:

"$700. GWYANDOTTE, W. VA., NOV. 20, '73.

"Eight months after date *we* promise to pay to the order of Sperry, Hale & Co. Seven Hundred Dollars, at 2d Nat. Bank, Ironton. Value received."

Pay H. D. FRANCIS. WHITE, BONNER & WRIGHT.

"SPERRY, HALE & Co."

The answer of White, Bonner & Wright was that the note was fraudulently obtained from Sperry, Hale & Co., and that Francis received the same from them with notice of such fraud. The reply denied such

notice, the note having been indorsed to him some time before it became due.

Before the trial, White and Bonner made a motion to stay proceedings in the case, founded upon section 21 of the bankrupt act, they having been adjudged bankrupts. Wright had not been declared a bankrupt. The court overruled the motion, and refused to stay proceedings, which action of the court is assigned as error.

At the first trial, the plaintiff introduced the note, indorsed as shown above, and rested his case. The defendants thereupon requested the court to instruct the jury to render a verdict for the defendants; whereupon the plaintiff moved the court to be permitted to withdraw such submission of the case to the jury, and to offer further testimony of his right to recover, which the court granted, and to which the defendants excepted; and such action of the court is assigned for error.

For the plaintiff there was then introduced his own deposition, which stated that he bought and received the note indorsed to him from Sperry, Hale & Co., some months before it became due; that he had no notice or knowledge that Sperry, Hale & Co. had obtained it from the makers by fraud; that he paid the payee of the note about $600 for it, to-wit, by excepting and paying a draft for $365, and by a note for $200, which he held against Sperry and Hale, which was paid by the taking of the note sued on; and that he did not regard Sperry, Hale & Co. as very good, and would not have liked to trust them for the $365 in money.
503 But it does not appear that they were insolvent. Francis *then resided at Corry, Erie county, Pa., and the makers of the note at Gwyandotte, W. Va.

There was no other evidence offered to the jury by either party than the note and the deposition of the plaintiff Francis.

The court charged the jury properly upon the law governing the case, for no exception was taken to the charge, and it is not set out in the record. The jury rendered the following verdict:

CINCINNATI, April 27, 1875.

We, the jury in the issue joined, to find for the plaintiff and a sess his damages at seven hundred and thirty dollars and eighty cents.

$730 80. HENRY IVES, *Foreman.*"

The verdict did not style the cause by giving the names of the plaintiff and the defendants, or the number of the action, or the court in which it was pending.

The defendants moved for a new trial upon the grounds that the verdict was manifestly against the evidence, against law, and was too indefinite and uncertain to warrant the ocurt to render a judgment upon it. The court overruled the motion for a new trial and entered a judgment upon the verdict, to all of which the defendants excepted, and such action of the court is assigned as error.

DECISION.

We do not think the court erred in refusing to stay proceedings in the action because two of the three joint makers of the joint note had been declared bankrupts. The plaintiff, on obtaining judgment, would have the right to make the same upon execution out of the property of such third joint maker who was not bankrupt; and to obtain such judg-

ment the instrument sued on and the action being joint, he had the right to retain all the parties, otherwise he could not have obtained a judgment against any of them. Code, Secs 58, 415; *id.* Sec. 77.

The permission given by the court to the plaintiff, after he had rested and the defendants had requested the court to instruct the jury to return a verdict for them, to offer further evidence to the jury, was a matter within the discretion of the court, and is not a ground of error; As there exists under the code no power in a court in such cases to *non-suit* a plaintiff which would leave him the right to sue again, but a verdict and judgment upon the merits are required to be rendered, great injustice would often be done were a court to refuse to do just what was done by the court in this case in reference to allowing the plaintiff the privilege to advance further testimony in *support of his action. In Graham 504
v. Davis, 4 O. S., p. 381, the supreme court, per RANNEY, J., says: "Indeed, very few cases can arise in which a court would be justified in closing a case until all the evidence offered in good faith and necessary to the ends of justice has been heard," though they there hold that the matter is one for the exercise of the sound discretion of the court. The other question made by the plaintiffs in error going to the merits of the case is this: It was and is claimed by them that where negotiable paper is transferred before due in fraud of the maker's rights, it is not enough for the indorsee to prove that he used ordinary care and prudence in the transaction to prevent it from operating to the prejudice of others, and that he received such paper in due course of trade, citing McKesson v. Stanbery, 3 O. S. 156, Davis v. Bartlett, 12 O. S. 534-5. The court must be presumed to have given the law to the jury correctly; and, upon the evidence of the plaintiff, which was not attempted to be contradicted, we think the jury were warranted in finding the verdict which they rendered in this case. The plaintiff had the right to seek payment of his old debt by taking this note and paying the agreed difference in money. The mere fact that he thought that otherwise the payment of such old debt might be doubtful is not to be made to operate against his right to take payment in the note of a third person. There was no error committed by the court or jury as to this part of the case. The verdict is sufficiently definite and certain. It is written and signed by the foreman, as required by the code, sec. 274. It is not necessary to style the cause in a verdict by stating the name of the parties, or to give the number of the cause, or the court in which the action is pending. The clerk is required to read the verdict to the jury (sec. 274), and it can only be understood to be rendered in the cause and upon the issues the jury have been sworn to try.

The judgment will be affirmed with costs.

O'Connor and Tilden, concur.

Hilderbrand and *Bruner*, for Plaintiffs in Error.

Hoadly, *Johnson* & *Colston*, for Defendants in Error.

528 *STREET IMPROVEMENTS.

[Superior Court of Cincinnati, General Term, June, 1875.]

† CITY OF CINCINNATI V. JOSEPH LONGWORTH ET ALS.

Yaple, O'Connor and Tilden, JJ.

Where a city improving a road or street in order to straighten it, takes part of the private property of an abutting property owner without his knowledge or consent, and without paying him for it, and such owner does not discover this till the improvement is begun, and does not take any steps to prevent the improvement from going on, such owner cannot resist payment of the assessment on the ground of the city's want of title in part of the road; he must get compensation for his land in a separate action.

O'CONNOR, J.

This is a proceeding in error brought by the plaintiff to reverse a judgment rendered at special term, and also a proceeding in error brought by the defendant, Joseph Longworth, to reverse the judgment rendered against him.

529 *The action below was to recover from each of the defendants the amount assessed against his or her land for the improvement of the Edwards road in the city of Cincinnati.

It was admitted on the trial that the proceedings of the common council were irregular and defective, though not void, in the resolution to contract with the said John Horton to do the work, said resolution not having been adopted by a two-third vote, and also in the advertisement for proposals to do said work, and, therefore, it devolved on the court, under section 550 of the municipal code, to ascertain the reasonable cost of the city, which the court did.

It seems that the several parcels of land of the defendants, assessed for the improvement, were not subdivided into lots, but were in bulk. Section 542 of the municipal code provides, that, "In making a special assessment according to valuation, the council shall be governed by the assessed value of lots where the land is subdivided and the lots are numbered and recorded. Where there are lots which are not assessed for taxation, or there is land which is in bulk and not subdivided into such lots, the council shall fix the value of such lots, or the front of such land to the usual depth of lots by the average of two blocks, one of which shall be next adjoining on each side. If there are no blocks so adjoining, the council shall fix the value thereof, so that it will be a fair average of the assessed value of other lots in the neighborhood."

Section 543 provides: "That in all cities of the first class * * * the tax or assessment specially levied and assessed upon any lot or land for any improvement may amount to twenty-five per centum of the value of such lot or land after such improvement is made the cost exceeding the said per centum that would otherwise be chargeable on such lot or land shall be paid by the corporation out of its general revenue."

The evidence showed that the nearest laid-out lots to the lands of the defendants are eighty feet in depth, and that other lots in the vicinity range from one hundred to one hundred and five feet in depth, and the council having omitted to fix the depth of the defendants' lots for the purpose of the assessment, the court fixed such depth at one hundred

† See 19 B., 178; also 48 O. S., 637.

feet, and found from the testimony the value per front foot of the several parcels of land assessed. This finding of value was the value of the several parcels *after* the improvement was made. Twenty-five per centum of this value, with interest and costs, but without penalty, the court found was legally chargeable to the several parcels. This was the limit prescribed by section 543, otherwise, after making all the deductions claimed by the defendants, the fair cost price of the work would have been more.

*To these findings and judgment of the court the plaintiff below, who is plaintiff in error here, excepted. We think, however, they 530
were warranted by the evidence. As to the defendant, Joseph Longworth, who is one of the defendants in error here, and who on his own behalf files a cross-petition in error, the final decree finds that, "In making said improvement, the plaintiff departed from the line of the Edwards road, as theretofore located and established, for the purpose of straightening the said road, under the direction and by the order of the city of Cincinnati, after the work was begun; and the plaintiff appropriated for that purpose a portion of the land of the defendant, Joseph Longworth, without first making compensation therefor, and contrary to the direction and without the consent of said Longworth. That said Longworth did not know that said land had been taken until after the said city had entered into possession thereof and graded the land down to the bed of the road as improved, but before the same was macadamized and graveled. But the court finds that said Longworth did not by any proceedings, legal or equitable, seek to restrain or prevent the said appropriation or the passage of the ordinance to assess the cost thereof. And the court finds the portion of land so taken to have been of triangular shape, five hundred feet in length at the base and thirty-five feet in altitude."

The evidence shows that John Horton, the contractor, for whose benefit the action was brought, testified that, while he was doing the work, Mr. Joseph Longworth passed along several times and did not make any objection to the work or its location, so far as he heard.

Joseph Longworth testified that Mr. Tripp, city civil engineer, called on him and said there was a crook in the road opposite his, Longworth's, property, and asked him to give ground to straighten it. Longworth said he would not give an inch. Tripp then said they would take the old line. Mr. Longworth further says: "I did not consent to give the ground, but stated that I would not. Notwithstanding this, the fences were taken away and a cut of eight to fifteen feet made, which leaves it perpendicular—cuts my road away and cuts off access. I did not know that the cut was made until it was done." On cross-examination, he says: "I did not make any application to court or the city to restrain the cutting through my land. I knew of the cut directly after it was made and before the final completion of the whole work of Edwards road by macadamizing and graveling."

It is claimed on behalf of the defendant, Longworth, that in view of this evidence the court erred in giving judgment for *any part of the assessment on his land, and the case of Harbeck v. 531
Connelly, 11 Ohio St. Rep. 227, is cited. In that case the city of Toledo, desiring to condemn certain land for the extension and construction of a street, commenced proceedings by publication to make *the unknown owners* of said land parties defendant. The court of common pleas, of Lucas county, gave judgment in favor of the city, which judgment the supreme court reversed because the publication did not follow

the requirements of the statute. In the meantime, however, the work progressed and the improvement of the street was completed. Connelly, the contractor, brought suit against the Harbecks for the amount of the assessment upon their land adjoining the improvement and recovered judgment in the district court. This judgment was also reversed by the supreme court, the court holding that "the attempted appropriation was void *ab anitio*, and the parties engaged in the work or its procurement were all trespassers."

It does not appear from these cases, there being three of them, the first commencing on page 219, that the Harbecks knew of the improvement until they were sued for the assessment. It does appear, however, that they procured the reversal of the order of condemnation.

In the case of William E. Kellogg, treasurer of Lorain county, v. Albert Ely, 15 Ohio St. Rep. 64, which was an action for an injunction to perpetually restrain said Kellogg, as treasurer of the county, from the collection of an assessment for the construction of a ditch, and which injunction was granted in the court of common pleas, and, on appeal in the district court, the supreme court, in reversing these decrees:

Held: "That where a party on whose lands such ditch has been, wholly or in part, constructed has stood by and failed to resort to any remedy, legal or equitable, until after the ditch was made, a court of equity will not interfere by injunction to prevent the collection of such assessment, even if it be assumed that the proceedings of the commissioners have so far failed to conform to the provisions of the statute as to render them wholly illegal and void in law."

"In the case of Goodin v. The Cincinnati and Whitewater Canal Co., and others, 18 Ohio St. Rep. 169, it was held that the owner of land, who stands by, without objection, and sees a public railroad constructed over it, cannot, after the road is completed, or large expenditures have been made thereon upon the faith of his apparent acquiescence, reclaim the land, or enjoin its use by the railorad company. In such case there can only remain to the owner a right of compensation."

See also the case of Hatch v. The Cincinnati and Indiana Railroad Co., 18 Ohio St. Rep. 92.

532 *In view of these decisions we cannot say that the court at special term erred in holding that as against the defendant, Longworth, the road became a public highway, he being remitted to his action for full compensation. It is true, it cannot be said that he stood by while the cut was being made and his land permanently disfigured, but he did nothing to prevent the road bed being macadamized and graveled. The same land might have been condemned and legally appropriated, and had this been done, the defendant would first have received the value of the land so taken and afterward be chargeable with the assessment on the abutting property. As it is, the assessment comes first.

The judgment is affirmed.

F. W. Moore and *Samuel F. Hunt*, for Plaintiff in Error.

King, Thompson and *Longworth*, and *Stallo & Kittredge*, for Defendants in Error.

* MORTGAGES—INTEREST AND USURY. 619

[Superior Court of Cincinnati, General Term, October, 1875.]

WM. M. HUBBELL, v. CHARLES D. MANSFIELD.

Yaple, O'Connor and Tilden, JJ.

The assignee of a mortgage upon real estate brought suit against the mortgagor to foreclose the same. He made H., a third party, a defendant averring that H. "*claims* some lien upon or interest in said mortgaged property, or some part thereof, of the precise nature of which plaintiff is not informed," etc., and praying that H. be required to answer, etc. H. was duly served with summons. Both mortgagor and H., being in default, the court found the amount due upon the mortgage, and the rate of interest the same should thereafter draw, and granted an order of sale of the mortgaged premises. The mortgagor never, in any way, objected to the decree. H. filed a petition in error to reverse the finding and decree because there was usury in the amount found due, and in the rate of interest it was made to draw.

Held: That the mortgagor could waive the usury so far as he was concerned, and must be held to do so until he brings error based on that ground; and that H. does not appear to have any interest in the mortgaged property, and, therefore, is not entitled to disturb the decree, he being a mere volunteer. Having failed to set up any interest by answer, he must be held to have waived whatever right he had so far as concerns the plaintiff's claim.

YAPLE, J.

This petition in error is prosecuted here by Hubbell to reverse a judgment and order for the sale of mortgaged premises rendered in this court in special term in favor of Mansfield against one Weiler, the sum found due being $2,284.94. The notes, which were negotiable, with others, and the mortgage, were made by Weiler to McGuffey, and by him assigned before due to Mansfield.

In the petition to foreclose the mortgage Hubbell was made a party defendant, the averment as to him being that plaintiff "is informed and believes that Hubbell *claims* some lien upon or interest in said mortgaged property, or some part thereof, of the precise nature of which claims plaintiff is not informed." The prayer was that Hubbell be made a party defendant and required to answer, etc. Hubbell was duly served with process, but filed no answer and made default. Hubbell claims that the *decree shows that usurious interest is included in it, and that it is 620
made to draw a usurious rate of interest.

We hold that Hubbell does not appear to have any interest in the premises or any part thereof, which he must have to be entitled to attack the decree upon the ground of usury. Weiler, the debtor, could waive usury, and he must be held to do so until *he* files his petition in error.

Bell v. Union Bank, 14, O. S. 200. Hubbell's default was, in legal effect, an admission that he had no interest in the premises to be protected against any decree that might be rendered against Weiler for usury; for the petition showed the usury just as clearly as the decree, except as to the eight per cent, which the decree makes the amount due draw. Hubbell has shown no such interest in the premises as entitles him to object to such eight per cent., or to anything else in the proceedings and judgment.

Judgment affirmed with costs.

King, Thompson & Longworth, for Plaintiff in Error.

McGuffey, Morrill & Strunk, for Defendant in Error.

622 *DEEDS—BOUNDARY LINES.

[Superior Court of Cincinnati, General Term, October, 1875.]

SAMUEL BURT v. FREDRICK CREPPEL

Yaple, O'Connor, and Tilden, JJ.

B. owing a large lot of ground, sold and conveyed a part of it by mites and bounds to S. by deed. They agreed upon the boundary line between them, which was probably somewhat different from that which the calls of the deed would establish. S. sold and conveyed to C. by the same description as that contained in the deed to S. pointing out the division line that B. had shown to S. C. commenced to erect a new house upon his lot, when B. in
623 terposed, and claimed that its wall was upon *his lot, being over the line he had pointed out to S and which S. had pointed out to C. C. took down this wall, and built according to such pointed out line, B. not objecting until after C. had completed his house. He then brought ejectment for the strip between the line as called for in the deed, and the line as pointed out. Owing to an uncertainty as to a corner of B's original tract, the division line as given by the deeds, was not certain.

Held: That as against C. B. was properly held by the court *estopped* from denying the line as pointed out to be the true one.

YAPLE, J.

This is a petition in error prosecuted by Burt to reverse a judgment rendered in favor of Creppel by this court in special term.

Burt and Creppel were the owners of adjoining lots in the city of Cincinnati, and Burt sued Creppel to recover a narrow strip of the ground to the court, a jury being waived, and judgment rendered in favor of in Creppel's possession, claiming it to belong to his lot. A trial was had Creppel. It is sought to reverse this judgment upon the ground that it is against the law and the evidence.

The question was one of boundary purely. The testimony adduced by Creppel tended to prove, among other things, that he purchased the lot of one Shultz; that Shultz and Burt, the plaintiff, who conveyed it to Shultz, agreed upon the line claimed by Creppel; that when Shultz was selling to Creppel, he, in the presence of Burt, pointed out such line as the line dividing the lots, to which Burt assented; that a part of the Shultz house stood on the ground since claimed by Burt, but no part of it was on his lot, according to the agreed line; that subsequently Creppel built a new house on his lot, removing the old one, and that Burt saw the work go on, and agreed that it might be built where it stands, agreeing that his line took no part of the wall, which he now claims is upon his lot, and which he seeks to recover.

The court was warranted by the evidence in finding these claims of fact to be true, and we would not be justified in holding that such finding was against the weight of the evidence. It may be that the true line, according to the calls of the parties' respective deeds, is as Burt claims it, but that is not mathematically certain. Creppel's lot, by his deed, was to be thirty-six feet front on the road, and twenty-four feet and a fraction at the rear, on the river, and the road at Creppel's front has been changed toward the river, and is now a street; nor is the beginning corner of his lot, called the "Green" corner, established with certainty. The law governing the case is not the rule decided in McAfferty v.

Conover, 7 O. S., 99, which was in relation *to *title* to a *tract* of land. The law applicable to boundaries governs the case, as to which see Bobo v. Richmond, 25 O S., 115; Rockwell v. Adams, 16 Wend., 285; Boyd v. Graves, 4 Wheat., 413. 624

A disputed or doubtful boundary may be agreed upon by parol; and if the parties make improvements upon the disputed ground in accordance with such agreement, they will be estopped from denying the line so agreed upon. Their respective deeds cover the land up to such agreed line.

The judgment will be affirmed, with costs.

Judges O'Connor and Tilden concur.

J. H. Clemmer, for Plaintiff.

Stone & Stone, for Defendant.

---

*MARRIED WOMEN—BILLS AND NOTES—PLEADING. 665

[Hamilton County District Court, April Term, 1876.]

Cox, Force, Burnet, Murdock and Avery, JJ.

C. M. COOK v. SPENCER ET AL.

No recovery can be had against a married woman upon her promissory note, whether made before or after the amendatory act of March 30, 1874 (71 O. L., 47), unless it appear that she has separate property to be charged therewith, which is an affirmative fact to be averred and proved.

FORCE, J.

This was a petition in error to reverse the judgment of the court below. The action *was in the ordinary form upon a promissory note against C. M. Cook. The defendant below set up that her full name was Catherine C. M. Cook, and that she was then and still is a married woman. To that answer a demurrer was filed, which being sustained, judgment was rendered for the plaintiff below. The petition in error alleged error in this action. 666

Judge Force announced the opinion on the petition in error. The case, he said, made it necessary to determine what was the condition of a married woman to make personal obligations under our law as it now stands, and while the law was in such a transitory state as it now is, subject continually to amendments, it certainly was not an easy matter to determine just what was the law at any specific time. The only way to arrive at a determination was to look at the statutes and compare them with the statute law as it stood before the statute enacted. The statute upon which this action was based was the act of 1874. That was an act which certainly allowed personal actions to be brought against a married woman. It allowed her to be sued upon her obligations like a *feme sole* or a man. But the act of 1874 was an amendment of the Code of Civil Procedure. The object and effect of that act were to regulate the mode of procedure in actions against married women. It determined the way of proceeding upon a cause when the cause of action existed. But that act did not create or affect causes of action. It left the causes of action and the grounds as they were. It merely affected the mode of proceed-

ing in attempting to enforce an existing cause of action against a married woman. The old rule was that, so far as a married woman was concerned, her contracts or her attempts to make contracts were null and void. It was long ago held that where, however, she owns separate property, that, in courts of equity, she could subject that property to the liabilities of her obligations. Her separate property had been increased by statute, and so the number of cases in which she could subject her property to her obligations was increased. The statutes had allowed her also to contract directly personal obligations in certain cases. So that the law as it stood when the statute of 1874 was enacted, was that she was authorized by law to subject her own property to her obligations. She was authorized by statute to make certain specific personal contracts but subject to these rules the law still remained the same—that a married woman could not make a contract, except in special cases. Hence, where a suit was brought against a married woman, it must be shown that it was either a case where she could charge her separate estate, or it was a case where she was authorized by statute to make a contract.

667 *The petition was in the ordinary form, upon a promissory note. Upon its face it did not appear who the defendant was. It was undoubtedly a good petition. When the defendant set up coverture, it not appearing in the pleadings as they stood upon the petition and answer, that this was a case where a married woman could incur obligations, either being a case where she could subject her separate property, or where she could make a separate contract, that condition of coverture was a good defense to the petition, and it was incumbent on the plaintiff to bring the case within the cases where a married woman should subject herself to obligations either by amending the petition or filing a reply.

Judgment reversed.

WRIT OF ERROR.

[Hamilton County District Court, 1876.]

Cox, Force, Burnet, Murdock and Avery, JJ.

LIZZIE SNYDER v. CITY OF CINCINNATI.

Where a writ of error is allowed to the police court by a judge of the supreme court in vacation, returnable to the district court, the writ must be issued by the clerk of the district court and served and returned before the defendant is in court, and until then the case is not ready for hearing.

Cox, J.

It appeared in this case that a writ of error was allowed by a judge of the supreme court in vacation to the police court of Cincinnati, returnable to the district court. The statute provides that the supreme court, or a judge thereof, may allow writs of error, and make them returnable either to the supreme court or the district court.

Defining the practice under this law, the supreme court, in the case of Gebhard v. The State, 3 O. S., 509, says: "When the writ is allowed by that court in term, it must be issued out of that court. Where allowed by a judge in vacation, and made returnable to a district court, it must be issued from the clerk's office of the district court." The transcript ap-

plication for allowance, and the allowance, are all filed in this court. But no writ has been issued, and consequently the case is not now ready for hearing. The writ must first be issued by the clerk of this court, and served and returned before the defendant is in court.

APPEALS.

[Hamilton County District Court, 1876.]

Cox, Force, Burnet, Murdock and Avery, JJ.

LOUIS COOK v. THOMAS LLOYD (FLOYD.)

A case not appealable under the law of 1875, because for less than $100, being in fact appealed by giving bond and filing a petition in appeal, a judgment by default will be reversed for want of jurisdiction.

Cox, J.

The case came up on error in the common pleas. It was originally before a magistrate on a claim for less than one hundred dollars, and was under the law of March 30, 1875, not appealable. Notwithstanding an appeal bond was given and the case taken to the common pleas, a petition was filed and judgment rendered *for plaintiff by default. The error 668
assigned on the record was that the court had no jurisdiction. This was clearly appealable.

Judgment reversed.

CONVERSION.

[Hamilton County District Court, 1876.]

Cox, Force, Burnet, Murdock and Avery, JJ.

†CITY OF CINCINNATI V. LEONARD & COOK.

A lot owner who pays for improvements in front of his property does not acquire an ownership in the brick and sand used in making the improvement.

MURDOCK, J.

The case came up on error to the common pleas. Leonard & Cook commenced an action before a magistrate, charging that the city by its contractor tore up a sidewalk in front of their premises and converted the bricks and sand to its own use to their damage in the sum of ninety dollars. A trial was had and a judgment rendered in favor of Leonard & Cook, which judgment was affirmed in the common pleas.

In the petition in error it was objected first, that the city could not maintain the action, because the magistrate was not authorized to sign any such bill of exceptions; that all the authority he had, except in actions of forcible detainer, was to sign and seal a bill of exceptions made to rulings during the trial, and that he could not sign a bill of exceptions for the purpose of reviewing his judgment simply on the ground that it was against the weight of testimony.

This was not a case in which such an objection would arise. The court was not called on to decide whether the judgment was right or wrong on the weight of tes-

†The judgment in this case was reversed in Leonard v. Cincinnati. See opinion 26 O. S., 447; Leonard v. Cincinnati cited 27 O. S., 669, 674 and distinguished 31 O. S., 424, 430. The decision of the district court covering another point by the case is found, 4 Rec. 213.

timony. But it was contended that taking all the testimony the magistrate was not authorized to render a judgment for the plaintiff, and there may be a bill of exceptions to review his action in that respect.

The court proceeded to remark that a lot owner who pays for improvements in front of his property, does not acquire an ownership in the brick and sand used in making the improvement. If it did not belong to him, he would not be entitled in this case to recover, because it does not appear the city did anything more than to take up the brick and sand for the purpose of relaying it or repairing the sidewalk, in accordance with the ordinance of the city in reference to such improvement. It cannot be contended the action of the magistrate should be sustained, because the parties had complied with the notice to repair the sidewalk. It is true they got such a notice, and that a party getting the notice had a right to repair the sidewalk within a certain time, but they must do it in a certain way, and if they do not, the city may tear up the pavement and relay it in a proper manner. It is stated by the plaintiffs and their witnesses that they simply had a permit from the proper officer to make the improvement. But the party employed by Leonard
669 *& Cook did not consult the city engineer, and did not do the work under his supervision. Laying aside the question whether they are not precluded from maintaining the action because they attempt to collect from the city what the city had collected from them for an improvement, they must show that the city committed an act which rendered it liable in an action of this kind, and must show that the work they did was in accordance with the laws and ordinances of the city. On the contrary, it is shown that they did not consult the engineer, and that the work was not done under his supervision. That being the case, they are not entitled to recover the amount they paid the contractor.

MECHANICS' LIEN.

[Hamilton County District Court, 1876].

Cox, Force, Burnet, Murdock and Avery, JJ.

†HENRY STEPHENS v. UNITED RAILROADS STOCKYARD CO.

The statutes commonly called the mechanics' lien law, as amended March 30, 1875 (72 O. L. 166), do not provide a remedy in favor of a creditor of a sub-contractor against funds in the hands of the owner of the building, due or to become due to the original contractor.

AVERY, J.

The plaintiff alleged he furnished brick for the construction of the Stockyard hotel under a contract between the company and Isaac Carson, but did not allege anything due from the company to the contractor, and the defendant having demurred, the plaintiff then amended by setting out that he furnished the brick under a contract between the company and Jenkins & Ludwig and Isaac Carson, and that Jenkins & Ludwig were the principal contractors. But he did not state under what contract he furnished the brick, or how the Stockyard company became indebted to Carson, and the petition was again amended, alleging he furnished the brick under Carson, who was a sub-contractor. The defendant demurred, and the common pleas sustained the demurrer and dismissed the petition.

The only question is upon the demurrer, whether the mechanics' lien law protects a material man employed by a sub contractor. The words of the law are that every mechanic or other person, who shall perform labor or furnish material toward the construction of a building, may present the owner with an attested account, upon which he will become entitled to be paid out of the fund. These words are large enough to include any person who furnishes material for building, no matter by whom employed, or if not employed by anybody. The court held that the lien has not been extended beyond the creditor of the contractor, and until the legislature shall enact otherwise there should not be such a construction of the law as was contended for in this case.

Judgment affirmed.

The decision in this case was affirmed by the supreme court. See opinion 29 O. S., 227.

*SALE OF INTOXICATING LIQUORS. 670

[Hamilton County District Court, 1876.]

Cox, Force, Burnet, Murdock and Avery, JJ.

GOTTHOLD MARKERT v. HELENA HOFFNER.

A petition to recover of a saloon keeper for selling liquor to plaintiff's husband an habitual drunkard, to her injury of her means of support, must aver that the defendant knew that her husband was an habitual drunkard, but language large enough to include this allegation will be sufficient.

BURNET, J.

Petition in error to reverse a judgment against Markert, the keeper of a saloon in Mount Pleasant, for $300, the action being brought against him for the unlawful selling of intoxicating liquor to the husband of the defendant in error, who, it was averred, had been for six years before the commencement of the action an habitual drunkard, whereby her means of support were diminished.

It was claimed by the plaintiff in error that there was error committed by the common pleas in the admission of testimony and in overruling a motion for a new trial; that under the petition it was not competent for the plaintiff to offer evidence tending to show the husband was an habitual drunkard, as it was not alleged that fact was known to the defendant.

Judge Burnet, in delivering the opinion, said that under the third section of the law there would be no violatiou of its provisions, unless it were known to the defendant in the action that h· was an habitual drunkard, and the language in the petition was large enough to include that allegation.

Judgment affirmed.

JUSTICE OF THE PEACE—JURY.

[Hamilton County District Court, 1876.]

Cox, Force, Burnet, Murdock and Avery, JJ.

HARMONIA LODGE, ETC. v. J. R. SCHAFFER.

Under section 81 of the justice's act, providing that if in a justice's court the panel is not full, the constable may fill it in the same manner as is done by the sheriff in the common pleas, and as the sheriff is to call in talesman when the venire is exhausted, it is not error for the justices to refuse a special venire to fill the panel.

COX, J.

The case was originally tried before a justice of the peace and six jurors. When it was called only one juror on the venire answered and three efforts to fill the panel by calling talesman having failed, the plaintiff in error demanded a special venire to fill the panel, which was overruled. Section 81 of the justice's code provides that if from challenge or other cause the panel should not be full, the constable shall fill it in

the same manner as is done by the sheriff in the court of common pleas. This manner is by calling in talesman, and it was the manner adopted by the constable. There was therefore no error, and the judgment would have to be affirmed.

SUIT ON INJUNCTION BOND.

[Hamilton County District Court, 1876.]

Cox, Force, Burnet, Murdock and Avery, JJ.

JAMES E. TYLER v. MARY RYAN ET AL.

In an action on an injunction bond given to procure a restraining order from sale of property under execution, which restraining order was afterwards set aside as wrongfully obtained, the plaintiff must prove that he has sustained damages in consequence of the order.

MURDOCK, J.

The action was on an injunction bond. A judgment was obtained before a magistrate, and the constable levied on the tools and materials of a cooper shop belonging to Mary Ryan, refusing on her demand to set apart certain property from execution. She thereon procured a restraining order preventing
671 *him from selling the property, and gave bond. The court finally dismissed the petition on which her restraining order was granted, and thereon suit was brought on the bond.

The court was of the opinion that the restraining order was wrongfully obtained, but it by no means followed that any damage resulted to the party. The court below did not determine the amount of damages, so that the party who claims he sustained damages in consequence of her obtaining this order was compelled to show the damage.

Judgment affirmed.

APPEALS—ERROR.

[Hamilton County District Court, 1876.]

Cox, Force, Burnet, Murdock and Avery, JJ.

†THEODORE FŒLLER v. CARSTON VOIGHT.

1. Appeal and error proceedings will not lie concurrently, for the appeal vacates the original judgment, hence there is no longer a judgment to which error can be prosecuted.
2. If a sub-contractor sues the owner before a justice of the peace, on a claim under the mechanic's lien law, and the case is appealed to the common pleas court, where the owner by cross-petition avers that he holds a fund on which there are several claimants, and interpleads them; *Held*, that the case on the cross-petition is an equity case, with all the incidents of an original jurisdiction, including a right of appeal to the district court.

AVERY, J.

The case came into the common pleas by appeal from a justice, the action being by a sub-contractor to recover $96 under the mechanic's lien law. The owner of the building by answer and cross-petition alleges

† Another decision in this case will be found in 5 Rec., 1.

that after paying the contractor $400 he had $187 in his hands for which there were several claimants who had given him notice under the lien law, some of whom had commenced suits in other courts, and he asked that they should be made defendants and the accounts be adjusted. They came in accordingly by cross-petition, alleging that the payment made to the contractor was a payment in advance. The plaintiff by reply made the same allegation, and it was found in the common pleas the contractor had been paid in advance, and that money enough was left to pay all the parties, a judgment being accordingly rendered in favor of each, and the property ordered to be sold. From this judgment there was an appeal, and the case is now before this court on petition in error, there being a motion to dismiss both the appeal and the petition in error; the appeal because the judgment was not appealable, and the petition in error because of the appeal. It necessarily follows that one motion or other must be granted.

In such cases it is held that all the incidents of original jurisdiction attach, including the right of appeal, if the case is not such as would entitle either party to a trial by jury. Upon the question, whether this was a case in which either party would be entitled to a trial by jury, the court was of opinion it was not. Substantially it was a case brought by the owner of the building to compel several claimants who had given notice to adjust their accounts among themselves, and to restrain some from proceeding in other courts by independent actions. It involved the exercise of equitable powers of a court in adjusting the several claims, not simply claims against the fund, but the claims of the several claimants among each other. It was appealable, *and being so, the original judgment was vacated, and that judgment being vacated, the petition in error will not lie, and must be dismissed. On the other hand, the motion to dismiss the appeal must be overruled. 672

COMMON CARRIER.

[Hamilton County District Court, 1876.]

Cox, Force, Burnet, Murdock and Avery, JJ.

AMERICAN EXPRESS CO. v J. P. EPPLY.

A corpse was shipped by an undertaker in a casket, he giving the carrier his bill C. O. D., though ordered to ship in a rough box only, and the consignee got the corpse and left the casket, and the undertaker sued the carrier for his bill, including the price of the casket; *Held*, that the consignee had a right to open and examine the package before paying; and the consignor has no lien on the corpse for the price of the casket, and it would be against public policy to require a carrier to return a corpse for non-payment.

BURNET, J.

The action was originally before a justice of the peace, and by petition in error came into the common pleas. The facts are these: A death occurred of a colored man in the city hospital; his friends in Indianapolis telegraphed to the authorities of the hospital to have the corpse put into a rough box and sent by express to Indianapolis. The defendant in error (the plaintiff below) being called as an undertaker to attend to the matter,

went to the American Express company and inquired if they would take a corpse in a rough box to Indianapolis, and seeing one of the subordinate agents was informed the express company would probably not do so. He reported to the friends of the deceased that it would be impossible to send the corpse as required by the dispatch, and that it would be necessary to put it into a tight case or casket. To this there was a reply, stating that the friends would be able to pay, and asking him if he was willing to send the body in that way. The undertaker answered that he was willing to do so, and he furnished a casket, inclosing it in a box which was delivered by the express company with his bill, the box to be delivered on payment of the bill. It was delivered at Indianapolis to the party who had sent the telegram to Cincinnati; but when this party had opened it and found a casket containing the corpse, he took out the body and returned the casket and box to the express company, which brought it back and tendered the same to the undertaker, who, on being informed that the body had been taken out, refused to receive the casket and box, and brought his action against the express company for the amount of his bill.

On the trial before the magistrate, it was sought to prove the terms of the contract, or contents of the telegram. The defendant below (the express company) asked the magistrate to give certain special charges, which were refused, and which in substance were, that the consignee has the right first to open the package to ascertain whether it does contain what has been ordered before he is bound to accept, and that being offered by the carrier this opportunity, he should find the contents were not such as he had ordered, he has the right to return the pack-
673 *age, and that although the express company was authorized to deliver them on payment of the price, it has the right under such circumstances to return the property to the consignor, and is not liable for the amount of the bill.

This court was satisfied the charges that were asked are correct; that a consignee to whom goods are sent inclosed in a package, under a contract with a consignor, is not bound to receive them until he has the opportunity of inspection, and if, under inspection, he has the right to return them, and this even where the carrier delivers the goods into the hands of the consignee, previously demanding that he should pay the bill, this being simply a security of the carrier in case the goods are not returned. But in case the goods do not respond to the order, the consignee has the right to receive back the money, and the carrier the right to return the goods to the consignor.

It was claimed, however, that at the time the package was delivered to the express company it contained the corpse, and that at the time it was returned by the express company the corpse was taken out, and that thereby the security for the payment of the bill had been lost, that it was the duty of the express company on refusal of the consignee to receive the package, to return the casket with the corpse.

The goods which the consignor undertook to send, and for which the bill was made out, was the casket. There was a separate charge for personal attention, but the consignor would not be held to have a lien on the corpse either for the price of the casket or the value of the goods. It would be against public policy and grossly improper that a carrier should be held to the responsibility of returning the corpse under such circumstances. The charge requested to be given in the magistrate's court

should have been given, and, the common pleas having affirmed the judgment of the magistrate, that judgment would be reversed.

Collins & Herron, for Plaintiff in Error.

Boyce & Boyd, contra.

---

*CORPORATIONS. 705

[Superior Court of Cincinnati, General Term, April, 1876.]

Yaple, O'Connor and Tilden, JJ.

† FRANKLIN BANK v. COMMERCIAL BANK.

Two banks were chartered and doing business under the free banking act of Ohio, passed March 21, 1851 (49 O. L., 41), and having yet more than two years and a half of existence. The president of one of the banks was the owner of a large number of shares of the capital stock of his bank, but was indebted to his bank individually, and as one of the members of a business co-partnership in an amount greater than all his capital stock, which indebtedness always thereafter continued to an amount greater than the two hundred shares of fifty dollars each, which he transferred as collateral security for a $10,000 loan to the other bank.

The statute chartering such banks provided that "each bank shall have a lien upon all stock owned by its debtors, and no stock shall be transferred without the consent of *a majority of the directors*, while the holder thereof is indebted to the company." It also provided that no banking company shall be the holder or purchaser of * * * the capital stock of any other incorporated company, unless such purchase shall be necessary to prevent loss upon a debt *previously* contracted in good faith, on security, which at the time was deemed adequate to insure the payment of such debt, independent of any lien upon such stock; and stock so purchased shall in no case be held by the company so *purchasing for a longer period of time than six months if the same can be 706
sold for what the stock cost at par." The law also made the taking of more than six per cent. interest in advance upon a loan a forfeiture of the entire debt loaned. All certificates of stock expressly stated upon their face and as part of their terms that such stock "was subject, together with all dividends thereon, for any debts or demands due from the holder to said bank."

On May 16, 1870, the president of such bank went to the other bank with a certificate of two hundred shares of fifty dollars each of the capital stock of his bank, which he owned, and on the back of which certificate he had signed his name, and his signature was witnessed by the person who was the cashier of the same bank of which he was the president, but not purporting to be witnessed as cashier. The object of such signature and attestation was to authorize a purchaser of the stock to write above them a proper form of assignment and power of attorney, to have the same transferred to such purchaser. Such signature and attestation were made prior to May 16, 1870, and with no view to the transfer made on that day to the other bank for a loan by it to such president. He asked and obtained a loan from such other bank, payable on demand, for $10,000.00, he to furnish acceptable security, and gave such certificate of stock so indorsed and witnessed as collateral security therefor, which was accepted. The loan was asked by and made to such president individually, and not to his bank. He had previously taken out funds from his bank irregularly, which he in part replaced with the $10,000 00 so borrowed, but without the knowledge and request of either bank. Such stock was and continued to be worth more than par. On December 31, 1872, the day before both banks were to cease and wind up their affairs, there was yet due upon such $10,000.00 loan an amount as great or greater than the value of such stock. The bank holding it on that day presented it to the other bank and demanded its transfer to it upon the stock

† Judgment in this case was affirmed by the Supreme Court, in opinion 36 O. S. 350.

books of the bank issuing it, which demand was refused on the ground of the stockholder's indebtedness to his bank. Thereupon the bank holding such certificate sued the one issuing it for a wrongful conversion of the stock and to recover its value.

Held, 1. That the bank issuing such stock by virtue of the statute had a valid lien upon the same for any indebtedness to it of the stockholder incurred before notice of an assignment of the stock by the stockholder.

2. The knowledge of the president, who owned the stock and assigned it to obtain a loan to himself, was not notice to the bank of which he was the president.

3. The debt to such bank by a co-partnership, of which such stockholder was a member, was an indebtedness of his to the bank, for which it could assert and enforce its lien upon his stock.

4. In attesting the signature of the owner of the stock upon the back of the certificate, to enable him to dispose of it, the person so attesting could only act upon his individual responsibility and not as the cashier or agent of the bank, the act being beyond his authority and powers as such; and the same could not amount to a representation of *the bank* to any one who might take it for value that such stockholder was not indebted to the bank and can not *estop* the bank from setting up and enforcing its lien upon such stock so assigned for the holder's indebtedness to it. By the statute a majority of the directors only could have waived such lien.

707 *5. The bank loaning money upon the faith of such security was acting beyond its corporation powers, the statute forbidding it to loan upon such security, or to take such security for such loan, which will defeat its right of recovery in such a case. The object of the statute was to prevent one of such banks from getting the stock of and thus controlling other banks.

6. The fact that the stockholder's bank got the money obtained by him from the other bank by such loan and pledge of stock is immaterial, as the borrower had the right to do as he pleased with the money, and it was loaned to him for his individual purposes.

7. Usury in any of the loans was not pleaded by either party, but the plaintiff's counsel claimed in argument that the evidence established usury in the indebtedness of such president to his bank, which forfeited such indebtedness. The defendant's counsel objected to the consideration of the question of usury, because not pleaded; but if considered, he claimed that the evidence established that there was usury in the plaintiff's loan to such stockholder, the defendant's president.

Held: That the defense of usury may be waived, and that it is waived unless pleaded. Any defense, which it is in the power of the parties to waive, they will waive without pleading it, as the other party can not be required or expected to be prepared to disprove facts not in issue, but of which evidence may drop out in the course of the trial.

8. Whether the holder of a certificate of stock assigned to him as collateral security is entitled to have it transferred to him upon the books of the corporation; and whether he can, upon a refusal so to transfer, maintain an action for its wrongful conversion.—*Query?*

YAPLE, J.

This cause comes here for decision upon the facts and the law by reservation from special term.

The plaintiff and the defendant were both banking corporations, organized and doing business as such under the statute of March 21, 1851 (49 O. L. 41; 1 S. & C., 168), entitled "An act to authorize free banking." They ceased as such banks on the first day of January, 1873, but, by express provision of law, still exist for the purpose of suing and being sued in order to close up their affairs.

The statute governing these banks provided among other things as follows:

"SEC. 11. The capital stock of every company shall be divided into shares of fifty dollars each, which shall be deemed personal property, and shall only be assignable on the books of the company in such a manner as its by-laws shall prescribe; *each bank shall have a lien upon all stock owned by its debtors*, and no stock shall be transferred *without the consent of a majority of the directors*, while the holder thereof is *indebted to the company*."

"SEC. 12. No company shall take as security for any loan or discount, a lien

upon any part of its capital stock; but the same security, both in kind and amount' shall be required of shareholders as of persons not shareholders; and no banking *company shall be the *holder* or *purchaser* of any portion of its capital stock, 708
or of the capital stock of *any other incorporated company*, (*i. e.*, incorporated under the act), "unless such purchase shall be necessary to prevent loss upon *a debt previously contracted in good faith*, on security, which at the time was deemed adequate to insure the payment of such debt, *independent of any lien upon such stock;* and stock so purchased shall in no case be held by the company so purchasing *for a longer period of time than six months* if the same can be sold for what the stock cost at par.

Section 24 provides that no such bank shall take, on any loan or discount, more than six per cent. per annum in advance, and that if it does so, the entire debt or demand shall be held and adjudged forfeited. Bills of exchange, payable elsewhere than at such bank, may be purchased at the current rate of discount, however, without rendering the transaction usurious, provided that it be not understood that they are to be paid elsewhere than at the place upon which they are drawn.

On May 16, 1870, while these banks had yet more than two years and a half to run, one Charles B. Foote, who was president of the Commercial Bank, and a large stockholder therein, borrowed from the Franklin Bank, by producing a New York bill of exchange, the sum of $10,000, the loan being to him *individually*, and he gave the Franklin Bank, by way of collateral security for such loan, two hundred (200) shares of his capital stock of the Commercial Bank, the shares being for fifty dollars each, or $10,000 in amount. The stock was then above par, ranging, according to the testimony, at from ten to twenty cents on the dollar premium.

The following is a copy of the certificate of stock:

"COMMERCIAL BANK OF CINCINNATI, STATE OF OHIO.

"Number 44. Shares 200.

"This certifies that Charles B. Foote, of Cincinnati, Ohio, is the proprietor of two hundred shares of fifty dollars each in the capital stock of the Commercial Bank of Cincinnati. Transferable only on the books of the bank by the said Charles B. Foote or his lawful attorney on the surrender of this certificate, and is subject, together with all dividends thereon, for any debts or demands due from the holder to said bank."

"CINCINNATI, March, 19, 1869.

"H. COLVILLE, *Cashier.* CHAS. B. FOOTE, *President.*

"[REV. STAMP, 25 cts.]"

Endorsed upon the back of the certificate is the following:

"CHAS. B. FOOTE."

"Witness, H. COLVILLE."

*Colville at this time, and for a long period before and afterwards, was the 709
cashier of the Commercial bank; and this blank indorsement was made and witnessed to enable any purchaser of the certificate from Foote to write above his signature a formal assignment to him, such purchaser. It was made and witnessed prior to May 16, 1870, and with no reference to the transfer of it by Foote to the Franklin bank to obtain the loan which he received on that day, and the Commercial bank had no notice of the assignment of the certificate to the Franklin bank until after October 15, 1870.

The money which Foote obtained from the Franklin bank he applied toward the payment of a larger sum, which was due from him to the Commercial bank, which sum he had taken out without the bank's knowledge and replaced to that extent without its knowledge; nor did the Franklin bank know or inquire of Foote what he desired the money for which he obtained from it, or how he expected to apply it. It was loaned to him personally, upon his individual credit and upon the faith of the collateral security afforded by the transferred stock certificate.

If there is included the indebtedness of Buchannan & Co., of which firm Foote was a member, to the Commercial bank on the 15th day of October, 1870, until after which date the bank had no notice of this transfer of the stock by Foote to the Franklin bank, Foote's indebtedness to the Commercial bank was greater than the par or the actual value of all the stock which he held in the bank, including these two hundred shares; and such indebtedness remained and still remains in excess of such value of the stock in question, *provided* the validity of such indebtedness is not affected by the question of usury.

On December 31, 1872, the day before these banks were to wind up and cease, Foote was still indebted to the Franklin bank upon its loan to him in more than $10,000.00, and more than the value of the stock assigned by him to it

as collateral security for such loan; and the Franklin bank duly applied to and demanded of the Commercial bank the transfer of such stock upon its books to it, the Franklin bank, which demand was refused by the Commercial bank, it claiming to have a lien upon the stock for Foote's indebtedness to it, and asserting the right on its part to apply such stock or its value upon Foote's indebtedness, and thereupon the p aintiff brought this action against the defendant for the value of such stock, alleging its wrongful conversion by the defendant.

The certificate of stock upon its face expressly states that it "is subject, together with all dividends thereon, for any debts or demand due from the holder to said bank;" and the statute creating the bank expressly provides for the same lien, and
710 *also enacts that "no stock shall be transferred without the consent of a majority of the *directors* while the holder thereof is indebted to the company."

This act by its terms does not give the right to waive such a lien to the cashier, the preside t, teller, or any other officer or agent of the bank, but only to a *majority* of the directors, thus by the clearest implication denying such power to the cashier, president, teller, or other officers or agent of the bank, or to them all combined, the power being vested in the board of directors, as such, alone.

Such a lien does not exist by the common law; and, in the absence of a statute, no restriction upon the transfer of stock assigned by the holder to a purchaser could be prescribed by a corporation whose stockholders so parting with his stock might be indebted to it. Bullard v. Bank, 18 Wal., 589; Bank v. Lanier, 11 *Id.*, 369; Lee v. Citizens' Natl. Bk. of Piqua, 2 Cin. S. C. R., 296

But such statutory provisions may create such liens and have uniformly been held to be valid.

"SEC. 355. Another and very important species of by-laws to moneyed and trading corporations, and to which those which we have just been considering are to some degree only ancillary, are by-laws securing to the corporation a lien upon the shares of a stockholder for debts due from him to the corporation. Such a lien does not, it is clear, exist at common law in favor of an incorporated company. It is, however, usually given by statute or act of incorporation to incorporated banking companies, *so that all must take notice of it;* and where the clause of the statute or act of incorporation provides that no stockholder *indebted* to a bank shall be authorized to make a transfer or receive a dividend until such debt shall have been discharged, it includes notes discounted by the bank for the stockholder, as well as debts due for an original subscription, and that, too, whether such notes have come to maturity at the time the transfer is applied for, or not, and whether the stockholder is liable on the same as principal or indorser. The lien extends, too, to dividends as well as to shares, though only shares and stock be specifically named, and continues, though all other remedies for the debt be barred by the statute of limitations" Ang. & Am. on Corps., 9th ed., sec. 355, and the numerous cases there cited; see also Conant *et als.* v. Seneca County Bank *et als.*, 1 O. S., 298.

711 And such lien will exist in favor of the bank for any indebtedness *incurred to it by the stockholder, until the bank has notice of the sale, transfer or disposition by the stockholder of such stock. Conant v. Seneca Bk., 1 O. S. 298. Platt v. Birmingham Axle Co., 41 Conn. 255.

It will exist for a debt due from a co-partnership of which the stockholder is a member. Mechanics' Bank v. Easp., 4 Rawle, 384. Geyer v. Ins. Co., 3 Pitts., 41.

Hence, the debt due the Commercial bank from Buchannan & Co., of which firm Foote was a member, was a lien upon the stock, no one of the bank officers knowing of the transfer to the Franklin bank of this stock, except Foote himself, until after the Buchannan & Co. debt had been incurred Foote, in his transactions with the Franklin bank, and with the Commercial bank, was acting for himself alone, and not as agent for the bank; for he could not be both principal and agent—in the first character acting for his own private gain, and in the latter, in the very transaction, to the prejudice of the bank of which he was the president. See Platt v. Birmingham Axle Co., 41 Conn. R. 255, *a* p. 264.

But, the plaintiff claims that the defendant is *estopped* from setting up Foote's indebtedness to it, to the prejudice of the plaintiff's rights, because Hugh Colville, who was, at the time, the cashier of the defendant's bank, *witnessed* the signature of Foote to the blank assignment upon the back of the certificate, well knowing all the premises, and with the intent to enable Foote to sell or pledge his stock by authorizing the holder to write over Foote's name the proper form of assignment, so as to enable such holder to get the same transferred to him on the books of the company; and it is also averred that such witnessing of Foote's signature by Colville, the cashier, was understood to constitute, and in fact constituted, a representation and an assurance by the defendant to all who might deal with Foote for

the stock that he was the owner of it, and had the right to transfer it free from any and all claims of the bank; that this construction was, by custom upon which the plaintiff relied, fully understood in the business community where the plaintiff received the stock from Foote.

The evidence does not establish, as no witness swears, that, by custom, such an indorsement so witnessed was regarded as a representation by the indorser and the witness attesting his signature that the indorser was not indebted, in fact, to the bank. The witnesses merely regard such bank indorsement a valid and sufficient indorsement, which they would accept as *readily as any other indorsement however formal. And, under the decisions of all the courts of law before 712 which the question has come, such form of indorsement is held valid. The purchaser, who desires such stock transferred in his name upon the books of the corporation, may write above the signature the proper form of indorsement.

But, what authority had Colville, the cashier, or any other officer or agent of the bank, other than the board of directors, over the subject of the stock of any stockholder, or his dealings with it? He could not directly waive, for the bank, its lien upon Foote's stock for Foote's debt to the bank; and it might be difficult to understand how he could do it indirectly. All that he could say or do about Foote's or any other stockholder's dealing with his stock, he would necessarily say or do, personally, on his own account, and upon his own personal responsibility, and not as the agent of the bank; for the bank never gave him any power to act for it in relation to any stock, or its transfer, owned by any of its stockholders. In this matter he simply did what any other attesting witness does when he witnesses a signature to a writing, or a blank to be overwritten, and this is all that the attestation purports. H. Colville, as an individual, witnessed the genuineness of Foote's signature, so that Foote could, if he desired, negotiate the stock, as he had a right to do, in spite of the bank, which could only claim a lien upon it for Foote's indebtedness to it; and this was done before the transfer to the Franklin bank, and not at all in view of such transfer.

The case of Platt v. Birmingham Axle Co., 41, Conn. R. 255, above cited, clearly establishes this: There the wife of the secretary of the corporation was the owner of shares of stock in such company. She and her husband assigned it to A., for value, but A. did not notify the corporation of the assignment to him. Two years afterward the wife obtained a loan from the company on the faith of her stock which she had not with her, but promised to get and give to the company. The statute made the stock liable for the debts of the stockholder to the company. A. afterward applied to the corporation for a transfer of the stock to him upon its books, It re used to do so, and upon a bill filed to compel the transfer, such bill was dismissed. The court cites and quotes from The Farmers' and Citizens' Bank v. Payne, 25 Conn., 449; Bank U. S. v. Davis, 2 Hill, 451, Nelson, J. Winchester v. Baltimore & Susq. R. Co. 4 Md. R., 231; Story on Agency (6 Ed.), Section 140 *b*.

The last authority says:

"Perhaps it will be found that if either of these distinctions *is to 713 prevail it will sap the foundations on which the security of all banking and other moneyed corporations, if not of all corporations, have been hitherto supposed to rest; to wit, that *no act*, or *representation* or *knowledge* of any *agent* thereof, *unless officially done*, made or acquired, is to be deemed the act, representation or knowledge of the corporation itself."

The witnessing of the signature of Foote on the back of the certificate of shares of stock was, then, the act and representation of Hugh Colville, personally, and not the act of the bank by him as its agent, for the act was not within the scope of his agency, nor does it purport to be. He does not witness it as *cashier*, nor had he authority to do so. There is nothing in the transaction to relieve a party purchasing from Foote from inquiring into the fact of his indebtedness to the bank, or to relieve them from the obligations imposed by the statute in such cases upon the stock to answer such indebtedness, subject to the lien of the bank upon this stock for Foot's indebtedness to it, he had the right to assign or dispose of it as and to whom he pleased. And the only purport and effect of Colville's attestation of the genuineness of his signature is to aid him in exercising that right, bnt nothing more or further. It amounts to no representation at all as to Foote's being indebted to the bank.

Neither of the parties has, in its pleadings, in any manner set up or insisted upon usury, but their counsel argue (the defendant's attorney objecting to its consideration) that question upon the evidence. The plaintiff's counsel insist that the proof shows that usurious interest was reserved or taken by the Commercial Bank in its loans to Foote, which loans constitute the alleged indebtedness upon which

the lien upon this stock is claimed. The defandant's counsel reply, that if this were even so, Foote, being president of the bank, loaned the money to himself without consulting the bank, and that he could not borrow the money by making an illegal agreement with himself and thus destroy his liability to the bank for the money taken out by him; and counsel for the defendant also claim that the Franklin bank in this loan to Foote, for which it received this stock as colla eral, took usurious interest, by reason of which the whole debt became forfeited.

The answer to the claims of both parties upon this branch of the case is that, neither has pleaded usury, which is necesary to be done to authorize the court to try the question and declare a forfeiture. Usury must always be pleaded, otherwise it will be waived, the parties having a right to waive it if they desire. Tyler on Usury pp. 458-464, and authorities there cited.

714 Any matter that *parties* have a right to insist upon or waive *must be pleaded to authorize a court to give effect to such matter. No party is expected or required to adduce evidence upon any question not raised and put in issue by the pleadings, otherwise preparation for trial would require litigants to be ready to meet not only every actual issue made, but every issue that might possibly have been made in a cause. This requires courts to disregard evidence of facts not in issue; for if in issue, the other party might be able to produce proof to overcome such evidence. If the nature of a case, as developed upon a trial, be such that the state will not, for reasons of public policy, permit the party to maintain it, the failure of the other party to plead its illegality might not, however prevent the court from enforcing such rule of public policy, as no individual can waive a rule of that kind. Courts, however, exercise this right cautiously and only in clear cases admitting of no reasonable doubt.

But, as the parties verifying these pleadings are experienced bankers and knew all the facts, as did their counsel the law, before verification and filing, it is clear that the parties did not desire to assume the responsibility of pleading usury, and as they did not, the court is not required to consider the question when raised by counsel, for the first time, on argument upon the testimony. That would be to put a responsibility upon the court which the party is unwilling to assume. But, if Foote had obtained this loan, and pledged therefor, as collateral security, this stock from some person or bank other than the plaintiff's, or a free bank, such as these two banks were, and such person or bank other than the plantiff, or a free bank such as these two banks were, and such person or bank upon the facts of this case could not have recovered from this defandant the value of this stock, can this plaintiff do so?

The statute enacts that "no company shall take, as security for any loan or discount, a lien upon" * * * or be "the holder or purchaser of any portion of the capital stock of *any incorporated company*, unless such purchase shall be necessary to prevent loss upon a debt *previously contracted* in good faith on security, which at the time was deemed adequate to insure the payment of such debt independent of any lien upon such stock," etc.

Now the Franklin bank in the face of this statute, made the loan to Foote upon this certificate of stock as collateral security. The right to this stock, which it thus sought to obtain, was expressly denied to it by law. Its taking the stock from Foote in this manner, and for the purpose that it did, was outside of its corporate powers; and it can not enforce a right it could not acquire. The case clearly falls within the principle of Swayne v. Bank of Chillcothe, 8. O. R., 257.

715 *The obvious purpose of such statutory provision was to prevent one free bank from obtaining the stock of others, and thus controlling or destroying them, and the transaction between the Franklin bank and Foote was within the very mischief sought to be prevented by the law. The loan was a call, or demand loan, and the banks had then more than two years and a half of authorized existence.

Upon this ground alone, the plaintiff's action must fail.

The fact that Foote took the money which he got from the Franklin bank, and applied it to his debt to the Commercial bank, which thus secured the benefit of it can not help the plaintiff's case. The Franklin bank did not give Foote the money for that, or for any other particular purpose, nor did the Commercial bank authorize or request Foote to procure the money for such object. The application of the money was the voluntary act of Foote, who had the right to do what he pleased with it. As the Franklin bank and Foote intended the money should be Foote's, its case is no stronger, in law, by reason of what Foote actually did with the money than if he had applied it to purchase for himself a homestead.

The defendant has argued that the plaintiff was not entitled to have the stock transferred to it on the defendant's stock books, because, it did not own the stock

but only held it as collateral security, by reason of which fact the defendant did not convert the stock by refusing such transfer, and the plaintiff claims, that, as the banks were to go out of existence the day following such demand for a transfer, the refusal defeated the plaintiff's right to obtain the portion of the assets to which this stock was entitled. Both these are interesting questions of law, but from what is above stated, the determination of neither of them is necessary to the decision of this case, and they are left undecided, and no other question argued in the case is material to its proper decision in view of what has been determined.

Judgment for defendant.

---

*BUILDING ASSOCIATION MORTGAGE. 765

[Hamilton County District Court, May 24, 1876.]

Cox, Force, Murdock, Burnet and Avery, JJ.

OHIO BUILDING ASSOCIATION v. MICHAEL B. LEYDEN.

1. A provision in the defeasance clause of a building association mortgage that the amount due on foreclosure shall be ascertained by adding to the considerations named the arrearages for fines, dues, and interest, and deducting the dues paid, will be rejected by the court, for the real transaction is a redemption of the stock drawn by the member in advance, leaving him his right as a corporator and the association its right to charge him dues.
2. A married woman borrower of a building association is estopped to resist her mortgage on the plea that her shares were subscribed by her husband in her name in order to evade the limit of twenty shares.

AVERY, J.

This was an action to foreclose three mortgages made by the defendants in this case. Two of the mortgages were for $3,000 and $1,500, representing together the par value of 15 shares of stock, and were conditioned that the wife, who it was recited had become a member of the association, should pay the dues, fines and interest upon the shares. The other was for $6,000, representing twenty shares of stock, conditioned that the husband, who it was also recited had become a member of the association, should pay the dues, fines and interest.

The wife testified that her name was signed as a subscriber for stock upon the books of the company by her husband without her authority, and it was insisted that this was a device to enable the husband to hold more than twenty shares of stock, this being the limit allowed by statute.

Upon the issues as made by the pleadings this question could not arise. If it could there was not a particle of evidence except that the name of the wife was signed without her authority. It did not lie in the mouth of the husband to say this, for he assumed to have authority, and if what he assumed was false it was a fraud perpetrated by him upon the company. The mortgage executed by the wife recited that she had become a member of the association, and by that recital she was estopped to deny the fact.

The other points made by the defense were as to the amount due upon the mortgages. The par value of the stock which was named as the consideration, was in fact not received because the premium which upon the three shares amounted to $1,425, was deducted. But this did not affect the dues that were still to be paid, because the defendants still remained members of the association, and were

bound to pay dues because of such membership. For a like reason it did not affect the fines that were to be paid on default of payment of the dues, and the fines being twenty cents upon each dollar of dues, come within the ruling of the supreme court in the case of Hagaman v. The Ohio
766 *Building Association, 25, O. S., as being reasonable. Upon the other hand, however, interest that was to be paid arose not because of the stock owned by the defendants, but because of the loan they made, from the association. In respect to interest they stood as debtors to the association, and therefore interest can be charged only upon the amount of the loan. So far as interest has been charged upon premium by charging it upon the entire amount named in the mortgage the defendants were entitled to a deduction. The mortgage contains a provision that upon forclosure the amount shall be estimated by adding to the consideration named in the mortgage the arrearages for fines, dues and interest, and deducting the dues that have been paid. This would be to compel the defendants to account for the entire sum named in the mortgage, although, in fact, they only received that sum less the premium that was deducted. It would also be treating the defendants as members of the association, charging them with arrearages and at the same time depriving them of benefits that they had reason to expect by the payment of dues.

In cases of this kind the only real transaction is a redemption of the stock held by the member in advance, leaving to him his rights as a corporator, and leaving to the association its rights to charge him dues. As corporators, the defendants would have the right not simply to a credit of the amount named in the mortgages or the dues paid by them, but would be entitled to the increased value of their shares by reason of their own and other members' contribution to a common fund. In cases of this kind it is not contemplated that the loan advanced to the member upon his stock will be called for, but simply that he will be required to pay dues until the par value of all the stock in the association is paid up, and then he will be entitled to share with the other members *pro rata*. If he has drawn his stock in advance, the effect will be that at that time he will have repaid the amount. This question has been fully passed upon and determined in the case of Hagerman v. The Ohio Building Association, where the court rejected a stipulation not exactly the same, but in principle similar to this, by holding that where parties have agreed upon one method of stating an account, it is judicial legislation to establish a different method. This is simply where a court of equity will not adopt the agreement of the parties as a rule of damages where the agreed rule would make the recovery altogether disproportionate to the loss occasioned by the default, and produce a result contrary to the evident design of the legislature in creating these associations.

It followed, therefore, that this proviso of these mortgages was to be rejected and the amount was to be stated between the
767 *parties upon the basis—not of the consideration named in the mortgage, but of the dues that were to be paid by the defendants and interest upon the amount actually advanced. The supreme court again offered a guide as to the manner of computing such account, and in this case, owing to the fact that the association had stopped receiving dues, preparatory to winding up, it was very easy. The defendants were in default for fifty-seven weeks' dues. The dues were fixed at one dollar per share, and, altogether, the defendants had thirty-five shares. Having

deducted the interest already paid in previous payments upon premiums and charging the defendants with the dues upon their shares for the fifty-seven weeks, with fines of twenty cents upon each share and interest upon the amount actually advanced, all the elements of the account would be furnished. Judgment would be rendered for this amount.

J. McGrath and *J. Wm. Johnson*, for Plaintiffs.
Goodman & Storer, Contra.

---

*WILLS.

[Hamilton County District Court, 1876.]

Cox, Force, Murdock, Burnet and Avery, JJ

ALBERT MILLER v. CATHARINE BANGARD.

Notice to admit a spoliated or lost will to record, under section 5945 Revised Statutes, if no one interested to resist resides in the county, must be given by publication.

BURNET, J.

This was a petition in error to reverse a judgment of the common pleas. The original proceeding in the case was an application to admit to probate and establish the spoliated will of Charles Miller, deceased, made in 1873, before the present incumbent's term began. The transcript of the proceedings in the probate court did not show that any notice of application was given except to John E. Rothert, the administrator of the will, and the decree stated affirmatively that it appeared that there was no one interested in resisting the probate residing in this county.

Judge Burnet decided the case. He remarked that it was claimed on behalf of the party in whose favor the will was probated that where no person interested in resisting the probate of a will resides in the county where the testator last resided, there is no notice required to be given by statute. The court could not so interpret the law as found in sections 47 and 48 of the Wills act. The supreme court, in the case of Banning v. Banning, had held that the proceedings to establish a spoliated will were not *ex parte*, but were to be had upon due notice of application made, and, as the court read the section of the statute providing for notice, they were of the opinion that where there is no person residing in the county interested in resisting the probate of the will, the notice by publication referred to in the statute must be given. The proper interpretation of the language of the section itself required this, and accepting the statement of the supreme court, as this court must, that it was not an *ex parte* proceeding, to be correct, it was necessary in *order to conform the interpretation of the statute to the genius of our institutions and the requirements of the constitution. The interpretation of the statute that was given in the probate court could only be justified upon a transposition of the sentences of the section, which gave the section a restrictive effect. 768

† The judgment in this case was affirmed by the supreme court in Baugarth v. Miller, 26 O S. 541.

Upon the construction of the statute given by the probate court there was error, and the court below, in affirming the judgment of the probate court, erred.

Judgment reversed.

Messrs Glidden, Butterworth and *Pohlman,* for Plaintiff in Error.

Forrest, Cramer & Mayer, Contra.

---

* PAYMENT—SCHOOLS.

[Hamilton County District Court, 1876]

Cox, Force, Murdock, Burnet and Avery, JJ.

†E. C. CROFTON v. BOARD OF EDUCATION OF CINCINNATI.

1. A double payment by inadvertance as to a contractor after a sub-contractor had filed an attested account, is recoverable.
2. By the act of 1873 the board of education succeeded to the city in its school property, and its right so far as school property was concerned, including the right of action for school funds.

FORCE, J.

The board of education brought suit in the common pleas against Crofton, to which the latter demurred, and the demurrer being overruled, Crofton answered. The issue was raised by petition, answer and reply, and judgment was rendered against Crofton. He brings a petition in error to reverse that judgment.

Crofton had a contract with the city to put up a schoolhouse. Before the building was finished sub-contractors served notice, stopping the city from paying money due to the contractor. Suit was brought by an assignee of the sub-contractors to recover $1,100 and the city filed an answer, stating that the money was brought into court, and judgment was rendered that the money should be paid to the sub-contractors or their assignee. As a matter of fact, the city had paid to Crofton all that was due to him in addition to the amount paid to the sub-contractors, and inasmuch as there was a double payment, the board of education claims it is entitled to recover back $1,100.

It does appear that there was a double payment; that after the city had been served with notice by the sub-contractors, and their claim had been established, the city paid to Crofton himself, by mistake, this $1,100. This appears to have been done during the transition of the books from the city to the board of education. It appears a double payment was made; that the payment was made by mistake. The admission by the city and judgment against the city in the case brought by the sub-contractors, can not affect this action. For that was to subject the money fixed in the hands of the city by the sub-contractors' notice, while this is to recover money subsequently paid by the city to Crofton. The board of education is the proper party to sue, because by the act of 1873, this board succeeds to the city in its certain property rights, which rights include the right of action against Crofton for school money.

Judgment affirmed.

Fox & Bird, for Plaintiff in Error.

Peck & Gerard, for the City.

---

†The judgment in this case was affirmed by the supreme court, see opinion 26 O. S. 571.

MECHANICS' LIEN.

[Hamilton District Court, 1876.]

Cox, Force, Burnet, Murdock and Avery, JJ.

† THEODORE FOELLER V. CARSTON VOIGHT.

The language of the mechanics' lien law, rendering the owner liable to sub-contractors for money "paid in advance, by collusion or otherwise," does not refer to payments before due, made in good faith.

MURDOCK, J.

Voight contracted for the erection of additions to his house with Jones & Hicks, for $700, to be paid when the work was completed, ready for painting. During the progress of the work he paid twenty-five dollars to Jones, who immediately handed it over to one of his sub-contractors. Just before the house was ready for painting, at the earnest solicitation of Jones & Hicks, he paid them $400, which they put in their pockets and, to use the language of the witnesses, "ran off." Soon after Voight was served with an attested account of the work and labor done by Foeller, and also of other sub-contractors. The case comes here by appeal from the common pleas, and a great deal of testimony was offered on both sides.

This court found from the testimony that the payment by Voight to Jones & Hicks was not collusive, but was made in good faith, Voight believing he had a right to make the payment, and the other parties believing they had a right to receive the money.

*The claim, however, was made that, notwithstanding the court might find the money was paid in good faith, yet being paid in advance of the time prescribed in the contract with Jones & Hicks, the sub-contractors had a right to require him to pay it over again, at least to the extent of the amount of the attested accounts, of which they had given him notice, for work and labor done by them as sub-contractors under Jones & Hicks. 2

The court was of opinion that the words in the statute "paid in advance by collusion or otherwise," the word "otherwise" must be understood as relating to the subject of the special word "collusion," and meant a payment made collusively, or by some fraudulent or collusive practice, and did not include a payment made in good faith, and with no intention of defrauding anybody. Voight, therefore, having paid $400 to Jones & Hicks a few days before it was due under the contract, and not having paid it collusively or fraudulently, was not bound to pay that amount over again to the sub-contractors if the balance due on the contract was not sufficient to pay the amount of their several attested accounts.

Deducting this $400 from the $700 which was to be paid when the work was completed, $25 already paid, $88 which it took to finish the work according to the contract, and $21 paid to a sub-contractor who was entitled to it by a decree of the superior court, left $187 due on the contract with Jones & Hicks, which sum, after deducting the costs of this

† Another decision in this case will be found 4 Rec., 671.

proceeding, the court order to be distributed *pro rata* among the several sub-contractors.

Jacob Wolf, for Plaintiff.

C. B. Okey and *L. B. Wright*, contra.

MECHANICS' LIEN.

[Hamilton District Court, 1876.]

Cox, Force, Burnet, Murdock and Avery, JJ.

FITZGIBBON v. GREEN & CO.

Where a building was to be completed and paid for at a certain time, and by default of the contractor was not completed at the time, and the owner thereupon settled with the contractor, paying him for what had been done, and treating the contract as at an end; the payment was not made in advance, within the meaning of section 6 of the Mechanics' Lien law, and the owner was not liable by reason thereof to a material man or sub-contractor, subsequently serving an attested account.

PETITION in error.

AVERY, J.

The case was one under Mechanics' Lien law, tried before a jury in the common pleas, this being a petition in error to reverse the judgment. Fitzgibbon was the owner of the building, and Green & Co. furnished lumber to the contractor. The price of the building was $2,130, to be paid two-thirds as the work progressed, and the remaining one-third on the completion of the building, June 1, 1872. At that date the building was not completed, and on June 26th the shop of the contractor being levied on under execution, he being unable to proceed, and abandoned
3 the job. At *that time the owner settled with him, paying him in full for the work that had been done. Afterward the owner, on his own account, completed the building at a cost which, including his own labor, made the entire amount $54 less than the contract price. Green & Co. furnished the lumber in April, 1872, and gave notice under the lien law, July 8, 1872. They were the plaintiffs below.

The court in its charge construed the contract and instructed the jury that one-third of the price was to be retained until the completion of the building, and that if when the lien notice was served, July 8th, the owner had paid for more than two-thirds of the work done at that time, he was liable to Green & Co. for the excess. The court further instructed the jury, that while if the contractor abandoned the work, the owner might settle with him, yet that this could not be done to the prejudice of the sub-contractors and material men, who were entitled to have the contract remain as it was.

In this there was error, under the decision in the case of Foeller v. Voight, 4 Rec., 671, which had been just announced; for it made the owner liable by reason simply of payment in advance, without reference to the circumstances under which it was paid. But there is another point, also, in which the charge must be regarded as erroneous. By the contract

the building was to be completed June 1st; and that time having arrived, and the building not being finished, it was competent for the owner to consider the contract at an end. If, therefore, he paid at that time for what had been done, he did what he was equitably, as between himself and the contractor, bound to do, for so far as he had received the benefit of it. Nor could Green & Co. complain, for as to them it is no hardship to hold that knowing the time of payment would arrive on the 1st of June, and failing to give notice of their claim under the law, they took the risk.

The statutes, as to payments in advance, provide merely that the owner shall be bound for what would have been due under the contract at the time notice was received, in case no such payment had been made. Under the contract in this case nothing would have been due at the time notice was received, for the date of such receipt was July 8th, and the day the building was to be completed and paid for was June 1st. To hold the owner liable in such case would be to allow the material man not only the advantage of the contract, but in addition the advantage of the contractor's default. It would be to stand on the contract with respect to the time of payment, and to stand off the contract in respect to the completion of the work.

The court below, also, at the request of the owner, instructed the jury that if the contractor abandoned the building, he would have no right to recover what was remaining unpaid, and that *Green & Co. stood 4
in his place. But in addition the court charged that if the owner went on and finished the building, putting himself in the place of agent for the contractor, the contract stood as security for the material man.

If this charge is to be taken as assuming that the owner went on as agent, it was contrary to the facts, for the owner testified that there was no such understanding at the time of the settlement, and that between himself and the contractor the contract was at an end. On the other hand, if the charge is to be taken as matter of law, that in such case the owner became the agent, it must be deemed erroneous. If the contract was at an end by default of the contractor, and his discharge, no obligation rested on the owner to carry forward the building to completion, and the material man, whose right against the owner depended on his standing in the place of the contractor, had no right to insist upon the owner doing what as between him and the contractor he would be compelled to do. Therefore, in such a case, as matter of law, it would not be true that the owner, going on with the building after the contract had come to an end, occupies the place of agent for the material man or subcontractor.

Judgment reversed.

Jordan, Jordan & Williams, for Plaintiff in Error.

W. H. Standish, contra.

MECHANICS' LIEN.

[Hamilton District Court, 1876.]

Cox, Force, Murdock, Burnet and Avery, JJ.

GEORGE CRIST v. H. A. LANGHORST, ASSIGNEE.

Where the principal contractor of a building, before its completion, makes a general assignment for the benefit of his creditors, the rights of a sub-contractor on such part of the contract price as was not due at the time of the assignment, perfected by filing his attested account with the owner, is superior to that of the assignee.

FORCE, J.

This case was heard in the common pleas on demurrer to answer. Langhorst brought suit against the owner of a building and other parties, alleged to be sub-contractors, claiming that he was the assignee of the contractor, and that there was money in the hands of the owner of the building, and that the other defendants claimed an interest in the fund as sub-contractors. Crist, one of the defendants to that petition, filed an answer, setting up a claim to which Langhorst demurred. His demurrer was sustained, and the claim of Crist dismissed. Crist files this petition in error.

From the pleadings it appears that one Meyers, owning land in the suburbs, undertook to put up a row of buildings, and made a contract to that effect. Before they were completed the contractor, on the 9th of October, 1875, being insolvent, made
5 *a general assignment to one Benning for the benefit of creditors. It does not appear that Benning accepted, but subsequently, on the 21st of the month, the creditors chose Langhorst as assignee, which was approved by the probate court. On the 12th of October, Crist, a sub-contractor, served Meyers with notice of his claim, and complied with the statute. The work was subsequently completed by the 16th of February, 1876, a sum of money agreed by all the parties to be correct being found due at that time from Meyers upon the contract. The question is whether the sub-contractor or the assignee has the better right. The case is not a case of payment made by the owner before due. It is not a case of an order drawn on the owner before due by the contractor, and accepted. It is not the case of a transfer and assignment by the contractor of money in the hands of the owner, and already due to the contractor. It is not the case of an assignment by the contractor, for a valuable consideration, of his contract; and whatever may hereafter become due under it. It is the case of an assignment by the contractor of money not yet due or earned to a general assignee for the benefit of creditors. This is not an assignment for consideration, but an assignment to a volunteer. Such assignee does not even stand in the position of an assignee in bankruptcy. He is little more than the agent of the assignor, to distribute the assignor's assets among his creditors. He stands in no better position and has no better right than his assignor. Now, if a sub-contractor files due notice before money becomes due from the owner to the contractor, the law puts him in the place of the contractor, and when the money becomes due the law interposes between the owner and the

contractor, and diverts this money to the sub-contractor, who has given such notice before it can reach the contractor. The general assignee of the contractor stands in no different position from that of the contractor himself; and, hence, where such assignment has been made before money becomes due from the owner to the contractor, the law in the same way interposes between the owner and such assignee, and diverts the money to the sub-contractor before it can come to the assignee. The demurrer to Crist's answer should have been overruled, and the judgment is therefore reversed.

Jordan, Jordan & Williams, for Plaintiff in Error.

Butterworth & Vogeller, contra.

---

*ATTACHMENT—CONVERSION. 6

[Hamilton District Court, 1876.]

Cox, Force, Murdock, Burnet and Avery, JJ.

† DEVINNEY V. SMITH & MCALPIN.

An attachment for fraudulently contracting a debt does not lie where the fraud did not enter the inception of the contract, but was a conversion of property lawfully in possession, as when property, in the hands of a factor, was afterwards shipped by him as his own, and, hence, became subject to set-off by his consignee.

Cox, J.

The proceeding was instituted to reverse the common pleas in vacating an attachment. Devinney sued the defendants to recover $2,834, as the proceeds of 16,674 pounds of butter, and alleged they fraudulently contracted the debt; he also alleged he had good reason to believe sundry persons were indebted to E. M. Smith or to Smith & McAlpin. On the motion to dissolve the attachment, a number of affidavits were filed. The affidavit of E. M. Smith denied the debt was fraudulently contracted, and averred the property was delivered to the defendants as commission merchants; and they shipped the butter to their correspondent in New Orleans, and advised the plaintiffs of each step taken; that the net proceeds of the sale amounted to $2,572, no portion of which came into their hands; the consignee claiming to set-off debts of Smith & McAlpin against the same; that the understanding was that they were to do with the merchandise as with their own property, and with this understanding the shipment was made. There was an affidavit of Charles E. Brown to the same effect. An affidavit was made by Devinney in support of the original affidavit, stating that he never authorized the defendants to ship the butter on their own account or to draw on their own account for it; that after the 1st of January, 1876, he asked them to draw on account of said butter, and they replied they had no account of sales, and could not draw until they had received such account.

The motion to dissolve the attachment was on the ground that the debt was not fraudulently contracted; that no fraud entered into the inception of the contract, and that it was a case where Devinney had

† For common pleas decision see 1 B., 43.

Borrego's eleven league claim of 13,284 acres, situated on the Sulphur Fork of Red River, conveyed by said Rusk to said Davis on the same 5th day of May, 1845.

The third class of claims was for a tract of 8,856 acres, situated on the double bayou in Liberty county, Texas, on the Galveston bay, conveyed to Harrison W. Davis by Charles L. Harrison on April 4, 1845.

These were Spanish claims, and there is no evidence in the case showing their validity, or that McMicken ever had any connection with them, or held in his possession any papers pertaining to them. There being, therefore, no evidence that he ever converted to his own use any part of them, they may be omitted wholly in the further consideration of the case.

The fourth class was land claims for 19,860 acres, the papers for which McMicken did obtain possession of between 1849 and 1853, part of which he caused to be located and patented to himself, and which, by
16 his will, passed to and are held by Andrew McMicken, who is not a *party to this suit. They were as follows:

		ACRES.	NO.
1.	Heirs of P. W. Anderson, Donation Warrant	640	113
2.	" " Bounty Warrant	1,920	2,705
3.	" " Head Right Certificate	1,476	1,019
4.	S. P. Williams, Bounty Warrant	640	2,425
5.	Thomas Kolheuss, "	640	2,424
6.	John M. Lemon, "	640	2,824
7.	" "	1,280	2,428
8.	" Head Right	1,476	889
9.	Robt. F. Roberts, Bounty Warrant	640	2,423
10.	John H. Moore, Head Right	320	407
11.	E. J. W. Lowrey, Head Right	1,476	146
12.	" Bounty	1,920	2,421
13.	Isaac B. Bradley, Head Right	1,476	1,018
14.	" Bounty	1,920	2,822
15.	M. Kelley, Bounty	1,280	2,422
16.	Harrison W. Davis, Head Right	1,476	145
17.	Isaac B. Bradley, Donation	640	112
		19,860	

Of these certificates, Harrison W. Davis located in the Victoria land office in Texas, on April 25, 1840, some 16,000 acres; and on February 23, 1853, H. Beaumont, agent of C. McMicken, styled in the land office records " attorney in fact for H. W. Davis, " " *raised*" as it is styled; all these locations. What was ever done by anybody with the claims for the difference between the 19,860 acres and the 16,000 acres located by H. W. Davis, does not appear by any evidence in the case.

Out of such lifted claims, McMicken having, be re-located them on other claims, on December 20, 1853, procured patents in the names of the original grantees of such claims. For the Roberts claim, 640 acres; for the Kelley claim, 1,280 acres; Harrison W. Davis, head right claim, 1,476 acres, all the land being adjoining and lying in Travis district, Hays county, Texas, being in all 3,396 acres. For the expenses, etc., of locating and procuring patents for these lands, McMicken deeded his agent, H. C. Cook, assignee of Beaumont, the one-fourth or 849 acres, leaving him (McMicken) 2,547 acres, which his devisee, Andrew McMicken still holds; and the evidence is that such land is worth about *fifty cents* per acre. Harrison W. Davis made these locations in the

year 1840, long before Texas was annexed to the United States; and except as to his own head right, he acted as the agent of other parties, who owned such claims. The evidence is that it was difficult to ascertain the boundaries of these lands as located, and that, by the laws of Texas, the occupancy of lands, so located by settlers or claimants for five years, gave the latter a paramount right. The testimony also shows that there were improvements made upon the land, some 6,000 acres *located by Davis near Victoria, worth in 1853 and since some 17
$30 per acre. It is also proved that some of the parties for whom H. W. Davis had made these locations proved the loss of the original papers, lifted the locations and located their claims elsewhere. This was done by agents familiar with the Texas land laws and system. So it is fair to hold upon the evidence that these locations of the year 1840 were no longer available in the year 1853, and that the locations would have to be raised and the certificates located elsewhere to render them available for the purpose of securing lands.

There is no testimony showing that in 1853 McMicken, the plaintiff, Harrison W. Davis, or anybody else acting in that interest, could, out of these certificates, have secured more land or done better than was done by McMicken: The evidence is that some of the parties to whom such certiffcates had been granted, had, in 1851, ignored the Davis agency, and procured lands by employing other parties, so that the question of the plaintiff's right to recover is narrowed down to the value of the certificates for 3,396 acres, claimed to have been wrongfully appropriated by McMicken.

The first question is, what was Harrison W. Davis' interest in them at any time? He certainly owned his head right for 1,476 acres, his head right having been granted to him by the republic of Texas in consideration of his becoming a citizen thereof, he having also been a soldier during its war for independence. The other certificates he seems to have held as agent under contracts for compensation in shares of such lands as he might locate and secure titles to—at least he was the ostensible agent, for it appears that his brother, James E. Davis, a lawyer of New Orleans, was largely interested, in fact, with him, but could not act in his own name prior to annexation, he not being a resident of Texas.

Harrison W. Davis and James E. Davis were brothers. The latter had two daughters, Mary E. Randall, married to Charles M. Randall, since deceased, and Janetta Finney, wife of Johu Finney, all of New Orleans; and a son, Joseph A. Davis, a lawyer, now deceased, Charles M. Randall was a lawyer, and John Finney is a lawyer. When James E. Davis died, which was in Texas, in December, 1858, where he had gone to look after these land matters, he left as his heirs his widow, Margaret T. Davis, and his son and two daughters. Charles M. Randall died in March, 1859, leaving Mary E. Randall, his widow, and his heirs, his mother, Elizabeth Randall; his brother, Andrew Jackson Randall; and his sister, Anna Maria Brawley. Charles M. Randall was the nephew of Charles McMicken, Elizabeth Randall, Charles' mother, being Mr. McMicken's sister.

*Charles McMicken purchased and took proper conveyences from 18
all the heirs of Charles M. Randall of all their interests in the latter's estate, which conveyances are dated April 13, 1850. On April 24, 1847, Harrison W. Davis, with the knowledge and consent of James E. Davis,

conveyed all these Texas lands and claims to Charles M. Randall, the consideration named in the deed being $10,000, upon certain expressed trusts, to-wit:

"It is understood that the legal title to some of the above described tracts of land is not complete, but the said Davis covenants and binds himself that as soon as the legal titles are complete in the name of the original grantees or their assignees, he, the said Davis, will make or cause to be made to the said Charles M. Randall, his heirs, etc., perfect titles to all of the described land, clear of all incumbrances, and to execute any further and other deeds necessary to make the titles perfect, and the said Charles M. Randall is hereby authorized and directed to take all proper steps under this conveyance to effect that object.

"It is further understood that many individuals hold *bonds* and *claims* on the said Davis for part of lands above conveyed to said Randall. When those bonds and claims are presented to said Randall, he is, without cost or expense upon his part, to convey such interest to the applicant as he is entitled to in the judgment of the said Randall, which judgment is to be conclusive on said Davis.

"It is further understood that out of the individual interest of said Davis in the above conveyed land, the said Charles M. Randall is to convey to two neices of H. W. Davis, Janetta Davis and Mary E. Randall, twelve hundred and fifty (1250) acres each, to be selected by said Randall out of good sugar and cotton lands, as near together as possible. These tracts I give to them in consideration of my love and affection for them."

The evidence establishes that Randall, in fact, paid no consideration for the property mentioned in this deed. John Finney swears to this; so do Mrs. Mary E. Randall and Mrs. Janetta Finney. This, in law, created a *resulting* or *implied trust* in favor of Harrison W. Davis to the extent of his interest and there was no need to express such trust in his favor. What was the extent of such interest in Harrison W. Davis beyond his head right to 1,476 acres?

The evidence of John Finney and Janetta Finney, his wife, and of Mrs. Mary E. Randall, shows that James E. Davis, and not Harrison W. Davis, except to the extent of his services to be paid in land, was the party really interested in these lands, Harrison W. Davis being in fact, only his agent.

19 John Finney says: * * * "The property embraced in *this conveyance had been purchased with the funds of James E. Davis and in the name of H. W. Davis, the latter giving the business his personal attention and supervision for the joint account of the two. I understand the land was taken in the name of H. W. Davis, who was a citizen of the republic of Texas, because an alien could not hold land in that republic.

"After the annexation of Texas to the United States, Mr. Jas. E. Davis preferred to have the title vested in the name of Mr. Randall, and for that reason they were conveyed to Mr. Randall. H. W. Davis may, for aught I know, have desired the same thing."

It is proved by Finney that James E. Davis was embarrassed pecuniarily, and that Mr. Randall was looked to to bear the expenses of perfecting titles, he to have a lien on the land for his reimbursement and for his services, and he did advance to James E. Davis several hundred dollars. Mrs. Janett, a Finney, in answer to the question: "What in-

terest had Mr. Harrison W. Davis to these lands conveyed to Mr. Randall?" said: "He owned a certain portion as his own head-right claim; the rest he held as agent of James E. Davis, who furnished the means for the purchase of said lands."

Mr. Randall's testimony tends to establish the same state of facts. These are the plaintiff's witnesses. All the evidence and circumstances in evidence tend to show James E. Davis the principal beneficiary of the trust.

The heirs and representatives of James E. Davis are seeking nothing in this action, but only the plaintiff, who claims the interest of and through Harrison W. Davis alone. Harrison W. Davis, having conveyed to David Bayles in March, 1856, and David to Jesse, the plaintiff, on April 12, 1856. Harrison W. Davis' deposition has been taken by the plaintiff; but he is not a competent witness, and his testimony can not, therefore, be received (Code, section 314, p. 5). McMicken being dead, and the facts testified to having occurred prior to such death, assignment of his claim does not make him a competent witness against McMicken's executors. The only interest in H. W. Davis which the evidence establishes is to his head right, and to be compensated in land for his services and expenses in locating and perfecting titles. Whether he ever did what would entitle him to such compensation is unproved, and stands upon mere conjecture.

The next thing to consider is what *notice* had McMickenof the rights of Harrison W. Davis when he obtained these papers and when he raised such locations and made others, and procured patents therefor?

The deed of Harrison W. Davis to Charles M. Randall purports *to be for the absolute sale and conveyance by the former to the latter, for a valuable consideration, of all Davis' right, title and interest, with certain specified and expressed trusts in favor of other persons exclusive of Harrison W. Davis, among which beneficiaries James E. Davis, to the extent of his "*claims*," might be, as he could prove by parol that he was one mentioned in the deed holding claims. 20

It is true that as H. W. Davis and Randall were, in law, strangers, and as Randall, in fact, paid him no consideration for the conveyance, the law implied a trust in favor of Davis, but to charge one dealing with Randall or his heirs for the property so conveyed, with notice of such implied trust, actual notice would be required, or knowledge of facts and circumstances sufficient to put one upon inquiry.

The heirs of Randall, as we have seen, for a valuable consideration, conveyed these Texan lands and claims to McMicken on April 13, 1850, and it is not satisfactorily proven that he was advised of any claim of Harrison W. Davis to them.

Upon producing evidence of Randall's death, who were his heirs, H. W. Davis' deed to Randall, and this deed and the papers, the land officers would, as they did, allow McMicken to control locations and entries as "attorney in fact" of Harrison W. Davis, the term, "attorney in fact," as used in law matters, applying to purchasers from, as well as agents of, the person originally entitled.

The next question is, when, and from whom, and upon what terms did McMicken get possession of the papers?

Janetta Finney, the plaintiff's witness, testifies that he obtained them in February, 1853, from her mother, Margaret T. Davis, who died before this suit was brought, when McMicken was on his way to Texas

upon business of his own, that he agreed to try to get lands and perfect the titles thereto free of expense to her, and to receive the half of such lands for his services and expenses. There is no evidence showing that the papers were delivered at any other time, or upon any other terms.

Two years before this, or in 1851, parties entitled to 10,828 acres of the land located by Harrison W. Davis in 1840, thinking he had abandoned the business, proved the loss of their certificates, and obtained new locations, employing as their agent D. C. Freeman, whose testimony has been taken, and his brother's. Had the old locations of 1840 been available, surely they would have been perfected, instead of new dues made on other lands. These claims were Bradley's, Winter's, Lowrey's, Lemon's and Cobhouse's.

21 After Randall's death, Mr. Finney, who took possession of *his papers, gave those pertaining to these Texas lands to Margaret T. Davis, the widow of James E. Davis, and she gave them to McMicken. After the latter's return from Texas, upon her demand McMicken redelivered to her all the papers which he did not make use of in locating these lands. Finney saw these papers after their return by McMicken, but is not certain whether all the papers which he originally gave to Margaret T. Davis were among them or not. It does not appear, then, that McMicken knew that James E. Davis' heirs claimed to have an interest in these land claims as beneficiaries under the deed from Harrison W. Davis to Charles M. Randall, but not that Harrison W. Davis himself had. Mary E. Randall and Mrs. Finney, with her husband, the sole surviving heirs of James E. Davis, are made defendants to the action, because, as the plaintiff alleges, "their consent to join as plaintiffs could not be obtained." They do not answer. Their interests are really adverse to the plaintiff, and it is obvious they do not desire to give him the benefit of their rights, if any they have, against the estate of McMicken.

Upon the facts and the law, the most that McMicken did to the injury of Harrison W. Davis was, with Mrs. Margaret T. Davis, to convert to their own use, in February, 1853, his head right claim for 1,467 acres of land.

The plaintiff is not pursuing the land obtained upon that claim by McMicken. His right is, therefore, restricted to the value of the warrant at the time of conversion, February, 1853. Dixon v. Caldwell, 15 O. S., 412.

In that case the action was brought by the real owner of a land warrant to hold one, who had purchased it innocently upon a forged assignment, and had located it upon land and procured a patent therefor in his own name, as trustee of the land, for which he sought a conveyance from such alleged trustee affirming the location by such trustee.

The supreme court decided that such legal owner had a clear right to recover the value of the warrant at the time of the conversion, the good faith of the purchase being no defense to the *legal* demand.

So that case, *in form* a proceeding in equity, was really only an action at law trover, for wrongfully converting the land warrant. And such is the real character of this action against the executors of McMicken to recover for his alleged wrongful acts. It is true that such land claims are for many purposes considered real estate, but for wrongfully appro-

priating them, where the land secured by them is not sought, they are governed by the laws of personalty.

The conversion took place in 1853, before the passage of the *code, and the action was not brought until in September, 1859, 22
or after more than six years. The statute of limitations, in force before the code, applies to legal causes of action accruing before its passage. That statute limited the right to bring an action of trover to four years after the accruing of the cause of action; and in case of fraud, the failure to discover the fraud did not prevent the running of the statute, as under the code. To chancery causes proper that statute had no application. Lapse of time, in cases of fraud, did not begin to operate to prevent relief in chancery until its discovery. But a party cannnot plead a legal demand in the form of a bill in chancery, and thus avoid the running of the statute of limitations. The pleadings in this case are in the form of equitable pleadings, while the plaintiff's case was a legal one only, as in Dixon v. Caldwell.

The defendants—the executors—answered that the cause of action was based by "*lapse of time*," and it is claimed by the plaintiff that this is not an answer setting up the statute of limitations. This distinction was well founded before the code, as the statute of limitations did not generally apply to equitable causes of action at all. In the present case "lapse of time could have no proper meaning other than that of the statutory bar, for the cause of action is a legal and not an equitable one; and we must give the answer a liberal construction. We think the chancery form of the answer is good enough for the equity form of the petition, which only sets forth a case at law.

Judgment for defendants.

O'Connor, J., concurred.

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

C. D. Coffin and *Lincoln, Smith and Stevens*, for Plaintiff.

Stallo & Kittredge and *A. Taft & Sons*, for the Executors.

---

*MUNICIPAL CORPORATIONS. 73

[Superior Court of Cincinnati, General Term, June, 1874.]

O'Connor, Tilden and Yaple, JJ.

†E. ROBERTS & CO., v. CITY OF CINCINNATI.

The city of Cincinnati, by ordinance prohibited, under penalty, the keeping or storing of petroleum oils in certain parts of its limits, in quantities exceeding three barrels, or one hundred gallons, unless kept in warehouses or cellars under ground, and in such manner that such oils could not overflow adjoining premises, and without the owners, or storers thereof obtaining license to so keep the same, and forbidding the storage of this class of oils in quantity in other parts of the city. Within the district subject to such license, Roberts & Co. established a lumber yard, and kept thereon great quantities of lumber, relying upon the city to enforce the observance by others of this ordinance.

Certain persons, in violation of all the provisions of the ordinance, had collected and kept stored on premises adjoining those of Roberts & Co., and where the same could overflow their lumber yard, some forty thousand gallons of such inflammable oils; Roberts & Co. having lumber in their yard to the value of some $130,000. Roberts & Co. frequently called the attention of the city au-

† This case is cited 42 O. S., 625, 628.

thorities to the illegal keeping of such oils and requested them to enforce the ordinance, but the authorities neglected and refused to do so; nor did Roberts & Co. ever make complaint in the police court and prosecute the violators of the ordinance.

On June 8, 1873, the oils took fire which rapidly communicated to the yard and lumber of Roberts & Co. and consumed it all. In an action by Roberts & Co. against the city of Cincinnati to recover the value of the lumber, *Held*, that they had no cause of action against it, such oils not being in the possession and under the dominion and control of the city, but in the possession and subject
74 to the disposal of third persons, *in which case the city could not be held liable for the injury resulting to others from the burning thereof, it not being the policy of governments to indemnify individuals for losses sustained, either from the want of proper laws, or from the inadequate enforcement of laws, made to secure the property of individuals where such loss is occasioned by the unlawful personal acts of third persons, or the unlawful use by third persons of their property, and the mere omission of the municipality to pass or enforce such laws. Where such loss is occasioned by acts of omission or commission on the part of the municipality in reference to the proper keeping, management and control of property *in its possession*, and in reference to which it has duties to perform, it may be liable.

2. The payment by the offender of the penalty prescribed for the violation of such ordinance does not amount to a license to violate it by such payment; but it is to be taken as the expression of the city council, that, if the exercise of their legislative discretion, such penalty will be sufficient to prevent the commission of such offenses.

YAPLE, J.

This case comes before us on reservation, from special term, of a general demurrer to the petition of the plaintiff. The action was brought against the city for its *non-feasance*, to recover $130,000, damages for the loss by fire, on June 8, 1873, of lumber of that value, owned by the plaintiffs. The fire and the loss were occasioned by the taking fire and burning of a large quantity of petroleum oil, gasoline and benzine, (some 1,000 barrels, containing more than 40,000 gallons,) stored and kept in violation of the city ordinances, by certain persons, the owners thereof, in the city, and adjoining plaintiff's premises upon which their lumber was placed. The city ordinance, the substance of which is stated in the petition, provided that no greater quantity than three barrels, or one hundred gallons, of such oils should be stored in any one place within that portion of the corporate limits of the city—that is, where plaintiff's lumber and such oils were—unless said place of storage was under the surface of the earth, or was inclosed by a levee or earth embankment, and was certified to as being secure from overflowing to the adjoining premises; and unless the owner thereof, or person storing, had obtained a license to store such oils in accordance with the provisions of such ordinance. The plaintiff avers that the oils so kept by such persons were kept by them in violation of all the provisions of this ordinance; and that they stored their lumber where it was burned relying on the city to enforce such ordinance; that they frequently called the attention of the city authorities to such oils and to the manner in which they were illegally kept, and requested and demanded the enforcement of the ordinance in that behalf, but that the city neglected and wilfully refusedto enforce such ordinance and remove the oils so stored and kept therein; and that such oils took fire, which communicated to and burned
75 the lumber mentioned, amounting *in value to the sum of $130,000, for which sum judgment is asked against the city. The city demurred to the petition on the ground that it does not state facts sufficient

to constitute a cause of action against the defendant, the city of Cincinnati. The petition does not state what penalty, or penalties, the ordinance prescribed for the violation of it, nor that the city had the authority under it, by virtue of its provisions, or the provisions of any other ordinance of the city, to take possession of and remove, or place free from danger to others, such oils when illegally kept. Such property, though it may be a source of danger to other property from its inflammable nature, may yet not be a *nuisance*, in the legal sense of the term, to other property when kept in its vicinity, and whether any or what ordinances shall be enacted by a municipal corporation in relation to the keeping or storage thereof within its limits, is a matter entirely within the legislative discretion of such corporation, for the exercise or non-exercise of which it can not be held liable, whatever liability the parties keeping such oils may incur by reason of carelessly, improperly or recklessly keeping it. The ordinance in question must then be supposed to have provided all the penalties for keeping such oils in violation of its provisions, that the city council deemed necessary to prevent its violation; but we have no right to suppose that the ordinance *required* or even *permitted* the city to take possession of and remove, or forfeit, oils kept illegally in violation of its provisions. We do know, however, that the plaintiffs, or any other person could have made complaint, obtained a warrant and had the owners or keepers of this oil arrested and dealt with in the police court according to the terms of the violated ordinance, or that any policeman might have arrested them upon view, in the violation of the ordinance and brought them before the police court for examination, (Munic. Code, sec. 210), and that such officers would have been bound to act, but that the city could not be held liable for their wrongful or wilful refusal to act. The insuperable objection to the plaintiff's right to recover in this case, in our judgment, lies in this; the oil was in the exclusive possession and under the sole dominion and control of the owners or keepers of it, not in the possession or under the dominion or control of the city, or its authorities. If a penalty only attached to the owners or keepers for so storing it, such penalty was deemed by the city an ample provision for preventing the oil from being so kept or stored. It was not enacted in order that the payment of such penalties might be a license to violate its provisions, but because the infliction of such penalties was deemed sufficient to prevent, or cause to cease, the violation of the ordinance. If too lenient to accomplish this *end, it amounted to no more than a mistaken exercise of legislative discretion on the part of the city council for which the city cannot be held liable. If the city authorities had even been authorized or required by the terms of the ordinance to take possession of and remove, or forfeit, such oil, the officers failing to do so—if positively required—and not the city, would have been liable; and if merely authorized and not having done so, would merely have amounted to the failure or neglect to exercise a legal discretion vested in them; for the non-exercise of which no action could lie against the city. 76

If a mere penalty against such owners or storers of the oils was prescribed, then the city authorities had no legal right to take such oils from those having the possession of and dominion over the same, but were confined to the enforcement of such penalty. It would be a monstrous assumption of authority on the part of the municipal corporation to seize and take from the possession and control of its owners, all property which they might be keeping or using in violation of some merely penal

ordinance, and the hazard to the city would then become great, for being in the actual possession and having full dominion over and control of such property, the city, for negligently or improperly keeping it and thereby injuring the persons or property of others, might, in many cases, be guilty of *misfeasance* in using and controlling the property, and thus become liable in damages to those so injured.

The general principles governing this case are well stated in Western College v. City of Cleveland, 12 O. S. 375, in which case at page 377, Gholson, J., saying: "It is obvious that there is a distinction between those powers delegated to municipal corporations, to preserve the peace and protect persons and property, whether to be exercised by legislation or the appointment of proper officers, and those powers and privileges which are to be exercised for *the improvement of the territory* comprised within the limits of the corporation, and its adaptation to the purposes of residence or business. As to the *first*, the municipal corporation represents the state—discharging duties incumbent on the state; as to the *second*, the municipal corporation represents the pecuinary and proprietary interests of individuals. As to the *first*, responsibility for acts done, or omitted, is governed by the same rules of responsibility which applies to like delegations of power; as to the *second*, the rules which govern the responsibility of individuals are properly applicable. It is not the policy of governments to indemnify individuals for losses sustained, either from the want of proper laws, *or from the inadequate enforcement of laws made to secure the property of individuals.*" And the case of Howe v.
77 *City of New Orleans, 12 La. An. R., 481, is a decision most pertinently illustrating the general principles announced by the supreme court of this state. In that case a fire had destroyed a building, leaving the wall standing *upon the lot of the owners*. This wall fell and injured the minor son of the plaintiff, who was walking on St. Charles street. The testimony showed that the city surveyor, who had the power to cause the wall, after the fire, to be taken down, was aware of the fire, that he observed the condition of the wall from the street repeatedly, and was of opinion that the public were in no danger from its falling, but he never entered upon the premises in order particularly to ascertain its condition." The court held, reversing the judgment below against the city for $7,500, that "nuisances may exist in the city without rendering the same liable for the consequences. The city is no general warrantor against the acts of individuals. Its police may be applied to for the purpose of preventing injuries, but if such police err in their judgment, or if injuries are occasioned because they are inefficient in their exercise of the powers with which they are invested, the city at large cannot be held responsible for acts of third persons which, under a more sagacious and efficient police, might possibly have been prevented.

The case at bar has no analogy to the case of injuries done to individuals by the negligent manner in which work to public streets is done, or the want of repair in the same, for the *possession* of the servitude of of the streets is *in the city*, and on the same principle that a private person is responsible for an injury done by a falling structure *upon his property*, it is possible that the city, in such cases, may be held liable. But in the case at bar there is no statute nor principle of law of which a recovery can be maintained against the city for the error of judgment of the city surveyor." So it will be seen that for *non-feasances* on the part

of a municipal corporation for failure to prevent injury to property or persons from other property illegally or improperly kept and guarded or used, the test determining whether or not it is liable, is, whether or not such offending property is in its possession and dominion and subject to its disposal and control; or whether these are in some third person or persons. In the latter case it is not liable, in the former it may be.

The demurrer to the petition is sustained.

Thos. McDougal and *Hoadly Johnson*, for Plaintiff.

Warrington, Peck & Cramer, City Solicitors, for Defendant.

ASSESSMENTS—BIDS. 153

[Superior Court of Cincinnati, General Term, October, 1875.]

CITY OF CINCINNATI V. GOODMAN, ET AL.

Yaple, O'Connor and Tilden, JJ.

1. Bids for improvement may be advertised for in two sections and let in one section to the contractor.
2. If in improving a street upon an old road, the street encroaches upon private property, which has not been condemned or paid for, but the owners made no objection until the work was done, they are estopped to deny the validity of the assessment, even though they might recover compensation.
3. An ordinance to improve, which did not specifically order the cost to be assessed upon the abutting property, but incorporated by reference thereto, the resolution declaring the necessity which did so assess the cost sufficiently, orders the cost to be assessed.
4. Advertising for bids in one English and one German paper, instead of two English papers is covered by section 550 and the amount properly chargeable is recoverable.
5. If the lowest bidder was released by the board of improvements at his own request, and a higher one was accepted, the board having the discretion, the assessment is valid.
6. Under a usual variation provided for in the contract, more stone may be required to be put on a street than the contract calls for, and included in the assessment.

O'CONNER, J.

This is an action to recover the amount of an assessment for the improvement of the Grandin road. The case was reserved at special term for decision hereupon the certified evidence.

*Various defenses are made to a recovery. It is objected, in the first place, that in making the improvement, private property 154 was taken without condemnation and against the consent of the owners, and that therefore the assessment must wholly fail. We think, however, the evidence shows that the improvement was limited to what was known as the old county road, forty feet in width, which in some places had been encroached upon by the adjoining proprietors. But even if private property had been taken, we think the evidence further shows that all the owners of property abutting on the improvement were aware of the progress of the work, and took no steps legal or equitable to restrain it. This brings the defendants within the decision of this court at the last general term in the case of the city for the use of Horton against Longworth and others, which decision followed that of the

supreme court in 18 Ohio St., 169, Goodin v. The Cincinnati and White Water Canal Co., where it was held that "The owner of the land who stands by, without objection and sees a public railroad constructed over it, cannot, after the road is completed, or large expenditures have been made thereon upon the faith of his apparent acquiescence, reclaim the land, or enjoin its use by the railroad company. In such case there can only remain to the owner a right of compensation." To the same effect are the cases of Kellogg v. Ely, 15 Ohio St., 64, and Hatch v. The Cincinnati and Indiana Railroad Co., 18 Ohio St., 92.

It is next objected that the common council did not by ordinance determine, before the work was done, to assess the cost of the improvement on the abutting property. We find, however, that the resolution of the board of improvements that the improvement was necessary provided for the assessment of the cost upon the abutting property, and that the ordinance to improve, regularly passed by a two-thirds vote, incorporated by reference, the language of the resolution as to the assessment, and this before the work was let. This we think is a substantial compliance with the requirements of the municipal code.

It is also objected that before the contract for the improvement was entered into with Joseph Sieber, John I. Wright bid for the work at a much lower price than that in the contract, and that he (Wright) was released from his bid at his own request, by the board of improvements. But we think this was a matter in the discretion of the board of improvements and council, and cannot affect the assessment.

So, also of the defense that the work was advertised in two sections, and let in one section to the contractor. This we think was in the discretion of council.

155 The defendants further claim that more stone was put on the *work than the contract calls for, and that for this excess they are not properly chargeable. But it seems this excess was merely a variation in the performance of the work which was provided for in the contract, as is customary in all such contracts with the city.

It is admitted that under the ruling of this court, the proceedings were irregular, the advertisement required being published in only one English paper instead of two, and that this brings the case within the provisions of the curative section 550, requiring the court to find the true value of the work done. We think the weight of the evidence shows that the work is fairly worth the amount of the assessment, and we therefore give judgment for the plaintiff for that amount, but without penalty.

Judgment for plaintiff.

Collins & Herron, for Plaintiff.

J. J. Miller and *Stallo & Kittredge*, for Defendants.

On motion for leave to file petition in error, the supreme court refused the application.

*JUDGMENT—NEW TRIAL. 189

[Superior Court of Cincinnati, General Term, October, 1875.]

ALFRED PARKER v. JOHN ROBINSON, JR.

O'Connor, Tilden and Yaple, JJ.

A defendant who had alleged in his answer facts, which if true, constituted a full defense to the case made by the plaintiff's petition, being absent at the time the case was called for trial, the cause being tried upon the evidence adduced by the plaintiff and a verdict being rendered for him, after the lapse of more than three days from the rendition of the verdict, but during such trial term of the court, moved the court to set aside the verdict and permit him to defend the action for reasons allowed by section 534 of the code in the case of vacating proceedings after the trial term.

Held: That the court could entertain and grant such motion, sections 299 and 301 of the code requiring motions for new trial to be made within three days not applying to such a case. 190

YAPLE, J.

This is a petition in error prosecuted here to reverse the judgment of this court rendered in special term in favor of Robinson and against Parker for the sum of sixteen hundred dollars and costs.

The grounds of error assigned are the overruling of the motion of Parker, made during the trial term, though more than three days after the rendition of the verdict to set aside the verdict and judgment, and because the court had no jurisdiction of the subject matter of the action.

The plaintiff below, Robinson, sued Parker in trespass for taking his horse and prayed judgment for two thousand dollars.

Parker answered, alleging, first, that the horse was worth only fifty dollars; second, denying all the allegations of the petition, and third, pleading that he distrained and sold the horse for fifty-two dollars, as county treasurer of Brown county, Ohio, for non-payment of taxes due from the plaintiff upon his personal property, the tax duplicate having been placed in his hands by the auditor of the county. To these answers there was, by way of reply, filed a general denial.

At the time of the trial, the defendant, his counsel and witnesses were all absent, and a jury was called, impanelled, sworn and tried the cause upon the evidence adduced by the plaintiff, the defendant being in default by failing and neglecting to be present and prosecuting his defense. The jury rendered a verdict in favor of the plaintiff for $1,600.

During the trial term, after more then three days had elapsed, the defendant, by his counsel, appeared in court and filed a motion to set aside the judgment and verdict, because they were ignorant of the time of the trial, and but for such ignorance they would have been present and defended it. They stated the facts supported by affidavit, which they claimed justified such non-attendance at the trial. They also alleged that they had a complete defense to the action, because of the truth of the allegations contained in their third answer, which they supported by affidavits. They also averred that the horse was only worth fifty dollars and supported the same by affidavits.

The plaintiff filed no counter affidavits.

The motion was overruled by the court and the judgment upon the verdict was permitted to stand.

At common law a court had full power over its judgments and entries during the term at which they were entered and could set them aside when, from any cause, they were improperly entered.

191 *We think that section 299 of the code, requiring a motion for a new trial to be filed within three days after the verdict, etc., is rendered, does not apply when such verdict, etc., has been rendered in the absence, at the trial, and upon the default or failure to prosecute or defend, of the party against whom the same may be rendered, and who makes a motion to set aside and vacate the same. We think that, in such case the code is silent and the common law rule prevails. Sections 301 and 299, which are in *pari materia*, relate solely to *new trials*, while the whole of section 534, except the first paragraph, relates to *vacating* and *modifying* judgments *after* the term upon certain specified grounds, which have mostly to be taken advantage of by petition and summons as in the commencement of an action. Surely these can be taken advantage of upon *motion* if that be made during the term at which such proceedings were had or entered. Why compel the party to wait until the term expires and avail himself of his right by petition?

We think the defendant made a showing sufficient to require the judgment to be set aside and vacated.

It does not appear from the record in this case that the court had no jurisdiction of the subject of the action by reason of section 47, part 2 of the code; for the reply denied that the act was done by the defendant in virtue or under color of his office. This is a question of fact to be tried by a jury under proper instructions from the court. We now express no opinion upon the question as to whether such defense be maintainable to defeat jurisdiction or not. If all true it states a defense upon the merits. The judgment will be reversed with costs, and it and the verdict vacated and set aside.

The defendant will be required to pay all the costs of the trial term.

OC'onnor and Tilden concur.

White & Waters, Attorneys for Plaintiff in Error.

Thos. Powell, for Defendant in Error.

---

235 CONTRACTS—ESTOPPEL—STATUTE OF FRAUDS.

[Superior Court of Cincinnati, General Term, January, 1875.

JARED W. POST v. THOMAS B. WILSON.

Yaple and O'Conor, JJ.

1. P. and W. were each owners of stock in, and creditors of a street railroad corporation in large amounts. The corporation had issued a large amount of bonds, secured by first mortgage upon the property and franchises of the corporation, to enable it to construct and equip the road. P. and W., fearing that such bonds would get into the hands of purchasers who would use them and the mortgage to secure their payment in such a way as to compel the sale of the road and franchises of the corporation, and thus sacrifice their stock in the corporation and the debts it owed them, agreed with each other that, W., who had the means to do so, and P. not, should purchase such bonds and pay for them, and that they should use them for their mutual benefit, with the right given to P., within a reasonable time, to pay W. half what the bonds cost the latter, with interest,

and then to become the owner of half of them and half of the mortgages; and W., with the aid and assistance of P., did purchase and pay for such bonds in real estate, the value of which P. and W. never were able to agree upon, both knowing at the time of their agreement all the facts affecting the validity or invalidity of such bonds; and P. thereafter made exertions, by means of such bonds, to protect the interest of both—traveled from New York city to the city of Cincinnati for that purpose, and there joined with W. in a suit to enjoin a party from an unlawful interference with the rights and property of the corporation, in an affidavit for injunction in which action P. swore that W. was the owner of such bonds secured by such mortgage, and made that fact a ground for the interposition of the court by injunction, and thereafter by letter urged the counsel of both parties to have the road brought to sale upon such mortgage, and, by letter, requested W. to do so.

Held: That P., in subsequent proceedings in such injunction suit, to sell the road upon such mortgage to satisfy such bonds, is *estopped* from denying their validity in the hands of W.

2. That upon such trial between P. and W. as to their respective rights and interests in such corporation by reason of their being stockholders and creditors, and by reason of the purchase by W. of such mortgage bonds, it is competent for the court to find the value of the real estate paid by W. for such bonds, and to give to P. the right, on payment to W. *of the one-half of such value, with interest, to have from W. the half of such bonds and the interest due upon 236
them, and their half interest in the mortgage securing them.

3. The court, in such case, has power to fix a reasonable time within which P. must exercise his right of repurchase by paying to W. such half cost price, with interest, and in default of doing so, that all shall belong to W.

4. Where such corporation is greatly indebted, its debts pressing, and its affairs becoming desperate in consequence, and a speedy sale and confirmation are desirable, or almost indispensable; seventy days within which P. shall exercise his right of purchase of half the bonds is not an unreasonable short period of time, and if the court fixes that limit, its action is not a palpable abuse of its discretion, such as to authorize a court of errors to reverse its order in that respect.

5. P.'s efforts in assisting W. to purchase such bonds, and his acts thereafter to secure and protect their joint interests under his agreement with W. to purchase half the bonds from him, by instituting such suit, is sufficient to take his contract with W. (it being verbal) out of the statute of frauds of the state of New York, that statute requiring such contracts to be in writing, or partly performed by the payment of some part of the purchase price.

YAPLE, J.

This is a proceeding in error, *first* on the part of Post, who was a large creditor and stockholder in the Mount Auburn Street Railroad company of Cincinnati, a corporation, to reverse a judgment and decree of this court, rendered in special term in August, 1872, by which the validity of forty seven (47) bonds of $1,000 each, issued by said corporation and secured by a mortgage on the property of the railroad company, executed to one J. M. Ballestein, as trustee, together with the accrued interest thereon, were adjudged valid, and the mortgage a lien upon such railroad and property, and on account or which the same were ordered to be sold in case of the non-payment of the amount found due thereon. Forty of such bonds were found by the court to have been owned by Wilson, six by one Henry G. DeForest, and one by Thomas A. Nesmith.

Secondly—It is a petition in error by Wilson against Post to modify so much of said judgment and decree as found that Wilson purchased the forty bonds to protect his interests and Post's as stockholders and creditors of such corporation, under an agreement between them that Post, within a reasonable time after the purchase, should pay Wilson half the purchase price paid by Wilson for the bonds, and then have and own half of them, and which decree gave Post seventy days after its

entry to make such payment, to-wit: the one-half of $15,350.83, the amount, with interest, paid by Wilson for the same, the court finding that Wilson paid therefor real estate of the value of $13,000.

237 Wilson claims that such agreement between them, if made, remained *wholly executory, and was therefore invalid by the statute of frauds of the state of New York, where the alleged contract was made; that the manifest weight of the evidence was that no such contract was made, but established clearly that he bought such bonds solely on his own account, and that the value, $13,000, which the court fixed as the value of the real estate paid by him for the bonds, was entirely too little.

The large amounts of stock respectively owned by these parties, and the amounts in which the corporation was indebted to them respectively, neither disputes. There was issued by the corporation, besides these bonds, $300,000 of stock, nearly all of which was owned by Wilson and Post.

Post claims that the bonds are illegal, or invalid, because: *first*, they were ordered to be and were issued by a board of directors, none of whom, who were disinterested; were stockholders of the corporation, and without the authority of the stockholders; *second*, that forty-six of them were issued to Hurxtall & Sears, contractors, in place of one Roberts, the original contractor, to construct the road, Hurxtall & Sears being at the time they were authorized and issued, members of the board of directors, and participated in its action in that behalf, when they had assumed Roberts' contract to construct the road, and by his contract he was to complete the same for $297,000 of the stock of the corporation, which he and Hurxtall & Sears have received in full; *third*, that Wilson was a purchaser of the bonds, with notice of the facts rendering them invalid; and, *fourth*, that the mortgage given to secure them was not negotiable, and the bonds being invalid, it could be no lien upon the property of the corporation under the rule of law settled by the supreme court of this state, in the hands of anybody, *bona fide* purchasers for value of the bonds or others—all such *bona fide* holders of such bonds being mere general creditors of the corporation, and, hence, that an order of sale upon the mortgage given to secure the bonds, and making the same a lien thereon in preference to other creditors, could not be rendered in favor of anybody.

Wilson claims that he had no notice of any facts charging him with notice of the invalidity of the bonds; that they were not invalid, but valid, and the mortgage given to secure them a lien and the prior lien upon the property of the corporation; that Hurxtall & Sears, to whom they were issued for the construction and equipment of the road, laid out cash and expended labor, dollar for dollar, for all of them; that they did not merely take Roberts' contract and agree to complete the work of construction in his stead, but that they bought his stock and then agreed with the company to do part of his work, to the amount of what they still owed him for his stock, therefore received by him of the company,

238 the company to pay them the residue; that they *agreed with the company to do much more than Roberts was bound to do by his original contract; that the company expressly agreed with them, that, if they would do so, it would secure them for so doing. Roberts having become embarrassed and unable to comply with the terms of his contract; that this was before Hurxtall & Sears, or either of them, became directors of the company; that after they had completed their work upon the

basis of the above agreement with the company, and had become entitled to a sum of money equal to the amount of such forty-six bonds, at par, the board of directors, they being members and voting therefor, though a majority of such board, without them, did also vote as they did, voted them that amount of bonds payable in one year, but afterward such bonds were recalled with the assent of the parties, and the present bonds and mortgage given in their stead, upon the same vote of the board of directors; and that afterward, and after both Hurxtall & Sears had ceased to be directors of said company, the board of directors ratified all that had been done in issuing such bonds and executing such mortgage. Upon this alleged state of facts, it is claimed that the issuing of such bonds and the execution of the mortgage to secure them were valid and binding in law, because, had it not been done, Hurxtall & Sears could have maintained against the company a bill for the specific performance of such agreement to secure them for such expenditures and work, and also because the corporation ratified the issuing of the bonds and the execution of the mortgage, after Hurxtall & Sears had ceased to be directors.

It is also insisted that Post, by his acts in this case in this court and by his acts and conduct with and toward Wilson out of court, has *estopped* himself from denying the validity of these bonds and mortgage as against Wilson, the company and all the other parties in the case acquiescing in their validity; the corporation, in fact, in its answer expressly admitted the validity of the bonds and mortgage, and prayed for a speedy sale of the road to satisfy the same and the debts of the company, it being unable to pay them, etc.

OPINION.

In the view we take of the case, we deem it unnecessary to determine whether these bonds and the mortgage executed to secure them were valid or not. If that question were alone presented by the record, it would, we may properly say, be one of both difficulty and doubt. We, however, think that upon the facts of the case both Post and Wilson, as against each other, are estopped from denying their validity, and no other party interested has done so. The evidence is very voluminous, and we can only state, generally, its effect.

*1. It is not clear whether Wilson was directly influenced by Post to purchase them from Bloss, their holder and owner at the 239 time of such purchase, upon the assurance by Post that they were valid, or upon the assurance of Judge Taft, the president of the corporation, that they were so, or whether Wilson was advised by Post of their alleged invalidity. On this subject there is a direct conflict of testimony between Post and Wilson, and the court below did not expressly find upon the fact.

2. It is clear upon the evidence adduced by both that, before and at the time of such purchase of such bonds by Wilson from Bloss, he, Wilson, and Post, owned respectively a large portion of the $300,000 of the capital stock of the corporation, Wilson afterward buying more thereof from Roberts, so that between them, they finally came to be the owners of nearly all such stock. It is equally clear that they were aware of the issuing of the bonds and the execution of the mortgage to secure them; that they feared they would get into hands that could enforce them, and thus endanger their stock or wholly destroy its value, besides

sacrificing their respective claims as creditors of the road for moneys advanced by them to pay its debts; that Post had not then the funds in hand to spare to purchase any of the bonds, and thereupon requested, advised and assisted personally, Wilson to do so upon terms as cheap and favorable as possible, with the understanding and agreement between them that Post, upon paying to Wilson half of the value of the purchase price paid by the latter for them within a reasonable time, should become the owner of one-half of them; that, in the meantime, they were to be so used for the benefit of both as to preserve to each his interest in the corporation and its property and road; and that the cash value of the real estate given by Wilson for the bonds was not easy to determine, but was from time to time attempted to be fixed by the parties but without their agreeing, and also Post sought to get Wilson to take for such half stocks in an odorless rubber company at a certain valuation, which Wilson never agreed to do. But Wilson himself testifies that he told Post that he would let him have half the bonds upon his paying half their cost and that he was willing to do so.

3. It is also clear that the affairs of the corporation became so desperate by reason of its indebtedness that it was in danger of being sold and the stock and interests of Post and Wilson in a great measure or wholly sacrificed; that Post, before December 4, 1869, came out from the city of New York to the city of Cincinnati to look after his and Wilson's interests in the road, growing out of Wilson holding these bonds, subject to Post's right to purchase half of them from Wilson upon the terms of their original agreement, as well as to their interests as stockholders in and creditors of the corporation; that, on the last *named day, Post
240 and Wilson instituted a suit in this court to enjoin Thomas A. Nesmith, president of the corporation, from doing certain acts prejudicial to its interests and to theirs, in the petition in which action sworn to positively by Post as well as Wilson, it is said: "And that said Thomas B. Wilson is the owner and holder of forty thousand dollars in amount of the mortgage bonds of said company," which is the very action, No. 25,403, in which this judgment and decree, here sought to be reversed, was rendered—Ballastier, the trustee, the Mt. Auburn railroad company, De Forest, and others being made parties and filing cross petitions, and in which Post, subsequently, on October 9, 1871, filed his answer and cross petition against Wilson and to which Wilson replied taking issue with Post, and the determination of which issue is now complained of by both parties.

In his answer and cross petition, filed nearly two years after he had invoked the aid of the court in the same action, to give him and Wilson relief on account of Wilson being the owner of such mortgage bonds, he, at length, gives the history of the corporation and the issuing of these bonds and the execution of the mortgage to secure them and alleges their invalidity; and he also avers that these bonds were purchased by Wilson, in pursuance of an agreement between them, in November, 1869, on the joint account of both, to protect their stock and claims as creditors, *but not to be enforced against the road, etc., and prays, among other things*, to have the bonds and mortgage declared invalid, *and for other proper relief, etc.*, not asking to be permitted to pay Wilson half his advance and to become half owner of the bonds and mortgage. But on January 25, 1870, but little more than two months after Wilson's pur-

chase of the bonds and the institution in this court of the suit, Post wrote to Judge Tilden, then the attorney of both of them, as follows:

"Mr. Wilson and myself have *to-day* united our interests in the Mount Auburn railroad company, and we both desire this property and franchises to be sold as soon as possible for the non-payment of *interest* on the first mortgage bonds now past due, and we will then commence anew." On April 2, 1870, Post wrote, urging the sale of the road upon the mortgage to Wilson from Cincinnati, and he has in many other ways acted with Wilson in asserting their validity. He never did otherwise until he and Wilson failed to agree upon the price which he should pay Wilson for the half of them. We think he is clearly estopped from denying their validity in the hands of Wilson.

4. While Wilson was the owner of the bonds and of the mortgage to the extent that it secured them, we think that upon the testimony of both Post and Wilson, Post had the right to purchase half of them from Wilson within a reasonable time *by repaying Wilson the value of one-half of their cost with interest. This left Wilson their owner 241
until Post did so, and nothing said or done by Post was inconsistent with such state of facts; the difficulty always was how much and in what Post should pay—about this Post was always trying to negotiate with Wilson.

We think Post partly performed his agreement, so as to take the same out of the statute of frauds of the state of New York, by coming to Cincinnati to protect their mutual interests by the institution of the action against Nesmith to preserve the value of the bonds and mortgage which the original agreement between him and Wilson in relation to the purchase of the bonds contemplated that he might do.

5. The value fixed by the court upon the real estate Wilson gave for the bonds was, in our opinion, low enough, but not clearly too little, and we do not feel authorized to disturb this finding, as the parties could not agree upon what Post should pay Wilson, the date of this decree, August 3, 1872, was the earliest period at which Post could pay it. The court fixed the reasonable time in which he should so pay at seventy days thereafter. This was a matter fairly within the discretion of the court, and that discretion can not be reviewed upon error. In view of all the evidence and the circumstances the indebtedness and condition of the road, Post, by availing himself of the right given him by this decree, could have saved all that it was possible to save of his interests as a stockholder in and creditor of the corporation. With less stock than Wilson, though a somewhat larger creditor, he could have secured the one-half of the road, etc., free from its debts and stock in other persons' hands. He did not file this petition in error until December 21, 1872, long after the seventy days had expired, and he never executed any undertaking to stay proceedings under the decree, which was a decree, among other things, for the sale of the road, its property and franchises. Wilson filed his petition in error to modify the decree, on January 4, 1873. If Post has not availed himself of his rights under this decree, which we can not know judicially, it is his own fault. We find no error in the record, which we are to look at as of the date of August 3, 1872. It seems to us the decree was not only what the law warranted upon the facts, as against both these parties, but was required thereby. The undetermined right of Post to subrogation to De Forest's rights in consequence of the payment to the latter of his decree for the amount of certain interest coupons due upon the six bonds held by him, is not before

us. The court below did not decide, but reserved that question for decision in the further progress of the cause.

242 *The judgment will be affirmed, each party to pay his own costs made in this his proceeding in error.

Lincoln, Smith & Stevens, for Post.

Hoadly, Johnston & Colston, and Wm. Austin Goodman, for Wilson.

Tilden, J., having been of counsel in the case did not sit.

SUMMONS.

[Superior Court of Cincinnati, Special Term, May, 1876.]

CATHARINE STAPLETON, ADMRX., v. E. P. REYNOLDS, ET AL.

A summons to appear and answer in a civil action may be served on Sunday.

STATEMENT OF CASE.

One of the defendants, W. B. Shute, was served on Sunday, April 23, 1876, with a summons in this action, which is a suit to recover damages for causing the death of plaintiff's intestate. The summons was issued and placed in the hands of the officer upon a secular day. The defendant Shute made a motion in due season to set aside said service of summons on the ground that the service of said summons was void, because made on Sunday. The motion was resisted by plaintiffs, on the ground that the service was good though made on Sunday. In connection with the motion an affidavit of the officer serving the summons was filed, tending to show that said Shute was a non-resident of the state of Ohio, and came into the state late on the Saturday night preceding the day when the summons was served, and was going beyond its border the Sunday night following.

Hoadly, Johnston and Colston, for the plaintiff in support of the service of the summons argued.

243 * Is service of a civil action on Sunday good by the laws of Ohio?

We claim the service is good.

Throughout Christendom in early times the whole year I was one continued term for hearing and deciding causes. Christian magistrates, to distinguish themselves from the heathen, who were extremely superstitious in the observation of their *dietfasti et nefasti* went into a contrary extreme and administered justice on all days alike—Sunday and every other day. But when the church became dominant it interposed and exempted from the tumult of forensic litigation certain seasons—and thus we first obtained terms of courts—and also prohibited holding court on Sundays and certain feast days. This prohibition was made by a canon in the year A. D., 517—before the Saxon invasion—and was incorporated in the Theodosian code. When the constitution of England came to be settled, the terms of court—being under control of the clergy—were appointed with an eye to these canonical prohibitions—3 Bl. Com. 275, 6.

These canons and constitutions were all confirmed by William the

Conqueror and Henry the Second, and so became part of the Common Daw of England, 3 Burr, 1597–8–9, 1600–1601.

But these canons referred only to judicial acts and not to ministerial acts. The canon was "*Nullus espiscopus vel infra positus die dominico causas judicare præsumat.* The settled construction of this Canon Law was that it applied merely to judicial acts—*judicare causas*—Mackalley's case, 9 Coke, 67.

It was resolved in that case that no *judicial* act ought to be done on Sunday; but that *ministerial* acts may be lawfully executed on Sunday—*id.* 2nd Resolution, p. 67 b. See also 14 New Hampshire, p. 136–137. Also 17 Pick. 109

From this it follows that by the common law, business not in the nature of a *judicial* proceeding can lawfully be done on Sunday, except so far as it is prohibited by statute law. Drury v. Defontaine, 1 Taunt, 136.

Such is the state of law at the present time.

We come now to the statute, 29 Car., 2 C. 7, sec. 6.

Until this statute the above distinction between judicial and ministerial acts was always recognized, and it was always held until that statute that civil process might be served on Sunday, being a ministerial act. That statute prohibited the service or execution upon the Lord's day of "any writ, process, warrant, order, judgment or decree, except in cases of treason, felony, or breach of the peace," and declared "that the service of every such writ shall be void."

But this statute is not in force in Ohio. On the contrary, the common law rule which made service of summons on Sunday *good— 244
being a mere ministerial act—applies to this case, unless it has been changed by some statute.

We claim with great confidence that there is no statute in this state which changes the common law in the particular above referred to.

The statute law of Ohio on this subject is found in 1 S. and C., p. 84, sec. 6 and sec. 8.

This act was passed February 24, 1831, and took effect June 1, 1831.

This act made certain persons therein named privileged from arrest on civil process. By it all persons were privileged from arrest on civil process on Sunday and the 4th of July. But sec. 8 of the act provided that nothing in the act should privilege any person named from being served at *any time* with a summons or notice to appear.

Upon this statute it is to be observed that arrest on civil process is a *ministerial act*, and there was no use of passing a statute to exempt from arrest in civil suits on Sunday unless there was a liability to such arrest before the statute. Why exempt from arrest on civil process on Sunday if the arrest was void? This statute has been in force ever since December 6, 1799. See 1 Chase Statutes, p. 257, sec. 4 and sec. 6. Ibid., p. 494, Chap. LXXX., sec. 4 and sec 6.

This statute is a clear indication that but for its provisions, which means at the common law, persons could be arrested on Sunday on civil process. Otherwise the statute was unnecessary.

Secondly. This statute applies only to exemption from arrest on Sunday, and expressly provides it shall not privilege persons therein named from being served with summons at any time. This is a clear recognition that while every person is privileged from arrest on Sunday

in a civil action, no person is privileged from being served with a summons on Sunday.

This seems to us clearly to dispose of the question.

Nor does the "common labor" statute alter the correctness of our position. That act was passed February 17, 1831 (S. and S. 289), by the same legislature that passed the act above mentioned, and just seven days before the passage of that act. The "common labor" act subjects to a fine not exceeding five dollars any person found at "common labor" on Sunday.

Does this statute render void the service of a summons in a civil action on Sunday? Clearly not. If this statute make service of summons on Sunday void, it would also make an arrest on civil process void if done on Sunday. If this act make arrest on civil process on Sunday void, why did the same legislature, seven day *after*, pass a law to exempt persons from arrest on Sunday?

245 **Thirdly.* The "common labor" statute has received a critical examination, and has been pretty thoroughly dissected by our supreme court in Bloom v. Richards, 2 O. S., p. 387.

We are clearly of opinion that a sheriff in serving a summons on Sunday cannot be said to be a person found at "*common labor*" within the meaning of this statute.

In the case of Bloom v. Richards the court held that "labor" meant "manual exertion of a toilsome nature." Service of summons cannot amount to "manual exertion of a toilsome nature," and is not "common labor."

We think the service is good, and that the motion ought to be overruled.

YAPLE, J.

Motion to set aside service of summons upon W. B. Shute defendant, such service having been made by the sheriff upon Sunday. This motion is made by one of the defendants, W. B. Shute, to set aside the service of the summons upon him by the sheriff, because the same was made on Sunday, the 23d day of April, 1876. The only provisions made by the statutes of Ohio bearing directly upon the subject are found in sections six (6) and eight (8) of the statute of 1831, 1 S. & C., p. 84, entitled: "An act privileging certain persons from arrest and imprisonment." Section 6 provides: "That no person shall be arrested * * * on the first day of the week commonly called Sunday," etc. And section 8 provides: "That nothing herein contained shall be so construed as to * * * privilege *any person herein named from being served at any time with a summons or notice to appear.*" These provisions relate to civil actions and process. This statute would by its terms appear to expressly authorize the service of a summons in a civil action upon Sunday, and there is no statute forbidding such service. In the early history of Christianity courts were held on Sundays as well as upon other days. For the history of the fact and the reasons therefor, see 3 Black. Com. 275, 276.

William the Conqueror and Henry II. forbid the exercise of *judicial* functions upon Sunday, confirming the Theodosian Code of the year 517. Afterward, in Mackalley's Case, 9 Coke's Rep. 66, it was resolved by all the judges of England, "that no *judicial act* ought to be done on that day, Sunday, but *ministerial acts* may be lawfully executed on the

Sunday, for otherwise peradventure they can never be executed, and God permits things of necessity to be done that day, and Christ says in the Gospel, *Bonum est benefacere in Sabbatho.*"

In Swann v. Broome, 3 Bur., 1595–1602, Lord Mansfield *rend- 246
ered a most careful and learned decision adhering to the law as laid down in 9th Coke.

The doctrine of the common law as laid down by Coke and Mansfield has been recognized in this country, Johnson v. Day, 17 Pick., 106. The statute of Ohio forbidding common labor on Sunday, passed at the same session and about the same date as the statute above quoted in reference to arrests for debt has no application to the case, the subject matter of the two statutes is entirely distinct. Exemption from arrest for debt on Sunday was a change of the common law. The service in this case must then be held good, and the motion overruled. If the law be objectionable, it is for the legislature and not for the courts to change it. Certainly every one ought to have Sunday for worship, or for rest and relaxation from all business cares, and under ordinary circumstances no civil writs or process should be served on any one upon that day. But the ministerial officer holding a writ is to judge whether or not it is necessary to serve it on Sunday to prevent the law being defeated. We read that God rested on the seventh day, not that he slept. It is due to the officer in this case to say that the reason he gives for serving the writ on Sunday is, that the party sought to avoid service by coming to the city very late on Saturday nights and leaving on Sunday nights. Be this as it may, he had the right to determine whether he ought to execute the ministerial act of serving the party on Sunday or not. The court will not inquire whether he was mistaken. Motion overruled.

Hoadly, Johnston, & Colston, for Plaintiff.

Sayler & Sayler, for Defendant.

---

*BILLS AND NOTES. 257

[Superior Court of Cincinnati, General Term, October, 1876.]

DATER v. SIMON & CO.

O'Connor, Tilden and Yaple, JJ.

Where a promissory note, dated at a certain city, with the place of payment in blank is delivered by the indorser to the maker, there is an implied authority given to the maker to fill the blank by inserting any place of payment in the same city.

ERROR.

O'CONNOR, J.

This is a proceeding in error to reverse a judgment rendered at special term.

*The action below was upon the following promissory note: 258

$5,000. CINCINNATI, Oct. 6, 1874.

Ninety days after date we promise to pay to the order of Gilbert Dater Five Thousand Dollars, payable at the Fourth National Bank.

[Signed] P. WEVAND and D. JUNG.

[Indorsed] GILBERT DATER.

Weyand and Jung made no defense. Gilbert Dater filed an answer, in which he denied liability for the reason, as shown by the testimony, that after he indorsed the note, and before the same had been purchased by Simon & Co., the words "Fourth National Bank" had been added after the words "payable at," that this had been done without his knowledge or consent, and claimed it was a material alteration of his contract of indorsement, he being an accommodation indorser, and consequently discharged him.

It appears by the bill of exceptions that the note in controversy and one other note at four months, were drawn on blank printed forms, leaving the words "payable at" and the blank following unchanged, and the blank unfilled. That two or three days after Dater indorsed these notes, Jung, of the firm of Weyand & Jung, defendants below, took the note sued on to Simon & Co. to be discounted, and Max Thurnauer, of the firm of Simon & Co., plaintiffs below, refused to discount it unless it was made payable in bank, and asked Jung to get a new note, payable in bank.

This Jung promised to do, saying Dater lived in the country, and that he would see him. Jung took the note to his place of business, and believing that he had the right to fill the blank, told his clerk to insert the words "Fourth National Bank" after the words "payable at," which the clerk did, and the next day Jung again called on Simon & Co., and seeing Thurnauer said, "There is your, note," or, "There is a bankable note." Thurnauer asked no questions, but took the note and discounted it. All parties agree that neither Simon & Co. nor Dater knew that Jung filled the blank as stated. The note was duly protested for non-payment, and Dater duly notified.

Some time after the discounting of this first note, Jung took the second note before mentioned to Dater, and asked him to fill the blank by making it payable at some bank. This Dater refused to do, and retained the note.

Upon this evidence the court below gave judgment for Simon & Co., the plaintiffs below, for the amount claimed. This judgment it is now sought to reverse.

The plaintiff in error, Dater, relies for a reversal of the judgment in the case of Sturgis & Hale v. Williams, 9 Ohio St.
259 *Rep., 443, in which the court held that "when a note, payable generally, is made and indorsed in blank for the accommodation of the maker, and at the time of its discount is altered without the knowledge or consent of the indorser, by the *interlineation* of a particular place of payment, such alteration is material, and discharges the indorser"

It is to be noticed in the case cited that the alteration was made by interlining, in the body of the note, the words, "payable at the office of Sturges & Hale," and not by filling up a blank in a printed form or written note, and which blank was the appropriate place for inserting the place of payment. And so the court say in concluding its opinion: "As to the unauthorized character of the alteration, it may be sufficient to say that it is admitted to have been made without the knowledge or expressed consent of the defendant, and as the note, when indorsed, *was without blanks*, full and perfect in all its parts, there is nothing apparent from which such consent can be inferred or presumed."

We cannot, therefore, regard this case as an authority for the plaintiff in error, as it suggests, at least, that where blanks are left in a prom-

issory note, an implied authority to fill such blanks may be inferred as against the maker and indorser, and in favor of any one legally entitled to the note. This is the only case cited by the plaintiff in error.

In the case of McGrath v. Clark, 56 New York, 34, cited by defendants in error, it was held that where the "defendant indorsed a promissory note with the time and place of payment in blank, and delivered the same to the maker, who filled the blanks, that the delivery of the note to the maker gave him an implied authority to fill the blanks by inserting any time and place of payment he chose.

In Woolfolk v. Bank of America, 10 Bush, 504, also cited by defendants in error: "That if a bill is complete, any alteration in a material part without the consent or authority of the parties to it, renders it invalid in the hands of an innocent holder, as well as of one who takes it with knowledge of the fraud. But when blanks are left, the party who is so confiding as to affix his signature to such paper, investing those for whose accommodation it is made with the power to fill the blanks, as well as the opportunity to practice fraud, must suffer the loss rather than an innocent holder."

In Trigg v. Taylor, 27 Mo., 547, it was held "that if a bill or note is so negligently drawn, with blank spaces left for the addition of other words or figures, so that alterations may be made without exciting suspicion, the loss ought to fall upon the party in fault."

*No authority has been cited affecting the conclusions of the above cases, and we are of opinion that they correctly state the law. 260
It is not claimed that Simon & Co. knew of the alteration having been made by Jung, and it follows from the above authorities and our view of the law that they were not guilty of negligence in omitting to inquire of Jung, when he returned with the note, whether Dater had made or authorized the alteration.

The judgment of the court at special term must, therefore, be affirmed.

Affirmed.

Long & Kramer, for Plaintiff in Error.

D. M. Hyman, for Defendant in Error.

HUSBAND AND WIFE—MORTGAGE.

[Superior Court of Cincinnati, General Term, October, 1876.]

†PATRICK ET AL v. LITTELL & CO.

O'Connor, Tilden and Yaple, JJ.

1. A real estate agent and a husband and wife, the wife holding the legal title to the land, agreed in writing that the real estate agent should procure and pay a competent person to examine and report to him upon the title of such land, and, if satisfactory, he would procure for them a loan of money upon it, they to pay the examiner of the title and a named commission to such real estate agent; and that to secure such loan they would execute to the lender of the money a deed in fee simple for the land and take from him a ten years' lease of the property at a named rent, amounting to eight per cent. per annum upon the

†This case was affirmed by the supreme court. See opinion, 36 O S., 79. The decision was followed in 36 O. S., 517, 523.

money loaned, and also pay all taxes, charges and assessments thereon, with the privilege to redeem the land at the expiration of the lease by repaying the sum loaned. The husband and wife refused to perform the agreement and were sued by the agent for his commission and to recover the expenses of examining the title.

261 *The husband and wife answered, that the loan was to be secured by such conveyance and lease instead of an ordinary mortgage, with the intent and purpose on the part of the plaintiff and the proposed lender of the money to keep the same from taxation and, thus defraud the state of its revenue.

Held: That the answer stated in defense, such a conveyance and lease being a mere mortgage, and a form of mortgaging as much recognized and sanctioned by law as any other method; that it would be a credit owned by the lender, which he would be bound to list for taxation the same as any other credit, and if he did not his fraud upon the revenue would necessarily begin and end when called upon for the return of his property for taxation and he should neglect to do so.

2. The plaintiff's petition averred that the contract with the plaintiff related to the separate estate of the wife and was for the benefit thereof—that she held the legal title to the property. Neither husband nor wife denied this in their answer. At the trial the husband testified, no objection being offered to his testimony, that he owned the property, the legal title only being in his wife and that the money to be borrowed was for himself, but that the plaintiff did not know such facts. The court rendered a personal judgment against the wife, as well as the husband, and made the same a charge upon her separate estate.

Held: That under the 28th section of the code as amended in 1874 (71, O. L., 47) this was correct; the entire transaction being since such amendment, and that the court in its discretion properly disregarded such testimony of the husband, as the wife who was sued personally as well as the husband, being in default in that respect, admitted such allegation.

YAPLE, J.

This is a proceeding in error prosecuted here by Patrick and wife seeking to reverse a judgment rendered by this court in special term against them and in favor of Littell & Co., for $162 and costs.

Littell & Co., the plaintiffs below, sued Patrick and wife for an alleged breach of an agreement, which was in these words:

"CINCINNATI, Oct. 9, 1874.

"*To Joseph H. Littell & Co.:*

"You are hereby authorized to negotiate for us a loan of $10,000 on our house and lot, 50x136, known as No. 534 Court street, between Baymiller and Freeman streets, on a basis of a ten year lease, we to give a good and sufficient deed of general warranty, free of dower and clear of incumbrances, and to receive a lease for ten years with privilege of redemption at the expiration of said term—we to pay ground rent at the rate of eight per cent.—that is to say $800 per annum, payable quarterly, and all taxes and assessments that are or may be levied against said property. We also agree to pay attorney's fees for examination of title and your commission for negotiating loan—commission to be one per cent.

(Signed.) "J. W. PATRICK,
"RUTH A. PATRICK."

262 *Upon this agreement the plaintiffs averred that they paid an attorney $50 for examining title, which title was approved, and secured a party who was ready and willing to make the loan as stipulated for in such agreement; but that the defendants when requested to comply with their agreement wholly refused to do so or to comply with any part thereof, whereby there was due to them from the defendants the sum of $150 with interest, etc.

The petition then averred that the above "contract so executed by the said Ruth A. Patrick with her said husband related to her separate estate for the benefit thereof, and is a charge thereon—that said Ruth A. Patrick held the legal title to said property in said contract described."

The answer admitted the making of the contract set forth in the petition and that Ruth A. Patrick was a married woman, the wife of John W. Patrick.

The answer then sets up "that a practice has prevailed in the city of Cincinnati for some years last past of loaning money upon conveyance of real estate absolute upon its face, the grantee therein executing a lease with privilege of purchase

for the amount of the loan and binding the lessee to pay all taxes, the amount of the rent being the amount of the interest agreed to be paid by the borrower; that the object and purpose of putting the transaction in the form described is to enable the lender to evade the payment of taxes; and that the transaction contemplated in the contract stated in the petition was of this character, the design of said Littell & Co., and the principal for whom they were acting in that behalf, the lender of the money, was to enable the lender of said money to obtain full legal interest upon the same, and to escape the payment of taxes, the said lender appearing upon the records of the county to be the owner of the real estate, and omitting and intending to omit to make any return of said moneys for taxation."

To this answer the plaintiffs filed no reply.

The case was tried partly upon facts agreed to by the parties in open court and upon testimony not objected to or sought to be contradicted by either, and in which there was no conflict.

The defendants admitted, among other things, "that the plaintiffs had the sum of $10,000 ready to loan to them in pursuance of the contract, and that they had paid an attorney $50 for examining the title to the premises named in the contract, which was a reasonable sum for such service; and that the title to the premises was in Ruth Ann Patrick, defendant."

C. W. Horne's deposition was read in evidence by the plaintiffs. He was the person whom the plaintiffs had got to agree to lend the money, and fully proved the facts stated in the *plaintiff's petition. He was not asked and did not state either in his direct or cross-examination, why the loan was made in the form 263 prescribed by the contract, nor did any other witness. The whole was left to rest upon the averments of the defendants' answer. The defendants called as a witness the defendant, John W. Patrick, who testified "that the said premises belonged to him although the legal title was in Ruth Ann Patrick, his wife, and that the money proposed to be borrowed through plaintiffs was for his use; but the plaintiffs knew nothing as to that." To this testimony the plaintiffs did not object, nor did they in any way seek to contradict it.

The judgment entry found "that the defendants, John W. Patrick and Ruth A. Patrick, are indebted to the plaintiffs as claimed in the petition in the sum of one hundred and sixty-two dollars, and that said debt is a charge against the separate estate of said Ruth A. Patrick. It is therefore considered by the court that the plaintiffs recover of the defendants the said sum of $162, and costs of suit; and that said judgment is a lien upon the separate estate of the said Ruth A. Patrick."

To this judgment the defendants excepted, and filed their motion for a new trial, which being overruled they filed their petition in error here to reverse it.

Two grounds of error are relied on in argument, the motion for a new trial and the petition in error being general: The first is that the transaction was illegal and against public policy, as it was intended, by the form of the security for the loan agreed upon by the contract, to defraud the state of revenue. And the second that no personal or other judgment should have been rendered against the defendant, Ruth A. Patrick, wife of John W. Patrick.

The constitution and laws of the state require all credits of every person in excess of indebtedness to be taxed. Every owner of credits is required every year to return them to the assessor for taxation at their true value in money, under oath; or if not under oath to return them not under oath, in which case fifty per cent. is to be added for failure to swear to their correctness. A deed of conveyance of real estate from a borrower to a lender, and a lease back from lender to borrower at a rent equal to the agreed rate of interest, with a right given in such lease to the borrower to *redeem* within a specified time, the borrower to pay all taxes and assessments (as any mortgagor in possession would be bound to do), is, by the well settled law of this state, a mortgage, the amount of money so secured as much a credit owned by the lender as if the mortgage were in the usual form of a mortgage. And the one form of mortgage is, by the laws of this state, just as legal and proper as the other. *No law or rule of public policy can therefore be violated by securing 264 a loan of money in the form stipulated for in this contract. And if the papers were executed and put upon record in the form stipulated for in the contract, the record would show, *prima facia*, that the lender held only a mortgage on the property, Patrick and wife would have made an absolute deed to Horne, the lender, for the property. He would have executed to them a lease for the term of years at a fixed rate of rent, eight per cent., upon the consideration named in the deed with "privilege of *redemption* at the expiration of said term." The word in the contract is "*redemption*," not even "re-purchase." This would show that the transaction could be nothing else than a mortgage.

Take, then, the utmost that the language of the answer can mean, and it amounts only to this: The lender and the plaintiff (not the borrowers as well) had this form of mortgage stipulated for so that when the the assessor should call upon the lender the next and following springs, he could with a clearer conscience, omit or refuse to return this credit for taxation. The entire wrong, the entire fraud, would have to be done then, for until such omission or refusal no law could be violated. The only illegality that could possibly arise would be in a future act or future acts of the lender, not in his taking a legal and authorized form of mortgage, which, when taken, he would be as much bound to return for taxation as any others. Why, suppose a man were to sell a horse, and take a note for his price due in a year, so selling the horse because he intended to conceal the promissory note taken for him from the assessor: could the purchaser of the horse, who purchased in ignorance of such intent, set it up to defeat an action upon the note? Surely not. All the legal wrong that could arise would be when the owner of the note called upon to return his property and credits for taxation should conceal it and omit to do so.

We hold, therefore, that that answer of these defendants states no defense.

As to the second objection, we have to say that the petition which was against both husband and wife, averred that the contract related to the wife's separate estate and was for the benefit thereof—that she held the legal title to the property described. Neither the husband nor the wife, in their answer, denied this, and it was therefore, by both admitted upon the record.

This averment, if a cause of action, was made out for breach of the contract by failure to perform it on the part of the husband and the wife, rendered her liable to a personal judgment under the act of March 30, 1874 (71 O. L., 47), amending the 28th section of the code, the contract having been made in Oc-

265 *tober, 1874, and broken in that mouth, or early in the next November.

The motion for a new trial was by both defendants based upon the grounds that the judgment was against the law and the evidence, and the petition in error simply states that the court below erred in overruling the motion for a new trial, and in rendering judgment against the defendants.

The evidence given without objection at the trial of the husband that he owned the property, and that his wife merely held the title in trust for him, and that the money to be borrowed was for him, still left the wife's admission of record that the facts were otherwise—that they were as stated in the petition.

In this view of the case, we do not think the court was bound to consider such parts of the husband's testimony; that it was discretionary with the court whether it would do so or not. This, we think, is the full extent to which the decision of the supreme court in the case of Hoffman v. Gordon, 15 O. S., *a* p. 218, goes. The court did not do so, because it is obvious from the whole record that the question was not specially urged by either party, the main question being that of the legality or illegality of the transaction.

We think it is now too late to assign the court's failure to consider and credit the husband's testimony in these respects as error.

The judgment at special term will be affirmed.

Judges O'Connor and Tilden concur.

Matthews, Ramsey & Matthews, for Plaintiffs in Error.

J. R. Murdock, for Defendants in Error.

---

266 *WILLS—DEVISE.

[Superior Court of Cincinnati, General Term, October, 1876.]

WILLIAM MURRAY v. SUSAN MURRAY, ET AL.

O'Connor, Tilden and Yaple, JJ.

1. A testator, by his will vested the legal title in fee simple to each of his children in the portion he gave to each, except one, to him he gave as follows: "To my son J. M. I give and devise" (describing the realty) *in trust.* "..... The trustee to have the control of the property to rent and collect rents: and from this revenue to pay all taxes on the property and all repairs necessary to keep the same in a state of good preservation for the benefit of my said son and his heirs,

and to pay to him (J. M.) such sums of money as shall be necessary to clothe and board him. The balance of income remaining from the above reservations to be kept to meet emergencies.....I hereby appoint without security my son G. M. sole trustee," etc.

Held: That the will vested in J. M. the equitable fee simple of the lands devised; that the money accumulating, after taxes, etc., were paid and he clothed and boarded, accumulated for him, he being the equitable owner thereof; and that money paid out of such fund for emergencies could only be paid by the trustee for J. M.'s emergencies.

2. The trustee and all of J. M.'s brothers and sisters, except one, having died intestate and without children, or widows, such one claimed that J. M. had only an equitable life estate in the property, or part of the rents and profits, and, J. M. having died, leaving a will and a widow to whom he devised the property in fee, such surviving brother of J M. claimed the property in fee simple. The widow and devisee of J. M. brought suit under the 557th section of the code to quiet her possession and obtained a decree quieting the same. The defendant, among other things, answered that he had brought suit against such widow to contest the will of J. M. on the ground of his incapacity to make a will and of undue influence, which action was pending and undetermined. There was no denial of this allegation; but the parties went to trial and judgment was rendered without reference to such pending suit.

Held: That the bringing and pending of the action to set aside such will did not affect the title of the devisee under it; and that the court was authorized to render the judgment it did, as the defendant did not ask to delay the trial of the cause until the final hearing and determination of such action, contesting the validity of the will, which, in its discretion, the court might have done. But, as the widow would only have a life estate in the property as heir of J. M. in case his will shall be set aside, and the defendant will inherit the fee, upon petition in error, the court will modify the judgment below so as to permit the defendant to prosecute such action to contest the will and to reap the *fruits of such action, so modified, the judgment will be affirmed with full costs, as the court below would have made the same saving of right had the party called attention to it. 267

YAPLE, J.

This is a petition in error prosecuted here to reverse the judgment of this court in special term rendered in favor of Susan Murray against William Murray.

The action was originally brought by John Murray against William Murray under the 557th section of the code to quiet the possession and title of John against the claims of William to, in lot No. 118, house No. 205, on Elm street, in the city of Cincinnati, describing the lot by metes and bounds.

Pending the action and before the trial John died, leaving a widow, the said Susan Murray, but no children or children's descendants, and a will by which he devised the lot to his widow, Susan Murray, in fee simple. The will has been duly probated and has not been set aside in any proceedings to contest it. Thereafter Susan Murray was made party plaintiff to the suit and filed her supplemental petition to obtain the same relief as prayed for in the petition of her deceased husband.

William Murray answered denying that John ever had more than a life interest in a part of the rents and profits of such realty, averring that he, William, was the owner of the property in fee, which fee and his right to the possession became absolute upon the death of John.

He also averred that a suit had been begun and was still pending in the court of common pleas of Hamilton county to set aside the will of John Murray, deceased, upon the grounds, among others, that he had not legal capacity to make a valid will, and that the will was procured to be made by the undue influence and coercion of Susan Murray of her said

husband while he was so mentally incompetent to make a will. The answer of such suit pending to set aside the will of John was not replied to by the plaintiff; and, therefore, stands admitted upon the record. At the trial it was established that William Murray and John Murray were brothers, children of William Murray, sen., deceased; that the widow of William Murray, sen., deceased, was dead, and also that all his children other than William and John were dead when suit was brought, none of them leaving a will, children or children's descendants, or widow. While there was other testimony admitted without objection as to John's capacity to make a will and some ruled out, to which the plaintiff in error excepts, the only competent evidence was the will of William Murray, sen., and the will of John Murray, deceased. The will of William Mur-
268 ray, sen., gave the homestead, *No. 90 Longworth street, and house No. 87 Longworth street, with all his personal effects to his widow, Esther Murray, for her natural life. "At her decease the above-named property shall revert to my daughter Caroline Amanda Murray."

"*Second:* To my son William Murray, jr., I give and devise house No. eighty-eight (88) Longworth street, north side, between Elm and Plum streets, also house No. eighty-five (85), south side of Longworth street, between Elm and Plum streets, with all the metes and bounds as they now stand.

"*Third:* To my son John Murray I give and devise house No. two hundred and five (205) Elm street, west side, between Fifth and Longworth streets, *in trust* with all metes and bounds as now stands; the trustee to have the control of the property to rent and collect rents; and from this revenue to pay all taxes on the property, and all repairs necessary to keep the same in a state of good preservation, *for the benefit of my son John and his heirs*, and to pay to him (John Murray) such sums of money as shall be necessary to clothe and board. The balance of income remaining from the above reservations to be kept to meet emergencies.

"*Fourth:* To my son George Murray I give and devise No. two hundred and three (203) Elm street, west side, between Fifth and Longworth streets, with all the metes as now stands. Also my Marietta and Cincinnati Railroad stock.

"I hereby appoint *without security* my son George Murray sole trustee and executor of this my last will and testament."

The court below found "that the plaintiff, Susan Murray, is the owner of the equitable fee simple title to the premises in the petition described under and by virtue of the provisions of the last will and testament of William Murray.....and of the last will and testament of John Murray, her husband.....that the legal title to said premises was by the terms of the said last will and testament of the said William Murray vested in one George Murray for certain uses and purposes therein expressed for the benefit of the said John Murray and his heirs; that the said George Murray has departed this life, and that the purposes of said trust are fully accomplished, it is thereupon, on motion to the court by counsel for the said Susan Murray, ordered that John C. King be and he is hereby appointed as trustee of said estate, pursuant to the terms of said will in the place and stead of the said George Murray, deceased, and the said John C. King having appeared in open court, and accepted said trust, it is thereupon ordered, adjudged, and decreed by the court that he, as such trustee, make, execute and deliver to the said Susan Murray, a deed in fee

simple for said premises within ten days from this date, and in *default of the execution and delivery of such deed within the time 269
so limited, it is ordered that this decree operate as such conveyance. And the court do further find that the claim or pretended title of the defendant, William Murray, as against the title of the said Susan Murray is absolutely null and void, and that the said Susan Murray be quieted in the peaceable possession and enjoyment of the premises in the petition described."

Upon the probate of the will of John Murray the equitable fee of the lot, if John Murray owned it, became vested in his widow and devisee, Susan Murray, and the mere bringing and pendency of an action to contest the validity of and set aside such will did not divest or legally affect such fee in her, William Murray did not ask the court to postpone the trial of the cause until the final determination of the action to set aside the will as he might have done, and which request the court in its discretion might have granted; but he went voluntarily to a trial, which resulted in the foregoing judgment and decree. The pendency of the action to set aside the will of John, which, until finally determined, could not affect Susan Murray's title under the probated will, was, therefore, no bar to a final judgment in the action founded upon that will to quiet the title of the devisee under it. This, we learn from the judge who tried the case below, was not claimed by the defendant below; and it has not been claimed or even alluded to by his counsel who have argued the cause before us in general term; and we should not have alluded to it had we not found the fact stated in the answer and in no manner replied to or contradicted.

What was sought below, and what above has been argued here, and was and is the proper construction of the will of William Murray, Sr., so far as it relates to the devise to or for the benefit of his son John.

We think the court below did not err, but was clearly correct in giving to this part of the will the construction given in and by the decree.

The legal title of the property was devised to George Murray in trust for the benefit of John and his heirs. The trustee was to have the control of the property, to rent and collect rents, and from such rents pay all taxes on the property, and for all repairs necessary to keep the same in a state of good preservation; to pay to or for John such sums of money as were necessary to clothe and board him; and to keep the balance of such income to meet emergencies. The naked legal title only of such balance was in the trustee (he could hold possession of it only as such trustee) while the beneficial ownership of it was in John, for whom it was to accumulate, but John's or heirs' emergencies might, at *times, require more than merely enough to clothe and board 270
him, and this power to pay out of the fund to supply such emergencies was consequently given so that neither John nor his heirs after him could compel the trustees to account to them for money expended for such purposes. The emergencies meant could only be the emergencies of John or of his heirs.

The defendant in error is entitled to have the judgment affirmed; but, as there is a suit pending by William to set aside John's will, which, if decided adversely to the will, will only give Susan Murray a life estate in the property by descent from her husband, and William Murray will be vested with the fee, we, out of caution and to prevent any possible dispute about, or misconstruction of the judgment elsewhere, will

do what the court below would have done had counsel advised it in any way of the matter, modify the judgment by providing that "but nothing herein contained shall be construed to prohibit the said defendant, William Murray, from contesting or affect his right to contest in court the validity of the said will of John Murray, deceased, or as affecting any right he may obtain by judgment in such contest."

So modified, the judgment will be affirmed with costs of these proceedings in error.

O'Connor and Tilden, JJ., concur.

Mallon & Coffee, Attorneys for Plaintiff in Error.

Morrow & King, Attorneys for Defendants in Error.

---

285 *PLEADING—PARTIES.

[Superior Court of Cincinnati, General Term, October, 1876.]

† HEPWORTH V. PENDLETON, ET AL.

O'Connor, Tilden and Yaple, JJ.

1. Misjoinder of *parties* is not a ground of demurrer under the code, provided the necessary parties are before the court. *Defect* of parties and misjoinder of *causes of action* are grounds of demurrer.
2. The statute of frauds is a statute of evidence and not of pleading, and it is not necessary to allege in a pleading that a contract therein mentioned was in writing, although the statute requires it to be in writing; it is sufficient to prove it to be in writing on the trial. An allegation in a pleading that a contract was made is an allegation that a valid contract was made, and a valid contract must be proved.

O'CONNOR, J.

This is a proceeding in error to reverse a judgment rendered at special term, the judgment having been rendered by default. There is consequently no bill of exceptions, and the questions raised are solely on the petition and exhibits of the plaintiffs below.

The action was to recover rent claimed to be due under a lease for ninety-nine years, renewable forever, made by Nathaniel G. Pendleton and wife, the premises to be revalued every fifteen years, the first revaluation to be made after the first ten years, and the rent to be six per cent. of the valuation. By the terms of the lease, after the first ten years, three persons were to be selected by the parties to appraise the value of the property, and in case the said parties could not or did not make such selection, then the judges of the court of common pleas of Hamilton county were to appoint the appraisers, the same course to be followed every fifteen years thereafter.

The petition states that at the expiration of the first ten years of the term, in April, 1849, "the said parties did consent and agree that the said premises should be valued at the sum of $20,420 for the term of fifteen years from the first day of April, 1849, and that by the terms of said lease the annual rent therefor would be $1,225.20," which rent the plaintiff in error, *Wm. Hepworth, paid for the ensuing fifteen
286 years. The petition further states that on the expiration of the said term of fifteen years, to-wit, on the 31st day of March, 1864, it was also agreed by and between the said parties that the said valuation should continue unchanged for the next fifteen years, and that the plaintiff in error continued to pay said annual rent of $1,225.20 until the first day of July, 1874, at and from which time he ceased to pay. The judgment for the plaintiffs below was for $1,926.00 by default.

The first assignment of error is that the petition does not show that the plaintiffs are assignees or heirs at law of Nathaniel G. Pendleton and Jane F. Pendleton, the lessors.

---

†For decision of district court affirming the judgment in this case, see 4 B., 120.

The petition states that the plaintiffs, George H. Pendleton, Elliot H. Pendleton, Susan I. Bowler, Martha E. Dandridge and Anna P. Schenck are the owners in fee of the property therein described, and that on the first day of April, 1839, Nathaniel G. Pendleton and Jane F. Pendleton, his wife, *who are the ancestors* of the said plaintiffs, and are since deceased, did by deed of lease duly executed by them and Wm. Hepworth, demise the following described premises, etc. This, we think, is a sufficiently definite statement that the plaintiffs acquired title by descent, and excludes the idea of a title by purchase.

It is next assigned for error that in the petition certain trustees are joined as plaintiffs with their *cestuis que trust*, and it is claimed that if the trustees have the right to recover the rents due, the *cestuis que trust* have not and are improperly joined as plaintiffs.

It is stated in the petition that Martha E. Dandridge is intermarried with Alexander S. Dandridge, and that George H. Pendleton and Elliott H. Pendletonare the trustees of the title and entitled to collect the rents of the property of the said Martha E. Dandridge in trust for her use and benefit. That Anna P. Schenck is intermarried with Noah H. Schenck and Samuel F. Hunt is trustee of the title and entitled to collect the rents of the property of said Anna P. Schenck in trust for her use and benefit. All these persons are made parties plaintiff, and the objection is that there is a misjoinder of parties plaintiff. If this were so, the only way to have reached the petition at special term would have been by motion, and a motion necessarily admits that the petition states a cause of action, that is, that there is something which can be amended. If there be nothing to amend, that is, if the petition states no cause of action, the proper course is to demur. But the code, section 87, does not authorize a demurrer where there is a misjoinder of parties, provided the necessary parties are embraced in the pleading, and if the necessary parties are not so embraced, then there is a defect of parties *and not a misjoinder. Section 87 of the code provides that the defendant 287
may demur to the petition only when it appears on its face, among other things, "that there is a defect of parties, plaintiff or defendant," or "that several causes of action are improperly joined." The code then authorizes a demurrer where there is a defect of parties, or a misjoinder of causes of action, but not when there is a misjoinder of parties. The objection to this petition is not that there is a defect of parties plaintiff, that is, that there are too few plaintiffs, but the objection is that there are too many.

It is not claimed that all the necessary parties are not before the court, but that some are before the court who have no right to recover. This does not render the petition demurrable, nor does it affect the rights of the defendant beyond the unnecessary increase in the record, because the payment of the judgment is a full discharge of the defendant's liability.

But even if it were a good ground of demurrer at special term, it is too late to take advantage of it now. Section 89 of the code provides that:

"When any of the defects enumerated in section 87 do not appear upon the face of the petition, the objection may be taken by answer, and if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same except only the objection to the jurisdiction of the court, and that the petition doe, not state facts sufficient to constitute a cause of action."

In the present case there was neither answer nor demurrer, and the judgment was taken by default.

The third and fourth assignmentsof error may be considered together, because each raises the question whether the petition states a cause of action.

The third assignment of error is: 'The record shows said plaintiffs have recovered judgment against the plaintiff in error at the rate of $1,200 per year in quarterly payments with interest on each quarter, without charging that any valuation had been made of said premises on the first of April, 1852, or within thirty days thereafter, or at any other time."

As to this assignment of error, the petition states that when the time arrived when, by the terms of the lease, an appraisement was to be made, the plaintiffs and defendant agreed upon the value of the premises for the ensuing fifteen years; and as the only object of appointing appraisers was to fix a value to which all parties must consent, it is clear that the parties had the right to agree upon that value without the aid of appraisers.

But it is objected that the petition does not state that the agreement of the parties as to value was in writing, and that if not in *writing it was not binding 288
on either party under the statute of frauds, it being contended that an agree-

ment fixing the value of leased premises for fifteen years of the term, upon which value six per cent was to be paid as rent by the terms of the lease, is an agreement creating an interest in land. Whether such an agreement does create an interest in land or not, is not necessary for us to determine here, although we are clearly of the opinion that it does not, because, even if it does create an interest in lands, it has always been held, and frequently so decided in this court, that the statute of frauds is a statute of evidence and not of pleading, and that it is not necessary to allege that a contract was in writing, although the statute requires it to be in writing; it is sufficient to prove it was in writing on the trial. The allegation that a contract was made, is an allegation that a valid contract was made, and it is sufficient if it be proved on the trial that the contract was valid.

The fourth assignment of error is that the petition does not show any cause of action. For the reasons we have stated we think the petition does show a good cause of action, and the judgment must be affirmed.

Fox & Bird, for Plaintiff in Error.

Paxton & Warrington, for Defendant in Error.

---

367 *ARBITRATION.

[Superior Court of Cincinnati, General Term, October, 1876.

SCOTT v. REEDY.

O'Connor, Tilden and Yaple, JJ.

1. When a question of infringement of a patent has arisen between parties, and that
368 question is pending in a court of the United States, and *the parties enter into a covenant, agreeing to refer such question to arbitration, and one of them covenanting that in case the award shall be adverse to him, he will dismiss the proceedings in the case pending and brought by him, and the referee awards that there is no infringement of the patent, as claimed, it is the legal duty of the covenanter to dismiss such proceedings. The covenant itself is lawful and binding, and a further prosecution of the suit is a breach of the covenant which entitled the covenantee by an action to recover some damages.
2. Such damages are such as naturally and ordinarily follow the breach of such a contract, or as the parties may reasonably be supposed to have contemplated, as the natural consequences of such breach. These properly will include the expenses incurred in resisting such persistent prosecution of the case, in the payment of reasonable counsel fee and the necessary expenses attendant upon such resistance.

ERROR.

CASE STATED.

The present plaintiff, who was also the plaintiff below, claimed to be the inventor and owner of an improvement in elevators, secured by letters patent, issued to him by the United States on the first of August, 1868.

On the 9th day of the previous June, the defendant had obtained letters patent for an improvement in hoisting machines. On the 20th of January, 1871, the defendant, claiming that the machine of the plaintiff was an infringement of his patent, brought a suit in equity against him in a circuit court of the United States to restrain such infringement, and for an account. On the same day the parties entered into an agreement for an amicable adjustment of the controversy which had thus arisen between them. The terms of this agreement were put in writing, and the instrument was executed by both parties. It contained a provision by which the parties mutually agreed to submit the question of infringement

to a referee, who was named in the instrument. If he should decide that the machine of the plaintiff was an infringement of the patent of the defendant, then the plaintiff consented to abandon his improvement, and to manufacture no machines. Should the decision, however, be the other way, then the defendant covenanted that the suit in equity, above referred to, should stand dismissed at his costs, and that he would not molest the plaintiff in the manufacture of his machine.

The present action was brought to recover damages for alleged breaches of these covenants of the defendant.

It appeared in evidence at the trial that the defendant attempted to revoke the submission, notwithstanding which the referee proceeded to render his decision in writing, of which he delivered copies to both parties. The defendant disputed the regularity of the proceedings before the referee, and claiming *the right to submit, for the adjudication of the court the question of 369
the validity of his decision, persisted in the further prosecution of his suit in equity. The plaintiff set up the award in bar, and at the hearing the case was dismissed, The plaintiff in that suit took an appeal to the supreme court of the United States, and there the decree of the circuit court was affirmed.

It is alleged in the petition that after the referee had made his decision, and on the inducement afforded by it, the plaintiff granted to one Buckley a license to manufacture and vend his machine throughout the state of Ohio, thereby securing to himself valuable returns by way of license, fee or royalty; that thereupon the defendant brought a suit in equity against Buckley for an injunction and account; that the plaintiff, having warranted the title to Buckley, was called in to aid to defend the suit thus brought, incurring thereby large expenses in the defense of such suit. During the progress of the testimony of the plaintiff, and before the submission of the case to the jury, the plaintiff asked leave to dismiss his action without prejudice. This application was refused, and the plaintiff excepted. The court charged the jury, to which charge the plaintiff also excepted, and the jury returned a verdict in favor of the defense. The points of exceptions to the charge appear in the following opinion:

OPINION.

TILDEN, J.

The contract of submission was a perfectly valid instrument, binding upon both parties. Had the defendant succeeded in his attempted revocation of the authority of the referee, he would have been liable in damages for breach of his contract to submit. The decision of the referee was a conclusive adjudication of the question referred to him, and would so have remained until judicially set aside. The covenant thus to submit, and the accompanying covenant of the defendant to abide by the decision and to dismiss the suit in equity referred to in the submission, and not afterwards to molest the plaintiff in the exercise of the rights conferred on him by his letters patent, are not perceived to have been open to any legal objection.

They were not illegal; they were not against any rule of public policy, or contrary to public morals. They were supported by a sufficient consideration in law. Like any other legal covenant or promise, the defendant was bound to perform them according to their terms.

The defendant had in one sense the right because he had the power to apply in a court of justice to obtain an injunction upon the question of
370 the validity of the decision of the referee. *But such an application, notwithstanding there was power to make it, or, in a sense, the right to make it, equally, as if made without right, was a distinct and clear violation of this covenant, and the defendant is in law, in the opinion of the court, liable in an action for the breach of it; for the covenant was in its terms absolute. It contained no exception to enable the defendant, by an act of violating its terms, to ascertain, by an adjudication, whether he was bound to perform that which he had thus absolntely bound himself to do. We are of opinion, therefore, that the subsequent prosecution of the equity suit, to the benefit of which the referee had decided he was not entitled, was a distinct and clear breach of this covenant, as would also have been any subsequent act of molestation of the plaintiff.

If we are right in these views, as upon well-settled general principles of law, we think we are, the plaintiff was entitled to have a verdict in his favor. Every violation of the ascertained legal right of a party is a legal injury which entitles him to recover some damages. Even if the charges are nominal, merely; such injured party is entitled to have his legal right vindicated by a verdict in his favor.

This right is important to him, not alone on account of any damages which he may have in fact suffered, but by reason also that he is entitled to avail himself of the record of the recovery, by way of bar to further litigation of the same subject matter. We conclude, then, that the verdict on the evidence and the law should have been in favor of the plaintiff.

2. The court, on a very careful consideration of the subject, is further of opinion that the taxed costs, which were, or which might have been recovered by the plaintiff by the judgment of the court in the suit in equity, and which were incurred in the experiment made by the defendant to litigate the validity of the award subsequently to the day when the decision was made did not form the necessary or proper basis for fixing the amount of the recovery to which the plaintiff became entitled by the breach of the covenant. The employment of counsel by the plaintiff to resist this proceeding, the occupation of the time and the services of the plaintiff in attending upon it, may well be regarded as having been in contemplation of the parties in entering into the contract, and as the natural and almost unavoidable consequences of the defendant's breach of it. For these reasons, without now considering any further elements of damages, the court think the plaintiff was entitled to recover compensatory damages. With these views upon the questions here determined, I do not, as one member of the court, deem it necessary to consider the claim made by
371 the plaintiff in error, that during the *pendancy of the trial he was entitled, under the code, to dismiss his action without prejudice.

Judgment reversed, with costs, and case remanded.

SEPARATE OPINION BY YAPLE, J.

For myself, I think the judgment in this case should be reversed upon an additional ground.

After the jury were sworn, and during the trial, the plaintiff in

error, who was the plaintiff below (there being no set-off or counter-claim pleaded) sought to dismiss the case without prejudice, but the court denied his right to do so, and he excepted. A verdict was rendered against him, and judgment was rendered upon the verdict, so that he is in a very different situation from what he would be had he dismissed his case without prejudice. The Code, section 372, provides: "An action may be dismissed without prejudice to a future action: 1. By the plaintiff before the *final* submission of the case to the jury, or to the court, where the trial is by the court."

I am inclined to hold that a case is not *finally* submitted to a jury until they are charged by the court, and retire to consider of their verdict.

My construction of the word "final" is that it means what is expressed in the Indiana Code: "An action may be dismissed without prejudice, first, by the plaintiff, *before the jury retire.*" 2 Ind. Stats. (Gavin and Hord), p. 216.

Had our statute simply used the words: "At any time before the cause is submitted to the jury," the construction might well be otherwise.

On the other ground, I also concur in the reversal, Russon. Arb. pp. 63, 68, 146; 5 B. and A. 507.

Simrall & Hosea, for Plaintiff in Error.

Logan & Randall, for Defendant in Error.

---

*PLEADING—VERDICT. 372

[Superior Court of Cincinnati, General Term, October, 1876.]

O'Connor, Tilden and Yaple, JJ.

THE C. & S. R. Co. v. DURBIN WARD.

1. Under the system of practice prescribed to the courts by the civil code, it is incumbent upon the respective parties to an action, as it was by the rules of pleading at the common law, which prevailed in our courts before the adoption of the Code, to state in writing the facts constituting the cause of action and grounds of defense. The evidence at the trial, to make it admissible, must conduce to prove the truth, if denied, of the statements so made; the verdict of the jury must respond to the issues formed by such denials, and the judgment of the court must be so applied as to vindicate the legal right, and only the legal right, as it is described and defined in the pleading.
2. It is the sole purpose of an answer either to controvert the right of the plaintiff to recover upon the facts stated in the petition, by a general or specific denial, or to allege facts which constitute new matter, operating by way of confession, and avoidance, or facts forming the basis of affirmative counter-relief by way of set-off or counter-claim New matter consists of facts which, if true, are in law, a defense to the action. This defense, impliedly, admits the truth of the facts stated in the petition, and that, upon these facts, the plaintiff is entitled to recover, and it avoids the effect of these admissions by other facts, or new matter, which goes to show that a right of action, once existing, has been lost or discharged, as by release, accord and satisfaction, payment, performance, the statute of limitations, etc. Facts, the proof of which would be competent on the trial of the issue formed by the denial, or otherwise immaterial, are not new matter, and their presence in the answer exposes the answer to the legal objection of irrelevancy and redundancy.
3. If the redundant and irrelevant matter contained in the answer consists of facts,

which of themselves, or when coupled with other facts to be supplied by the plaintiff at the trial by the evidence, would, in a proper state of the pleading, authorize a recovery in his favor, such recovery can not be had. Such recovery would involve not merely a departure from the case made by the petition. Such a state of evidence would be a case also of failure of proof, and the recovery would be in a case not stated in the petition at all.

4. The action was founded on a special contract the terms of which were set forth in the petition. This case was put in issue by the denials of the answer. The answer then proceeded to set forth the terms of a special contract between the same parties, which was alleged to have been in writing, and the answer denied that the terms of this contract had been complied with so as to authorize a recovery upon it. The reply *averred
373 that this contract had been performed. A comparison of the terms of the two contracts made it apparent that they were substantially unlike the one giving rise to a cause of action substantially different from that originating in the other. The trial throughout was conducted upon the theory that the right of the plaintiff to recover upon either of the two contracts, according to the proofs, was put in issue by the pleadings. The verdict was general, and the record of the proceedings at the trial contained no evidence to enable the court on err or satisfactorily to find upon which of the two contracts, or cause of action, the jury intended to found their verdict.

Held: 1. That the verdict, considered as one founded on the written contract set forth in the answer, can not, in law, be sustained.

2. That where an immaterial issue, or one not made by the pleadings, is, at the trial, blended with one that is, in a matter involving the substantial rights of the parties, or in a manner calculated to mislead the jury, or to induce confusion in their minds, and where it does not distinctly appear from the record that the jury intelligently understood the nature and scope of the questions referred to them, or that they intended in fact, that their verdict should respond only to the issues actually made by the pleading, it is the duty of the court, on error, to set the verdict aside.

TILDEN J.

This case comes before us by petition in error. The present defendant was the plaintiff to the original action, and on the trial of the action in the court, sitting in special term, he obtained a verdict and judgment. At a former term, sitting here, numerous questions, arising upon the assignments of error were fully argued and submitted for our consideration. The record we have found to be voluminous to a degree not at all common in our experience, and the facts, many of them to be extracted from contradictory evidence and conflicting circumstances, have been found to be greatly involved, and to present questions of unusual difficulty. We have devoted to the study of all the questions presented in the arguments, and by the case, all the time we have been able to spare from the duties of the court room, and consistent with the dispatch of other causes involving less labor, and having equal claims upon us. In proceeding now to dispose of the present one, we feel at liberty to abstain from any preliminary formal outline statement of the case itself. The parties may be assumed to be entirely familiar with everything which would be included in such; and we shall refer to such facts only as shall appear to us to be necessary to explain the grounds of our rulings.

Before proceeding to consider the questions directly raised by the assignment of error, we find it necessary to determine and define the limits of the inquiry before us, and the nature and scope of the issues made by the pleadings. The questions to which we are thus led are
374 whether the claim of the plaintiff below *to recover upon the written contract set forth in the amended answer was included in the issues, so that upon proof of performance of that contract on his part, he

was entitled to recover; and if such claim was so included, then, whether the claim on the evidence and the law was sustained at the trial. If either question requires an answer in the negative, then our subsequent inquiries will, necessarily, be confined to the case made by the petition.

In the petition the cause of action is set forth in these words: "On or about the first day of September, 1870, the defendant employed the plaintiff to solicit and procure pledges of subscriptions and donations in aid of the construction of its said railway, and agreed to pay him for his services in that behalf five per centum upon the amount of subscriptions and donations obtained as aforesaid. And the plaintiff accepted such said employment, and agreed to the compensation proposed, and thereupon proceeded to obtain pledges of subscriptions and donations as aforesaid, and did obtain the same in the counties of Hamilton, Butler, Warren, Greene and Clark to the amount of $250,000, according to the terms of his said employment. And on or about the 13th of November, 1870, the plaintiff reported said pledges to the defendant, and then exhibited to the defendant the written evidences of the same, and delivered copies thereof to the defendant, whereby the defendant became indebted to the plaintiff in the sum of $12,500, with interest from the 13th of November, 1870," for which judgment is demanded. The defendant filed an amended answer. By the first defense contained in this the defendant specifically denied the employment set forth in the petition, and the agreement and promise to pay five per centum upon the amount of the subscriptions and donations obtained. The effect of this denial clearly was to put in issue, and to throw upon the plaintiff the burden of proof of every fact material to a recovery in his favor. But the amended answer proceeded further, and as a record and special defense, set forth the contents of two letters, dated, respectively, on the 13th and 21st of October, 1870, both signed by A. M. Shoemaker, agent of the defendant below, and addressed to the plaintiff below. These letters, as described in the amended answer, purported to be an offer or proposal, thereby, of the terms and conditions of an employment, the acceptance of them by the plaintiff below being necessary to constitute a binding contract embracing the terms so proposed. These terms were in every important particular substantially different from those of the contract set forth in the petition. Indeed the contract and the cause of action were substantially unlike. The contract as set forth in the petition, entitled the plaintiff below to recover *the stipulated percentage, whatever might be the conditions (whether useful or 375
available to thedefendant below, or not so), which might be expressed in the subscription to stock, or instruments of donations to be obtained. According to the contract proposed in the letters, the only restriction placed upon the discretion of the defendant below, in the selection of a route for its proposed road, was that the road should pass through Mill Creek Valley and the town of Lebanon. That the aid contemplated by the employment was to be such as would reasonably subserve the purpose of constructing a road upon this route, and offered, upon conditions, not abridging the discretion of the defendant below in this respect, except so far as expressed, is, necessarily, to be implied. The contract, as proposed in the letters, made it a condition that the proposed aid should amount to $250,000, and it made it a further condition that this amount should be obtained within thirty days from the date of the letter of October 13th, and, finally, that there should be a conveyance, free of charge, to the defendant below, of the right of way, and all

work done thereon, thus referring to an old road bed which had been constructed and then abandoned by a former company.

The amended answer further avers that the letters of the 13th and 21st of October were received by the plaintiff below, immediately after their date, who made no objections to the terms of the contract, as set forth in the letter of October 21st, and took no exceptions to it, but proceeded with the work of obtaining donations and subscriptions until November 15th, 1870, the day fixed for presenting them to the defendant below. It is then further averred, that no contract or understanding ever was made, or ever existed between the parties, other than that set forth in the letters, and denies especially and in detail the performance by the plaintiff of each and every one of the stipulations and conditions on his part to be performed according to the contract as set forth in the letters. These averments were put in issue by the reply, with certain specified exceptions, one of which is expressed in the allegation that the persons holding the right of way referred to in the answer were ready and willing, and offered to convey the same, according to the terms of the contract; but that the defendant waived the execution or tender of a deed until the defendant should begin work upon the proposed road.

On this state of the pleadings we are of opinion that the only issues presented for trial were those which directly arose upon the petition. Every material fact contained in the petition was controverted by the special denials of the answer, and every fact tending to prove or disprove the case set forth in the petition was competent to be proved at the trial of the issues raised by the denials. Some of the facts set forth in the special defense, *stated as if they constituted new matter, were of this nature, and all that were not so were wholly immaterial to the real issues. One of these facts of the former class was presented by the averment that the only contract ever entered into between the parties was that whose terms were expressed in the letters of the 13th and 21st of October. As matter of pleading, this averment was simply an argumentative denial. It was an affirmative allegation, stated as though it confessed and avoided the plaintiff's cause of action, and yet the fact averred was not new matter, it was simply a circumstance of evidence which could be offered in support of the denial. In order that evidence may be competent under a denial, it need not be in its own nature negative. Affirmative evidence may be used to contradict the allegations of the petition and may, therefore, be proved to maintain the negative issues raised by the defendant's denial. Thus in an action on a promissory note against the maker or indorser, the petition alleges title in the plaintiff, and the fact that he is the owner and holder of it. The denial would put this averment in issue, as it would be material, and its truth essential to a recovery. Proof by the defendant, that, prior to the commencement of the action, the plaintiff had assigned the note to a third person, would be affirmative in its immediate nature, but negative in its effect upon the issue; for it would controvert the truth of the plaintiff's allegation. So in the present case the making of the contract set forth in the petition and put in issue by the denial, was a fact the burden of proof of which was, by the issue, devolved upon the plaintiff at the trial. The defendant was at liberty to controvert this fact in two modes. He might simply have contradicted the plaintiff's proofs, and, in that purely negative manner, have procured a decision of the issue in his

376

favor. The result would have been a defeat of the plaintiff's recovery by his failure to maintain the averment of his petition, but the court and jury could not have been called upon to find whether the written contract had been broken or not, the decision should simply have been that the contract set forth in the petition had never been made. On the other hand the defendant below was not bound to confine itself to a mere denial directly of the testimony of the plaintiff's witnesses, and overcome its effect by contradictory proofs. It was competent, under the general denial, to introduce evidence affirmatively proving the making of a contract differing in its terms from that set forth in the petition, and then, by circumstances, to show that such contract was the only one which the parties had ever made. These circumstances, those which it proved would have tended strongly to prove that no other contract was made, were also set forth in the special answer, but these, like the main fact, were *merely matters of evidence, admissible as such at the trial under 377
the denial, and constituting in no sense either new matter or forming the basis of counter-relief. The tendency of this mode of pleading could only have been to produce confusion and uncertainty. And it is in this view mainly that we have thought it useful to refer to the subject at such length. The fault itself is one of form merely. The objection is that the matter was redundant and irrelevant. It would have been stricken out on motion; and had the verdict and judgment been in favor of the defendant below, the objection could not have been taken on error. Remedies and Remedial Rights by Pomeroy, secs. 624, 627, 630.

2. But the verdict and judgment having been in favor of the plaintiff below, the question arises whether such recovery was founded upon the contract set forth in the answer, or on that set forth in the petition. The material for the answer to that question must be derived from the record of the proceedings which took place at the trial. We assume here that the recovery was founded on the written contract, reserving for another place the consideration of the question of whether it was so. In that view, and supposing that the petition had set forth and claimed to recover upon the written contract, we should be inclined to hold that the verdict was against the law of the case. We mean by this, that looking to the terms of the contract, as expressed in the letters, and to the conditions of the subscriptions and guarantees which were offered and admitted in evidence, we should, as now advised, be inclined to hold that a case was not made out at the trial, which, in law, authorized a verdict in favor of the plaintiff below. But the claim of right on the part of the plaintiff below to recover upon the case which grew out of the written contract was not made in the petition at all; and therefore, even supposing that the evidence made out a right to recover upon it, that right, not having been put in issue by the pleadings; was not available to the plaintiff below, unless he was entitled to found a recovery upon the averments of the answer.

The reply, admitted the writing of the letters, averred a readiness and willingness to convey the right of way, and denied all the other allegations of the answer, including, of course, the averment in the answer that the plaintiff below had failed to comply, on his part, with the terms of the written contract. It is, moreover, manifest from the proceedings at the trial that the right of the plaintiff below to recover upon the written contract was on both sides regarded as being involved in the issue, so that if the evidence should prove that the written con-

tract was the real contract, and subject of controversy between the parties, and further, that the plaintiff below was entitled to recover upon
378 it, such recovery might be had under the issues made by the *pleadings. Of the fourteen special charges demanded by the defendant below, ten of them—*i. e.*, the 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, (12), 13th and 14th were apparently based on this idea, and may properly have been refused on the ground that the subjects of them were not embraced in the issues. Of the remaining charges, two were given as requested, and the rest were pertinent to the issues raised upon the petition. The general charge, the attention of the court having thus and by other means been brought to the subject of the written contract, contained instructions directly bearing upon the right to recover upon it. The object of the defendant below was to defeat the action, and it is entirely apparent that this object would have been attained by simply proving that the written contract was the only contract the parties had ever made. This proposition was contested on the trial by the defendant below, and among other things, he offered evidence tending to prove that the letters were not intended to become to the written evidence of any contract between the parties, but for a wholly different purpose, and that they were written by way of fulfillment of one of the terms of the contract sued on, and received and acted on only in that view.

And throughout the trial the plaintiff below insisted upon his right to recover upon the contract set forth in his petition. Still, the plaintiff below, as if to guard against the contingency of failure of his case in this aspect, also adopted the other alternative, and pursued the case upon the claim that, on sufficient evidence, he would be entitled to a verdict upon the basis of the written contract set forth in the answer. It must have been with that view that evidence was offered by him for the purpose of proving the waiver of the conveyance of the right of way stipulated for in the letter of the 13th of October, the assent of Shoemaker to the terms of some of the subscriptions procured by the plaintiff below, and the adoption and ratification of the terms and conditions of all the subscriptions and guarantees submitted to the Board of Directors of the defendant at the Burnet House on November 15th. In no other aspect could these facts have been regarded as being in any way material. The contract set forth in the petition imposed no obligation to procure any right of way; it fixed no period of time during which performance should take place on the part of the plaintiff below; it did not specify any fixed amount of the aid to be obtained, and no restraint was imposed respecting the terms and conditions upon which such aid should be offered. On this and the other evidence in the case, the plaintiff below claimed, as before stated, to recover upon the contract set forth in the petition; but failing in that, he claimed also to recover upon that set up
379 in the answer. Both *claims were resisted, both were litigated throughout the trial, and both were considered by the jury, and are now under review.

Unless, therefore, the plaintiff below was entitled, by an averment in the reply, and proof at the trial, of performance of the written contract set forth in the answer, he can not retain the verdict if it shall be proved that such verdict was founded on the written contract. Was he so entitled? We think not. We think it may be stated as a settled rule of practice that the cause of action and the grounds of defense intended to be made the subject of the litigation must be set forth in

the pleadings of the party who seeks to enforce such right of action, or to avail himself of such grounds of defense. The adverse party is required to prepare for and resist at the trial no other cause of action and no other ground of defense. In no other way can a triable issue be formed. At the trial, no evidence is competent which is not relevant to the issue so formed. No charge of the court can be properly asked for or properly given except upon questions of law arising upon evidence which is relevant to the issues; and a judgment founded upon a verdict which is not substantially responsive to the issues is incurably defective. These rules are distinctly recognized and made imperative by the code. The pleadings must be in writing, and must contain a statement by the parties of the facts constituting their respective claims and defenses (sec. 82). The petition must contain a statement of the facts constituting the cause of action (85) The answer should contain a general or specific denial of each material allegation of the petition controverted by the defendant, or of any new matter constituting a defense, counter-claim or set-off (92). An issue is triable only when founded upon pleadings thus framed. A triable issue can not arise except upon a material allegation in the petition denied by the answer, or upon a set-off or counter-claim presented by the answer, and denied by the reply, or upon material new matter in the answer or reply (261). These provisions permit only denials, and statements of matter of confession and avoidance. They do not authorize the averment of matter which is not new, or which consists of details of evidence going to support a denial. See Pomeroy on Remedies and Remedial Rights, sec. 630.

If the evidence at the trial makes a case which, in a matter not material, differs from that made by the pleadings, the variance may be avoided by an amendment conforming the pleadings to the case provided (secs. 131 and 132); or if the evidence have been received without objection at the trial, and recovery is had upon the evidence, outside of the pleadings. the judgment will not, on error, be disturbed. Hoffman v. Gordon, 15 O. S., 211. *But this can not occur where the variance is substantial—sec. 137. Such a variance makes a case of failure of 380
proof under sec. 133, and the necessary result is a failure of the action or defense. Dean v. Yates, 22 O. S., 388; Hill v. Supervisor, 10 O. S, 621; Satchell v. Durrell, 4 O. S., 543; Johnson v. Morse, 45 Calif. R., 515; Pomeroy, sec. 559.

Having concluded that if the verdict and judgment were founded on the written contract, there was error, we are next to inquire from the record what was, in fact, the foundation of the recovery; for unless we can ascertain with reasonable certainty that the verdict was or was intended by the jury to be responsive alone to the issues formed upon the petition, it would be unnecessary and even improper now to assume to pass upon any of the exceptions which were taken at the trial. If it be merely doubtful in which of the two aspects of case the jury considered, and intended to decide it, or if there be good reason to believe that the jury were misled by the charges of the court or otherwise in the conduct of the trial, or if for any reason this court is not able to say affirmatively that the verdict was responsive to the material issues and all of them, it is bound to hold that there was a mistrial of the case.

The theory of the case made upon the petition, according to which the trial would appear to have been conducted on the part of the plaintiff below, was that it never was intended by Shoemaker and his associ-

ates to construct a road on the line described in the letter of the 13th of October, except in the event that they should be unable to secure another route, and that the movement out of which the employment arose had a concealed but wholly different object in contemplation. Mr. Shoemaker was an eminent civil engineer, and had been a successful railroad undertaker. General Ward resided at Lebanon, and represented a strong local feeling in favor of any enterprise promising the advantages of a railroad to the town and neighborhood. These motives brought these gentlemen together as early as February, 1870, and from that time down to the date of the letter of October 13th negotiations were carried on between them by correspondence and otherwise, with a view to such an enterprise. Some of the promoters were men of large means and influence, were already interested in other lines of road, and rightly supposed to be willing to engage in any scheme which should promise the means of a direct and independent railway communication between Cleveland and Cincinnati. Negotiations were opened by the promoters through Mr. Shoemaker, and were at one time pending with the president of a railroad company then owning and engaged in operating a road which passed through Springfield and proceeded thence to Dayton. The object of this
381 *negotiation was to obtain the use of this link of road; and it is claimed that the scheme of the promoters was to bring into use a road belonging to them, extending from Delaware to Springfield, and in a nearly direct line from Dayton to Cleveland, and then to construct a new road between Dayton and Cincinnati, on a line considerably west of Lebanon and through Middletown, and which would not accommodate its inhabitants at all. The policy of the Cincinnati, Hamilton and Dayton Railroad Company was opposed to this enterprise, as it threatened a rival route from Dayton to Cincinnati, and took prompt measures to defeat it, offering even large pecuniary aid in support of that of a road by the way of Lebanon. In the course of the summer of 1870 a meeting was held at Saratoga Springs, composed of prominent persons representing their various interests, and it resulted very soon that the negotiations which had been pending for the use of the link of road connecting Springfield and Dayton were broken off. The promise then seemed very strong that the Lebanon route would be adopted, and work upon it prosecuted with vigor, and active measures were entered upon apparently with that view. In September the promoters became a corporation by the due execution of the necessary certificate required by statute. General Ward testified that in effecting this organization he acted as the legal advisor of the corporators, and that from this period onward he acted in concert with Mr. Shoemaker, and had frequent communications with him. These communications embraced the subject of commissions. General Ward testified—although in this particular, as in some others, he was directly contradicted by Mr. Shoemaker—that in these interviews, and especially in one which took place at or about the time the certificate of incorporation was executed, it was expressly agreed that he should be paid a commission of five per cent. upon the amount of any aid which he should obtain. He testified that it was understood that this argument should be put in writing, but that it never was so; and that the letters of the 13th and 21st of October were written pursuant to an express mutual understanding, and for a wholly different purpose, which purpose was explained to have been that these letters should be used to operate along the line of the proposed road. The subscriptions and guarantees, which were

claimed to have been procured pursuant to the contract, were laid before the board of directors at the meeting held at the Burnet House on the 15th of November, and their terms and conditions certainly then became known to every member of the board. They were not approved, nor were they rejected; they were simply taken under advisement. Their terms and conditions were explicit and clear, and the importance of their departure from those expressed in the letter of *the 13th of October 382
must have been obvious, and if they were not in conformity to the contract of employment, under which they had been professedly obtained, it is not easy to see why the consideration of them should have been postponed. The discussion does not appear to have been formally renewed between the parties, but subsequently to the meeting of the 15th of November the defendant below appears to have obtained the right to use the link of road connecting Dayton and Springfield, and then abandoning the route by way of Lebanon, to have adopted and constructed its road from Dayton to Cincinnati, on the westerly line by the way of Middletown.

At the trial the plaintiff below asked for no special charge. Of the fourteen special charges requested by the defendant below, eleven of them were, as already stated, upon questions involving the right of the plaintiff below to recover upon the written contract. In the general charge the jury were told by the court that they were first to inquire whether, in point of fact, the contract between the parties was a verbal contract, as claimed by the plaintiff, or the written contract expressed in the letters, as insisted by the defendant below. Having determined this question, the jury were next told to inquire whether the plaintiff below had performed the contract as they should so find it. If they should find the contract to have been in writing, they would ascertain whether the full amount of $250,000 had been raised. In estimating the amount of donations and subscriptions, the jury were told to count only those which were in accordance with the contract, whether verbal or written, as they should find it. If the contract should be ascertained to have been originally in writing, but afterwards changed or modified by parol, the jury would apply the same rule to the contract as they should find the fact to be. The jury were further told that if they should find the written contract to have been the actual contract, as claimed by the defendant, that the same was not afterward changed or modified, and that the subscriptions and donations did not amount to $250,000, to be ascertained in the manner already explained in the charge, their verdict would be for the defendant below. On the other hand, should they find that the subscriptions and donations did amount to $250,000, and further, that the right of way had been secured, and a conveyance of it offered to be made, the plaintiff would be entitled to a verdict; but that if the full sum of $250,000 had not been obtained, the verdict would be the other way. The jury were further instructed that if they should find the contract to have been the verbal one, they would ascertain the amount of donations and subscriptions which had been obtained, and allow five per cent. on such amount, provided the jury should also find that the plaintiff below had secured the right of way.

*The evidence certainly had some tendency to establish the case 383
of the plaintiff below on the petition. The jury may, perhaps, have thought that it was not intended by the promoters to build the proposed road on the Lebanon route at all. They may have believed that the move-

ment in that direction was designed as a mere means of strategy which would exercise a persuasive influence in effecting a resumption of the former negotiation; and it is apparent that such a supposition was rendered at least plausible that the circumstance that the other party to the former negotiation was present at the meeting at the Burnet House on the 15th of November, an observer of the proceedings which then took place, and that soon after the negotiation was renewed and consummated. If the real purpose was, in fact, that which this theory asserts, it is manifest that the chances of its accomplishment would be all the greater in proportion as the movement in favor of the Lebanon route should be formidable and threatening.

The real object of the promoters may have been, not so much to obtain pecuniary aid for the Lebanon route, to be used on that route, as to procure a local demonstration in its favor; and in that view the terms of the subscriptions and guarantees would be, or might be, unimportant. These considerations would strongly support the proposition that the verbal was the actual contract, or, if not, that the stipulations in the letter of the 13th of October, respecting the terms and conditions of the donations and subscriptions to be obtained, were subsequently waived so that in either view the plaintiff below would be entitled to a verdict for the amount found on the footing of the case made in the petition. On the other hand the record certainly does afford some indications that the jury may have founded their verdict upon the case arising upon the written contract. But that which is controling with us, and which has arrested our studies in the aspects of the case presented by the assignments of error, is the circumstance that the jury were led, with the assent and acquiescence of both parties, and were directed to consider and find upon that case. It would have been entirely correct for the court below distinctly and at once to have withdrawn from the jury the consideration of the case of the written contract, or to have instructed them to disregard the evidence on that subject except so far as it was relevant to the issues formed in the case made by the petition. Had such a charge been called for, and the subject of it at all considered, it is fair to presume the charge would have been given, and the charges withheld which pointed out the conditions which would authorize a verdict for the plaintiff on the basis of the written contract. It was not necessarily incumbent upon
384 the judge who presided at the trial, *sua *sponta* to raise that question, and his attention not having been called to it, it is not hard to see why it was overlooked. Both parties assumed that the right of the plaintiff below to recover upon the basis of the written contract was asserted in the pleading on his side, and a proper issue formed for trial, and the trial from beginning to end was actively conducted on that theory. The result upon the record, as it comes before us, is, that it is impossible for us to say, with sufficient strength of conviction to satisfy our judgment, that, in point of fact, the verdict was founded on the case made by the petition, or so intended by the jury. In the other aspect of the case we have already expressed our opinion to be that the verdict and judgment can not be upheld on the law; and in this the conclusion above stated renders it wholly unnecessary to express any opinion upon the points of law which were raised at the trial, or upon the effect of the evidence which is involved in the exception taken to the action of the court below in overruling the motion for a new trial.

*PLEADING—AMENDMENTS. 410

[Superior Court of Cincinnati, General Term, October, 1876.]

O'Connor, Tilden and Yaple, JJ.

JOSEPH LEVY, ET AL. v. B'NAI B'RITH, ET AL.

1. Filing an amended petition, a demurrer to the original having been sustained and leave to amend taken, making different parties defendant, is an abandonment of the case against the original defendants, and entitles them to a dismissal and such dismissal is without prejudice.
2. Proceedings in error to reverse an order sustaining a demurrer to a petition must be dismissed where it does not appear that plaintiff has not asked leave to amend, and defendant has not final judgment on the demurrer, for as amendment is still possible, there is no final judgment.

YAPLE, J.

This is a proceeding in error prosecuted here to reverse certain proceedings of this court had in special term.

In April, 1875, the plaintiffs in error, who were plaintiffs below, filed their petition for relief against all the defendants in error, who were defendants below, except Mack, Aub and Hellman, setting forth certain facts, and praying specific and general relief.

The district grand lodge demurred to the petition, the demurrer being filed June 18, 1875. None of the other defendants answered or demurred. In December, 1875, the demurrer was sustained, and the plaintiffs took leave to amend in ten days. The grounds of the demurrer were, that the petition did not state facts sufficient to constitute a cause of action, that several causes of action were improperly joined, and that there was a defect of parties defendant. The second does not show whether the demurrer was sustained upon all the alleged grounds of demurrer, or upon but one or two of such grounds, the entry simply sustaining the demurrer.

On December 31, 1875, the plaintiffs filed an amended petition, omitting all the parties defendant named in the first petition, and making Henry Mack, A. Aub, and Max Hellman, trustees of Mount Carmel lodge No. 20, defendants, and they were all duly served with process.

On January 11, 1876, the grand lodge, Wilhelmsdorfer, secretary of Mount Carmel lodge, and Solomon Levi, trustee, filed their demurrer to such amended petition because it stated no cause of action against them, or either of them. This demurrer *by leave of the court, they afterwards withdrew, and all 411
the defendants, except Mack, Aub and Hellman, the only defendants named in the amended petition, moved for judgment of dismissal, and that they recover their costs, which judgment of dismissal the court rendered, and the plaintiffs excepted. The court ordered the case as made by the amended petition, to be docketed and numbered as an independent or new action, the defendants named therein having been duly served with process. The original case was No. 31,738; the new one was, by order of the court, numbered 31,738½, and to this action of the court the plaintiffs excepted. This cause has never been disposed of, but is still pending in special term. Upon the demurrer of June 18, 1875, being sustained, there was no judgment rendered upon the merits of the

case, but it was simply sustained, and the plaintiffs took leave to amend, and did amend, by filing the petition against the trustees of Mount Carmel lodge, Mack, Aub and Hellman.

Where a court merely sustains a demurrer, its action can not be reviewed by petition in error. To authorize a proceeding in error, a demurrer to the petition must not only be sustained, but the same must be followed by a final judgment in favor of the defendants, upon the merits, so these questions raised by the demurrer of June 18, 1875, are not before us.

With the case made by the amended petition against Mack, Aub and Hellman, trustees of Mount Carmel lodge alone, the defendants in the former petition had nothing to do, and it was proper for the court to require it to be designated by another number on the docket. This course would tend to prevent still greater confusion than had already crept into the case, and it could do the plaintiffs no injury, for it could make no difference whether their case was numbered 31,738 or 31,738½.

The only question before us is, whether the court erred in rendering judgment of dismissal in favor of all the defendants except Mack, Aub and Hellman. We think not, because the plaintiffs by filing the amended petition clearly abandoned their case against these defendants, and they were entitled to such judgment of dismissal. This, we think, is settled by the case of Dunlap v. Robinson, 12 O. S., 530; syllabus (1).

By the operation of section 372 of the code, such dismissal is without prejudice to a future action. For this reason the judgment must be affirmed, and the questions so elaborately discussed by counsel, do not, we think, call upon us for their consideration or decision, as they are all, perhaps, involved in the case of Mack, Aub and Hellman pending in special term.

Affirmed.

Jacob Wolf, for Plaintiffs in Error.

J. & V. Abraham, Contra.

---

421 ***ATTACHMENT.**

[Superior Court of Cincinnati, Special Term, November, 1876.]

†ANN CONLEY v. JAMES CREIGHTON.

An action for damages for breach of promise of marriage, though in form an action upon contract, yet, as in ascertaining the damages the rules applicable to torts and not contracts apply, it is not a demand arising upon contract within the meaning of code section 191, sub. 9, upon which an attachment on the ground of non-residence can be obtained.

This is a motion to discharge an order of attachment. The plaintiff in the action sues to recover damages for the breach of a contract to marry, and claims to recover the sum of $10,000. The plaintiff sued out an order of attachment founded upon an affidavit stating that the defendant was a non-resident of the state of Ohio, that her action had arisen upon a contract and promise of the defendant to marry the plaintiff, that such claim was just and that she believed that she ought to recover in such action the sum of $10,000. An order of attachment was accordingly issued, and the Commercial bank of Cincinnati was served as a garnishee, upon the

† Affirmed by the superior court in general term. See opinion 2 B. 4.

statement in the affidavit that the bank had in its possession, or under its control, moneys and credits belonging to the defendant individually, and also as a partner in the firm of James Moore & Co.

TILDEN, J.

The ground of the motion, as it had been stated by the counsel *to be, is that the claim of the plaintiff is not a debt or demand arising upon contract, 422 judgment, or decree, within the meaning of schedule IX, of section 191 of the code.

The enacting clause of the section referred to provides that the plaintiff in a civil action for the recovery of money, may, at or after the commencement thereof, have an attachment against the property of the defendant upon either of nine several grounds particularly defined in the section. But in schedule IX, it is further provided that an attachment shall not be granted on the ground that the defendant is a foreign corporation, or a non-resident of this state for any claim other than "a debt or demand arising upon contract, judgment, or decree."

Taking the enacting clause, that is the descriptive words, viz.: "In a civil action for the recovery of money," with the other clause in schedule IX, it is obvious that the qualifying words in the schedule were intended to operate by way of exception. In this view and reading the two clauses together, the statute may be held to mean that an attachment may be granted in all civil actions for the recovery of money, except in the case where the defendant is a foreign corporation, or a non-resident of this state, in both of which cases an attachment is not authorized, where the claim of the plaintiff is not a debt or demand arising upon contract, judgment or decree. The claim of the plaintiff certainly does arise upon contract, but this alone is not sufficient. The claim must also be one constituting either a judgment, decree, or a debt or demand. The precise question then is, whether the claim of the plaintiff to recover damages for the breach of the contract to marry, is in its nature and within the meaning of the statute, a debt or demand. It is certainly not a debt, for in a legal sense a debt can only be considered to exist in those cases in which at the common law the technical action of debt could have been maintained. The action of debt at the common law lies to recover money due on legal liabilities as for money paid, lent, had and received, or due on an account stated, for work or labor or for the price of goods, or upon simple contracts, express or implied, whether verbal or written, whenever the demand is for a sum certain, or one which is capable of being reduced to certainty. The certainty thus referred to has relation to the amount or sum which constitutes the debt. Such debt must on its face fix the amount, or the case must be such as to admit of liquidation without involving in the ascertainment of the amount the mere exercise of judgment or opinion. Hence at the common law the action of debt could not have been supported for the recovery of unliquidated damages, or a promise to marry. It is assumed, however, that the word "demand" is one of larger signification. This word is coupled with the word *"debt" by the disjunctive word "or" and it is certainly true, as a general rule, 423 that where words are so connected, they are to be taken as referring to different subjects. But the word is not always disjunctive, it is sometimes interpretative or expository of the former word, and according to that rule the two words would be convertible. The question is in what sense, with what latitude, and under what restrictions, if any, were the words intended by the legislature to be received and understood. The word demand, except when used as a verb, does not appear to have obtained by the modern cases any determinate signification. Lord Coke says, "that *aemand* is a word of art and of an extent in its signification greater than any other word except claim." Co. Litt. 291; Litt. sect. 508, and see Denny v. Manhattan Co., 2 Hill 220; Scott v. Humpheys, 9 Serg. and R. 124. Still the meaning and scope of this word is here very free from being defined or fixed. We are simply told that its legal meaning is very broad, but not so broad as that of the word "claim," may be accepted, however, as being generally correct, so that, for example, a release of all debts and demands would operate to discharge the claim arising upon a contract to marry. But here, as before remarked, the word is used in a clause confessedly operating by way of exception. The clause authorizing an attachment in all actions for the recovery of money would include a claim founded upon a contract of marriage. Those words are cut down by the clause forming the exception. To hold that the exception did include that case before me, would be to hold that the language of the enacting clause meant the same thing, and it would be to refuse to give effect to the exception.

Whether, therefore the word debt and the word demand are of the same meaning or not so, some restriction must be placed upon the word demand in order to

give a full effect to the purpose of the statute. But it is unsatisfactory to deal with the substanial rights of parties upon a mere criticism upon words, and while I am inclined to think that the word demand was designed to refer to a liquidated claim, I prefer to look at the general perview and policy of the statute.

It will be readily seen that the main difficulty in the way of the application of the harsh and summary remedy of attachment against the property of a non-resident, lies, in cases like the present, in the circumstance of the uncertainty of the amount which the absent debtor ought to pay, and the license given to the attaching creditor to employ the process wantonly and oppressively. In all other cases of attachment some protection is affored to the delinquent debtor by the requirement of an undertaking. In this there is none except the moral sense of the interested
424 party, who, by his oath alone, declares the amount * recoverable in the action. In actions founded on securities which, in terms, determine the amount of the debt or demand, no such consequences can arise. In those in which the amount can, in advance, be made certain by definite and determinate proof, no mischief is likely to result. These cases are apparently such, only where the ascertainment of the amount involves simply a process of estimation or calculation upon an ascertained basis, or upon a basis capable of being made certain without a resort to mere discretion. Such would be the case in an action founded on book account, or on a contract for the sale and delivery of chattels, for work and labor, for goods sold and delivered, and by one partner to a dissolved partnership against another to recover a balance payable to him on settlement of the partnership accounts. I refer similarly, to the cases cited in the argument of Goble v. Howard, 12 O. S. 165; Ward v. Howard, 12 id. 158; Hoover v. Gibson, 24 O S. 389; Pope v. Hibernia Ins. Co., 24 id. 481. Neither of these cases involved the question now under consideration, and the reasoning of the court, so far as it bears on that question, harmonizes with the views above expressed. It is almost superfluous to say that the case of Caldwe l v. Spilman, decided by the old supreme court on the circuit in 1849, and reported in the 2d Western Law Journal, p. 149, is not at all in point. As the law then stood an attachment was authorized in all cases sounding in contract, which a contract for marriage undoubtedly is. For a similar reason the cases cited from the New York reports in support of the motion are entitled to exercise no influence upon the question as now presented.

The action for breach of promise of marriage, though nominally an action founded on the breach of contract, presents a very strong exception to the general rules which govern contracts. The action is given as an indemnity to the injured party for the loss she had sustained, and has been always held to include the injury to the feelings. affections, and wounded pride, as well as the loss of marriage. From the nature of the case it has been found impossible to fix the amount of compensation by any precise rule, and, as in tort, the measure of damages is a question for the sound discretion of the jury in each particular instance. Sedgw. on Dam. 455; Southard v. Rexford, 6 Cowen R. 254; Tobin v. Shaw, 45 Main R, 348. The very object of the action is to fix the amount of the claim; and the amount can never be known in any other way. How then can a plaintiff swear to any? How much shall be set down to the account of injured feelings, and affections, and wounded pride? And how much as the value of the lost marriage?

425 I confess myself as being wholly unable to regard such a claim as a demand within the meaning of the statute. I am willing to call it a claim arising upon contract for the recovery money, and to concede that an attachment would lie under the first clause of sec. 191; but I think also that it is included in the exception made by the ninth schedule of the section, and an attachment will not lie.

SPECIFIC PERFORMANCE—INTEREST AND USURY.

[Hamilton Common Pleas Court, 1876.]

L. MOSSMAN v. GEO. R. SCHULTER, EXR.

1. An agreement to deliver government bonds will not, in general, be enforced, money damages being adequate compensation for breach of the agreement.
2. In a civil action brought for specific performance of such an agreement, a money judgment for compensation may be rendered.

3. If the borrower agrees to pay to the lender of such bonds the value of coupons as they accrue, and additional interest, so as to make a stipulated interest on the value of the bonds, the transaction is in substance a money loan.
4. Where the entire interest is as near as practicable legal interest on the value of the bonds, or such as will not exceed legal interest upon reasonable fluctuations in their value, the loan will not be held usurious, though such entire interest may exceed by a small fraction legal interest upon their value at the time the loan is made.

FORCE, J.

The plaintiff alleges that in September, 1869, he handed over to John Luhn, now deceased, a number of United States bonds with an agreement that they were to be held in trust and returned on demand; that Luhn returned some, but that three of them. for $1,000 each, are yet unreturned; and he asks a decree against the executor of Luhn's will ordering him to execute the trust by returning the bonds with unpaid accrued interest. It is claimed by the defense that the case is not one for specific performance; and that, if the plaintiff is entitled to any relief, the defendant should have credit for usurious interest paid.

It appeared in evidence that some of the bonds were five per cent, and some six per cent; and that Luhn, as long as he held *them, 426
was to pay the plaintiff the coupons or their value as they accrued, and also three per cent upon the face of the bonds.

The first question to be determined is, whether the plaintiff is entitled to a decree for specific performance of the agreement to return the bonds. Where specific performance is asked of an agreement to deliver chattels, the rule is to give a decree where the chattels are of such rarity, or have a value of such character, that they cannot be replaced at all, or cannot be replaced without difficulty by money. As when there was a sale of a pair of porcelain vases of special rarity and value. Falke v. Gray, 4 Drewry, 651.

It has long been held in England, that an agreement to deliver stock, by which there is meant government securities, will not be enforced, as they can always be purchased in the market at current rates, and they have only a pecuniary value. It has been held, however, that an agreement to deliver shares in a private corporation presents different considerations. The amount of shares in any corporation is quite limited compared with the amount of government securities; they are subject to fluctuations in value, and the person entitled to hold them is entitled to have the benefits of any speculation growing out of such fluctuations; and the ownership of such shares is accompanied with the right of voting in such corporation, which is something independent of their pecuniary value. Hence the later cases in England hold that an agreement to deliver such shares can be specifically enforced.

In this country the general rule is that an agreement to deliver such shares which are here called stock, will not be specifically enforced, money damages being generally adequate compensation for the breach. But such an agreement will be specifically enforced when it appears from the testimony in the case that the uncertain value of the stock renders it difficult to do justice by damages (White v. Shuyler, 31 How. Pr. R. 38); or where an impending vote upon important questions in the corporation give the stock a value aside from its pecuniary value. (Treasurer v. Commercial Co., 23 Cal. 390.)

But with government securities the amount is so large they can al-

ways be purchased in the market, their value is comparatively staple, and is merely the pecuniary value of an investment. Hence in this country, as in England, an agreement to deliver such securities will not be specifically enforced, but the party is left to his action for damages. In this case, therefore, the prayer for the specific performance will be refused.

The next question is, where the party asking for specific performance fails to make out his case, will the case be held for the purpose of awarding him money damages? It is true that in *one or two English
427 and American cases it has been held that in some cases where a party asks for, and fails to get, such a decree, the chancellor will award him compensation in money. But these cases are very few in number, very exceptional in character, and are of questionable authority. But where a bill is filed for specific performance, and it is held that decree will not be given, because money damages will be adequate compensation, it has never been held that a chancellor would hold the case and decree compensation in money.

But under the code different considerations present themselves. This court is not a court of chancery exclusively any more than it is exclusively a court of law. A civil action is not a suit in equity, nor is it an action at law, though it may be of the nature of either. This court sits to hear and determine any sort of litigation cognizable under the laws of Ohio, and a civil action is a statement of facts which a party claims entitles him to some redress with a prayer for the relief which he is entitled to. Hence, if a party files a petition stating facts which constitute a cause of action, the court is authorized and required, upon the case being proved, to provide such relief, or remedy, as the law annexes to the facts proved, not such as the party asks for. If a party states and proves a cause of action, but asks for relief, which the law does not give, the court is not restrained by the prayer in the petition, but is authorized and required to administer such relief as the law provides for such cause of action. Hence the plaintiff here is entitled to a money judgment.

It is claimed that the transaction was a usurious loan. Usury is the exaction of illegal interest for a money loan. It does not apply to the hire of chattles. An agreement to return a bushel and a half of corn at the end of the year in return for one bushel was held not to be usurious. (Morrison v. McKinnon, 12 Fla. 552.) Lending a cow and a calf to be returned at the end of four years with another cow three years old, was held not usury. (Cummings v. Williams, 4 Wend. 679.) Borrowing a number of sheep to be returned on one year's notice, and meanwhile to pay fifty cents per annum per head—fifty cents being more than legal interest on the value of one sheep—was held not usurious. (Hall v. Haggart, 17 Wend. 280.) A loan of one hundred and forty-two shares of bank stock for one year to be then returned with thirty additional shares, was held to be not usury. (Steptoe v. Harvey, 7 Leigh 501.)

But the nature of the transaction is determined, not by its form, but by its substance and intent. Where either funds or specie at a premium are exchanged for bank notes at a discount with a view to cover a loan at a greater than legal interest, it is usurious. (Turney v. State Bank, 5
428 Humph. 407.) In the *present case the defendant loaned government bonds receiving for the loan the value of the coupons as they should accrue, together with three per cent. interest on the face of the bonds, making a stipulated annual interest on the market value of the bonds. This transaction is in substance a loan of money at interest.

Was the loan usurious? The supreme court of Illinois held that where an obligation is payable in a commodity of fluctuating value, the parties may stipulate for any consideration they choose for the forbearance, provided they do not make it absolutely certain that the party shall pay more money or value than that for which the note was given and legal interest thereon. (Partlow v. Williams, 19 Ill. 132.) And a small excess gained in calculation of interest by considering the year as consisting of only three hundred and sixty days, has been held not to be usury. (Planters' Bank v. Bass, 2 La. Ann. 430; Agricultural Bank v. Bissell, 12 Pick. 586.) Hence it may be fairly said that when in a loan of government bonds the interest agreed to be paid is as near as practicable to legal interest on their value, or is such as will not exceed legal interest on reasonable fluctuations in their value, the loan will not be held usurious though the interest may exceed by a small fraction of a per cent. legal interest on their value at the time the loan is made.

In the present case the entire interest agreed to be paid appears to be about eight and one-twelfth of one per cent on the value of the bonds at the time the loan was made, and much less than legal interest for a considerable time that the loan has lasted. The defense of usury will not be made out.

Judgment for the value of the bonds, with accrued interest, less credits proved by defendant.

Hilderbrand & Bruner, for Plaintiff.

Jordan, Jordan & Williams, for Defendant.

---

*RAILROADS—CONTRACTS. 429

[Hamilton District Court, October Term, 1876.]

† W. U. TEL. CO. v. A. & P. TEL. CO., ET ALS.

A contract made for sufficient consideration between a telegraph company and a railway company, stipulating that the telegraph company shall have for twenty-five years the exclusive right to construct and operate a telegraph line over the track and right of way of the railway company, is not void as against public policy, but is valid, and an attempted breach of the contract will be restrained by injunction.

FORCE, J.

The plaintiff claims that it made a contract with the Junction Railway company, a company owning and operating the line of railway from Hamilton, in this state, to Connersville, Indiana; that by this contract the plaintiff acquired for twenty-five years the exclusive right to construct and operate a telegraph line over the right of way of the Junction Railway company, and by this contract there were mutual stipulations binding on the parties thereto, for the benefit of each respectively. It is claimed that by inadvertence in this contract the railway was named not the Junction Railway, but was styled the Cincinnati and Indianapolis Junction Railroad company; that by conveyance the Cincinnati, Hamilton and Indianapolis Railway company, one of the defendants, has become

†For decision of the common pleas in this case, see 1 B., 201.

the owner of the property and franchises of the Junction Railroad company, and that the Cincinnati, Hamilton and Dayton Railway company is interested therein, and that these defendants are bound by the terms of the contract described; that notwithstanding this, these railway companies, defendants, are about to violate the contract, and permit the Atlantic and Pacific Telegraph company to construct a competing line of telegraph over the said right of way, and the Atlantic and Pacific company is now about to go on with the construction thereof. The plaintiff prays for an injunction.

The first question presented is, whether or not the contract being made as appears on its face, with the Cincinnati and Indianapolis
430 *Junction Railroad company, was ever binding on the Junction Railroad company. It appears that the contract was made by the plaintiff for rights in and over the railway, between Hamilton and Connersville, that it was made with a party claiming to own and operate such railway, and that it was signed by the person who was the president of that railway. The agreement recites that it is made by the corporation owning such railway, and that it is sealed by the corporate seal. Now the Junction Railway company was the company which owned said railway track, and was operating it. The contract is sealed by the corporate seal of the Junction Railway. The Western Union Telegraph company and the Junction Railway company began at once to act under and in accordance with this contract. It was treated by both parties as the contract of the Junction Railroad company, and that being the case the Junction Railroad company could not thereafter say it was not their contract, because the words "Cincinnati and Indianapolis" were added to the proper name of the title of the company. Upon the first point, therefore, we hold that the contract was the contract of the Junction Railroad company.

It appears that before this contract was executed, the Junction Railroad company had mortgaged its road-bed, property and franchises, and after the execution of the contract proceedings were instituted in the circuit court of the United States for the Southern district of Indiana, and also for the Southern district of Ohio, in which proceedings the entire property mortgaged was sold. The railway company, defendants in this suit, hold title under that sale, and they claim that by the sale they acquired a title, disincumbered of any claim that the plaintiff herein may have had under the contract it now sets up.

Upon this, several questions present themselves. Was the agreement a mere personal contract between the telegraph company and the Junction Railroad company? or did the contract give the telegraph company some interest or right in the road and its right of way? If so, the contract being subsequent to the mortgage, did the purchaser under the foreclosure acquire title divested of such right, though the telegraph company was not party to the suit? Or, finally, is such a contract to be regarded as made by the railway company on behalf of and for the benefit of the mortgagees and others interested in the railway and so binding on them. Nice distinctions are made in the books on all these questions, but it is not neceseary to consider them in this case. It appears from the testimony that McLaren, who purchased at the sale in the foreclosure suit, purchased in trust for the Hamilton and Dayton Railroad company, and the company paid the price bid; that the Cincinnati, Ham-

ilton *and Indianapolis Railroad company was organized a distinct corporation, it is true, in name and in law, from the Hamilton and Dayton Railroad company, although all the officers of the one company are also the officers of this other company. But it appears in the testimony that the Cincinnati, Hamilton and Indianapolis company holds all its stock for the benefit of the Hamilton and Dayton Co.; that it is, in fact, and always has been, merely the owner of the naked title, while the Hamilton and Dayton company is, and has been since the sale under the decree, the beneficial owner. Now, under this state of fact, it appears that when the property was bid off to McLaren, the Union Telegraph company was in the act of reconstructing its telegraph line, and had not yet made much progress; that after this sale it continued the reconstruction of the line, and completed it at considerable expense. Hence, when the purchase was made, the purchaser, by seeing the telegraph line in existence and in operation, knew that the telegraph was there at least under some claim of right, and when the purchaser saw the railway company continuing its operations and its reconstruction of the line, it was thereby notified that the telegraph company was doing this under some claim of right. Yet the telegraph company never has been disturbed, nor has its right ever been questioned. On the contrary, the telegraph company and the railway companies defendant, have ever since that purchase been acting entirely in accordance with the terms of the contract sued on. Moreover, the president of the Hamilton and Indianapolis Railway company, in writing to the telegraph company for franks or passes over the lines of the telegraph company, writes that they are the franks or passes secured to his company by the contract which is now sued on. Hence, the contract has been so accepted, ratified and confirmed by the railroad companies that they can not object to their being bound by its terms. *431

But, also, the defendants claim the contract is void as against public policy, being in restriction of trade. But this contract only binds the railway company not to permit a competing line of telegraph to be constructed over its right of way. This right of way is a narrow strip of ground. The rest of the country is open. And while a contract in general restriction of trade is void, yet a contract restricting its exercise over such limited extent of territory, and for a limited time, can not be held, and never has been since the case of Mitchell v. Reynolds, held as void.

There is a special provision of the contract by which the railway company is restricted from carrying over its track material for a competing line, and delivering such material at points *other than the regular stations. It is claimed that this clause is void at all events. *432 We do not dispute the proposition that if the railway company undertakes to deliver at other points than regular stations goods for certain customers, it can not bind itself to refuse to make similar delivery to other customers. But what is claimed in this case, and admitted by the defendants to be the fact, is, that the railway company has agreed with the Atlantic and Pacific Telegraph company to deliver at such points along its line, material to enable the Atlantic and Pacific Telegraph company to construct over the right of way of the company a competing telegraph line. Now, such transportation and delivery of telegraph material is one step toward the construction of such competing telegraph line, and if an injunction is to issue against the construction of the line, it will, of course, also go against such transportation and delivery of ma-

terial. The injunction will be granted as prayed for against all the defendants.

Judges Collins and *Hoadley*, for Plaintiff.
Matthews and *Ramsey, contra.*

JUDGMENT—ESTOPPEL.

[Superior Court of Cincinnati, General Term, October, 1876.]

O'Connor, Tilden and Yaple, JJ.

JACOB KNAUBER v. JACOB FRITZ.

1. Where, in an action for the recovery of money, the demand of the plaintiff is for tified by the security afforded by the lien given by statute in favor of mechanics in certain cases, and the proceedings in the action result in a judgment establishing such lien, and in a separate personal judgment, such personal judgment becomes a lien also upon all the real estate of the debtor, and the judgment creditor may enforce such lien as in other cases.
2. If after the recovery of such judgment, and in order to prevent a sale of the real estate of the debtor, not bound by the mechanics' lien, a third person, for the accommodation of the judgment debtor, indorses the note of such debtor for the amount of the judgment and costs, and
433 *the note is delivered to the judgment creditor without any agreement that the note shall operate as a satisfaction of the judgment, but with an agreement between the judgment creditor and indorser, that upon payment of the note such a judgment shall be assigned to the indorser for his indemnity, the payment of such note will not operate as a satisfaction of the judgment. On the delivery of the assignment the indorser becomes entitled, as against the judgment debtor, as also against the judgment creditor, to insist upon the lien of the judgment.
3. That when a third party before such assignment becomes in good faith the purchaser from the judgment debtor of the property covered by the general lien of the judgment, having no notice of its assignment, and pays the purchase money to the judgment debtor upon the representation of the judgment creditor, that he will enforce only his mechanics' lien and has no lien except that arising under the statute, and will enforce none except that and his right to recover upon the note, such judgment creditor will be estopped from afterward asserting the general lien of his judgment. Such estoppel will bind the assignee of the judgment, and the equity of the purchaser will prevail over that of the assignee of the judgment.

STATEMENT OF FACTS.

In July, 1873, Fred. Fritz, being owner of a leasehold estate in a lot of ground fronting on Hamilton road in this city, and of a malt house standing thereon, became indebted to Francis Fritch, P. J. Burkhart and Joseph B. Blettner, a firm doing business under the firm name of Fritch, Burkhart & Co., in the sum of $1,046.77, for machinery and materials and fixtures placed in such malt house, to secure the payment of which Fritch, Burkhart & Co. took a lien, under the mechanics' lien law. Subsequently Fritch, Burkhart & Co. brought an action in this court for the purpose of enforcing such lien, and obtained a judgment for the amount due to them. These proceedings resulted also in a personal judgment in April, 1874. The personal judgment thus obtained became also a lien on two other lots of ground situated on Walnut street in this city, to both of which the plaintiff had title and upon which two lots execution was

levied, and these lots levied on were advertised to be sold at sheriff's sale. Before the day of sale Fred. Fritz applied to Jacob, his brother, to become surety for him for the payment of the amount of the judgment and costs to Fritch, Burkhart & Co., agreeing that he should have the benefit of the security afforded by the judgment for his indemnity. A note was then made for the amount of the judgment, signed by Fred. Fritz, and payable to the order of Jacob Fritz, and payable in ninety days, and this note was indorsed by Jacob Fritz and delivered to Fritch, Burkhart & Co., and the execution was recalled. After the maturity of this note, and in September, 1874, it was paid by Jacob Fritz, to whom Fritch, Burkhart & Co. assigned the judgment without recourse. Previously, however, * to this assignment of the judgment, and on July 14, 1874, a sale of the lots was negotiated through real estate agents 434 to Jacob Knauber, to whom they were conveyed by Fred. Fritz on the last-named day, he paying the consideration in full.

The present action was brought by Jacob Fritz against Knauber, et al., in March, 1875. The petition sets forth, among other facts, those above stated, and seeks an order of this court, declaring the judgment to be still a lien on the property, and further, for a judgment directing a sale of said lots freed and discharged of the claim of the defendants. The answer of Knauber, having denied the material allegations of the petition, sets forth, by way of cross-petition, the conveyance to him by Frederick Fritz, and states that the judgment in favor of Fritch, Burkhart & Co. had become satisfied prior to his purchase, by the delivery and acceptance of the note of Fred. and Jacob Fritz, that prior to the delivery of the deed to him, it was represented by Fritch, Burkhart & Co., that judgment had been satisfied by said note, and he disclaimed any interest in or lien upon said lots, and that relying upon such representations, he had purchased said lots in good faith and paid to Fred. Fritz in full the consideration therefor. These allegations were put in issue by a reply. They were tried to the court without the intervention of a jury and were found in favor of the plaintiff below, and upon such finding final judgment was rendered.

A bill of exceptions was duly executed at the trial, purporting to contain all the evidence. Exceptions were duly taken to all the rulings of the court, which were objected to at the trial, including an exception to the overruling of a motion for a new trial, and we are now called upon to review these proceedings, and to set aside the judgment there rendered, on the ground that the findings of the court were against the evidence and the law of the case.

TILDEN, J.

It cannot be doubted that the plaintiff below, by the terms of his purchase of the judgment became entitled as against Fred. Fritz and Fritch, Burkhart & Co., to enforce the lien of the judgment upon the Walnut street lots. It satisfactorily appears from the testimony that when Jacob Fritz became indorser of the note of Fred. Fritz, it was understood that he should also become entitled to such lien, so far as Fred. could confer it, and that it was agreed on the part of Fritch, Burkhart & Co., through their counsel, that upon the payment of the note of Jacob Fritz, the judgment and lien will be assigned to him.

The record of the judgment was public notice of the existence of

435 *the lien, and no person could become the purchaser of the lots discharged of such lien without the consent of Fritch, Burkhart & Co., or their assignee, with actual notice of the assignment. But, although Knauber had actual as well as constructive notice of the existence of the judgment—and of the lien there is no pretense of actual notice by Knauber that the judgment had been assigned to Jacob Fritz—Knauber had a right to treat Fritch, Burkhart & Co. as the owners of the judgment, as, according to the record, he appeared to be, and to deal respecting the property on that basis.

At the meeting held at the office of Bevan & Dolly, it is shown by the evidence that Fritch disclaimed having any lien upon the lots now in controversy, and claimed to have only a lien on the malt house lots. He said that he should look for the payment of his judgment to the note, and that he would take nothing back in court, meaning, by that expression, we suppose, that he would look to his lien on the malt house as well as to the note. Knauber was present at this interview with money in his possession to close this purchase from Fred. Fritz, and to pay over the purchase money, on having ascertained that he would not be interfered with by any proceedings under the judgment. He had a right to understand Fritch as intending to disclaim any interest whatever by virtue of the judgment lien upon the property which he had purchased. He paid over the purchase money to Fred. Fritz upon the faith of that disclaimer, and Fritch, Burkhart & Co. became clearly estopped from afterwards asserting any. As he had no notice that they had assigned the judgment to Fred. Fritz, he was not bound to make any further inquiry, and was entitled to regard Fritch, Burkhart & Co. as being still the owners of the judgment. At the time the purchase money was paid, Fred. Fritz had only the promise of Fritch, Burkhart & Co. that on the payment of the note the judgment should be assigned to him; the assignment itself was not made until after the purchase money was paid. Whether this circumstance would have made any difference, it is not necessary to inquire. Whatever remedies, if any, Fred. Fritz may have acquired as against Fritch, Burkhart & Co., on account of their promise to assign the judgments, and in consequence of the loss of the lien by the disclaimer of Fritch, we are of opinion that the equity acquired by Knauber must be regarded as superior to any acquired by Jacob Fritz, and that the judgment below must be reversed with costs.

J. R. Von Seggern, Attorney for Plaintiff.

Edward Adleta, for Defendant.

---

439 *ERROR—JUDGMENT.

[Superior Court of Cincinnati, General Term, October, 1876.]

Yaple, O'Connor and Tilden, JJ.

HAHNER v. KAUFMAN & CO.

Where the record does not show that the plaintiff in error is a married woman, a petition in error alleging error in fact, in that she is a married woman, when the judgment was rendered, does not lie, such remedy must be sought in the court rendering such judgment under section 534, of the code, part 5.

YAPLE, J.

Where there is nothing in the record to show that a defendant, against whom a judgment is rendered upon a promissory note, is a married woman, a petition in error to a higher reviewing court, alleging for error *in fact* that such party was, at the time of the rendition of such judgment a married woman, will not lie. The remedy must be sought in the court rendering such judgment under section 534, of the code, part 5.

"A court of common pleas, or district court, shall have power to vacate or modify its own judgments or orders, after the term at which such judgment or order was made. * * * For erroneous proceedings against an infant, *married woman*, or person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings."

Dismissed for want of jurisdiction.

H. J. Harrop, for Plaintiff in Error.

C. Von Seggern, for Defendants in Error.

---

*PATENTS—EVIDENCE. 494

[Superior Court of Cincinnati, General Term, January, 1877.]

Yaple, Tilden and O'Connor, JJ.

THOMAS G. GAYLORD v. HENRY L. CASE, ET AL.

1. Worthlessness of a patent is no defense against payment of agreed royalties on sales if the licensee has availed himself of the invention and has been in undisturbed possession.
2. A licensee may claim a re-issue of the patent obtained by a surrender of the original by the owner without his consent.
3. In an action for royalties, against a licensee, the defense that part of the device manufactured is not the same as that patented is a question for the jury.
4. A certificate of the commissioner of patents of the correctness of a copy or translation from a French volume in the patent office, is inadmissible to prove the existence of an invention prior to plaintiff's, such evidence is merely hearsay, and the book itself, or a duly proved translation, is the only way its contents can be shown.

YAPLE, J.

This is a proceeding in error, prosecuted here to reverse a judgment rendered in special term against the plaintiff in error and in favor of the defendants in error, who were plaintiffs below, in the sum of $7,478.08, and costs. If the verdict and judgment are in other respects binding it is not claimed that the amount is too great; nor is it claimed that the verdict is against the evidence, the bill of exceptions not containing all the evidence adduced at the trial. The defendants in error sued the plaintiff in error to recover damages for the breach of contract and subsequent modifications thereof as to the amount to be paid for royalties, made between them and Gaylord and F. Parsons (Parsons, by subsequent assignment to Gaylord, who was substituted by the parties as the sole contractor, being out of the case), on the 3d day of September, 1865, whereby it was agreed, among other things, that the United States did, on the 15th day of January, 1863, grant letters patent to Richard C. Rob-

bins which was then owned by the plaintiffs, for a certain improvement in gas pipe joints, the force and validity of which letters patent were thereby acknowledged by Gaylord and Parsons, and that as the plaintiffs were desirous of introducing pipes made according to the said invention and under the said patent in the states of West Virginia, Ohio, Michigan, Indiana, Illinois, Wisconsin, Minnesota, Iowa, Missouri, Kansas, Nebraska, Kentucky and Tennessee, the plaintiffs granted to Gaylord and Parsons "the exclusive right and license to manufacture, use and vend the said invention and improvement as secured by the said letters patent in the said states, for the term commencing on the 24th day of April, 1865, and continuing during the life of the said letters patent, and for all purposes for which iron pipes are or can be used, including water, gas and oil," and the said Gaylord and Parsons agreed "to render to the plaintiffs on the 1st day of January, 1st day of April,
495 *1st day of July and 1st day of October of each year for the term of which this license is granted, a true and exact statement of all pipes that they have sold, *or had sold for them*, with said improvement, the same to be verified by an affidavit, and, if required, to furnish the names of the parties or companies purchasing, and to pay the plaintiffs *for the use of the said invention and patent*, as a royalty or patent fee, five ($5) dollars, for each ton (of two thousand pounds) of pipes so manufactured for the purpose of conveying gas, oil and waste water, and three ($3) dollars for each ton (of two thousand pounds) of pipes so manufactured and sold for the purpose of conveying water—the said payments to be made quarterly, etc.," the grantees to retain "to themselves out of such royalties a sum equal to twenty per cent. as consideration or allowance for their share thereof." Also, that if the grantees "shall at any time fail to render to the grantors a written statement in manner aforesaid of the quantity of said pipes sold by them, or upon which said improvement is *used* by them, or *in their behalf*, for twenty days after said account should be rendered," "then," etc.

"And the grantees further agree to practically introduce said patent and improvement in the territory aforesaid within one year from the date hereof," etc, "or the grantors may annul this contract," etc. "And it is hereby understood and agreed that the grantees shall not be permitted to underlet, transfer, sell or assign the license herein contained without the written consent of the grantors indorsed thereon," etc.

The plaintiffs then averred that the defendants had caused to be manufactured and sold during the years intervening between the making of the contract and the time of bringing suit, September 11, 1873, a large amount of such pipe for which he had wholly failed to account, the royalties due to them for which amounted to $35,000, for which they asked judgment, etc.

The answer admitted the making of the contract and the substitution of Gaylord for Gaylord and Parsons, but averred that, with the consent of all the other parties thereto, he, Gaylord, assigned the same, before any pipe was manufactured thereunder, to the firm of T. G. Gaylord & Co., which was composed of the defendant, William Galway and Samuel B. Brown, which firm was substituted for the defendant in said contract; and he denied that he ever manufactured and sold any pipe under said contract, but on the contrary alleged that all the pipe that was so manufactured up to January 1, 1871, was manufactured by said firm of T. G. Gaylord & Co., and since then by the Gaylord Iron and

Pipe Company, a corporation, to the first of which he assigned the contract, and the firm, of which he *was a member, assigned to the cor- 496
poration, of which he was a stockholder, and he denied all allegations of false and fraudulent statements.

The answer also alleges that the plaintiffs represented that the patent was valid, when it was, in truth, void, and the invention, which was not the invention of the alleged patentee, worthless. The answer further denied that the several abatements of the rate per ton for royalties were made to the defendant, but were made to Gaylord & Co. and to the Gaylord Iron Pipe Co.

The reply puts in issue all the facts alleged by way of defense in the answer. It appeared as an uncontradicted fact in the case that the plaintiffs' solicitors, fearing that the original claim upon which this patent was based was too broad, applied for and obtained a re-issue of the patent, on surrender of the first one, dated August 28, 1866, containing a more definite claim, and which was to run seventeen years from the date of the first letters patent, January 13, 1863.

It was also an undisputed fact, at the trial, that Gaylord & Co., and the Gaylord Iron Pipe Co., rendered accounts to and paid the plaintiffs the royalties on all the pipe which they respectively manufactured and had sold, which they admitted was made under the letters patent as originally granted, or as re-issued; but they denied that the pipe sold, on which the plaintiffs were claiming royalty in and by their action, was constructed, substantially, under such patent, but was a different kind of pipe. The record also shows that the plaintiffs did not recover for royalties on any pipe which had not been sold, as well as manufactured, and the pay for which the sellers had not or were not entitled to receive.

To prove that the patent was void, the defendants offered to put in evidence a certified translation from a French volume in the library of the patent office, the translation being certified by the commissioner of patents, and which purported to ante-date the original patent in this case, and which it claimed was identical with the invention covered by the plaintiffs' patent, which evidence the court rejected, and the defendant excepted.

The first question which we shall consider is whether the court erred in refusing to permit the defendant to give in evidence the certificate of the commissioner of patents of the correctness, etc., of a translation of a French patent contained in a French volume in the library of the patent office, tending to prove that the claimed invention of the plaintiffs was, prior to the issuing of the Robbins patent, patented in France and published to the world.

*We have been cited to no statute, and we know of none, which 497
makes the certificate of the commissioner of patents competent evidence to prove the contents of any printed volume which may be in and belong to the library of the patent office. The book itself, or a duly sworn and proved translation, is the only way in which the contents of any such book can be established in a trial in a court of justice. The evidence offered was merely secondary, or hearsay, and was, therefore, properly rejected.

This renders it unnecessary to consider the effect of the patent act of 1839, 5 Stats. at Large, 353, section 6, which act has been ever since substantially continued in force, nor the interpretation of that statute as

made by the supreme court of the United States, in the case of O'Reilly v. Moore, 15 How., 112.

Prior to the manufacture of any pipe under the contract, Gaylord transferred it to the firm of Gaylord & Co., who manufactured and sold the same for some time, when they sold the same to the Gaylord Iron and Pipe Company, a corporation, the defendant being a member of such firm and a stockholder in such corporation, and the evidence established pretty clearly that the plaintiffs knew of such assignments and assented to each of them, or at least did not object to either; and that they communicated by letters with each of such assignees, and received royalties from each of them upon pipe sold under the original and re-issued letters patent, without objection. Upon such evidence the defendant asked the court to charge the jury that the defendant was not liable, but that if any liability existed the same was against Gaylord & Co. and such corporation, respectively, for the pipe each so sold. The court declined to so charge, but did charge that if the plaintiffs did agree that such assignees should become the parties to such contract with them, and that such assignees, with the defendants' assent, did so, then the plaintiffs could not recover, as there would then be a novation in each instance, and the substituted parties alone liable for what pipe they respectively sold; and the court left it to the jury, upon all the evidence, to determine whether such novation had or had not been effected. The jury found not; and we think the court did not err in leaving them to determine the issue, upon the evidence, as a matter of fact.

The defendants also claimed that the contract was made to secure to him a license and certain privileges under the original letters patent, which patent was surrendered and cancelled and a re-issued patent granted, which, he insisted, discharged the contract.

It is doubtless true that where suit is brought and pending for infringement of a patent, and while pending the patent is surren-
498 *dered and cancelled and a re-issued patent taken out, the plaintiff can not, if objection be not waived, file a supplemental bill and proceed to final judgment, as he could have done in the original cause if no such surrender and re-issue had occurred.

Reedy v. Scott, 23 Wal., 352, and cases there cited. That is a matter of practice; but a licensee under letters patent may, in case of the surrender of the patent by the owner without the licensee's consent, and a re-issue to him, claim and have the benefit of such re-issued patent. Gaylord had that right in this instance, at least if he did not offer to surrender the contract, and, especially, if those whom he procured to manufacture and sell the pipe continued to do so after the re-issue, and to render accounts to the plaintiffs for such pipe sold as was admitted to be covered by such re issued patent. Woodworth v. Hall, 1 Wood & Minot., 248; Potter v. Holland, 1 Fisher, 327; Woodworth v. Stone, 3 Story, 750.

The defendant also claimed that the invention was not useful, but was, in fact, worthless. This defense can doubtless be made in the case of every executory contract or promise; but where the licensee has actually availed himself of the invention according to the terms of his contract with the owner; has had the quiet, undisturbed use of it, has sold the products produced by its means so as to earn money, including the stipulated royalties to be paid the licensor, and has not disclaimed the licensor's rights in the meantime, or offered to surrender the license, he is estopped from contesting the value of the invention, or the validity of

the patent under which he has held such license. Such estoppel applied to this case, as the plaintiffs were permitted to recover nothing except for royalties on pipe which had actually been sold and for which the price had been paid, or a right and ability to collect such price existed.

The chief value claimed for the patent was that it contained an invention for constructing an air-tight joint, with much less lead than was used in former joints in iron pipe connections, was much more easily fitted in laying pipe, and was much more economical, etc. The method of forming the joint was by a groove and soft metal, as described in the patent, and the conical spigot was to be made tapering so as to render it easily fitted together into a line of pipe. The portion of the pipe not accounted for, and for which it is claimed there is no liability to account to the plaintiffs, was a large pipe, in which the conical spigot was not made tapering, but was, in other respects, like that described in the patent, having the same advantages as to the saving of lead, and in the making of the joint, the pipe being too large to admit of the tapering of the spigot.

*The court distinctly left it to the jury, upon the evidence, to say whether or not this pipe was substantially like that covered by the letters patent, and they found that it was. We think the instruction was correct, and if it was, the verdict is not complained of. The court would not have been warranted in saying as matter of law that this pipe joint, and such as was described in the patent were different. In the Corn Planter Patent case, 23 Wal., 182, the defendants were held to have infringed the patent, "although the levers used, in themselves, were different in *form* and point of attachment from the appellant's lever;" and see Sewall v. Jones, 91, 11 S. R. (1 Otto), pp. 183, 184, where the rule as laid down in the previous cases is stated and such cases cited. 499

We are not able to discover any error in the record. The judgment, therefore, is affirmed.

Sage & Hinkle and *Stallo & Kittredge*, for Plaintiff in Error.

King, Thompson & Longworth, for Defendants in Error.

MARINE INSURANCE.

[Superior Court of Cincinnati, General Term, January, 1877.]

O'Connor, Tilden and Yaple, JJ.

†Peabody Insurance Co. v. M. & A. Packet Co.

A policy of insurance on a steamboat contained the following stipulations:

1. "In no case whatever shall the assured have the right to abandon, until it shall be ascertained that the recovery and repairs of the said vessel are impracticable."
2. "That the assured shall not abandon, as for a total loss * * * unless the injury sustained be equivalent to fifty per centum on the agreed value" (of the vessel) "in this policy."
3. "In the adjustment of claims for partial loss or damage * * * no deduction will be made on account of new work for eighteen months from the date of the boat's departure on its first trip. From the termination of said eighteen months until the expiration of the twelve succeeding months, a deduction of one-fifth 'new for old' will be made on account of new work; and subse- 500

† For decision of this case rendered by the superior court at special term, see 1 B., 42.

quently (*i. e.*, after the expiration of thirty months) a deduction of one-third 'new for old' will be made in all adjustments of such claims for partial loss."

Held: 1. That the term "impracticable" does not relate to a mechanical possibility, nor to the ability to raise and repair the vessel at any cost; but that it is legally impracticable to recover and repair the vessel if the expense of so doing will exceed fifty per cent. of her actual value.

2. That the law in the United States is, that in estimating whether the injury sustained will equal or exceed fifty per cent. of the value of the vessel when repaired, her *actual* value, and not her *agreed* value in the policy, is to govern; and that this rule of law is not changed by the provision in the policy that the "assured shall not abandon, as for a total loss, unless the injury sustained be equivalent to fifty per centum on the agreed value in the policy," because if the vessel be injured to more than fifty per centum of her actual value, this is equivalent to, or in the same proportion as, fifty per centum of her agreed value.

3. That in estimating whether the cost of recovery and repairs will equal or exceed fifty per centum of the actual value of the vessel, one-third of the expense of repairs "new for old" material, is not to be deducted. That this deduction is allowed only in cases of partial loss, where the vessel, after the repairs, is returned to the insured, who has the benefit of the new for the old material; but in cases of constructive total loss by abandonment, the vessel is not returned and the insurers have all the benefit of the new material.

4. When after the disaster the insured gives notice to the insurer that he abandons as for a total loss, because the cost of raising and repairing the vessel will exceed fifty per centum of her agreed value in the policy, such reason is not the statement of a fact which concludes the insured or which could mislead the insurer, but is at most an expression of opinion as to which the insurer can judge as well as the insured. Both are at last bound by the test of the actual cost of raising and repairing the vessel, and by the construction which competent authority shall give to the terms of the policy.

O'CONNOR, J.

This is a proceeding in error to reverse a judgment rendered at special term. The action below was upon a policy of insurance for the sum of $2,000. The bill of exceptions shows that at the trial below testimony was offered by the plaintiff tending to prove that the steamer "Celeste," the subject of insurance, was a light draught stern-wheel steamer, suitable for low water navigation in the Arkansas river trade, and a little over six years old; that on the night of December 12, 1871, while navigating the Arkansas river at Siter's Chute, on a voyage to Memphis, Tennessee, she struck a snag, which knocked a hole in her bottom, so that she almost immediately sank in water about three feet deep at the bow. Notice of the disaster was given by telegram to the plaintiff at Memphis, and also to the defendant and the other insurers. The plain-
501 tiff at once gave *instructions to the officer in charge of the boat to raise her, if possible, and if he could not do so, to take good care of her and not wreck her, but to turn her over to the agent of the underwriters when he arrived. That at Siter's Chute, where the boat sunk, there were only at the time three feet of water, and that the submarine bell boat in use on those waters for raising vessels was working at a wreck twenty miles from the mouth of White river, and drawing four feet of water, and so could not get to Siter's Chute on account of low water. That the situation and condition of the Celeste, after sinking, was such, having regard to all the circumstances of the case, she could not be raised or repaired so as to save anything to her owners or the insurers, and that to raise and repair her would cost more than she would be worth when repaired, and that a prudent, uninsured owner would have wrecked her and would not have raised or repaired her; that the plaintiff was informed by his agents on the boat, after she sank, that she could not

be raised without the aid of the diving bell boat, and the plaintiff, therefore, made no attempt to raise her; that the defendant was informed that the plaintiff would not raise and repair her, and that a total loss was claimed, and claimed that the boat should be wrecked; that the underwriters refused this, and claimed the possession of the boat to raise and repair her. That the Celeste was, soon after she sank, delivered by the officer in charge to the agents of the underwriters by the order of the plaintiff, who took possession of her and attempted to raise her by building bulkheads and with wooden pumps by means of her own machinery; but, the river rising several feet, they failed in that attempt, but were thereby enabled to get the submarine bell boat up to her, and by her aid pumped her out and brought her round to Memphis, where she arrived about the 26th day of January, 1872, and was by the agent of the underwriters placed on the docks for survey and repair; that the plaintiff was duly notified of what had been done and was requested to join in having a survey made of the boat with a view to repairs; but the plaintiff thereupon refused to have anything to do with it, and abandoned the vessel to the underwriters, and so gave them notice, and subsequently gave notice thereof by a letter addressed by John D. Adams, president of the plaintiff, to Captain O. Palmer, agent of the underwriters, of which the following is a copy:

"MEMPHIS, February 3, 1872.

"*Capt. O. Palmer, Agent Board of Underwriters:*

"DEAR SIR:—You are hereby notified that we adhere to our previous position, which is that we have abandoned the steamer "Celeste to the insurers, and insist on payment as for a total loss, being thoroughly satisfied that it is impracticable to repair her, for the following reasons, viz.: the cost of bringing the boat to Memphis, raising and repairing and expenses will exceed fifty per cent. of her valuation, the agreed value of the boat, as per policy, $12,000. The value of wreck, as persurvey, of Clark and Washington (appointed by yourself), $3,000, making the damage $9 000. 502

Respectfully,

[Signed] JOHN D. ADAMS,
"*President M. & A. Packet Co.*"

That the plaintiff, when the boat was brought to Memphis and placed on the docks, gave the owners of the docks notice that they had abandoned the boat to the underwriters, and would not be responsible for any repairs, and that the owners of the docks repaired her.

The defendant introduced evidence tending to show that on receiving information of the disaster, the defendant, with the other insurers, employed Capt. Snodgrass, captain of the submarine bell boat, No. 14, to proceed, without delay, to the Celeste, and to raise her and bring her to Memphis, the nearest port, for repairs; that within a reasonable time thereafter the Celeste and cargo were raised and brought round to Memphis, the Celeste being navigated and propelled by her own machinery and power; that the gross expense of raising and bringing her round amounted to $3,945.38, which was duly adjusted as a general average loss and apportioned between the vessel and cargo, $1,800.97 being charged to and paid by the insurers on cargo, leaving $2,144.41 thereof chargeable to the boat; that the Celeste was thereupon placed on the docks for repair, and notice given to the plaintiff with a request that he should join in making a survey with a view to her repair, which was declined; that thereupon the underwriters caused her to be repaired and put in the same condition as she was at the time of the accident, at an expense, after deducting one-third new for old, of $3,516.95, the insurer having

paid two-thirds the cost of raising and bringing her to port, to-wit: the sum of $1,429.60, and also two-thirds the cost of repairs, to-wit: the sum of $2,344.64. That the plaintiff refused to pay any part of the balance and the dry dock company libeled the boat in admiralty and had her sold at marshal's sale for the sum of $2,500; and that there was insurance on said boat at the time of the accident, including the policy in this case, in the sum of $8,000.

It was admitted by the defendant for the purpose of the trial that the amount of the expense and cost of raising and repairing
503 *the Celeste was more than one-half the actual value of the boat at and just previous to the accident, or after she was repaired.

This is all the evidence, as set out in the bill of exceptions, except the policy of insurance, which was also offered. The policy contains, among other stipulations, the following:

1. "In case of any loss or misfortune resulting from any peril insured against, the party insured engages for himself or themselves, his or their factors, servants or assigns, to use every practicable effort for the safeguard and recovery of said vessel, and, if recovered, to cause the same to be forthwith repaired; and in case of neglect or refusal on the part of the assured, their agents or assigns, to adopt prompt and efficient measures for the safeguard and recovery thereof, then the said insurers are hereby authorized to interpose and recover the said vessel, and cause the same to be repaired for the account of the assured, to the charges of which the said insurance company will contribute in proportion as the same herein insured bears to the agreed value in this policy; but in no case whatever shall the assured have the right to abandon until it shall be ascertained that the recovery and repairs of said vessel are impracticable * * *."

2. "That the assured shall not abandon, as for a total loss, on account of the said boat grounding, or being otherwise detained, or in consequence of any loss or damage, unless the injury sustained be equivalent to fifty per centum on the agreed value in this policy * * *."

3. "In the adjustment of claims for partial loss or damage to hulls or vessels insured by the Peabody Insurance Company, no deduction will be made on account of new work for eighteen months from the date of the boat's departure on its first trip. From the termination of said eighteen months until the expiration of the twelve succeeding months, a deduction of one-fifth, 'new for old,' will be made on account of new work; and subsequently (*i. e.*, after the expiration of thirty months) a deduction of one-third 'new for old' will be made in all adjustments of such claims for partial loss. With these exceptions, the *actual repairs* to the boat rendered necessary by any accident insured against will be paid when it amounts to or exceeds five per cent. on the agreed value in this policy."

At the trial below the defendant asked the court to charge the jury:

1. "That under the terms of the policy the plaintiff had no right to abandon, and has now no right to recover, as for a total loss, if the Celeste, after sinking, was raised and could have been repaired at a net expense which would not have equalled $6,000, being one-half the agreed value."

504 2. "That in estimating the expense and cost of raising and *repairing the boat, with a view to determine whether it would or would not have equalled $6,000, the jury, after ascertaining the gross amount of the cost and expense of raising and repairing the boat, must deduct from the whole expense of raising her, the amount chargeable to

cargo in general average, and also from the estimate for repairs, one-third new for old."

8. "If the jury find that in fact the defendant raised and repaired the boat, restoring her to as good a condition as she was in, at and just previous to the time the accident occurred, and that the defendant offered to restore her to the possession of the plaintiff in that condition, subject to no charges or lien other than one-third of the cost and expense of raising and repairing her as aforesaid, and that such charges and liens did not equal $4,000, the proportion of the agreed value of said boat which was insured, then the verdict must be for the defendant."

4. "That if the plaintiff neglected and refused after the sinking of the Celeste to attempt to raise and cause her to be repaired, the insurers were authorized, by the terms of the policy, to interpose and recover the said vessel and cause the same to be repaired on account of the assured, being liable to contribute to the charge thereof in the proportion the sum insured bears to the agreed value of the boat, namely, one-sixth thereof; and that the assured had no right to abandon until it was ascertained that the recovery and repairs of said vessel were impracticable, and that such recovery and repairs were practicable, if the jury shall find that the vessel was in fact raised within a reasonable time and could have been restored to a condition as good as it was in at and just previous to the time the accident happened at any cost less than one-half its agreed value."

5. "That the notice of abandonment contained in the letter dated February 8, 1872, signed by John D. Adams, president of the Memphis and Arkansas River Packet Company, addressed and sent to Capt. O. Palmer, agent of the defendant, and other underwriters, assigns as the sole reason for said abandonment, that it was impracticable to repair the boat because the cost of bringing the boat to Memphis, raising and repairing and expenses would exceed fifty per cent. of the agreed value of the boat in the policy; and that it is not competent for the plaintiff now to rely on or claim to support or justify an abandonment on any other ground, and that if the jury shall find from the evidence that in fact the boat was raised and could have been repaired at a cost less than fifty per cent. of the agreed value, the plaintiff can not recover as for a total loss."

The court refused to give each and all of these special charges, except the first clause of the second special charge, *i. e.*, that the jury in estimating the expense and cost of raising and repairing *the boat, must deduct from the whole expense of raising her the amount chargeable 505
to cargo on the general average, which the court did give in the general charge. The substance of the special charges asked and refused are:

1. That to entitle the plaintiff to abandon the boat as for a total loss, the expense of raising and repairing, less the amount chargeable to cargo, must amount to $6,000, or one-half the *agreed* value of the vessel in the policy.

2. That in making the estimate of the expense for repairs, one-third "new for old" is to be deducted.

3. That it is not competent for the plaintiff to rely on, or claim to support or justify the abandonment of the vessel on any other ground than that contained in the letter of John D. Adams, president of the plaintiff, and sent to Capt. O. Palmer, agent of the defendant, to-wit: that the expense of raising and repairing her and taking her to Memphis would exceed fifty per cent. of her *agreed* value in the policy.

The court charged the jury substantially that it was the real value

and not the agreed value of the vessel which should govern in ascertaining whether the expense and cost of raising and repairing her would equal or exceed one-half her value when repaired, and that in estimating such expense one-third "new for old" was not to be deducted from the amount of repairs, but that the whole sum which it would cost the insurers and the insured in raising and repairing her was the sum by which to determine whether the expense equalled or exceeded one-half of her real value.

On these points the court charged the jury as follows:

"The rule of law in England is, that if the expense of repairs adjusted as a partial loss, would exceed the value of the vessel, the assured may abandon; and the rule in the United States is, that the assured may do so if such expense of repairs, adjusted as a partial loss, will exceed *one-half* the value of the vessel when so repaired. The agreed value mentioned in the policy is not the basis on which to determine the right."

"In ascertaining the expense of repairs, neither in England nor in America, except in Massachusetts and in the early history of the law in New York, is one-third 'new for old' material to be deducted, but such expense, in reference to ascertaining whether it equal the whole or the half value of the vessel when repaired, is what *both* the insurer and insured have to bear the costs of repairs."

"The general rule of law in both countries, with some exceptions, regulate the right of the insured to abandon to the underwriters by the value of the vessel, whether the policy be valued or open, that is, whether
506 the value is agreed to and fixed in the *policy or not." (See Crump's Mar. Ins. 277; Phil. Ins. Sec. 1539, and notes 4-5.)

"In England the same principle is settled in case the repairs exceed in cost the whole value of the vessel."

"I also hold that there is nothing in the policy of insurance in this case changing the above-stated rules of law."

The court then refers to the stipulations in the policy that the insured shall not have the right to abandon unless the recovery of the vessel and the repairs are *impracticable*, and also that the insured shall not abandon unless the injury be *equivalent* to fifty per cent. on the agreed value in the policy and charges:

That "it is legally impracticable to repair when the expense thereof will exceed one-half the actual value of the vessel when repaired, and the right to abandon in such case exists, for the purpose of settling such right to abandon, the loss or damage in such event is necessarily equivalent," though it may not be *equal* to half the agreed value of the vessel. If the vessel is given in the policy an agreed value double her actual value, and is actually injured to the extent of one-half, this is equivalent to one-half of the agreed value, though not amounting, in fact, to half the sum insured. Suppose this boat valued at $12,000 was worth only $6,000, and she had been insured by a peril insured against to the real value of $5,000; her remaining hull, etc., being worth, in fact but $1,000, surely there would be a right, under the terms of this policy, when properly construed, to abandon; the actual loss being five-sixths of the entire boat, and to repair necessarily costing more than half her value when repaired, making such repairs, therefore, legally impracticable. Whether injured to fifty per cent. or not is to be determined by the real value of the vessel at the time of the loss.

The court instructed the jury that upon this view of the law, to

which the defendant excepted, it was conceded that the verdict must be for the plaintiff for the full amount claimed and interest, less $400, the amount of the unpaid premium. Such verdict being rendered, and a motion for a new trial having been overruled, the court rendered judgment for the plaintiff, to reverse which this proceeding in error is prosecuted.

1. Did the court err in the charge given? It was agreed at the hearing of this case in general term by the plaintiff in error, that under the policy, if the vessel after the accident remained in specie, and it was mechanically possible to raise and repair her at any cost, or at least at a cost even greater than one-half her agreed value, still the insured could not abandon as for a total loss, because it was provided in the policy that "in no case whatever shall the assured have the right to abandon, until it shall be ascertained that the recovery and repairs of the said *vessel are impracticable." The court below was not specially asked 507
so to charge the jury, but it is claimed there was error in the general charge wherein the jury was instructed that it was legally impracticable to repair, if the expense exceeded what would be equivalent to fifty per cent. of the agreed value of the vessel.

Was this a correct definition of what is regarded as impracticable in insurance matters in reference to repairs?

It was held in the case of Moss v. Smith, 9 Manning, Granger & Scott 103, that "the ordinary" rule "which courts have adopted is this: if the ship, when repaired, will not be worth the sum which it would be necessary to expend on her, the repairs are, practically speaking, impossible, and is a case of total loss."

In the case of Wallerstein v. The Columbian Insurance Co., 44 New York, 217, decided in 1870, the court cites the above case, and says: "The American rule recognizes the same principle, but fixes upon a different amount of expense as giving the right to abandon. If the expense of repairs will exceed half the value of the ship when repaired, she is considered a total loss according to the American authorities, and may be abandoned." Referring to 2 Parsons on Marine Insurance, edition of 1868, pp. 125, 126, where all the cases are collected.

It is said in Moss v. Smith, above cited, "If the ship is actually lost by a peril of the sea, or any other peril covered by the policy, the assured may call it a total loss. If she sustains damage to such an extent that she can not be repaired at all, that also is a total loss. * * * But short of that, it may be physically possible to repair the ship, but at an enormous cost; and there also the loss would be total; for, in matters of business, a thing is said to be impossible when it is not practicable; and a thing is impracticable when it can only be done at an excessive or unreasonable cost. A man may be said to have lost a shilling when he has dropped it into deep water; though it might be possible, by some very expensive contrivance, to recover it. So if a ship sustains such extensive damages that it would not be reasonably practicable to repair her—seeing that the expense of repairs would be such that no man of common sense would incur the outlay—the ship is said to be totally lost."

We think, therefore, that the court in this case did not err in charging the jury that repairs were legally impracticable if the expense would be equivalent to fifty per cent. of the agreed value of the vessel.

2. But the counsel for the plaintiff in error and the court below differed as to the meaning of the word "equivalent" in the policy; the

508 plaintiff in error contending that it meant "equal *to," or "amounting to" fifty per cent. of the agreed value of the vessel in policy, and the court instructing the jury, that "equivalent" meant "ratio," or "proportion," and that if the vessel was injured to fifty per cent. of her real value, although not to fifty per cent. of her agreed value, such injury would be equivalent to, or in the ratio of, fifty per cent. of her agreed value, though not equal to fifty per cent. of her agreed value. In other words, although the policy provided that the assured should not have the right to abandon as for a total loss unless the necessary repairs were equivalent to fifty per cent. of the agreed value of the vessel, the court charged the jury that the assured had the right to abandon if the cost of repairs amounted to fifty per cent. of her real value. To this charge the defendant below also excepted.

It is clearly settled by the text writers, and by the decisions, that in estimating whether the cost of repairs will equal fifty per cent. of the value of the vessel, it is the real value and not the agreed value of the vessel which shall govern.

In Crump's Marine Insurance, pp. 276, 277, section 446, it is said: "The right of abandonment on the ground of damage to the ship is to be regulated by the value of the vessel, for sale, after repairs, whether the policy be valued or open." Citing Irving v. Manning, 6 C. B. 391, and cases there cited; and Moss v. Smith, 9 C. B. 108.

2 Park on Insurance, p. 1048 cites the case of Young v. Turing, 2 Manning and Granger, 600. In this case the Chief Justice told the jury that in considering whether there was a partial or total loss they ought not to take into account the value in the policy. Lord Abinger, in reviewing the charge, said: "I am not aware of any case or principle in the law of insurance which makes the estimated value in the policy a circumstance on which the question of total or partial loss ought to turn. The agreed value in the policy of the subject insured is intended to save the expense and doubt that may attend the investigation of value as affecting the *quantum* of compensation only. It may operate, according to events, to the advantage or detriment of either party, and where no fraud exists, both are bound by it."

In 1 Park on Insurance, p. 235, it is said: "Since the 19th of Geo. 2, the constant usage has been to let the valuation fixed in the policy remain in case of total loss, unless the defendant can show that the plaintiff has a colorable interest only, or that he has greatly overvalued the goods; but a partial loss opens the policy."

In the case of Bradlie, et al. v. Maryland Ins. Co., the supreme court held: "In respect to the mode of ascertaining the value of the ship, and, of course, whether she is injured to the
509 *amount of half her value, it has, upon the fullest consideration been held by this court that the true basis of the valuation is the value of the ship at the time of the disaster; and that, if after the damage is or might be repaired, the ship is not, or would not be worth, at the place of repairs, double the cost of the repairs, it is to be treated as a technical, total loss. * * * It follows from this doctrine that the valuation of the vessel in the policy, or the value at the home port, or in the general market of other ports, constitute no ingredient in ascertaining whether the injury by the disaster is more than one-half the value of the vessel or not."

But it is urged by the plaintiff in error that although this may be

the general rule, yet the very object of the provision of this policy, requiring an expense for repairs equivalent to fifty per cent. of the agreed value of the vessel to entitle the assured to abandon, was to take this contract out of the general rule, and that it was competent for the parties to make such contract.

No doubt it is competent for the parties to make such contract, but it must be clear that such contract, opposed to the general law, was made. As said in Crump's Marine Insurance 277, speaking of the American law, "A damage of fifty per cent. of the value of the vessel when repaired, is a constructive total loss of the vessel in case of the policy containing no *express* provision to the contrary."

In this policy there is an express provision that the expense of repairs shall be equivalent to fifty per cent. of the agreed value to give the assured the right to abandon; but does the word "equivalent" here necessarily mean $6,000, or one-half the agreed value in the policy, which is $12,000? Had such been the intention of the parties it would have been easy to say in the policy that the expense of repairs should equal one-half the agreed value, or should amount to one-half the agreed value of the vessel, or should amount to the sum of $6,000. But instead of this a form of expression is used, the meaning of which is at least doubtful, and if doubtful, the general rule must prevail. It may, as we think, be said, as was said by the court below, that fifty per cent. of the real value was in the same proportion, bore the same relation to the whole value of the vessel, as fifty per cent. of her agreed value bore to $12,000, and that it was equivalent to fifty per cent. of her agreed value, though not equal to it. And we think the illustration given by the court shows that this is the reasonable construction to give to this provision of the policy.

3. It is further assigned for error that the court refused to instruct the jury that for the purpose of ascertaining whether the cost of repairs was equal to fifty per cent. of the value the cost *of the vessel, one-third of the cost of repairs was to be deducted "new for old." 510

Arnould on Marine Insurance, 4th edition, at page 935, says:

"The whole estimated expense of so treating the ship as to make her fit to navigate the seas again, is to be included in the estimate. But a question has been raised in the United States, whether, in thus estimating the probable cost of repairs, a deduction is to be made of one-third "new for old." The better opinion which has the sanction of Story, J., and is adopted by the supreme court of the United States (in Bradlie v. Maryland Ins. Co., 12 Peters 399) seems to be that this deduction is not to be made. Mr. Phillips lends the weight of his sanction to the same doctrine. (2 Phillips Ins. sec. 1543). On principle it appears to be correct; indeed it follows as a consequence from the test of constructive total loss laid down in our jurisprudence—whether a prudent owner, if uninsured, would sell rather than repair, from a calculation that the cost of repairs would exceed the repaired value—this clearly implies that all considerations as to the cost of repairs are to be disregarded, which have reference to the sum they would cost an owner if insured."

Crump on Insurance, at page 277, says: "One-third new for old material is not to be deducted," and in a note on same page says: "A contrary doctrine has been adopted in some cases in the United States, but the above principle prevails," and cites Phillips Ins., sec. 1543.

In Bradlie v. The Maryland Ins. Co., 12 Peters 398, above referred to by Arnould, and part of which we have already cited, the court says: "In respect to the mode of ascertaining the value of the ship, and, of course, whether she is injured to the amount of half her value, it has, upon the fullest consideration, been held by this court that the true basis of the valuation is the value of the ship at the time of the disaster; and that, if after the damage is or might be repaired, the ship is not, or would not be worth, at the place of repairs, it is to be treated as a technical total loss. It follows from this doctrine that the valuation of the vessel in the policy constitutes no ingredient in ascertaining whether the injury by the disaster is more that one-half the value of the vessel or not. For the like reason, the ordinary deduction, in cases of a partial loss, of one-third 'new for old' from the repairs, is equally inapplicable to cases of a technical total loss, by an injury exceeding one-half the value of the vessel. That rule supposes the vessel to be repaired and returned to the owner, who receives a correspondent benefit from the repairs beyond his loss, to the amount of one-third. But in the case of a total loss, the owner receives no such benefit; the vessel *never returns to him, but it is transferred to the underwriters. If the actual cost of the repairs exceeds one-half of her value after the repairs are made, then the case falls directly within the predicament of the doctrine asserted in the case of 5 Peters 604. The same limitations of the rule, and the reasons of it, are very accurately laid down by Mr. Chancellor Kent in his Commentaries, 3 vol. 330; and in DaCosta v. Newhouse, 2 Tenn. Rep. 407."

511

We think the authorities very fully sustain the charge of the court below, that in estimating the cost of repairs one-third "new for old" was not to be deducted.

4. It is finally assigned for error that the court refused to instruct the jury "that it is not competent now for the plaintiff to rely on, or claim to support or justify an abandonment on any other ground" than that contained in the letter of the president of the plaintiff to the agent of the defendant, to-wit, that it was impracticable to repair the boat, because the cost of bringing the boat to Memphis, raising and repairs and expenses would exceed fifty per cent. of the *agreed* value of the boat in the policy.

We do not see in what way this declaration misled the defendants below, or caused them to do otherwise than they would have done had the reason given for the abandonment been that the repairs and cost would exceed fifty per cent. of the actual value of the boat. Had this ground been taken by the plaintiff, the defendants would still have raised and repaired the boat, the very thing they did. The reason given by the plaintiff for the abandonment, was not so much, if at all, the statement of a fact as a legal construction given to the terms of the policy, and if this construction was against his legal rights, he was no more at fault than the defendants, who were equally bound to know the law. The fact, if any, stated by the plaintiff, was that the cost of repairs would exceed half the value of the boat; but whether this value was the actual or the agreed value, the defendants were as much bound to know as the plaintiff, and this opinion at the time concluded nobody. The plaintiff and the defendants were bound by the actual test of the cost of repairs and the construction which competent authority might give to the terms of the policy.

We find, upon this review, no error in the record, and the judgment, is, therefore, affirmed.

Matthews, Ramsey & Matthews, for Plaintiff in Error.

Lincoln, Smith & Stevens, for Defendant in Error.

---

*TAXATION. 523

[Superior Court of Cincinnati, General Term, January, 1877.]

O'Connor, Tilden and Yaple, JJ.

JOSEPH FOSTER v. R. H. FENTON, TREAS.

1. Where by a clerical error, property is placed upon the tax duplicate for several years at much less than its valuation, fixed by the decennial board of equalization, the omitted portions of taxes for such years may be collected by the auditor, the property not having been conveyed.
2. It is no defense that if such property had been taxed at its appraised value the owner would at once have gone before the annual board of equalization, and have procured a reduction on the ground that the appraisement exceeded its true value, for such appraisement was of record in the proper office, and the owner was bound to take notice of the same.

YAPLE, J.

This case comes here upon demurrer to the petition by reservation from special term. The action is brought by the plaintiff to restrain the defendant, as treasurer of Hamilton county, from collecting certain taxes upon real estate of the plaintiff, situate in the city of Cincinnati, in such county.

It appears from the petition that at the decennial appraisement of realty in this state, in 1870–71, the real estate of the plaintiff involved in this case was appraised for taxation at $24,300; but by mistake of the auditor, up to 1876 the same was placed on the tax duplicate at only $16,200, or $8,100 less than its appraised value, and taxes were levied and paid by the plaintiff upon the mistaken basis. Discovering the mistake, the auditor, in 1876, for the years 1871 to 1875 inclusive, assessed upon it the portion of back taxes which ought to have been assessed and paid according to its valuation, amounting to $920.05, no part of which is for any penalty, and also placed the same upon the duplicate for the year 1876 at its appraised value, $24,300, which duplicate was by the auditor placed in the hands of the treasurer, who is proceeding to collect such back or omitted taxes. The plaintiff also avers that the appraisement is too high, and that if the land had been taxed at its appraised value he would at once have gone before the annual board of equalization and procured the reduction of such appraised value to the true value of the property.

*The question then presented, for decision is, whether or not such omitted portions of taxes for such years on the property referred to, can be levied and collected. The plaintiff claims not, because no statute enables it to be done, and because it would preclude the plaintiff's right to establish before the annual board of equalization that the appraisement of the state board of equalization is too high, and to have the same reduced to the true value of the property. 524

In relation to the last ground it is enough to say that the valuation was fixed by the state board of equalization upon this property, then and ever since owned by the plaintiff; that such appraisement was of record in the proper office, which bound the plaintiff to take notice of the same, and that he had the right to go before the local board of equalization and have it reduced if too high, provided such board could find other property appraised as much too low, and if it could not the appraisement, though too great, would be conclusive. S. & S., 755.

To determine whether there is any authority for the levy and collection of these taxes, it will be necessary to ascertain whether there is any statute which, by a fair and reasonable construction, warrants the same; for, though the constitution, article XII., section 2, provides that "laws shall be passed taxing by a uniform rule all * * * * * real and personal property, according to its true value in money," and although it is eminently just that every land owner should pay taxes on his lands according to their true value in money, as ascertained by legal appraisement, yet the constitution does not execute itself, and, to collect omitted taxes, some statute must give the right to enforce such collection and prescribe the means of doing so. We have, then, only to examine and construe our legislation to determine the question here involved.

The statute (1 S. & C., p. 112, section 19, xx.,) gives the auditor of state express authority, "from time to time, to correct all errors which he shall discover in the duplicate of taxes assessed in any county;" also (1 S. & C., p. 99, section 20, xx.), confers upon the county auditor the power, "from time to time, to correct all errors which he shall discover in his duplicate, either in the name of the person charged with the taxes, the description of land or other property, or *in the amount of such tax.*"

2 S. & C., p. 1453, section 35, xxxv., provides: "Each county auditor shall, from time to time, correct any errors which he may discover in the name of the owner, *in the valuation*, description or quantity of any tract or lot contained in the list of real property in his county; but in no case shall he make any *de-*
525 *duction* from the valuation of any tract or lot of real *property, except such as shall have been ordered either by the state board or by the county board of equalization, in conformity with the provisions of this act," etc. And sec. 48, 2 S. & C., p. 1458, enacts: "Each county auditor, after receiving from the auditor of state, and from such other officers and authorities as shall be legally empowered to determine the rates or amount of taxes to be levied for various purposes authorized by the law, statements of the rates and sums to be levied for the current year, shall forthwith proceed to determine the sums to be levied upon each tract and lot of real property, *adding the taxes of any previous year that may have been omitted*," etc. The above quoted section 20 was amended by vol. 70., O L., p. 10, but is, so far as the question here involved is concerned, in full force. Section 35 is in force. The act of April 6, 1876, 73 O. L., p. 113, does not affect the question now to be determined.

The act of March 21, 1874, 71 O. L., p. 31, provides: "That the auditor of each county in the state shall keep in his office a book, to be denominated a book of *additionals and deductions*, and that after the dupli-

cate shall have been delivered to the treasurer for collection as required by law, no amendments or alterations therein shall be made by any auditor during the fiscal year."

Sec. 2. "That when it shall become necessary to add to or increase the amount of the tax assessment upon any property upon said duplicate against any person or property, said auditor shall make an entry in said book of additionals and deductions of the amount of said additional tax or assessment, together with a description of the property and the name of the person to be charged therewith; and said auditor shall thereupon certify to said treasurer the same, who shall upon the receipt of said certificate proceed to collect said additional tax or assessment in the same manner as other taxes and assessments are now or hereafter may be collected," etc.

In this case it does not appear that the auditor did not keep such book of additionals and deductions, nor does it appear that he made these additions during the fiscal year, after he delivered the duplicate to the treasurer. So such parts of the statute are not before us for consideration.

The above sections thirty-five (35), forty-eight (48), and the act of 1874 seem to be ample to authorize the treasurer to do all that the plaintiff complains of, and they should be given a fair interpretation and construction, as it is but just that the plaintiff should pay on this property its fair proportion of taxes according to its true value in money, which it has hitherto escaped owing to a mere clerical error of the auditor in entering *it upon his duplicate at much less than its appraised value. The case of Ludlow v. Willich, 1 Cin. S. C. R., 315, upon 526
sec. 70 of the tax act, 2 S. & C., 1463, has no application to the case at bar; for there the auditor appraised the land as well as listed it for taxation, which he had no authority to do. Here a mere clerical mistake is corrected, under authority of law, and taxes collected under like authority, which ought to have been, and but for such mistake would have been, collected from year to year since such decennial appraisement, and hence the plaintiff can be no worse off than he would have been had no such mistake occurred, and the taxes have been levied and collected as they should have been. As the back or omitted taxes are not attempted to be assessed beyond the last decennial appraisement, and as there has been no conveyance of the land to a purchaser during the time it is thought to assess such taxes, we are not called upon to determine whether omitted taxes can be assessed for a period prior to such decennial period, or prior to such a conveyance or not. The demurrer to the petition is sustained.

O'Connor and Tilden, JJ., concur.

Perry & Jenny, Attorneys for Plaintiff.

Thos. B. Paxton, Co. Solicitor, for Defendant.

PARTIES.

[Superior Court of Cincinnati, General Term, January, 1877.]

Yaple, O'Connor and Tilden, JJ.

LOUIS MAZZA v. MICHAEL HEISTER.

A judgment for the removal of a building as a nuisance, being erected across a private alley through which plaintiff had a right of way, one of the defendants required to remove the same being a mere tenant, may be set aside, under section 40 of the code for want of necessary parties, in that his lessor's heirs are not parties, as he might be liable to them in trespass if he removed the building as ordered by the court.

YAPLE, J.

This is a petition in error prosecuted here by Mazza against Heister, to reverse a final decree and judgment rendered in favor of Heister against Mazza by this court, in special term, requiring Mazza to remove a certain building erected across an alleged private alley on Third street, in the city of Cincinnati, between what is known as the Chase building, owned by the heirs of S. P. Chase, of whom Mazza is the tenant, and
527 the *Henrie House, owned by the Schoenbergers, of whom James Watson is the tenant.

The action below was by Heister against Mazza and Watson, the tenants. The Schoenbergers were represented at the trial, and are there by counsel, their tenant, Watson, being in default, and they make no claim of right to maintain such building by themselves or tenant. The record does not show that Chase's heirs were represented in any way below, and Mazza's counsel disclaims representing them here. The evidence, which is set out in full in the bill of exceptions, shows conclusively that the lower story of such building, which is occupied by Mazza, was erected many years ago for S. P. Chase, who has kept tenants therein ever since, including the last tenant, Mazza, he and his heirs paying half the rent to the Schoenbergers.

It is here claimed that the judgment should be reversed, because Chase's heirs are necessary parties to a complete determination of the action, as Mazza might be liable to them in trespass were he to remove the building as commanded by the judgment of the court, such judgment being in no way binding upon such heirs.

Upon the record, we think such objection well taken. The code, section 35, provides: "Any person may be made a defendant who has or claims an interest in the controversy, adverse to the plaintiff, or *who is a necessary party to a complete determination or settlement of the question involved therein.*"

Sec. 40. "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; but when a determination of the controversy can not be had without the presence of other parties, the court must order them to be brought in."

Before the building can be taken down and removed as a nuisance to the plaintiff's right of private way, surely Chase's heirs and the Schoenbergers, who own the same, should have their day in court, and the right

to be heard in opposition, and their mere tenants from year to year, or month to month, can not fully represent and defend for their rights.

Schoenbergers have appeared throughout to represent the interests of their tenant, and to disclaim for themselves, but it does not appear from the record that Chase's heirs have done so; on the contrary, it appears that Mazza only appeared in person and by counsel. If such counsel represented Chase's heirs also to defend their tenant's rights, the record ought to show it.

Unless such entry be agreed upon and entered, reciting that such counsel also appeared at the trial for Chase's heirs, the *judgment 528
must be reversed, and the cause remanded to special term, with leave to the plaintiff to make Chase's heirs and the Schoenbergers parties defendant under one or both the provisions of section 35, of the code—that is, that they have or claim interests in the controversy adverse to the plaintiff, or are necessary parties to a complete determination or settlement of the question involved therein, which interests or claims they be required to set up by answer.

If no entry of appearance below for Chase's heirs be agreed upon and entered, the judgment will be reversed, with costs.

Judges O'Connor and Tilden, concur.

Wm. Disney, for Plaintiff in Error.

Stallo & Kittredge, for Defendant in Error.

King, Thompson & Longworth, for Geo. K. and John Schoenberger.

---

*BOND—SALE—EVIDENCE. 587

[Superior Court of Cincinnati, General Term, October, 1875.]

O'Connor, Yaple and Tilden, JJ.

†Mowry v. Kirk & Cheever.

1. M. agreed to sell to K. & C. all of his bonds of the O. & M. R. Co. (precise amount not known), but supposed to be about $14,000, at twenty cents on the dollar. The bargain was made after business hours away from their business place, the bonds being at the business place of M. The parties agreed to close the matter up next day. *Held*, that the contract was executory, not executed.
2. Both parties resided in the same city and were business men. The purchasers were able to pay for all the bonds, having in bank more than enough money to pay for them, and for which they were able, ready and willing to give the seller a check, which would have been duly honored, on presentation, for the price of the bonds so soon as the amount of the same could be ascertained. The business hours of the parties and of the banks in the city were from nine o'clock A. M. to three o'clock P. M., and purchasers of such bonds had the right to inspect them to ascertain their genuineness and amount before accepting and paying for them, and for this purpose it was usual for the seller to bring such securities to the business office of the buyer. M. not doing so on the next day, K. & C. went to his place of business some two hours before the close of business hours, and asked to see the bonds, etc. M. only showed them two of $500 each, claiming that he had only sold them $1,000 of such bonds, denied the sale

†A judgment in a case with this title was reversed by the supreme court. See opinion 19, O. S., 375. But see note at end of this case.

See for citations 28 O. S., 251, 257; 29 O. S., 448, 452; 32 O. S., 328, 330; 32 O. S., 494, 502; 35 O. S., 101, 107.

of more, and refused to let them have all he had. *Held*, that, as the purchasers were ready and willing before the close of the business day, to accept and pay
588 for all the bonds, and as before such *time, M. denied the contract and refused to comply with it, K. and C. were excused from making a tender of the price of the bonds, and after that day, might maintain an action against M. for the breach by him of his contract, and that the measure of their damages was the difference between the contract price and the market price of the bonds on the day they were to be delivered by the contract

3. If no sales of such bonds had been made for some time before such contract, nor for some time thereafter, but they were quoted at the time of the contract at twenty cents on the dollar; but M. after the sale, on the same day, learned from his attorney and the attorney of the railroad company, that by reasons of perfected arrangements of which he, the attorney, was cognizant, such bonds were then worth from *twenty-five* to *thirty* cents on the dollar, which information M., on the trial, admitted to have so received from such attorney. *Held*, that such statement of such attorney was competent evidence tending to prove the market price of such bonds at the time specified for their delivery to the purchasers. Hearsay derived from those or from sources in a position to know or give market price, is competent evidence to establish such price.

FINDINGS OF FACTS.

On and prior to the 29th day of May in the year 1863, the plaintiffs were engaged in the business of buying and selling for themselves, and on commission, stocks, bonds and other securities, in the city of Cincinnati, upon the south side of Third street in said city; and the defendant was then and there engaged in the business of banking, and also, to some extent, in buying and selling stocks, bonds and other securities, his place of business being on the north side of said Third street, nearly opposite the place of business of the plaintiffs; that the defendant was then the owner of and had in his possession in his said bank, the twenty-five railroad income bonds of five hundred dollars each, mentioned and described in the petition, and of the scrip certificate, representing a fractional interest in income bonds, amounting to four hundred and fifty-seven dollars and ninety-three cents, as mentioned and described in said petition, but no such bonds were issued in less denominations than five hundred dollars, and in order to convert said scrip into a bond, it was necessary that enough more scrip should be procured by the holder thereof, to amount, with it, to the sum of five hundred dollars, which said defendant did not own, or possess; that said bonds and scrip were obtained by the defendant from the said Ohio and Mississippi railroad company in settlement of a claim, which he held against it, that in the afternoon of said 29th day of May, 1863, after the close of business hours, the plaintiffs and defendant met, casually, at the place of business of the plaintiffs, the defendant not having with him said bonds or scrip—and not being then and there able to remember or state the true amount, or the numbers of such bonds, or of such scrip,
589 *but was able to, and did state to the plaintiffs, that they were all the bonds he had so received from said railroad company in settlement of his said claim against it, and that they amounted to between twelve thousand and fourteen thousand dollars, that is, the face of the bonds; that, thereupon, it was agreed between the plaintiffs and the defendant, that the defendant would sell and the plaintiffs would purchase from him all said bonds, at and for the price of twenty cents on the dollar upon the face of the same, said price to cover all the interest coupons attached to the same, whether due or to become due, and said sale

and purchase were, by the parties, agreed to be executed upon the following day, May 30, 1863, during business hours, that is, between nine o'clock A. M. and three o'clock P. M., by the payment therefor by the plaintiffs and the delivery thereof to them by the defendant, said 30th day of May, 1863, being Saturday; that the custom in such dealings, in the said city of Cincinnati then was, that the purchaser of such securities had the right to require the seller to bring them, for delivery, to the place of business of the buyer, in order that the latter might have the opportunity of fully and carefully examining them to assure himself of their being genuine and the coupons all properly attached, and to enable him to give the proper check from his check book upon his banker in payment; but the purchaser might waive this custom by going to the place of business of the seller to receive and pay for such bonds, if he so wished, or desired to receive them at an earlier hour of the day, than that at which the seller had the right and might bring them to him; that on said 30th of May, 1863, the plaintiffs were at their said place of business, expecting and waiting for the defendant to bring said bonds there for delivery to them, until afternoon of said day, but he did not come or send said bonds or any of them, that thereupon, on said 30th day of May, 1863, afternoon, but during business hours, one of said plaintiffs, for and on behalf of both, went to the said place of business of the defendant, where he then was present, and notified him that the plaintiffs were then ready and willing to receive and accept all of said bonds, and to pay for them according to the terms of said agreement of purchase and sale made upon said previous day; but the defendant denied having made said contract and claimed and insisted that he had only sold two of said bonds, amounting to one thousand dollars, at said price and upon said terms, and offered and tendered delivery of two of said bonds to said plaintiff, which the latter refused to receive or accept, but insisted that the plaintiffs were entitled to all said bonds by the terms of such said contract, which contract as claimed by the plaintiffs, the defendant then and there refused to comply with or fulfill, and in consequence of such denial and refusal by *the defendant, the said plaintiff went away 590
and the plaintiffs did nothing further in the premises on said day; that the custom then was in the city of Cincinnati, for purchasers of such sureties in such amounts as were involved in said contract, to pay for the same in checks upon their bankers, payable on presentation by the holder, or bearer, and not to carry with them and pay the actual money to the sellers, and this custom was well known to both the defendant and the plaintiffs, and their said contract was made with reference thereto and to be governed by it; that said plaintiff on said day took no check or money to the bank of said defendant to pay for said bonds, as plaintiffs did not know how much they would amount to, but were ready and willing to draw and give the defendant a proper check for the proper amount, had the defendant not denied the contract and had he been willing to comply with it; that when said contract was made and during all the said 30th day of May, 1863 (and for a long time thereafter), the said plaintiffs had funds (money) in a solvent bank in said city subject to their checks, payable on presentation by the holder or bearer, more than enough to pay for said bonds and scrip, according to said contract price, and were ready and willing and notified the defendant thereof, to so pay for the same, but the defendant so as aforesaid denied the said contract, except as to two bonds amounting together to one thousand dollars: that

the defendant did not then and there, or any time, exhibit to the plaintiffs, or either of them, said bonds or scrip, or inform them of the descriptions or amounts thereof, nor did they, or either of them, know the same until some days thereafter; but the defendant, when the said plaintiff called upon him, on the said May 30, 1863, as aforesaid, merely brought out of his safe or desk, the envelope containing them and took therefrom and exhibited to such plaintiff the said two five hundred dollar bonds, which he offered to deliver to him as aforesaid and such plaintiff did not request of the defendant to be permitted to see them, or to be informed by him of their numbers or amounts; that the plaintiffs were at all times anxious to receive said bonds and scrip, or the bonds without the scrip, and were ready and willing to pay the defendant for them as aforesaid, of which he had notice from them; that thereafter on the 3d or 4th day of June, 1863, the plaintiffs by inquiring of him, learned from the secretary of said railroad company, the numbers of said bonds, and their amounts, and from some other source, of said scrip certificate and the amount thereof, in ascertaining which the plaintiffs used due diligence, unless they ought in law, to have inquired of the defendant and requested him, on said May 30, 1863, to furnish them with such information; that thereupon, on
591 *the 5th day of June, 1863, the plaintiffs went to the said place of business of the defendant, and during business hours of that day, and then and there tendered to him, in payment of such bonds and scrip, or bonds without the scrip, two thousand eight hundred dollars, in currency, and demanded the delivery to them by the defendant of said bonds and scrip, or bonds, and defendant refused to accept the same, or to deliver said bonds and scrip, or either of them, for the alleged reason that he had only agreed to sell them said two bonds of five hundred dollars each; that the plaintiffs were, during all said time, from May 30, to June 5, 1863, inclusive of both days, ready and willing as aforesaid, to accept and pay for, as aforesaid, all said bonds without the scrip, or both bonds and scrip, of which the defendant had notice from them; that on said May 30th, and June 5, 1863, the fair cash market value of said bonds in said city of Cincinnati was twenty-seven and a half cents or seven and a half cents on the dollar more than the plaintiffs, by their said contract with the defendant, were to pay him for them; and that shortly after said 5th day of June, 1863, the defendant sold said bonds and scrip, for thirty-four cents on the dollar, or for fourteen cents on the dollar more than he so, as aforesaid, agreed to sell and deliver them to the plaintiffs.

CONCLUSIONS OF LAW.

Whereupon, as matters of law, the court holds:

First. That the contract and agreement, made and entered into between the plaintiffs and the defendant on May 29, 1863, was an *executory contract* for the purchase by the plaintiffs and the sale to them by the defendant of said bonds, on the terms and conditions and upon the consideration above stated; and that by the terms of such contract no property in and to any of said bonds was transferred by the defendant and vested in the plaintiffs, on said May 29, 1863, but that the title and property therein, and legal possession thereof, continued in the defendant.

Second. That at no time thereafter did the plaintiffs tender such performance of the contract on their part as to vest the right of property

in said bonds, or any of them, in themselves; that they never could have maintained an action of trover or replevin for the wrongful conversion or detention by the defendant, nor are they entitled to hold him as their trustee in the sale by him of said bonds, or call upon him to account to and pay them the proceeds of his said sale thereof.

Third. That the plaintiffs, having been ready and willing to perform said contract on their part, and having notified said defendant of such readiness and willingness, at the time and place *fixed by the terms of such agreement for the performance thereof, and the defendant having then and there upon such notice to him, denied the contract and refused to execute it, to-wit: on May 30, 1863, the plaintiffs became and still are entitled to maintain this action against the defendant for the difference, on that day, between the contract price of said bonds and their market price, with interest upon said difference from said May 30, 1863, up to the first day of the present term of this court, such difference being $937.50 and the interest $ 592

Fourth. That said scrip the defendant could not have compelled the plaintiffs to accept under said contract, nor could they have compelled him to deliver the same; and the plaintiffs are not entitled to recover for the non-delivery thereof.

Fifth. The plaintiffs' acts and omissions in the premises, after May 30, 1863, and upon June 5, 1863, in no manner affect, in law, their said right of action accruing to them on May 30, 1863.

Sixth. And that the plaintiffs are entitled to recover a judgment herein against the defendant for the sum of nine hundred and thirty-seven dollars and fifty cents, ($937.50) with interest from May 30, 1863, until the first day of the present term of this court, and their costs in this behalf expended. To which findings of fact and conclusions of law, defendant, by his counsel then and there excepted.

Opinion at special term.

YAPLE, J.

In determining what were the terms of the contract made between the plaintiffs and defendant on the 29th day of May, 1863, which has been stated in the findings of fact herein, the testimony of only three witnesses has been before the court—that of Mr. Kirk, one of the plaintiffs; Mr. Mowry, the defendant; and of Mr. Lord, a disinterested person. Kirk and Lord substantially agree as to the terms of the contract, while Mowry states that the agreement was only for the sale of $1,000 of the bonds, and that he would see Mr. Mitchell, the attorney of the Ohio and Mississippi railroad company, and his own attorney, and would then, perhaps, sell all that he held. Both Kirk and Lord say that nothing was said about Mr. Mitchell, or about Mowry seeing him, and then determining whether or not he would sell all his bonds at twenty cents on the dollar; but they say he agreed absolutely to sell all at that price, *and that the transaction was to be closed up the next day.*

Regarding all these witnesses as equally credible, for they are all intelligent and reputable gentlemen, the court is compelled to decide that the plaintiffs have established the terms of the *contract as claimed by them, by the preponderance and weight of the evidence. 593

In relation to the market value of the bonds in Cincinnati on the 30th of May, 1863, Mr. Mowry himself states that the same evening that

the contract was made he called upon Mr. Mitchell, the attorney, who had just returned from the city of New York, where he had been upon the business of the railroad company, and learned from him that, owing to certain business arrangements perfected, or about to be perfected, by the company, the bonds were worth there from twenty-five to thirty cents on the dollar. This information, I may here say, may have influenced Mr. Mowry in his refusal to fulfill this contract when called upon next day by Kirk to do so. Before the middle of June such bonds were selling as high as thirty-five cents on the dollar, and they ranged from thirty-two to thirty-five cents for a considerable period of time thereafter. Mowry sold the bonds in question for thirty-four cents on the dollar, in a month or so after this transaction with Kirk and Cheever.

Making all due allowances for the difference in price in New York and in Cincinnati, and for the fact that the contemplated business arrangements of the company had not been entirely perfected and carried into execution, and its success and effect upon the value of the bonds generally known in the market among dealers in such securities, it seems fair to fix their value, at the average, between twenty-five and thirty cents on the dollar, to-wit, at twenty-seven and one-half cents.

As to the law of the case:

It seems to me to be settled beyond the possibility of dispute that when one person agrees to sell another, for an agreed price, certain specified existing personal property, such property to be delivered by the seller to the purchaser, and the price therefor paid by the latter, cotemporaneously with delivery, at a time *subsequent* to that of the agreement of sale and purchase, the transaction is not an *executed* sale, but a mere *executory* contract for a sale—a sale implying a *conveyance of title*—which can not, without an express stipulation to the contrary, exist before the time arrives for delivery to the purchaser, and payment by him to the seller. And there was no express agreement in this case that the property in the bonds should vest in the plaintiffs upon the 29th day of May, 1863, the defendant simply to retain a lien upon them for the agreed price, to be paid next day. Further, I think it is firmly settled that, in the case of an executory contract for the purchase and sale of existing, specified and identified personal property, to be delivered and paid for at a time subsequent to that of the making of the contract, whether such time for the execution of the agreement be short or long from the making of *the
594 contract, the seller may, at the time and place of delivery, tender the property so bargained to the purchaser, and demand from him the payment for the same, place such property at the risk of the purchaser, and sue him for the price; or in such case he may take care of the property, offer it for sale, giving the purchaser notice thereof, and sell it, and after deducting expenses, hold the purchaser for the difference between the net proceeds of such sale and the contract price; and the purchaser, by tendering the price at the time and place of delivery, and demanding delivery, may, keeping his tender good, sue the seller for the value of such property in trover, or replevy it. And in such a case the seller may, if he be ready and willing to deliver, at the time and place of delivery, so notify the purchaser, if he be present, and without an actual tender, in case of refusal, may sue him and recover the difference between the market and contract price, at such time and place. And the purchaser, if then and there ready and willing to accept and pay for the property according to the contract and in the mode contemplated by the parties when they

made their agreement, may so notify the seller, if he be present, and if the latter denies the contract and refuses to deliver the property, the purchaser, without tendering the price, may sue and recover from the seller the difference between the contract and market price of such property.

This has long been the settled law.

Section 1, Saund. Pl. and Ev., p. 128, *marg.*, where it is stated that if the vendee of goods bargained and sold be ready and willing, and so notify the vendor to accept and pay for them, and the latter denies the bargain and refuses to deliver, the purchaser may maintain an action for breach of the contract, without tendering the price. Chitty on Pl., vol. 1, p. 327, *marg.*: "So, in action of assumpsit for not delivering bonds and other securities pursuant to an agreement, when the consideration money was to be paid on the receipt of the securities, it is not necessary to aver an *actual tender* of the money; an allegation of the plaintiff's readiness to pay is sufficient. So, in an action for the non delivery of goods, which the defendant had undertaken to deliver on request at a certain price, it is sufficient for the plaintiff, in his declaration, without alleging an actual tender of the price, to aver such request, and that he was ready and willing to receive the goods, and pay for them according to the terms of the sale, and that the defendant had notice of such readiness, but refused to deliver them. And when the acts to be performed by each party are mutual, and to take place at the same time, the plaintiff, it appears, should not only aver his readiness to perform his act, but also a notice of his readiness," etc.

*Swan, in his Pr. & Precs. vol. 1, p. 328, gives this form of declaration: "And the said plaintiff was always during that time," etc., "ready and willing to have accepted a delivery," etc., "as aforesaid, and to have paid the said defendant for the same," etc., "whereof the defendant then and there had notice." And in note (*a*) he says: "There is no necessity to aver an actual tender of the money." 595

The law on this subject has been settled in Ohio and elsewhere since the decision of the case of Rawson v. Johnson, 1 East, 203. See also 40 N. Y. R. (1 Hand) 584; Wheeler v. Garcia. And the opinion of the court in Keeler & Co. v. Schmertz, 46 Pa. St. R., when read, so far from holding a contrary doctrine substantially recognizes it, though the word "tender" is loosely used in the syllabus of the report. The case of Campbell v. Gittings, 19 O. R. 347, and cases decided in Ohio in accordance with the doctrine announced in that case, related to real estate, the delivery of possession of which, under a contract of sale, does not invest the purchaser with the full legal title, though it may be a complete equitable one. A formal paper conveyance executed and acknowledged as prescribed by statute is necessary to convey the legal title to lands, while mere delivery will transfer the legal title to personalty. That case, while often doubted to be good law, upon the circuit, and opposed, as it is, to the law as settled in England and in many of the states, has been and is to be limited to lands, and has never been held to govern contracts for the sale and delivery of personalty.

The only difficulty I found in this case was to determine whether Kirk and Cheever were, *in fact*, ready and willing, on the 30th day of May, 1863, at the bank of Mowry, to accept and pay for the bonds according to the contract, as Kirk notified Mowry they were—he not having taken with him either money or check.

By the custom of business, with reference to which these parties contracted, and which governed their contract, the payment was to be made by check. Kirk did not know what amount the check should be drawn for, as he did not know the amount of Mowry's bonds. Had Mowry informed him and not have refused to comply with the contract, Kirk could have there drawn and stamped the check and have given it to him—but as Mowry denied the contract, Kirk was not bound to do this, because not bound to *tender* the price in order to enable him to maintain this action. Mowry, according to the testimony of both himself and Kirk, given on this trial, only showed Kirk two five hundred dollar bonds, the others being in an envelope, which Mowry brought out, and from which he took the two bonds. Kirk could not, therefore, see or know
596 anything *of those remaining in the envelope, no more than he could have told how much money was in a roll in Mowry's pocketbook, had the latter opened it and taken out two bank notes. And, I think, Kirk was not remiss in failing to ask Mowry how many bonds, etc., there were in the envelope; for when Mowry denied that he had contracted to sell all of them, he would have been entitled to consider such a demand as impertinent as if Kirk had requested him to give him an inventory of all his private property and effects. Having the money in bank to be checked for, and notifying Mowry of that fact, and striving in every way to get the bonds and pay for them on delivery, was—I think, a sufficient readiness and willingness on the part of the plaintiffs to pay for them according to their contract.

In the report of this case in Mowry v. Kirk and Cheever, 19 O. S., 375, I am aware that the court held that the property being specific and identified, the title to the bonds passed from Mowry and vested in Kirk and Cheever on May 29, 1863, upon the conclusion of their bargain; but I find that it did not then appear, from the testimony before that court, *that the parties expressly agreed to "fix up" the matter the next day.* That is now a fact testified to before me on this trial by both Kirk and Mowry, and I have no difficulty in finding that the contract was an executory one for the purchase and sale of specified property *on the following day.*

Had the sale of the property been complete on the 29th of May, and the title thereto and risk thereof vested in the plaintiffs, the payment for it by the one and the actual delivery of it by the other would have been *concurrent* conditions *subsequent*, and not *precedent.* See Lowry v. Barrelli, 21 O. S., 324. In such a case the law is: "If ascertained chattels have been bargained and sold by a properly authenticated contract, *and the right of property has passed* to the purchaser, the vendor cannot rescind the contract, and revest the right of property in himself, and re-sell the goods by reason of the neglect of the vendee to take and pay for the goods at the appointed time; but, if the purchaser continues in default, and will not perform his part of the contract, the vendor may re-sell them within a reasonable period after he has given the purchaser express notice of his intention to do so." See Addison on Cont., 6th Ed. (Eng.), p. 197. See also Martindale v. Smith, 1 Q. B. (N. S.), 395; Milgate v. Kebble, 3 Sc. N. S. 358; 3 M. and Gr. 100; Wilmshurst v. Bowker, 8 Sc. N. R., 571; 7 M. and Gr. 882; Key v. Cotesworth, 7 Exch. 607; 22 L. J. Ex. 4; Page v. Cowasjee, Law Rep., 1 P. C. 127.

And upon the theory of the supreme court in the case as before them, I own that I am at a loss to understand how the fail-

ure *of Kirk and Cheever to tender the price of the bonds to Mowry on May 30th divested them of their property in them, subject to his 597
lien for the price, and reinvested him with such property. I gather from the report that the supreme court held that a tender on the 5th of June following the 30th of May was not within a reasonable time, and the delay worked, in law, a rescission of the contract, and thus reinvested Mowry with the title to the bonds. But it appeared from the evidence before that court that Mowry, on the 30th of May, showed Kirk the bonds, from which it would be inferred that Kirk then knew the number and amounts thereof, and was enabled to tender the exact price, if the plaintiffs had desired so to do; but it now appears, by the testimony of both Kirk and Mowry, that Kirk was only shown or saw the envelope containing such bonds, and the two bonds taken by Mowry therefrom and offered to Kirk. The plaintiffs did not learn how many bonds Mowry, in fact, had until the 3d or 4th of June, and then through the secretary of the railroad company that issued them to Mowry; and the tender of the check for $2,800 was on June 5th. I do not say that a tender on the 5th of June was a tender, under all the circumstances, made in time to vest the property in the bonds in the plaintiff.

It appears that, on the first trial of this case in this court, the property in the bonds was found upon the facts to have been vested in the plaintiffs, and that the defendant, having sold them for thirty-four cents on the dollar, could be held *as a trustee* of the plaintiffs, and made to account to them for the difference between the contract price and the price at which the defendants sold them. This basis for a judgment, I think, upon the evidence before me, wrong, and that the judgment should have been reversed on that ground; but I do think that on the proposition as to whether the property did pass to and vest in the plaintiffs, by what appears in the supreme court report of the case, there is so much room for doubt that that court might well be asked to review the decision, as it seems to have been taken for granted by counsel and court that a *tender* was necessary to enable the plaintiffs to maintain an action, and the case was disposed of on the insufficiency of that tender, the same not having been made in time. The right to elect to sue for a breach of contract merely does not seem to have been considered. But the case now before the court on the present testimony is different in essential particulars, as has been stated, and the court finds no difficulty in rendering a judgment for the plaintiff, as indicated in the statement of the conclusions of law upon the findings of fact.

Judgment may be entered accordingly.

*NOTE.—I have carefully examined Heyworth vs. Hutchinson, L. R. 2 Q. B., 447, cited by the supreme court: the sale of specific wool on board of a 598
vessel to arrive with guarantee that the wool should equal a sample shown, and if quality should be disputed, the dispute should be decided by seller's brokers, whose decisions should be final. *Held*, that defendant must accept the wool, as it was sold with warranty and not upon condition. The property passed by the sale, it being specified and identified; but payment was to be made *in futuro*, when the wool arrived, and dispute as to quantity settled, if one should arise. I can not see how that case can aid us in determining this, where delivery and payment were to be made the next day after the contract. Besides, the party there bound himself to take the wool, no matter what its quality was, seeking abatement in the price by award of the seller's broker.

YAPLE, J.

Opinion in general term.

This is a petition in error prosecuted here by Mowry against Kirk and Cheever to reverse a judgment of this court rendered in special term against him and in their favor for $937.50 with interest from May 30, 1863, and costs.

In the court below there was a special and separate finding of the facts and the law by the court, the last or sixth (6th) legal finding being a general one upon the facts so found, to-wit, "that the plaintiffs are entitled to recover a judgment herein against the defendant for the sum of nine hundred and thirty-seven dollars and fifty cents ($937.50) with interest from May 30, 1863 * * * and their costs in this behalf expended."

If the facts so found by the court warranted this conclusion of law, the judgment was right and must stand, though any or all of the preceding findings of law were erroneous, for they do not contradict this last legal finding, and it alone would have been a sufficient basis for the judgment. Riley v. Coghill, 1 Supr. Ct. R., 241, 2d paragraph of syllabus.

The findings are of record, and the opinion of the court trying the cause and rendering the judgment is in writing and in the possession of the counsel of the parties, and this will render a full statement of the case by this court unnecessary.

The evidence adduced at the trial warranted the court in finding the facts which it did, or, at least, such findings are not so against the weight of the evidence as to warrant a court, upon petition in error, to set them aside.

The opinion of the court, guided alone by its views of what the common law is, is that the judgment is right. The only question in our minds has been whether a former decision of the
599 *case by the supreme court—Mowry v. Kirk and Cheever, 19 O. S. 375—did not require the judgment to be rendered in favor of Mowry.

The supreme court decided upon the facts of the case as they were presented to it, that the property in the bonds sold by Mowry to Kirk and Cheever passed to and vested in the purchasers at the time of the contract, May 29, 1863; that they were simply to be paid for by the purchasers and handed over to them by the seller on the next day, May 30, 1863, Mowry, the seller, having merely a lien upon them and a right to retain possession of them until the purchase price was paid to him; that the going of Kirk and Cheever to Mowry on May 30th, and demanding the bonds, they not tendering the price or having with them the money to pay for them, amounted to nothing, even though Mowry denied that he had sold them more than $1,000 of such bonds, and that a tender of the price of the bonds on June 5, 1863, was too late, whereby Kirk and Cheever lost all the benefits of their contract and could maintain no action against Mowry.

It appears from 19 O. S., p. 379, that the undisputed testimony before the supreme court, that of Kirk, was: "The next day" (May 30th) "in the forenoon, I called at Mr. Mowry's office and told him that I came for those Ohio and Mississippi railroads bonds. He remarked, 'I don't know about that,' and got up and went back and brought the bonds or certificates and *showed them to me*."

If this were so Kirk and Cheever knew in the forenoon of May 30th

how many bonds there were and just how much was to be paid for them at the contract price, and might have tendered it on that day. Upon the present trial, both Kirk and Mowry testified that Mowry brought out an envelope containing the bonds and certificates and laid it on his desk and took out two five hundred dollar bonds, which he claimed were all he had sold, and did *not show Kirk the other bonds.* Kirk did not, as is admitted, know their number and aggregate amount. Now it does seem that Kirk was not bound to request Mowry to let him see all the bonds; that would have been as impertinent, after Mowry had denied the contract except as to the two bonds shown, as for Kirk to have requested Mowry to furnish him with an inventory of all his private property. From the envelope Kirk could know no more of how many bonds it contained than he could have told how many ten dollars bills Mowry had in a roll of money in his pocket-book had he taken out and exhibited two such bills. So the inaccuracy of fact testified to before the supreme court was, that the bonds were stated as having been shown to Kirk when only the envelope containing them was so shown; and Mowry never produced the bonds so as to enable the other party to tender the price, which he was bound to do. This difference of fact be- 600
tween the case as presented to the supreme court and to this court is certainly material when we consider the apparently well settled rules of law.

If the property passed to Kirk and Cheever by the contract of May 29, 1863, Mowry merely retaining a lien upon it and a right to its possession for the price, then, payment by the one and actual delivery by the other would have been *concurrent* conditions *subsequent* and not *precedent.* See Lowry v. Barrelli, 21 O. S., 324. In such cases the law is: "If ascertained chattels have been bargained and sold by a properly authenticated contract, *and the right of property has passed* to the purchaser, the vendor cannot *rescind* the contract and *revest the right of property* in himself, and re-sell the goods by reason of *the neglect* of the vendee to take and *pay* for the goods at *the appointed time,*" etc. See Addison on Conts. 6 Ed. (Eng.) p. 197; Martindale v. Smith, 1 Q. B. (N. S.) 395; Milgate v. Kebble, 3 Sc. N. R., 358; 3 M. & G., 100; Wilmshurst v. Bowker, 8 Sc. N. R., 571; 7 M. & G., 882; Key v. Cotesworth, 7 Exch., 607; 22 L. J. Exch., 4; Page v. Cowasjer Law Rep., 1 P. C., 127; Perkin's Benjamin on Sales, sec. 782.

Hence, the theory upon which the supreme court must have gone was that Kirk and Cheever's *tender* to Mowry was so *unseasonably delayed,* and after the lapse of so long a time that the law, by its own force, worked a *rescission* of the contract and sale. I am not prepared to say where authority can be found for such a holding as Mowry had the right to tender the bonds and upon refusal, sue for the price; but when it is remembered that May 31, 1863, was Sunday; that Kirk and Cheever had to make inquiries of the railroad company and others to ascertain what and how many bonds Mowry had, and that they did not ascertain sooner than June 3 or 4, 1863, a tender on the next day, June 5th, would not seem to be so far out of time as to work a rescission of the sale by mere force and operation of law. If this be so, upon so tendering the price on June 5th, which was $2,800 for $14,000 of bonds—more than Mowry had by $1,500, he having but $12,500 in such bonds, the plaintiffs were entitled to some damages.

I think the supreme court was clearly right in reversing the judgment in the case before it. Mowry, some six weeks or two

months after this contract, sold these bonds for thirty-four (34) cents on the dollar, or fourteen cents more than he bargained them to Kirk and Cheever for. The court trying the cause, the judgment in which the supreme court reversed, charged the jury: "The rule of damages applicable to the case" (contract and breach being proved) "is the difference between the *contract*
601 **price* of the bonds and the amount which *the defendant realized on the sale of them a short time afterward.*" This was on November 1, 1866, and the jury gave the plaintiffs a verdict of $2,140, upon which the judgment that was so reversed was rendered. The theory was that Mowry held and sold the bonds as the trustee of Kirk and Cheever, and was liable to account to them for the proceeds of the sale thereof. This strikes me as having been unjust, but it may be difficult, if the property passed on the 29th of May, as counsel upon both sides admitted it did, and which admission the court took for granted, to see how the judgment could have been otherwise, unless a rescission of the contract was forced by operation of law as was done. This charge and the charge that the property in the bonds passed to Kirk & Cheever by the contract, were not excepted to at all; and the latter was taken for granted by courts and counsel from first to last.

Upon the evidence before the court at the trial now under review, the contract would seem to have been only a contract *for a sale* and not *a sale* passing the property. In such event, if the plaintiffs were ready and willing to accept and pay for the bonds, and so notified the defendant, and he denied the contract and refused to perform it, the plaintiffs, without a tender of the money, were entitled to sue him and recover the difference between the *contract* price and the *market* price of the bonds at the time fixed for the delivery. My reasons and the authorities for this view of the case are given and cited in the opinion delivered at special term. I cite but one additional authority—2 Story on Conts., 5th ed., sec. 1333, *and cases referred to in his note 3.*

It is claimed that the petition avers a tender of the price of the bonds by Kirk and Cheever to Mowry, and, therefore, a tender must be proved to enable them to recover. The petition avers that "the said plaintiffs have always been ready and willing to receive and pay for the same at the rate or price aforesaid whereof the said defendant has always had notice;" and it avers a tender of the price in addition.

Under the code it seems to be clear that a plaintiff need only prove enough of the facts alleged in his petition to entitle him to recover, and if he has alleged other and further facts, which he fails to prove his right to recover will not be thereby defeated. Here the plaintiffs had to prove *no independent fact not alleged in their petition* to entitle them to recover, and, hence, their failure to prove a tender was no *variance* of the proofs from the allegations of the petition, and did not require it to be amended, and they proved enough to entitle them to recover.

The court below found that on May 30, 1863, the market price
602 *of these bonds was twenty-seven and one-half (27½) cents on the dollar, and gave the plaintiffs seven and one-half (7½) cents on the dollar as damages, that being the difference between the contract and the market price. It is claimed that such finding was against the weight of the evidence.

Now, there had been no recent sales of this class of bonds when the contract was made. The quotation was twenty (20) cents on the dollar.

But at that very time certain arrangements were making which were immediately consummated, which would greatly enhance the value of the bonds.

The evidence shows that the earliest sales after the contract were as high as thirty (30) cents on the dollar, and the bonds kept up to as high as thirty-four and thirty-five cents on the dollar, Mowry selling these bonds some six weeks after the contract at thirty-four cents on the dollar. Mowry believed on the 30th of May that the bonds were worth more than twenty cents on the dollar, and this, it is fair to infer, led him to desire to avoid the contract. Kirk and Cheever also believed them to be worth more than the price they agreed to pay, and from this it may be inferred that they were anxious to get the bonds. All these facts and circumstances were proper for the court to consider in arriving at the probable market value of the bonds on May 30th, as there were no actual sales of them on that day.

It was also in evidence that on May 29, 1863, Mr. Mitchell, who was the attorney of the railroad company and of Mr. Mowry, returned from New York City, and Mr. Mowry, after making the contract with Kirk and Cheever, went to see and consult Mr. Mitchell in reference to the bonds; and was informed by Mitchell that the bonds, by reason of the company's new arrangement, were then worth, in New York, from twenty-five (25) to thirty (30) cents on the dollar. It was fairly inferable by the court that this information caused Mowry to be reluctant and Kirk and Cheever eager. The evidence was competent to explain the motives and conduct of Mowry and as to whether he was correct in the claim that he had only sold $1,000 of the bonds.

As evidence of the fact of market price, it is claimed that Mitchell's statement to Mowry was mere hearsay and not competent to be considered to establish market price. Waiving the fact that Mitchell was the attorney of the railroad company and of Mowry, is it true that *market price* can not [be] proved by *hearsay?* In the case of Sisson v. Cleveland and Toledo R. Co., 14 Mich. R., 497, the evidence of a witness who testified to market price from what he had read in a newspaper, the newspaper not being put in evidence, was held competent. That case was affirmed and a similar decision made in the C. & T. R. *Co. v. Perkins, 17 Mich. R., 301; and see Lush v. Druse, 4 Wend., 317; re Funerstein's Champagne, 3 Wal., 145. In this last case, letters by third persons to third persons as to market price in a foreign port, though the writers were not dead, even held competent evidence. In Lush v. Druse the value of wheat at a certain point was allowed to be proved by a witness who had derived his knowledge *solely* from the books of large dealers in wheat at that place. The books were not produced, nor those dealers themselves made witnesses. 603

Upon the whole record we think the judgment should be affirmed with costs. (No penalty.)

V. and *Wm. Worthington*, for Kirk and Cheever.

Follett and Cochrane, for Mowry.

NOTE.—We have been thus full in the report of this case, as the decision has been affirmed by the supreme court, which, upon argument, refused to allow the filing of a petition in error, but made no report of the same; and it appears to shake, if not reverse, the decision of the same case reported in 19 O. S., p. 375. The profession must judge for themselves how far that report is now authority. The case has been three times before the supreme court. See 24 O. S., 581.

674 *DIVORCE—ALIMONY.

FRANK H. MAYER v. AUGUSTA MAYER.

[Hamilton Common Pleas Court, 1877.]

Where a man marries a woman whom he had seduced while the wife of another, and after living with her some time wilfully abandons her, knowing her liability to fall and she commits adultery, his petition for a divorce against her on that ground will be dismissed, for he conduced to her misconduct; but alimony previously awarded to her on the ground of his abandonment, may be forfeited, where she has property of her own sufficient for maintenance.

AVERY, J.

This case presents the question whether a man who has wilfully deserted his wife, and against whom a decree for separate maintenance, in the nature of alimony, has been obtained, may have a divorce for her subsequent adultery. The general rule is that a divorce will not be granted for a breach of matrimonial duty, where the petitioner is likewise guilty. It is much discussed, however, whether the guilt must be of the same character or degree. In England, at a period when only limited divorces from bed and board were allowed, it was held that neither cruelty nor desertion would be a bar to a petition for adultery. In this country it has generally been held otherwise, especially when the object
675 of the *suit is to obtain a dissolution of marriage. The reason is, that where a wife commits adultery, a husband, notwithstanding his misconduct, may be entitled to a separation, lest he be charged with the parentage of a spurious issue, while on the other hand, in respect to a dissolution of marriage, if he has not performed all the obligations of such marriage, he should not be left free to contract a new one. In Maddox v. Maddox (2 Ohio, 233), it is said that a petition for divorce is addressed to the equity jurisdiction of the court, and that a party must come with clean hands. In Whittington v. Whittington (2 Devereaux and Battell, 64), where a husband had wilfully separated from the wife, and the wife afterward committed adultery, his application for divorce was refused.

There are cases to the same effect in Missouri, California and Massachusetts. (12 Mo., 53; 10 Cal., 247; 4 Allen, 39.) The California case holds that the desertion by the husband, to be an absolute bar to divorce from bed and board, must be for such length of time as would have entitled the wife under the statute to divorce against him; but at the same time it is held that, in respect to decreeing a dissolution of marriage, the desertion of the husband for any time is to be considered by the court upon the ground that where a decree of divorce from the bonds of matrimony is desired, the plaintiff must be an innocent party, one who has faithfully discharged the duties of the marriage relation.

The Massachusetts case holds that desertion by the husband for a period not sufficient to entitle the wife to a divorce against him cannot be pleaded in bar of his action against her for adultery, but there is a later case in which this doctrine is announced; that misconduct of a husband not amounting to a cause of divorce may yet, when he makes no offer to amend his course, but seeks for a judicial separation for his wife's breach of duty, will be considered as qualifying his defense and

his right to rely upon it as a cause for dissolving the marriage relation in whole or in part. (111 Mass., 330.)

Under the English Divorce Act (20 and 21 Victoria), it is provided that the court shall not be bound to grant a divorce for adultery where the petitioner has wilfully deserted the other party, or has been guilty of wilful neglect or misconduct, that has conduced to adultery. This is but the embodiment in statute of the principle that has been administered by American courts without a statute—the principle that a man shall not take advantage of his own wrong, the principle of equitable estoppel. Under this act there are some instructive cases. In Borham v. Borham, Law Report, 1 Probate and Marriage, 77, where a wife had wilfully absented herself from her husband, *who had subsequently committed 676
adultery, the petition was dismissed. In Lempriere v. Lempriere, a wife was compelled, by the cruelty and drunkenness of her husband, to live separate from him, and she afterward committed adultery. *Held*, That he could not maintain an action for divorce upon that ground. In Bayliss v. Bayliss, Law Reports, 1 Probate and Marriage, 395, a man had married a woman of loose habits with whom he had previously cohabited. For a brief period he sent her away from him, and then, setting a watch upon her, detected her in adultery. His petition was dismissed. In Yeatman v. Yeatman, Law Reports, 1 Probate and Marriage, 187, a wife had obtained a decreee of judicial separation for the desertion of her husband, and afterward he applied for a dissolution of marriage upon the ground of adultery committed by her after his desertion. His application was refused. The plaintiff wilfully deserted his wife, and that fact was found in a suit instituted by her, and in which a decree for permanent alimony was pronounced.

Mr. Miller—Does the court understand the decree as finding that fact?

Court—It does find that fact.

Mr. Miller—There certainly was never any testimony of the sort in court.

Court—It is not necessary to consider what testimony that court had. It is only necessary to consider if there are grounds for this decree. I am standing on this decree. There is no question what the decree was; it can be read. Within a month after this decree the husband, it is alleged, detected the wife in an act of adultery. The evidence is conclusive that adultery was committed, but it is also conclusive that the husband was upon the lookout for it. The wife was a divorced woman when he married her. She had been divorced from her former husband upon the alleged ground of adultery committed with this plaintiff. He was not a party to that suit, but he knew of the divorce, and must be presumed to have known of the ground that was stated in the petition and decree. Where a man takes a divorced woman to wife, it would be extraordinary if he did not inquire what had caused her divorce from her former husband, and any inquiry made by this plaintiff would have led him to the knowledge of the fact. The parties were all residents of this city. The divorce was obtained here. The plaintiff had known the wife of her former husband when they were living together in marriage. Four months after the divorce was obtained the plaintiff married the woman, which of itself (so rapid was the consummation of the new marriage) might indicate that matters had progressed somewhat between the parties during the continuance of the old marriage.

677 *It is not necessary, however, to resort to presumptions. The answer in this case alleged that the plaintiff seduced the defendant while she was living in marriage with the former husband, and there is no denial.

Mr. Miller—Could that be replied to by any rule of pleading?

Court—It might be replied to: It might have been traversed. Without a reply it would be taken as admitted. From the wife, who has thus listened to the seducer, the plaintiff withdrew himself, leaving her exposed to temptation. He had previously attempted to obtain a divorce upon other grounds, and his petition, together with her cross-petition, were both dismissed. After the decree was pronounced in her suit for alimony, the relation of the wife was detected in this wise: Two policemen, passing upon their beat, at about midnight discovered a light progressing toward the house in which the defendant resided. They then heard a crashing noise, with cries of "watch!" and hastening up to the house found the doors broken open, the husband and a comrade in the house, a man naked down to his shirt in bed and the wife just stepping out, with the husband at the window outside the house immediately over the bed, holding something that looked like a pistol, and crying out to the man to lie still or he would shoot. The conduct of a husband who takes his wife in adultery and desires the adulterer to lie still in a bed still warm with the embraces of the wife, can be ascribed only to a desire rather that the adulterer should be caught and exposed than that his honor should be vindicated; nor can this conduct of the husband be ascribed to a desire that the law should avenge him, for although this man who had committed adultery was arrested and taken to the station-house he was left there and permitted to depart without any effort or attempt at an offer by the husband to prove the charge against him.

This case comes within the doctrine of the cases that have been cited. It is a case where a man, having reason to know the weakness of a woman, deserts her, and then, setting a watch upon her, detects her in an act which he should have every reason to apprehend would be committed by her when he had withdrawn himself from her society. The principle is stated in Law Reports, 1 Probate and Marriage, 397:

"It has been sometimes supposed that if a man chooses to marry an immodest woman he can afterward free himself from her by reason of her unchastity; but there is no such law. Whatever the previous life may have been, she binds herself by marriage to chastity, and if she breaks the conditions of marriage her husband is entitled to claim its

678 dissolution. But on *the other hand, a husband is bound at all times to accord to his wife the protection of his name, his home and his society, and is certainly not the less so in cases where the previous life of his wife renders her peculiarly accessible to temptation. No man is justified in turning his wife from his house without reasonable cause, and then claim a divorce on account of misconduct to which he has, by so doing, conduced." The court adds: "This I am of opinion the petitioner did." And in this case I add: "This I am of opinion the petitioner did."

One other consideration, however, remains. A husband may not be entitled to a dissolution of marriage where he has been guilty of misconduct, and yet at the same time, may not be obliged to render support out of his estate to a wife, who, independent of that, has means of her

own. The alimony under the decree which was previously pronounced at the suit of the defendant was possession by the wife of the house, No. 1450 Front street, belonging to the husband. This possession was subject to the payment to the husband of $80 per year, and was subject to the further orders of the court. The husband, on the other hand, was decreed to pay to the wife $280.43, and the wife was to bear the taxes upon the property. The wife has property of her own, some ten acres in the country, which is sufficient for her support. Her husband should not be bound, out of his estate, to give her a support which the court has decreed for his misconduct, when she, by her subsequent misconduct, as appears in this case, has forfeited that right. The petition prays not simply a divorce from the wife, but a modification of the alimony decree; and, proceeding to make such modification as seems proper, the order will be that the possession of the premises shall be surrendered by the wife to the husband, and the decree for alimony in that respect so far modified; provided, however, that before the wife shall be compelled to surrender, a settlement be made between the parties by the payment on the part of the husband of the $280.43, which he was required to pay under the decree, and by the payment by the wife of the $80 to which the property was subject in favor of the husband, together with the taxes for one year.

The petition for divorce will be dismissed.

S. A. Miller, for Plaintiff.

Jacob Wolf, for contra.

---

*TAXATION OF CATHOLIC PROPERTY. 26

[Cuyahoga Common Pleas Court.]

†BISHOP GILMOUR v. PELTON, TREASURER.

This was a proceeding regarding the taxation of Catholic church, and the school property connected therewith, for general purposes; also, for special assessments made for improvements thereon.

**Held*: That under the statutes of Ohio they are institutions of purely public charity, and are free from all ordinary state, county or city taxation, but that all such property is subject to special assessments for improvements made for the benefit of such property. 27

JONES, J.

The plaintiff in this case, Richard Gilmour, who is the Catholic bishop of the diocese, filed his petition in this case in this court, January 17, 1876, against the defendant, Frederick W. Pelton, who is the treasurer of the county of Cuyahoga, for the purpose of obtaining a perpetual injunction restraining him from proceeding to collect the sum of $3,930, as taxes alleged by the defendant to be due for the year 1875, on certain parochial school property, standing in the name of the bishop, but which taxes he insists were levied without any authority of law. At the commencement of this action, in pursuance of its object, he obtained a temporary injunction against the collection of said taxes.

---

†Decision of district court in this case was affirmed by supreme court, December 12, 1883 with entry: "We find no material difference between the facts in this case and those in Gerke v. Purcell, 25 O. S., 229, and therefore affirm the judgment below. No further report;" 1 O. B., 432.

The plaintiff avers in his petition that he is the owner in fee simple on certain trusts, more fully hereafter set forth, of five lots of land, with the appurtenances thereof, situated on the corner of Pearl and Division streets, in the city of Cleveland, to-wit: lots 1,072, 1,073, 1,074 and 1,075; also, that he owns, in the same manner and subject to the same trusts, two lots on the corner of Whitmon street, in said city, to-wit: 338 and 628; also, that he owns, in the same manner and subject to the same trusts, three lots on Superior and Lyman streets, in said city, to-wit: lots 101, 102 and 103; also, that he owns, in the same manner and subject to the same trusts, sub-lots 7, 8 and 9, and 10 feet of lot No. 10, all on Superior street, near the cathedral, in said city; also, that he owns, in the same manner and on the same trust, sub-lot 96, situated on Superior street, near Dodge street, in said city; also, that he owns, in the same manner and subject to the same trusts, sub-lot No. 19 in Lyman's allotment, in said city.

He further avers and claims all of this property (except a portion of lot No. 102, which is occupied as a parsonage, and lots 101 and 102, occupied as church property), is now and for several years past has been used exclusively for the purpose of holding therein public schools, which are open to the public free of charge, and that the same is used for the benevolent and charitable purpose of the free education of all the youth of the city who see fit to attend. He further avers that all of said property was paid for and buildings erected thereon by the voluntary contributions of the Catholics of the various parishes in which the several parochial schools are now situated, for the purpose of establishing such schools, which have since been supported by like voluntary and charitable donations and contributions. He avers that he, as the bishop of the
28 said church, holds *the title to said property for the benefit of said parishes, and in trust for the membership and schools thereof, with no other personal interest therein or expectancy of gain therefrom than to carry out and forward the purposes of charity and education, for which the schools are established; he insists that all the foregoing property so used for school purposes is wholly exempt from taxation, under the provisions of the constitution and the laws of the state of Ohio, and that the assessment of any taxes thereon is wholly illegal and void; but that notwithstanding this fact, he alleges, the defendant, as such treasurer, is about to proceed to enforce the collection of the same by distraint and other processes of law, to his great detriment and serious injury of said schools.

He, therefore, prays this court to restrain him from collecting the same, and for such other and further relief as may be just and equitable.

The defendant, Frederick W. Pelton, files an answer to this petition, in which he admits that the plaintiff is the owner of the various tracts of land described in the petition, but denies that the plaintiff holds them, or any of them, subject to any trust, expressed or implied; he avers that the plaintiff holds them all at his own will, with absolute power to sell or dispose of them for such purposes as to him may seem best; that he is not in any way accountable to any person, congregation or court within the state of Ohio or the United States for the manner in which he may use or dispose of the same, and that he is in fact only accountable for any use or the disposition of the same to the Roman Pontiff, his acknowledged superior in spiritual and temporal affairs, and to the ecclesiastical council of the church, organized under the authority of the Pope of Rome. He

further avers that said property has never been publicly *dedicated* to the use of said schools, that it has never been granted *by deed* to or for said schools, and that it is not in fact held or used exclusively for such schools nor for any purpose of a "purely public charity."

He denies that the school lots and houses are paid for by the voluntary contributions of those who were interested in the education of youth; or that they are supported by the charity of those whose funds contributed to the purchase of the same. He further denies that said schools are entirely charitable or that said property is used strictly for the purpose of charity or for the education of all who see fit to attend. He avers that said schools are furnished by the bishop with certain means at his disposal in a spirit of avowed hostility to the public schools of the state, and to prevent Catholic children and the children of Catholic parents from being exposed by instruction in the public schools to those principles of free toleration, etc., which the constitution of the state was ordained to establish, and that they are *maintained chiefly with the design and purpose of strengthening 29
the power of the Catholic church and in open antagonism to the public policy of the state of Ohio. He also denies that any of the property is exempt from taxation, or that there is now due on said property for the general *taxes*, appertaining to the state, county and city purposes, any such sum as $3,930; but he says a very large proportion of such sum of $3,930 standing on the tax duplicate is for *special assessments* for main sewers, district sewers, grading, paving, etc., and for which all property benefited thereby is liable, regardless of all exemptions from ordinary taxations.

The reply of the plaintiff to this answer of the defendant denies all of his affirmative allegations.

Under the allegations of these pleading a very wide door was necessarily opened for the admission of testimony, and a large amount of testimony introduced having but a slight or remote bearing upon what finally appears to be the vital question in the case.

We have not been troubled, however, with conflicting evidence, as the testimony consisted of the evidence of the bishop himself, of the several priests who supervise and have knowledge of the schools, together with documentary evidence in regard to the genuineness of which there is apparently no contention, such as the Pope's Encyclical letter, the decrees of the National Councils of Baltimore, the provincial Councils of Cincinnati, the Lenten Pastoral of the Bishop, and his controversial letters on the school system, written to the *Herald* in 1873.

There is, therefore, no substantial dispute as to the facts about these schools, the manner in which the money is raised with which to build and support them, the purposes to be subserved by them, and the method and instruction adopted therein.

The following is a brief synopsis of the most material portions of the facts as shown by the evidence:

First—It appears that about 6,000 children of the city are receiving instructions in these schools without expense to the state.

Second—That these children are almost, if not exclusively, the children of Catholic parents.

Third—That the conduct of the school is generally under the direction of the priest, who employs and dismisses teachers, pays their salaries, and, in case of opposition from the lay members, the bishop is

entitled to settle any dispute; and appeals may also be made to the councils and to the pope.

Fourth—That the schools are open to the public, alike to Protestant and Catholic on the same terms.

Fifth—That these schools, though the title of the property is in the bishop, are wholly acquired, paid for and supported by the voluntary donations of the congregations of the respective *parishes of the church, except that parents of children, who attend are *expected*, but not *required*, to contribute for tuition from twenty-five to thirty cents per month, but whether they pay or do not their right to attend school is unimpaired.

30

Sixth—That these contributions which are said to be voluntary amount to but a small portion of the actual current expense of maintaining them, after the purchase of the lands and erection of the building.

Seventh—That none of the school property in question is used by the bishop or the people, or in any way used or leased for the purpose of personal or pecuniary gain, nor does any income arise therefrom.

Eighth—At these schools, in addition to the usual branches of secular education, instruction is given in the catechism, religious and Bible history is taught to the children "from a Catholic standpoint;" the schools are opened and closed with prayer each day, and the apostolic creed is recited by the pupils. It is said, however, that peculiarly Catholic exercises are not required by the rules of non-Catholics.

Ninth—These schools are probably established by the several congregations under the impetus of the actions of the Councils of Baltimore, and the general teachings of the church, for the general purpose of instructing youth of their congregations in the principles of the Catholic faith and morals, along with the general literature, and because they considered that the common methods of education fostered heresy in the minds of Catholic children, and because they considered the books in common use had a tendency to impugn the principles of the Catholic faith, falsely set forth the dogmas of the church and to breed contempt and hatred for the Catholic faith.

Tenth—It also appears that the parents of Catholic children are subject to church discipline for refusing without good reason to send their children to these schools. The several provisions of the constitution of the state of Ohio, and the statutes passed in pursuance thereof, bearing on the general question, are as follows: Article XII., section 2 of the constitution of the state of Ohio provides that "laws shall be passed taxing all moneys, lands, etc., etc., * * *but burying-grounds, public schoolhouses, houses used exclusively for public worship, institutions of purely public charity, * * * may by general laws be exempted from taxation," etc.

Section 7, article I. of the constitution provides that "no preference shall be given by law to any religious society, nor shall any interference with rights of conscience be permitted," also that religion, morality and knowledge, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.

*Section 2 of article VI. of the constitution provides for the establishment by the state "of a thorough and efficient system of common schools throughout the state." 31

The statute of 1864, amendatory of the statute of 1850, Swan and Sayler, page 761, provides for the exemption from taxation of various kinds of property, to-wit:

First—All public school-houses, etc.

Second—All houses used exclusively for public worship, etc.

Third—For graveyards, etc.

Fourth—United States property.

Fifth—Court houses, jails, etc.

Sixth—Houses for the support of the poor.

Seventh—"All buildings belonging to institutions of purely public charity, together with the land occupied by said institution not leased or otherwise used with a view to profit."

It is perfectly clear from the contemplation of these provisions and the facts in regard to these parochial schools and school-houses of the Catholic church that they are not "public school-houses" within the meaning of article XII, section 2 of the constitution, authorizing the legislature to exempt them from taxation, and it is also clear that they are not exempt from taxation by virtue of the similar provision of the statute made in pursuance of such authority, exempting "public school-houses," the supreme court of our own state having distinctly held that the "public school-houses" therein described are school-houses that belong to the public, and are conducted under public authority.

But this school property in question is claimed by the plaintiff to be exempt from taxation under the subdivision of the statute of 1874, already quoted in pursuance of the authority, of article XII, section 2, which exempted "all buildings belonging to institutions of purely public charity, together with the land occupied by such institution not leased or otherwise used with a view to profit," etc.

The real question in this case is, are these schools exempt under the last quoted provision of the law? The defendant in this case insists:

First—That these parochial schools are not institutions of charity; that they are not purely public in their character, and, therefore, the provisions of the statute have no applicability, and that they are not exempted from taxation by reason thereof; and

Second—The defendant earnestly insists that the spirit and purposes in which these schools originated and are conducted, and the manner of conducting them to carry out such spirit and purposes, is so opposed to the public policy of the state that they are not and ought not to be exempt from taxation.

*I will first briefly examine the latter objection before proceeding to discuss the applicability of the statutory and constitutional provisions. The real question before us is what property the state of Ohio, by its lawfully enacted statutes, has in fact actually exempted from taxation, and is not a question what laws she ought to pass or what property she ought to exempt. That a thing is "opposed to public policy" is often said in a sentimental or oratorical way, but we have only to concern ourselves with things that are opposed to the public policy in the legal sense of the term, and which are in some way tainted with illegality of origin, purpose or tendency, or are a breach of public morality. It is not easy to perceive what force there could be in an argu- 32

ment against exemption drawn from its supposed opposition to public policy, if the property shall be found to be actually exempt by the plain provision of the statute; and if not actually exempt by the plain provision of the statute, it would, of course, be taxable, although it were in entire harmony with the public policy of the state. With what force could it be claimed that the public policy of the state would *forbid* the exemption of property from taxation which a public statute of the state, made in pursuance of the constitution, should in express terms actually exempt from taxation?

But if we proceed to analyze the question further and inquire how, why and in what respect the establishment of these schools is in any legal sense opposed to the public policy it is opposed to, or what part of the public policy of the state, or what particular part of the public policy of the state it is that forbids their establishment within its limits, we are certainly left without satisfactory response or definite information. Can it be claimed that the establishment of these schools is opposed to the religious public policy of the state? Clearly not, for the reason that the state has no religious policy to oppose or be opposed. As a state it is neither Catholic, Protestant, Jewish nor Christian. It protects and is bound to protect all equally and impartially, but does not specially uphold or encourage any one kind of religion above another. On the contrary, the constitution provides that "no preference shall be given by law to any religious society, nor shall any interference with the rights of conscience be permitted."

It is plain then that it can not be any particular religious policy of the state that these schools are opposed to.

Let us then inquire what civil public policy of the state these schools are opposed to, or what portion of its civil policy in regard to the establishment of public schools forbids the existence of these Catholic parochial schools, and how the establishment of such schools place them, or those who establish them, in opposition to the public policy of the state in that behalf? It certainly can not be claimed that it is the public
33 *policy of the state that the children of the state shall not receive any education in any other school than in one of the public schools established by itself; no such policy as that is hinted at in any of the statutes of the state. If this policy were actually established by statute and in harmony with the constitution, all private schools and colleges in the state would be liable to be abolished by such a public policy. Neither do we think that it can be truthfully claimed that it is the public policy of the state that children shall not be taught religious faith and morals in addition to secular instruction, either in the public or private schools in the state. A discretion over this subject is veiled in the public school authorities, which, if reasonably exercised, is not to be supervised by the courts of the state, and the idea that the public policy of the state is opposed to religious instruction in the private schools is wholly without foundation. I can not see, then, that in the establishment and conduct of these parochial schools any statute of the state is violated, that public morality or the policy of any law is infringed upon, or that any opposition to the laws of the land is therein taught or encouraged in any way.

Not only this, but it is clearly apparent that if these schools, because they are established by Catholic influences chiefly, and in pursuance of Catholic purposes, are so opposed to the public policy or the

state that a trust can not be enforced or a general statute of the state allowed to operate in their favor, that the argument is equally strong and conclusive against allowing the statute exempting church property to operate to exempt it so far as Catholic church property is concerned, for surely their schools can not be opposed to public policy in the legal sense, and their church itself be in harmony with the same public policy.

Yet it has not been claimed in the state, so far as I know, that Catholic church property is not exempt, nor that the proper reading of the constitution would be, "All houses used exclusively for public worship are exempt from taxation except Catholic churches, which are opposed to public policy."

Neither is it apparent why, if we reach the conclusion that they are clearly opposed to the public policy of the state in the legal sense, or, if either of them is forbidden by the same policy, they should not both be prohibited and their unlawful practices, if any they have, suppressed by statute law. There is no logical stopping place short of this, if in any legal sense of the word, the claims that they are opposed to the general public policy of the state has had any solid foundation under his feet.

It also seems further to be claimed that the fact that the bishop holds the legal title to all the school property (and as the defendant claims with absolute power of alienation and conversion), *has 34
something to do with this question or with the exemption of the property from taxation, under the statutes of the state. From the evidence in the case it clearly appears that Bishop Gilmour is merely the trustee holding the legal title to the school and church property for the benefit of the schools, parishes and congregations, whose money purchased it, and for whose use as school and church property it was designed and contributed, and that he has no right whatever, either under the laws of the church or the laws of the state to convert it to their uses without their consent, and I have no doubt whatever that a court of equity has the same jurisdiction in a case like this, and has the same power to enforce the faithful execution of this trust in behalf of the *cestui que* trusts as it has of any other trust involving the rights of persons and property.

But besides this, under the exempting clauses of the statute pertaining to churches or public charities, the title to the property is not an essential element, but it is the character of the institution and the uses to which it is put that regulates its exemption. The supreme court in the Bishop Purcell case says: "If the property is appropriated to the support of a charity which is purely public, we see no good reason why the legislature may not exempt it from taxation without reference to the manner in which the legal title is held, and without regard to the form or character of the organization adopted to administer the charity."

There is no statute of the state forbidding a bishop or other officer of this church or any other church from holding the legal title to property in trust for the use of a public charity or otherwise. It can not truthfully be said, therefore, that it is so against the public policy of the state for the title of the property to be held by the plaintiff in this case, as in any way to legally affect the question of its exemption from taxation. I think we must therefore dismiss as inadmissible in law and unsupported by testimony, the claim of the defendant that the establishment and maintenance of these schools is, in any legal sense, opposed to

the public policy of the state, the property in question is for that reason deprived of any privilege of the statute of exemptions if on a fair construction it applies to the case.

The state of Ohio has undoubtedly the legal right to tax, or exempt from taxation all the church, school, and charitable property, or any proportion of it that it may see fit. The question is, what has it done? Let us now proceed then to examine and ascertain whether the school property in question has been actually exempted from taxation by the statutes of the state, under the clause exempting property of "institutions of purely public charity."

35 *And the first question that arises is, is the establishment and maintenance of these schools a charity within the meaning of the provisions of the statute in question? "The meaning of the word charity in its legal sense is different from the signification it ordinarily bears. In its legal sense it not only includes gifts for the benefit of the poor, but also endowments for the advancement of learning, or of the institutions for the encouragement of science and art, and it is said for any other useful or public purpose." 3 Step. Com., 229.

In the Harvard College case, 12th Grey, 594, it was held that gifts "designed to promote the public good by the encouragement of learning, science, or useful arts, without reference to the poor, is a charity."

In the great leading case of Sackson v. Wendell Phillips in 14th Allen R., it was held that "A charity is a gift or gifts to be applied consistently with existent laws for the benefit of any number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by erecting or maintaining public buildings or otherwise lessening the burdens of government. And we think there is no doubt that it is universally admitted in this country that gifts and donations for the promotion, support, or endowment of religious or educational establishments are to be considered as charities regardless of the sects or denominations with which they may be specially connected."

From these definitions of charity and the authorities above quoted, which are substantially recognized as sound and correct by our own supreme court in the case already quoted, I have no doubt that the establishment and the maintenance of these schools chiefly by means of public contributions and gifts, is clearly within the statute in question.

2. The next question in this case is, are they charities that are purely public in their character? The uncontradicted testimony in the case shows that these schools are open to the public without distinction as to religion or sect, on the same equal terms; and it is of no consequence so far as this question is concerned that very few Protestants or others than Catholics have ever availed themselves of the privilege of attending. A hospital for the education in the principles of homœopathic medicine opened to the public, would be no less public because allopathists or eclectics wholly refused to attend.

A Presbyterian church is no less a place of public worship because Baptists, Catholics, Unitarians or Jews may not choose to worship therein. And our supreme court, in discussing a similar case, says: "For the purpose of determining the public nature of the charity it is not material

36 through what particular *form the charity may be administered, if it established and maintained for the benefit of the public, and so

constituted that the public can make it available. This is all that is required." 25 O. S. Report, 224.

They further say "that in such a case the charity is to be regarded as purely public;" also "that when private property is appropriated for the support of education for the benefit of the public without any view to profit, it constitutes a charity that is purely public; when the charity is public the exclusion of all idea of private gain or profit is equivalent in effect to the force of the 'purely,' as applied to public charity in the constitution." 25 O. S.

In the same case it is further said: "The circumstances that the use of property is free is not a necessary element in determining whether the use is public or not. If the use is of such a nature as concerns the public and the right to its enjoyment is open to the public upon equal terms, the use will be public whether compensation be exacted or not."

It distinctly appears from the proofs in the case that these schools are not carried on for private gain or profit. That the total receipts from tuition do not pay over one tenth of the current expenses of the same, neither are the premises leased with a view to profit, no money whatever being received for their use, for any purpose or from any source.

I can come, then, to no other conclusion than that these school premises are exempt from taxation under the existing statutes of the state, as to all ordinary taxes for state, county, and city purposes, on the ground that they are institutions of purely public charity, as will be seen from quotations already made. This is not the first time this question has been adjudicated in Ohio. On the contrary, I think that substantially all the questions involved in this case were in a similar case tried in Cincinnati before the superior court of that city, in a case brought by Archbishop Purcell against the treasurer of Hamilton county, to enjoin the collection of taxes on school, church and parsonage property. The injunction was sustained in that court, and the case went to the supreme court on error. The Reporter's statement of the case, as it was in the supreme court, is as follows, viz: "The schools are distributed among the different parishes of the Catholic church, the average attendance in these schools is about 15,000 children, a leading purpose is to educate the children of Catholic parents so as to keep them within the fold of the Catholic church; accordingly religious services, such as are required by the Catholic church, form a part, although a small part, of the daily exercises of the school. At those exercises the children of Catholic parents are expected, and other children are merely permitted, to be present; schools are opened for all denominations, and the instruction is sub-
*stantially gratuitous. Small contributions of twenty-five or fifty
37 cents a month are expected from parents, but the aggregate amount of these contributions is small. The schools are supported substantially out of the revenue of the church. They are not carried on with a view to profit."

This is substantially the very case we have before us now, and in that case the supreme court, on the facts, as set forth above, held that the property was exempt as constituting a purely public charity within the meaning of the constitutional provision. This decision was made by the unanimous concurrence of the five judges of that court, and I know of no reason why it should not be considered as authoritatively settling that question, and it is under the same construction we have given to the words "purely public charity" that numerous literary and theological

institutions and seminaries in this state under the control of the various denominations each, as Methodists, Presbyterians, Baptists, Episcopalians, etc., wholly or partially endowed by charity, or built up by voluntary contributions, are now and always have been held exempt from taxation, as that clause in the constitution is the only one authorizing the exemption of such property.

But one other question remains to be passed on in this case, and that is, whether the statute in question exempts this school property from the special assessments as well as the taxes for general purposes? Of the sum of $3,930 sought to be enjoined in this case, only about $1,000 is for the general taxes for state, county and city purposes, and the balance is for special assessments for sewers, paving, etc. I regard it as settled, by numerous authorities, that for special assessments, they not going to the state, but being levied and collected for improvements made for the special benefit of the property itself, the property is liable, regardless of the general exemption. This doctrine is sustained by 46 N. Y., 506; 8 R. I., 474; 116 Mass., 181; 5 Hun., 444, and other authorities in various states. The injunction heretofore granted in this case is sustained and made perpetual so far as the general taxes are concerned, and the petition is dismissed, and the injunction is dissolved so far as the same embraced special assessments for the benefit of the property itself.

W. B. Saunders, for Plaintiff.

T. C. Ingersoll for Defendant.

---

38 *BILLS AND NOTES.

[Cuyahoga District Court]

WILLIAM T. SMITH v. JOHN B. BRUGGEMAN.

Watson, Tibbals and Hale, JJ.

A transaction is already complete and, in pursuance of agreement and as a part of the transaction, negotiable promissory notes are given. Several months afterwards the payee, being desirous of disposing of the notes for property, applies to W. T. Smith and requests him to put his name on the notes as surety for the original maker, which he does, the maker having no know edge of the transaction at the time, but afterwards, on its coming to his knowledge, assents to it. The payee negotiated the notes as contemplated, and afterwards purchased them back in good faith.

Held—He could not bribe W. T. Smith, whose true relation to the paper was surety, for the payee, and he was bound to indemnify him, that the transfer by and retransfer to the payee did not confer on him any new or additional right.

For the plaintiff, Bishop, Adams and Bishop, citing as authorities, 42 N. Y., 24; 1 Tyln., 405; 44 Barber, 601; 8 Cash, 87-8; 7 Gray, 286; 24 Me., 179.

For the defendant, J. W. Heisley, citing 33 Iowa, 537; 35 Iowa, 257; 4 Mo. 449; 19 Me. 102; 10 Md. 118; 15 O. S. 299.

TIBBALS, J.

The plaintiff in his petition states that Charles A. Smith, in August, 1873, executed and delivered to the defendant four promissory notes, each for $2,400, payable in two, three, four and five years from September 1,

1873, with interest annually from the last date. Said notes were made payable to the order of defendant; that said notes were made and signed originally only by Charles A. Smith as maker, and it was not then, nor had it ever been, agreed that any one should become responsible as maker, surety or otherwise, except Charles A. Smith, and that said notes were made and delivered to said defendant for a certain supposed consideration, and said Charles A. Smith was not asked or required to furnish any other person to become liable with him on said notes as surety or otherwise. That about four months after the making of those notes the defendant, without the knowledge or consent of said Charles A. Smith, applied to plaintiff and without any consideration whatever obtained the plaintiff's signature under the name of said Charles A. Smith, on said note as surety for said Charles A. Smith. That each of said notes originally purported to be the several notes of said Charles A. Smith, and the promise was, "*I* promise to pay," etc.

The petition further alleges that although the signature of plaintiff was obtained by the defendant, in manner aforesaid, *yet he fears that these notes may be transferred so as to harass and vex the plaintiff, or be passed to some innocent third person unless 39 an injunction is granted to prevent such transfer. That they have once been transferred by defendant, but he has obtained them back again, and they are now in his possession.

Plaintiff prays for an injunction and that his apparent liability on said notes may be declared void and cancelled.

The defendant has answered, not denying the facts stated in the petition, but setting up certain matters which he claims as a defense to the relief asked by the plaintiff.

The answer admits that plaintiff signed the notes at defendant's request, but says that when plaintiff signed them defendant informed him that he wished to indorse the same to one John Rock. That said John Rock had told defendant if plaintiff would sign said notes he would take the same of defendant. The plaintiff signed said notes and one other note of the same amount, payable September 1, 1874, "With the intention and for the purpose of binding himself in law, as a co-maker for the payment of said notes to the defendant, the payee therein, and any and all subsequent holders thereof, without recourse to any other person than Charles A. Smith for indemnity in the premises."

That, on the same day or next day after plaintiff signed the notes, defendant bought certain land of said Rock for the purpose of selling again, and indorsed said notes to said Rock, including the last one named, for $12,000, not expecting ever to become owner thereof again. That subsequently he resold the land again to Rock and received in payment therefor all said five notes and a city bond of $500, before either of said notes became due. That the indorsement of said notes to said Rock, and taking them again from him, by defendant, for his interest in said land, was done in good faith, and with no purpose of defrauding the plaintiff, or of preventing him from making any defense he might otherwise have against the payment of said notes. That the purchase of said land of Rock was the transaction defendant and said Rock had in view when plaintiff signed said notes. That said Rock took said notes because plaintiff had signed them, and otherwise would not have taken them.

The answer further states that, after plaintiff signed said notes, said

Charles A. Smith, on being informed thereof, assented to it and approved the same, and paid the note, which became due September 1, 1874.

To this answer of Bruggeman, the plaintiff, William T. Smith, interposes a *demurrer*, on the ground that the "facts stated therein constitute no defense to this action." The demurrer, of course, admits the truth of the allegations of the answer, and the question is, Do they, being true, constitute defense; or, in other words, Are the notes enforceable in the hands of Bruggeman against William T. Smith?

40 *On the part of the plaintiff it is claimed that the notes having been signed by him after the original transaction was complete, between the original parties, that it is wholly without consideration as between the plaintiff and defendant, and that Bruggeman, though having in good faith and for a good consideration taken back these notes from Rock, he can not enforce them against W. T. Smith.

On the other hand it is insisted, on the part of Bruggeman,

First. That the notes having been, before due, signed by W. T. Smith, with the understanding and for the very purpose of inducing Rock to part with value for them; that Rock on doing so, and so receiving them, became entitled to hold them as good and valid notes against all parties, William T. Smith included; and,

Second. That Rock, having so become the owner, for value, was entitled to either pledge, collect or sell, indorse or transfer them with as good title as he himself had.

Third. That Bruggeman having bought them back in good faith, for a good consideration and without fraudulent intent, before the maturity of the same, that Bruggeman now holds them and is justly entitled to hold them free from any equity that Rock could hold them free from.

The case has been ably argued by experienced counsel, and numerous authorities have been produced in support of this general proposition, to wit:

That the defense of fraud or want of consideration can not be successfully set up against the holder of a negotiable promissory note, though he had notice thereof when he took it, provided he received it from a prior holder, for value, who had *no such notice*, and this is undoubtedly the well-established law on that subject.

But no such case has been produced, and we know of none, that affirms this doctrine in regard to the subsequent holder, when *he himself* is the very party who either fraudulently obtained the note or originally obtained it without any consideration, and we do not think that a defense of "title through an innocent holder" could be successfully interposed in either of those cases.

We have arrived at the conclusion that William T. Smith's real position on this note, as between himself and Bruggeman, is that of an accommodation-maker for Bruggeman. We do not see how this conclusion can be avoided.

He was not a joint maker with Charles A. Smith; he did not sign with him, or at his request, or for his benefit in any way. Bruggeman himself parted with nothing, and neither of the Smiths received anything for William T. Smith's signature as surety. The case appears to be simply this: That Bruggeman, having Charles A. Smith's notes to the

41 amount of $12,000, *wanted to get their face value for them of Rock, who refused to accept them for such value unless William T. Smith would sign too; that thereupon Bruggeman requested William T. Smith

to sign them, to enable him to use the notes in the proposed trade with Rock, which Smith did, and Bruggeman, on the strength of his signature, was enabled to so use them, and did so use them, and indorsed and delivered them to Rock. Under these circumstances, in our judgment, he was bound to indemnify William T. Smith for his liability, and save him harmless on all said notes; and when he bought and took them up from Rock he merely did his duty toward Smith, who had gratuitously signed them at his request and for his benefit solely. If Bruggeman could now enforce these notes against William T. Smith, he would compel Smith to pay $12,000 for nothing, without any recourse over to any one, based on no valid contract, and without the slightest consideration. We do not believe that either the law or the equity of this case requires or will permit this, and the plaintiff's demurrer to the answer of Bruggeman is therefore sustained.

This case was substantially determined in the court of common pleas as we do now decide, and we concur in that opinion and give judgment for plaintiff.

---

*MALICIOUS PROSECUTION—PROBABLE CAUSE. 58

[Hamilton County District Court.]

MATTHEW DUGAN v. MAGGIE O'NEIL.

The defendant's dismissal of the prosecution on finding the articles he thought were stolen does not show want of probable cause merely by showing plaintiff's innocence, when other circumstances show reasonable ground of suspicion.

AVERY, J..

The action in the common pleas was brought by the defendant in error for a malicious prosecution in causing her to be arrested on the charge of stealing a watch. Upon the trial she obtained a verdict, and a motion for a new trial being overruled and judgment entered, this petition in error was filed.

The right to recover in an action of malicious prosecution depends not only in the fact of innocence, but upon whether there was probable cause for belief in guilt; and in addition to want of probable cause there must be malice. The reason is, that where probable cause exists, and there is no malice, it would be against the interests of society that criminal prosecutions should be at the risk of liability in damages on failure to establish guilt. It would, however, seem difficult for a jury to comprehend that an innocent person may be arrested on a criminal charge, and yet be without redress against the person making the charge, and *the difficulty would seem to be greater where the case is that of a young 59
girl. The plaintiff below was a nurse girl in the defendant's family, which consisted of himself and wife and infant child, there being no other servants. The watch was missed by Dugan on a Sunday; it was not the watch he usually carried, and had last been in his possession the previous Tuesday, when in the presence of the plaintiff he put it into the pocket of a pair of new pants which he was wearing to a funeral that day, and which, at night, he hung on a chair in his bed-room and left there, with the watch still in them, to be taken care of by his wife, when he put on his every-day clothes the next morning. Upon putting on the same

pants Sunday, he missed the watch, and inquired of his wife, who said that Maggie, the plaintiff in error, had cleaned up the room, and put the pants away. This was unusual, and he then asked Maggie, who admitted putting the pants away, but denied seeing the watch; and although repeatedly questioned—he telling her he only wanted to find the watch—she persisted in the denial. He observed that her manner was confused, that she evaded his eye, and avoided his presence. He then left the house, and meeting a policeman on the opposite corner, stood talking with him; meanwhile Maggie went up stairs, and remained there some time. Afterward, having sworn out a warrant, he returned with the officer, who questioned Maggie again about the watch. She still denied having seen it, until the officer finally told her he must arrest her, when she confessed she had taken it out of the pants, but had put it back; and exclaimed to the wife of Dugan to save her. She said if the wife would go with her to the room, she would show where she put it. Accordingly the wife went, holding the baby in her arms, and Maggie, going to the wardrobe where the clothes hung, put her hands upon the various garments. Not appearing to find the watch, she was arrested. The next morning, upon Dugan putting on the pants he had been wearing during the week, the watch was in the hip pocket. He at once went to the police court and dismissed the case.

In all this there was no malice on his part, and while, from want of probable cause, a jury may infer malice, want of probable cause must be shown. Although a negative fact, it must be shown affirmatively, and by a preponderance of evidence. To discontinue a prosecution has been held to show want of probable cause, but this is where the discontinuance is without explanation. 4 B and C, 21. Here the explanation is that the watch was found where it had not been left, and where it was not, we are satisfied until between Saturday and Monday morning it was placed there by somebody. It was left in the pants which were worn to the funeral, and was found in the every-day pants, which had been afterward
60 put on and worn during *the week. How it came there is unexplained, but the burden of the explanation was not upon the defendant in the court of common pleas. It was sufficient that the finding established the plaintiff's innocence; it did not at the same time show that previously there was any want of probable cause for belief in her guilt. Probable cause does not depend upon the actual state of the case, but upon honest and reasonable belief. 16 O. S., 470. It is such reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves, as would warrant a cautious man in the belief. 20 Ohio, 119.

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

*AGREED CASE—DEVISE—WILL. 73

[Superior Court of Cincinnati, General Term, January, 1877.]

†MARY F. T. ELDER v. RHODA ANN TAYLOR.

O'Connor, Tilden and Yaple., JJ.

1. Where the judgment is upon a petition and demurrer, and the parties unite in executing a paper entitled "statement of facts on submission," the facts being substantially the same whether the issue be on the petition and demurrer or on the attempted submission, the court will consider the real controversy, leaving the necessary correction of the record to the conclusion of the case.
2. When a will left everything to the widow, with the proviso that she "provide for my adopted daughter," and the widow elected to take under the will, though these words do not carry any aliquot part of the estate, they confer a right to personal support, which, if withheld, will be ascertained by the court, in a money amount payable at periods: this right of support is for life and does not terminate by marriage of the daughter and her maintenance by her husband; but the right to recover for support withheld in the past does not constitute separate property for which she can sue alone without her husband's joinder.
3. Where a will was executed without the statutory formalities, and was admitted to probate, it was conceded, in an action depending on its construction, that for the purposes of the action its validity was conclusively established by the probate.

STATEMENT.

In October, 1876, the plaintiff brought this action in this court against Rhoda Ann Taylor, widow and devisee under the will of M. P. Taylor, and claimed adversely to her, an interest under the will. To the petition filed in the action Mrs. Taylor prepared a demurrer for insufficiency, which was submitted to the *court, and the 74
court on the 17th of March, 1877, by an entry duly made upon the journal, reserved all the questions thus raised for the opinion of all the judges in general term. On the same day, however, as appears from the entries in the case, the parties united in executing a paper, entitled a "Statement of facts on submission," and which was filed. This paper purports to contain a statement of facts, and is for all purposes now material, substantially a repetition of those contained in the petition. And thereupon an entry was made upon the journals by which the case as contained in the agreed statement was further reserved for the consideration of the court in general term. The facts as thus presented, and so far as they are material to the consideration of the case, are substantially these:

On the 6th of September, 1862, P. N. Taylor, who was then the owner of real and personal estate of considerable value, executed an instrument in writing in these words: "Cincinnati, September 6, 1862. In case of any accident with me, I give all my property and money to my wife, Rhoda Ann Taylor."

"P. N. TAYLOR.

"With this proviso, that she, my wife, provide for my adopted daughter, Mary Francis Boyle Taylor, adopted in the month of February following, being, in the year eighteen hundred and sixty-three, dated this day, November 25, 1873."

"P. N. TAYLOR.
—his X mark—

"Signed in the presence of the witnesses;
"DANIEL M. MOORE,
"WM. CHEESEMAN,
"CAROLINE M. REED,
"M. A. CHEESEMAN."

It would thus appear that about eleven years intervened after the absolute gift to Mrs. Taylor, prior to that by which it was supplemented by the provision made in favor of the plaintiff. Both must have remained or been in the possession of P. N. Taylor, the donor, and have taken effect by his death, which occurred the next day,

†Another decision by the same court, in this case, is found in 6 Rec., 641. Judgment of the superior court was reversed by the supreme court, with opinion. See 39 O. S., 535.

i. e., on November 26, 1873. He left no children or their representatives. His estate consisted of lands situated in this state and elsewhere, worth about $12,000, none of which was acquired by descent, devise or deed of gift, and of personal property of the value of about $7,000. The defendant is his widow. The written memorandum was proved and established as a last will and testament in the probate court of Hamilton county. The widow appeared in the probate court and elected to take under the will. An administrator was appointed, with the will annexed, and the estate was settled by him, who paid over to the defendant all the residue of the estate remaining in his hands unadministered. The plaintiff, who afterward married one Henry Elder, was born in June, 1855. Her real name being Mary F. Boyle. She
75 *was in no way connected by blood with either Taylor or his wife, but was taken into their family in February, 1863, she then being about eight years old. She continued to be an inmate and a member of their family, and was maintained as such member of it by Taylor during his life, and thereafter by his widow, until October 17, 1874. Taylor thus appearing by all the acts usual in such cases, as having manifested a distinct intention to place himself in *loco parentis* in respect of the plaintiff, and to adopt her as his own child. This course of conduct and treatment was continued down to October 17, 1874, when the plaintiff intermarried with one Henry Elder, at which time she withdrew from the family of Mrs. Taylor, and removed therefrom and established with her husband a separate home, where she has continued ever since to reside. The defendant entered upon the possession of the real estate and has ever since the death of her husband been in the possession and enjoyment of its issues and profits, and of the surplus of the personal estate. These are all the material facts involved in the consideration of the legal questions now before us.

OPINION.

TILDEN, J.

1st. We are not entirely satisfied with the proceedings by which the questions which have been argued before us have been brought into general term. Those which supplemented the original action were undoubtedly intended to be brought under section 495 of the code. That section provides that parties to a question that might be the subject of a civil action, may, without action, *upon a case* containing the facts upon which the controversy depends, present a submission of the same to the court. It is then made the duty of the court to hear and determine the case and render judgment as if an action were pending. In such a case the submission, the agreed case, and the judgment of the court thereupon, constitute a complete record. But here a complete record would include the petition, the demurrer to it, and the judgment of the court upon the demurrer. If it should happen in any case that the petition should not state all the facts truly, and that the submission did include them all, it might, and indeed would, result that a judgment in the one aspect of the case would be in direct conflict with the judgment in the other. Strictly, then, when the submitted case was made under section 495, the other case should have been discontinued or dismissed. But, as before remarked, the facts which are before us are substantially the same in both aspects, and, as both parties desire to obtain the opinion of the court upon the real controversy between them, the court has concluded to consider and express its opinion upon it, leaving any necessary correction of the record to be made on the return of the case into special term.

76 *2d. It does not distinctly appear whether or not the husband of the plaintiff is still living; if not so, she is clearly entitled, of course, to bring an action in her own name. If the fact, however, turn out to be otherwise, it may be found by the council for the plaintiff necessary to consider whether he ought not to amend the record in special term, by joining her husband as a party plaintiff jointly with her. Section 28 of the code as originally enacted, provided that where a married woman was a party, her husband should be joined with her, except only in two cases, that where the action concerned her separate property, or the action was between herself and her husband. This section has been several times amended. The last amendment, so far as we know, was that made by the act of March 30, 1874, 71 Ohio Laws, 47.

That act provides that "when a married woman is a party, her husband must be joined with her, except when the action concerns her separate estate, or is upon a written obligation, contract, or agreement signed by her, to set aside a deed or will, or is engaged as owner or partner in any mercantile or other business, and the cause of action grows out of or concerns such business, or is between her and her husband, in either of which cases only she may sue or be sued alone." It can not be claimed that the present case belongs in this classification at all, unless it can also be main-

tained that the present action in one or the other of the aspects in which it is before us in an action which concerns the separate property of the plaintiff. We are of opinion that the action does not now so concern her separate property. Had the provision made in her favor been in fact afforded to her, being a provision for her support and maintenance only, the substantial benefit which would have resulted would have operated in favor of the husband, inasmuch as to that extent he would have been relieved from the duty of support and maintenance which the law devolves upon him. It is true that the support and maintenance intended by the provision has been constantly withheld by the defendant ever since the marriage of the plaintiff, and a sum has accumulated which it is claimed the defendant is bound to pay in discharge of the obligation thus omitted to be specifically performed. Supposing this to be so, it does by no means follow that the plaintiff would be entitled to claim it as against her husband's marital right. In any view, however, it would not necessarily, or at all follow that the money thus to be recovered would be separate estate.

3d. We do not regard the case in either of its aspects as a case only for the construction of the will, or as presenting for consideration a merely abstract question in any form. Such construction is undoubtedly, as in other similar cases, involved. But the relief prayed for following the construction assumed in behalf of the plaintiff is in every sense entirely practical and *substantial. The case cited from the 77
O. S. Reps. on this subject is not, as we think, in point, and the objection under notice can not be sustained, the action not being one for the mere purpose of obtaining the court's opinion as to the meaning and legal effect of the will, and the action being for the further purpose, and as a consequence of the construction claimed, of obtaining a money judgment against the defendant. Cory et al. v. Fleming and wife, 1 Law Bul., 370.

4th. It is not disputed that we are to accept the probate of the will as having conclusively established its validity and obligation for all the purposes of the action. We are then simply to give a construction to the will and to apply its provisions to the facts presented by the case, which, therefore, resolves itself into two questions:

1st. Whether the provisions made for the plaintiff imposes a binding and forcible obligation upon the defendant from and after the death of her husband; and, 2d, whether such obligation, if so imposed, was terminated by the marriage of the plaintiff, and her consequent withdrawal from the family of the defendant.

It is proper to be premised that the recognition of such an obligation was unequivocally implied by the conduct of the defendant herself. From the death of her husband down to the marriage of the plaintiff the plaintiff continued to be a member of the family of the defendant, treated as an adopted child, and supported and maintained by the defendant out of the estate given to her by the will. In these respects she may be properly treated as having been fully aware of the intentions of her deceased husband and of the relations of the plaintiff, and of having intended to fulfill in good faith the intentions known to her, and to have further intended, by her election to take under the will, to carry into effect all the provisions of the will itself. In this respect we are of opinion that she did not mistake the duty which the will imposed upon her. The absolute gift to her made in 1862, and the provision made for the plaintiff in 1873, took effect at the same time by the death of the testator, and the subsequent probate of his will. Both provisions constituted parts of the same instrument, and they are to be construed together. Their effect is to vest the absolute interest in the real and personal property in the defendant, and to make the provision in favor of the plaintiff, a charge upon such interest, the defendant by her election having taken upon herself the burthen of such charge. The words of the charge do not, we think, involve any difficult question of construction. These words are, that the gift to the wife should be with the express provision that she should provide for the plaintiff. They do not define the extent of such provision nor limit its duration. They are not large enough to carry any aliquot part of the estate itself. *They were, however, intended to confer a substantial benefit, in 78
our judgment, to consist in the reasonable support of the plaintiff considered, as the testator had regarded and treated her as his child. He had in terms adopted her as such, and during her lifetime, from the moment of her adoption regarded and treated her as such. He had caused her name to be changed, and she continued to be addressed and regarded by the name of her adopted father down to the period of her marriage. It was not, we think, at all essential to the legal efficacy of this adoption that it should have been made by petition in the probate court under the statute. But perhaps this point is not very material, because the rights of the plaintiff depend upon the provision in the will in her favor. And this presents a question of construction, and the circumstances just referred to are regarded only so far as they

enable us to ascertain the real intentions of the testator. The disposition made in favor of defendant is in terms so general and broad as that standing alone they would carry the entire ownership. Those of the provision in favor of the plaintiff are restrictive. If it had been the intention of the testator to confer an interest in the property itself, it is obvious that express words should have been employed to express that purpose. But the words of the disposition are restrictive, and such as must be held to operate by way of proviso or exception from the general gift to the plaintiff. The gift to the plaintiff was expressly limited to a provision for her; and on principle and upon well considered precedents, we are bound to construe that provision as merely conferring upon the plaintiff a right to her personal support and maintenance. Such is the limitation upon which, indeed, the plaintiff claims a right to recover, and we recognize that claim as sufficiently supported by the law and facts. Had she continued unmarried and a member of the family of the defendant, no question could arise. But as she has been supported by her husband since her marriage, and the claim of the plaintiff has assumed the form of a money demand, it will become a question what rule shall be adopted by which to measure the amount of that demand. But that question is not now ripe for final determination, and may be properly hereafter heard upon evidence.

2d. A negative answer to the second question above stated seems to us almost necessarily to result from the reasoning already stated. The intention of the testator, as clearly expressed, was to provide for his adopted daughter, the plaintiff. These words are general and import no exception and no limitation in point of time, and impose no conditions upon which the gift was made to depend, or by which the duration of the enjoyment should be limited. And from the very nature of the case it is impossible to conceive that the testator intended that such enjoyment should terminate by the marriage of the plaintiff or by any other event than that
79 *of her death. We are, therefore, of opinion that she became clothed with the right of support and maintenance for life. The demurrer, therefore, will be overruled. And as the case is not now ripe for final judgment, the case will be remanded to special term for the purpose of ascertaining from evidence what would be a reasonable amount to be allowed on account of the support and maintenance of the plaintiff, from the date of her marriage down to the commencement of this action, as also for her subsequent support and maintenance, to be paid hereafter at periods to be ascertained by the court.

J. S. & C. S. Conner, for Plaintiff.

C. K. Shunk, for Defendant.

TAXES—TAXATION.

[Superior Court of Cincinnati, General Term, January, 1877.]

O'Connor, Tilden and Yaple, JJ.

†HUMPHREYS, AUDITOR, ETC., v. SAFE DEPOSIT CO.

Under the tax law of 1859 and its amendments, where the district assessor undervalued a lot or tract of real estate through ignorance or mistake as to character and value of its betterments or fixtures, the error in valuation should be corrected by the board of equalization, and can not be corrected by the auditor of the county under section 35 of said act.

YAPLE, J.

This is a proceeding in error, prosecuted here to reverse the judgment of this court rendered in special term, in favor of the defendant in error against the plaintiff in error, as auditor of Hamilton county, the judgment below being a perpetual injunction against the auditor, restraining him from assessing for taxation the safe of the defendant in error.

---

†Judgment in this case was affirmed by refusal of leave to file petition in error, by supreme court. See opinion 29, O. S., 608.

The defendant in error is a corporation of this state. It became incorporated about the year 1867, after which it leased from the Lafayette bank, a partnership, the west half of its bank building and lot upon which it stands, which is situated on the north side of Third street, between Main and Walnut streets, in the city of Cincinnati, upon a perpetual lease—ninety-nine years, renewable forever—at a stipulated annual rent, and agreeing to repay to the bank the half of the taxes paid by the latter. Prior to 1870, about the year 1868, the Safe Deposit company took possession of the part of the premises so leased to it, and at a cost of about $44,000 constructed a large safe, in which to keep, for reward, valuables deposited with it for safety by third *persons, as by its charter it was authorized to do. The safe is so con- 80
structed as to be part of the realty, there being no right of removal in case of the termination of the lease, nor could the same be done without injury to the real estate and the destruction of the safe itself.

The Lafayette bank and the Franklin bank buildings are built together on the same lot, each occupying an equal part thereof, and being similar buildings in every respect and of equal value.

After the construction of the safe, in the year 1870, Peter Gibson, the district assessor, to assess realty for the ensuing decennial period, assessed the Lafayette bank property and the Franklin bank property at the same sum, to wit: $55,000.00 each, which assessment, by the action of the state board of equalization, was reduced to $39,380.00, which was subsequently reduced by the city board of equalization to $31,900.00 each. The lease to the Safe Deposit company was executed July 21, 1868, but was not left for record until in 1874.

The district assessor did not assess the safe at all, he erroneously believing it to be personal property.

After the recording of the lease in 1874, the auditor of the county placed the safe on the tax duplicate as the property of the Safe Deposit company, fixing its taxable value at $30,000.00.

The Safe Deposit company obtained the perpetual injunction complained of to restrain such action of the auditor.

The auditor claims the authority to do what he did by virtue of the provisions of the tax law of 1859, sec. 35, p. 1453, 2 S. & C., which is as follows: "Each county auditor shall, from time to time, correct any errors which he may discover in the name of the owner, *in the valuation*, description, or quantity of any tract or lot contained in the list of real property in his county; but in no case shall he make any deduction from the valuation of any tract or lot of real property, except such as shall have been ordered either by," etc.

Properly to determine the powers of such auditor, it is necessary to examine and construe with the thirty-fifth section, the provisions of the statute creating annual boards of equalization and prescribing their duties and powers. Sections 39 and 40, 2 Sayler's Stats., p. 1642–3, provide for a decennial county board of equalization and also a city decennial board, having the same powers in cities of the first and second classes. "They shall raise the valuation of such tracts and lots of real property as, in their opinion, have been returned below their true value, to such price or sum as they may believe to be the true value thereof, agreeably to the rules prescribed by this act for the violation thereof. 2d They shall reduce the valuation of such tracts and lots as, in their opinion, have been returned above their value, as compared with the average valuation of the real *property of such 81
county, having due regard to their relative situations, quality of soil, improvements, natural and artificial advantages possessed by each tract or lot. 3d. They shall not *reduce* the aggregate value of the real property of the county below the aggregate value thereof, as returned by the assessors, with the additions made thereto by the auditor as hereinbefore required."

Section 44, 4 Sayler's Stat., p. 3270–1 and *Id.*, vol. 2, 1646, sec. 45, provide for annual county and city boards of equalization, the city board to be composed of the auditor and six citizens of such city, appointed by the city council. Such boards are for the equalization of *real* and *personal* property. They have the power to hear complaints and to equalize the valuation of all real and personal property according to the rules prescribed by the above quoted section 39, except as otherwise prescribed in such sec. 44, which various matters are immaterial for the purposes of the present case.

The supreme court, in the case of Mitchell & Matson v. The Treasurer of Franklin County, 25 O. S., pp. 156–7, says: "The constitution requires that the valuation for taxation of all property—real and personal—shall be according to its true value in money. There appears to be a necessity, from the very nature of personal property, in order that it may be taxed according to its true value in money, that an an-

nual valuation should be made; and so the legislature has provided. And if equality of burden between personal and real property must be preserved, it is necessary that the valuation of the latter should be adjusted annually also. If the decennial valuation of real property were the only method of securing its taxation according to its true value in money, great injustice would be done, on account of its fluctuations in value, not only as between owners of personal and real property, but as also between the proprietors of different tracts and lots of real property.

"Hence the legislature has wisely provided, as part of this system for taxing all property by a uniform rule, and according to its true value in money, for annual boards of equalization in counties and in cities of the first and second classes.

"These boards are empowered, and we may add required, to hear complaints and equalize the valuation of all *real* and personal property within their respective jurisdictions; by *raising* the valuation of any tract or lot of land * * * when the valuation is below its true value in money, and by *reducing* it when *above* its true value, provided only that the aggregate valuation shall not be *reduced* below a certain standard.

"This process of equalization is performed annually, and thus uniformity in the valuation of *all* property, according to its true value in money, is fairly provided for, if not actually secured."

82 *We may say, too, that the lease of the Safe Deposit company is of the west half of the Lafayette bank building, which is taxed to and in the name of the bank, while the safe only has been appraised and put on the duplicate by the auditor to and in the name of the Safe company. Hence its leasehold property and estate is divided on the tax duplicate, part in the name of the bank and part in its own name—over $15,000 of such leasehold is taxed to the bank, and it is sought to tax $30,000 of its value to the company. There is surely no authority to so divide for taxation a perpetual leasehold estate.

Where the lessee in a perpetual lease covenants to pay taxes, it is usual to assess and tax the property in his name, and when this is done, such leasehold estate only can be sold for taxes, 2 S. & C., p. 1591, sec. 3. But part of the leasehold estate can not be charged to the owner of the fee and part to the lessee. We are all clear, and so hold, that the value which this safe adds to the premises can only be fixed by the city board of equalization, composed of the auditor and six citizens of the city, appointed by the city council. They may do so, as they have the power to *increase* the valuation of real estate above the amount fixed for the county by the decennial appraisement, though they can not *decrease* such aggregate, except in certain cases and upon certain conditions.

The 35th section, giving the auditor power to *correct* any *errors* which he may discover *in* the *valuation*, does not, we hold, give the auditor authority to appraise real property higher than it has been appraised by the district appraiser, the state board of equalization and the annual county or city board of equalization. There is no error in the valuation of this lot as returned to the auditor and as fixed by the proper authorities. It is just as they made and returned it. The auditor assumes that the safe must have been omitted from the appraiser's consideration because the appraisement of the property of the two banks is the same, one having no such safe, and because the district appraiser says and testifies that he did not value the safe, as he considered it personal property, and he, in effect, re-appraises the property by adding to it $30,000. We think it would be giving a dangerous construction to section 35 to permit auditors to look into all that the district appraisers took into their consideration when appraising each tract or lot of land in 1870, and to add thereto whatever element of value he may ascertain that they overlooked. This Lafayette bank property was and is simply valued for taxation *too low*. It ought to have been, and should yet be, taxed according to its true value in money. To fix that value the city board of equalization, and not the auditor, is the proper and only authority appointed by law.

The judgment below is affirmed. (No penalty.)

Wm. T. Forrest, for Plaintiff in Error.

Hagans & Broadwell, for Defendant in Error.

*GUARDIAN AND WARD—LIMITATIONS. 83

[Superior Court of Cincinnati, General Term, January, 1877.]

O'Connor, Tilden and Yaple, JJ.

†LOUISA D. CRACRAFT ET AL. v. CATHERINE ROACH.

The 36th section of the act of 1816, (2 Chase, 935), which gave to courts of common pleas the power to appoint guardians to minors, and to authorize such guardians, or any guardian theretofore chosen or appointed, to sell all or part of the real estate of their wards, for their support or education, did not authorize the court to order a sale of the lands of an infant *feme covert* upon the application of her husband, made under said section.

2. A husband having made a deed of his wife's lands without her joining, it was claimed by the vendees that he thereby conveyed only his freehold estate in the land of his wife, during coverture, and not his tenancy by the curtesy, he having survived his wife, and that, therefore their possession became adverse at the death of the wife, and is protected by limitations; but the court *held*, that the husband's right during his own life could not be thus divided, and the heirs of the wife could not bring an action until the death of the husband, which did not happen long enough before the present action for possession to bar it by limitation; and it not being shown that the wife received any part of the purchase money, her heirs need not offer to restore any part of it before bringing suit.

This case is before us on reservation, and on all the questions of law and of fact which were litigated at the trial in special term. The object of the action is to recover the possession of real estate in Cincinnati to an undivided fourth part, of which the plaintiffs claim to have the legal title. This title is denied in the answer in which it is, moreover, insisted by way of equitable counter-claim, that the defendant is entitled to be quieted in her possession, should it turn out that the legal title is in the plaintiffs. Both parties deduce title under Israel Ludlow, who died intestate in 1804, seized of a tract of land containing about 100 acres, and of which the premises in controversy are part. Israel Ludlow left four children, his heirs at law, of whom the mother of the plaintiffs was one. It is not disputed that she transmitted to them all the estate which she derived by descent from her father, and as both parties claim under him his title must be regarded as a perfectly legal title, and such as to authorize a recovery, unless such right shall be successfully repelled on grounds presented by the cross-pleading. These will be briefly considered in their proper order.

1. The 100 acre tract was, in 1817, sold to one Broadwell under proceedings in probate in the then common pleas. These proceedings took place on the application of the guardians of three of the minor children of Israel Ludlow and Ambrose Ludlow; and their object, as expressed in the written application to the court, was to raise money by a sale of the 100 acre tract to pay the debts of the wards, and for their support and maintenance. The sole office of the proceeding, as the law then stood, was to obtain from the court the necessary authority to enable the guardians of the minors to convey the legal title to the purchasers at the sale, no provision then existing requiring the sale to be reported to or approved by the court. The *conveyances were accordingly made to the purchaser by the guardians of two 84
of the minor heirs, and by Ambrose Dudley, and by James C. Ludlow, who would appear to have attained his majority. Martha Catherine Ludlow was one of the heirs of Israel Ludlow. She was about eighteen years of age, and had already intermarried with Ambrose Dudley, and she became the mother of the present plaintiffs, or of those whom they represent. She was not joined in the proceedings of 1817 in any form, and she had no legal notice of those proceedings. Her husband, Ambrose Dudley, was, however, joined as a petitioner, and all the petitioners united in praying for an order for the sale of the land for the support of their wards. Ambrose Dudley, as before stated, apparently intending to act as the guardian of his wife, although she was not made a party to the proceeding, united in the execution of a

† The supreme court rendered decisions in the cases of Denglehart v. Cracraft, 36 O S., 549, and Hollerbrook v. Cracraft, 36 O. S., 584. See opinions in those cases.

deed to Broadwell. This deed was executed on May 1, 1818, the sale having taken place in the previous September. Mrs. Dudley did not unite with her husband in its execution or sign it at all; but more than two years afterward, *i. e.*, on June 20, 1820, she appeared before a justice of the peace in Fayette county, in the state of Kentucky, and the justice certified that she was privately examined, apart from her husband, and freely, without his constraint, "acknowledged and relinquished her right to the premises in controversy." This deed although purporting to have been signed, sealed and delivered by James C. Ludlow, Ambrose Dudley and Davis McFarland, on May 1, 1818, does not appear to have been acknowledged by them until August 17, 1821. On these facts the question arises whether or not the conveyance referred to operated to divest Mrs. Dudley of her title to the land. As the law stood at the time the deed was executed, it was competent for Mrs. Dudley, although under the age of legal majority, by uniting with her husband in the execution of a conveyance, properly acknowledged, of her lands to effectively pass the title. It is not, therefore, easy to understand why it is thought to be necessary that the husband should assume the relation to his wife of guardian in respect to her lands, and invoke the authority of the court to enable him to do an act not jointly with her, which, by express law, both could lawfully do without the aid of the court. We are unable to conclude that any additional sanction was afforded by the proceedings and order of the court. We think we are to determine the question of validity of the conveyance alone upon the statutes then in force, regulating the mode of the execution of deeds of conveyances of married women. We do not propose to accompany the statement of our conclusion on this question by any extended explanation of the grounds upon which we proceed. We
85 have examined the provisions of the statutes of * Kentucky in force at the time the deed was acknowledged by Mrs. Dudley, and the statutes of this state, and we are constrained to adopt the propositions which have been presented on that subject by the counsel for the plaintiffs. We think the conveyance did not operate to divest Mrs. Dudley of her title. She did not join with her husband in the execution of the deed, or even sign it at all, and had she so joined, the magistrate, who took the acknowledgment, acted without authority under the laws of Kentucky, which, by our law, were made operative in the case.

2. It is next contended, on the part of the defendant, that Mrs. Dudley was bound by the proceedings had in the court of common pleas; by which we understand it to be meant that these proceedings operated of themselves, independently of any subsequent conveyance, to divest Mrs. Dudley of the legal title, and to vest it in the purchaser. We think the husband must be regarded as having been a party only for his own interest as tenant for life; his wife had a separate interest, to take effect at the death of her husband, in her, or in her heirs, in respect of which she could not be concluded by the order of the court without having been made a party, and her husband was, in no just sense, her guard an, and as such, authorized by the statute then in force to apply for the sale of her inheritance. 2 Chase, Stat. 935.

Moreover, the law then simply authorized the court to entertain an application by a guardian for the sale of the ward's land. It contemplated the actual execution of a conveyance by the guardian, and there was no provision at law giving to the order of sale the effect of a conveyance.

3. We are of opinion, also, that no estoppel ever arose as against Mrs. Dudley and her heirs. She was not estopped by deed, because she executed none and properly acknowledged none. She entered into no covenant, for the deed, supposing her to have been a party to it, contained none, except the official one of the makers of the deed in their character of guardian. It is obvious to add that there are no circumstances in the case to raise an equitable estoppel. It does not appear that Broadwell was induced to become a purchaser by any representations, express or implied, of Mrs. Dudley. It is not shown that she received even any part of the purchase money, the probability being that such money was appropriated by the husband in virtue of his marital right. However this may be, it is very far from being shown that any circumstance occurred which can be made the foundation of a charge of fraud, such as would authorize a court of equity to preclude her from the assertion of her legal rights.

4. It is further contended, in behalf of the defendant, that Ambrose Dudley, by
86 his marriage, become seized of a freehold * estate in the lands of his wife only during coverture, and that his conveyance to Broadwell passed that estate only; that he was not, then, in as tenant by the courtesy, and that in order to perfect his estate, as such it was incumbent on him, subsequently to the death of his wife, to re-enter, and that the date when that right of re-entry accrued by the death of his

wife, the possession of his grantee became adverse and that the statute of limitations then began to run, or, if not, that the right of entry and the consequent right to bring a possessory action became barred in seven years from that time, by virtue of the provisions of the act, "to give additional security to land titles in this state." By the death of Israel Ludlow, Mrs. Dudley became instantly seized of the entire estate in fee simple in her portion of all the lands which had descended to his heirs! The law then interposed and divided this estate into two parts and vested one of them in the husband, and to the possession of this part he became entitled during the life of his wife and for his life. Another part consisted in a right to continue the possession of the part as tenant by the courtesy. Practically, this division of these rights was purely verbal, and that which, in fact the husband had, was, at all events, a freehold for his life, and no revertionary right could arise under any conceivable circumstances until his death. We are of opinion, therefore, that no such event, as the argument supposes, was interposed by the death of Mrs. Dudley, and that the possession of the purchaser under Dudley's conveyance did not become adverse, as claimed. We are further of opinion that no right of entry accrued to the plaintiffs until the death of Ambrose Dudley in 1875, and that the statutes of limitations interposes no bar to the action. The question under the other statute is suggestive of other considerations. This subject, so far as we are aware, has been directly before the supreme court, only in the case of Cox v. Hicox et al., 7 O S., 88. The question, however, determined by that case is very far from being the one of which we have to dispose or from furnishing the principle which must determine the case. The point determined was that open, notorious and adverse possession for seven years by a purchaser under a decree of foreclosure and sale, under the act of March 22, 1849, was a good answer in bar to a petition to redeem by a subsequent purchaser from the mortgagor, subject to the mortgage, although neither such subsequent purchaser nor those under whom he claims were made parties to the decree for foreclosure and sale. The second section of the act itself provides that no action of ejectment or other action for the recovery of lands or tenements shall be brought against any person claiming under or by virtue of any judicial sale, or any sale of forfeited, or other lands, for taxes, except within seven years after open and notorious possession, taken and continued by the defendant or other person under whom he may claim. This act makes a sale by a sheriff, marshal, executor, *87 administrator, or master in chancery, if made under a judgment, decree, or order of court of competent jurisdiction, a judicial sale within the purview of the act and upon an equitable construction, it could, we suppose, be made to include a sale ordered by the court on the application of a guardian of an infant; but the act further provides that all persons whose right of action may, or shall have accrued, before its passage, shall be at liberty to bring their actions at any time within five years after the passage of the act, although the term of seven years may have previously expired; and further, that if any person shall be an infant, *feme covert*, or insane, or imprisoned at the time of the adverse entry, he or she shall be entitled to bring his or her action at any time within five years after his or her disability shall have been removed, provided only that nothing contained in the act shall be construed to extend the time for bringing the action beyond the period limited in the general act for the limitation of an action. The question of the application of these provisions to the facts presented in the case before us, is certainly not free from difficulty. It is one which will require the intervention of the supreme court, and we regard our decision as being only a step in that direction. In disposing of it, we shall attempt little more than to state our conclusion. It is manifest, had Mrs. Dudley survived her husband, that, as her right to the estate which the law vested in her did not accrue until the death of her husband, whose freehold estate for life had become vested in his grantees, she would have been entitled, by the very words of the second section of the act under consideration, to bring her action within five years after her husband's death, she having been constantly under coverture. In point of fact, the reversion in her became, by her death in 1834, vested in her children, all of whom but one were infants. It is true they attained their majority, certainly within five years after the passage of the act of 1849. But, then, although the purchasers were in the open and notorious possession which was continued by them, and those claiming under them, such possession can in no just sense be said to have been adverse to the title of the heirs. The purchasers must be held to have known the law according to which they had acquired only the life estate of the husband, had they within the period of five years after they had attained their majority, have instituted an action, they must inevitably have failed, because the right of possession was still outstanding, and must so have continued to do until the death of Ambrose Dudley in 1875. We are unable to per-

suade ourselves, reading the act of 1849 in connection with the statute of limitations, both of which statutes are to be regarded as in *pari materia*, that upon any just construction we can hold that the act of 1849 is applicable to the case.

88 *5. The circumstances which furnish the grounds for the equitable cross relief claimed in the case as those grounds have been explained to us are, first, that no offer is shown to have been made previously to the institution of the suit to restore to the defendant any part of the purchase money paid by Broadwell. It being contended that under the code the plaintiffs are, in effect, seeking equity, and that an offer to do equity is an indispensable condition to the right to demand it; and secondly, it is claimed that the defendant is entitled to regard the deed of Mrs. Dudley as open only to the objection of error, defect or mistake, which may be corrected, amended and relieved against by the court under the statute upon that subject. First, section 558 of the code makes it necessary in an action for the recovery of real property, in the petition to state, merely, that the plaintiff has a legal estate in the property, that he is entitled to the possession thereof, and that the defendant unlawfully keeps him out of the possession. The case, as thus stated is properly put in issue upon section 559 of the code by an answer, denying generally the title alleged in the petition, or that the defendant withholds the possession. The title being put in issue, the argument, the distinction between law and equity having been abolished, is that a legal title on the part of the plaintiff may be repelled by the proof on the part of the defendant of a complete equitable title, and that such equitable title is in the defendant so long as the purchase money remains unrestored. Without stopping for discussion of the question thus made, it appears to us to be sufficient to say that, in our judgment, the evidence is not sufficient to establish the claim in point of fact. The plaintiffs represent the interests of Mrs. Dudley, and are bound only as she would have been, and it does not appear that she received any portion of the purchase money, or acquiesced in the receipt of it by her husband, otherwise than by the subsequent attempt to acknowledge the deed in Kentucky.

6. The constitutionality of the act of April 17, 1857, is conceded, and it has frequently been applied for the correction of errors and mistakes in the execution and acknowledgmeut of conveyances of real estate as against married women. The authority conferred by it upon the courts is expressed to be to amend and relieve against errors, defects or mistakes occurring in the deed or other conveyances of husband and wife executed and intended to convey the lands or estate of the wife or her contingent right of dower in the lands of her husband. And this power may be exercised in the same manner and to the same extent as in case of defects, errors and mistakes in the deeds of conveyance of any other persons. Several cases have been considered and determined in the supreme court involving the construction of these and similar provisions but we do not intend to prolong this opinion by any review of them, es-

89 pecially *as the facts presented by the present case are in some important particulars different from those of cases here referred to. These circumstances are, that the deed never was signed or sealed by Mrs. Dudley at all; she never, in fact, acknowledged that she acted without the constraint of her husband and relinquished her rights to the lands described in the deed. This acknowledgment was made separately from and not jointly with the husband, and the acknowledgment itself was made before a person having no color of legal authority at all. It is, in our judgment, impossible to regard the writing containing this acknowledgment as a deed or conveyance of husband and wife executed and intended to convey the lands of the wife, and we think it must be conceded that the remedy afforded by the act of April 17, 1857, was intended to be limited to errors and defects and mistakes occurring in deeds and other conveyances of husband and wife for the conveyance of lands The written statement of the justice, in which he professed to take the acknowledgment of Mrs. Dudley, must be regarded as having been her separate act, and as amounting in the law, at most in equity, to a contract to convey. The statute clothes the court with no authority to compel the specific performance of a contract of a married woman; it presupposes the existence of a deed or conveyance, executed substantially in conformity to other statutes on that subject, and limits the remedy to formal errors, defects or mistakes, and does not supply the want of any of the substantial acts required by law. A deed must have been executed by the wife, this deed must, in fact, have been acknowledged by her jointly with her husband, and must have been intended to convey the land. These steps having been taken in any case, a strong equity arises as against persons *sui generis*. Such an equity was by this statute designed to be extended to conveyances of married women, but it could not have been intended to create any new right, and the exist-

ence of the right itself is expressly made to depend upon that of the complete execution of a deed or conveyance, containing simply mistakes, errors or defects.

Judgment for plaintiffs.

Coffin & *Mitchell*, for Plaintiffs.

Clemmer & Clemmer, and *White, Morrow & King*, for Defendant.

---

*BRIDGES—CONSTITUTIONAL LAW. 106

[Hamilton County District Court, April Term, 1877.]

STATE OF OHIO EX REL. v. COM'R'S OF HAMILTON CO.

1. The act of May 4, 1877 (740 L. 503), providing for the taxation by the county commissioners, not exceeding two-fifths of a mill, for a bridge, to be expended by the board of public works of a city within such county, provided, however, that a certain railroad company shall bear such part of the expense as shall be agreed upon by it and the board of public works, means that it is only the cost over the amount to be paid by the railroad that the county is to pay, and until the railroad and the board have come to an agreement no obligation arises on the part of the county.
2. The act of May 4, 1877, authorizing county commissioners to levy a tax for certain public purposes, though permissive in terms is in fact peremptory.
3. An act of the legislature (74 O. L. 503) requiring county commissioners to levy a tax to raise a fund which is to be expended by the board of public works of a city within such county, for bridge purposes and over which therefore, they had no control, does not violate the constitution.

Refusal of Mandamus to compel the levying of a Tax to pay the Cost of Bridges over Mill Creek.

STATEMENT.

This was an application for an alternative writ of mandamus to compel the defendants to levy a tax not exceeding two-fifths of a mill of the real and personal property returned on the grand duplicate of the county, to pay for the erection of two bridges across Mill creek at the intersection of the line of the Cincinnati, Hamilton & Dayton Railroad with Liberty street, and to pay for the cost of changing the course of Mill creek, etc.

The claim of the relator was founded upon the act of May 4, 1877, and the court, in disposing of the case, said that the act conferring the powers on the commissioners to make the improvement and to levy a tax for the cost, although in terms simply permissive, are, in fact, peremptory, and it was clear, in the light of the decisions, that the commissioners are not simply authorized, but bound to exercise such powers as are conferred upon them by the statute.

It is contended by the commissioners that the act is unconstitutional and void, for the reason that it requires them to levy a tax to collect a fund over the expenditure of which they have no control whatever.

LONGWORTH, J.

We have been unable to find any constitutional prohibition against such legislative provision, and have not been referred to any case wherein the doctrine claimed by the defendants has been asserted, and we are constrained to come to the conclusion that, however contrary to sound policy a statute may be which requires the county to raise a fund to be expended by the board of public works of the city, free from the control of the county commissioners, such a law does not violate the constitution of the state, and the responsibility of passing such laws rests with the legislature alone.

The act in question, however, contains a provision that so much of the cost and expense of making the cut shall be borne by the Cincinnati, Hamilton & Dayton Railroad Company as shall be agreed upon by the company and the board of public works.

It is manifest from the statute, when taken up by its four corners
107 and viewed as a whole, that it is only the cost over and *above the sum to be paid by the railroad company under such agreement with the board of public works, that the county of Hamilton was expected and required to pay.

How could the commissioners determine what should be the amount of tax they ought to levy for the payment of this improvement, without knowing what portion of such cost the railroad company was to bear?

They are not required by the statute to levy a tax of two-fifths of a mill, but to levy a tax to pay the cost of the improvement not paid by the railroad company, *not to exceed* two-fifths of a mill.

It might be also that the board of public works should fail to come to an agreement with the railroad company touching the amount to be paid by the company, and in such case, no obligation could possibly arise on the part of the county.

The majority of the court are clearly of the opinion that action on the part of the board of public works and the Cincinnati, Hamilton and Dayton Railroad Company is a condition precedent to the existence of any obligation or liability on the part of the county commissioners, and it is not suggested by the court that the board or the company have come to any agreement, or even attempted to come to any in the premises.

For the reason given, the application for an alternative writ of mandamus will be refused.

Healy, for the Relator.

Paxton, Contra.

MUNICIPAL CORPORATIONS—DAMAGES.

[Hamilton District Court, April Term, 1871.]

JULIA MILLER v. CITY OF CINCINNATI.

Where a lot fronts on one street, and the city makes another street behind it running obliquely, so as to touch the lot only in one corner, in an action for injury to the improvements caused by negligent making of the street, it is error to charge that the plaintiff must show that he filed a claim for damages sixty days before bringing his action under either section 564 or 575 of the municipal code; such lot is not bounding or abutting on such street within such provision.

JOHNSTON, J.

The plaintiff instituted this suit to recover $2,000 damages to her property, fronting on East Sixth street, this city, alleging that by the unlawful and careless improvement of Gilbert avenue, the foundations of her improvements settled and cracked, and the surface of half the lot, by reason of a deep cut on Gilbert avenue, near the rear of her property, caved down into said avenue. Her lot, she alleges, fronted on Sixth street, and ran back ninety feet to an alley. The city denies all liability, and concludes by averring that the plaintiff never filed any claim for dam-

ages, as provided by section 575 of the municipal code, in order *to give the defendant an opportunity to have asssessors appointed to assess the damages. 108

The case was tried in the common pleas by a jury, and the testimony by bill of exceptions, in rather a meager shape, is before the court. Also the full charge of the court. The testimony developed, we think, substantially: The plaintiff's property did not abut upon, and was improved some thirty years ago with reference to Sixth street, and the grade thereof, and that the rear of the lot was upon an alley during all that time; that if any portion of the lot was in fact touched by Gilbert avenue, the evidence does not distinctly show it, but at the very furthest it is only claimed that Gilbert avenue, in running very obliquely across this alley, touched the lot at one corner. The evidence, as presented by the bill of exceptions, is very meager on this fact, and, in the opinion of the court, does not clearly establish the necessary fact that the lot "bounded" or "abutted" on Gilbert avenue, but, on the contrary, that it bounded and abutted on Sixth street, in contemplation of section 564 of said code. The court charged the jury that before the plaintiff would be entitled to maintain her suit, she must affirmatively show that sixty days before she commenced her suit she had filed a claim for damages with the clerk of the corporation, and that the city had neither paid nor taken any action thereon. There was a verdict for the defendant, the plaintiff having failed to show that this claim was so filed. The plaintiff claims that there was error in this portion of the charge, and a motion for a new trial based on that ground was overruled and exception taken. All of the testimony and the charge of the court are before us. In order to cut off a property owner from prosecuting his suit for damages sustained by the improvement of a street, it must clearly appear that his lot bounds and abuts upon such street. If but one inch intervenes, or further than that, if a lot has been laid off and all improvements many years before have been made according to the grade of a street in front of a lot, the cutting off of a small portion of one corner of the rear part of the lot that runs back to an alley, that is not such a bounding or abutting of a lot as would require a property owner to file a claim for damages, either under section 564 or 575 of said code. Such lot does not, in contemplation of law, abut upon the proposed improvement. These sections, especially 564, operate something in the nature of a forfeiture of a legal right, and where it is sought to enforce their provisions against a party, should be strictly construed against the party seeking this enforcement. Hence, the lot not abutting on Gilbert avenue, it was error to charge that the plaintiff would not be entitled to recover unless it should affirmatively appear that she had filed a claim for damages, as provided in section 575 of the code.

Judgment reversed, and cause remanded for new trial.

Pruden, for Plaintiff in Error.

Bates & Perkins, for City.

117 * CONTRACT.

[Hamilton District Court, April Term, 1877.]

W. U. T. Co., v. M. & C. R. R. Co., ET AL.

1. Where a railroad company owning a line of telegraph posts along its railway, makes a contract with a telegraph company for their use, and the railroad is sold to another company under a mortgage made prior to the contract, such company need not go on with the contract, but, having elected to do so, and having received the benefit for a period of time, it cannot escape the burden.

AVERY, J.

This is a proceeding to enjoin the Marietta and Cincinnati Railroad Company, as re-organized, from permitting the Atlantic and Pacific Telegraph Company to use a wire recently put upon the poles on the right of way of the Railroad Company, for general telegraphic purposes, the wire having been put up by the defendants against the protest of the plaintiff.

The Marietta and Cincinnati Railroad Company, as re-organized, is the owner, by purchase under foreclosure, of the track, road-bed and franchises of the Marietta and Cincinnati Railroad Company. The question is upon a contract made by the Marietta and Cincinnati Railroad Company with an association of persons, known as the Marietta and
118 Cincinnati Telegraph Company,*concerning the use of a line of telegraph posts which the Railroad Company had erected along its track. The claim is that this contract conferred an exclusive privilege upon the Telegraph Company, and that the rights and duties of the parties under it have passed respectively to the Western Union Telegraph Company, and to the Marietta and Cincinnati Railroad Company, as re-organized. The complaint is that the Atlantic and Pacific Telegraph Company has been permitted to put a wire on the posts and using the same, and the prayer is for an injunction.

There are four defenses: First, that the rights of the Marietta and Cincinnati Telegraph Company are not vested in the plaintiff; second, that the obligations of the contract are not binding upon the Marietta and Cincinnati Railroad Company, as re-organized; third, that the plaintiff is not in a condition to perform; fourth, that the contract did not create an exclusive privilege.

The rights of the Marietta and Cincinnati Telegraph Company are claimed by the plaintiff under an assignment from the American Telegraph Company, which in turn received an assignment from the Western Telegraph Company by an instrument which recited a previous assignment from the Cincinnati and Marietta Telegraph Company. There is no other evidence. But from the date of the assignment to the American Telegraph Company in 1859, and from the date of the assignment to the plaintiff in 1866, each of these companies respectively had been engaged in operating the telegraph and performing toward the Railroad Company the stipulations undertaken by the Cincinnati and Marietta Telegraph Company.

It is a familiar principle that a grantee will not be permitted to dispute the title of one from whom he has received and still holds possession; and, whether this principle rests on grounds of legal estoppel or

on the moral policy of the law, it extends to a party who has received and is continuing to receive performance of contract at the hands of another, and who would dispute the title of that other for the purpose of escaping any obligation in return.

A like principle will bind the Marietta and Cincinnati Railroad Company, as re-organized, if, in its relations to the plaintiff and to the American Telegraph Company, whom the plaintiff succeeded, he has assumed to occupy the place of the Marietta and Cincinnati Railroad Company under the contract. Upon this point there is the testimony of a witness, who, from 1860, was first station agent and local operator, and afterward superintendent of telegraph for the Railroad Company; also, a witness who was the superintendent of the American Telegraph Company and of the Western Telegraph Company, and after him the testimony of the present Western superintendent. These witnesses concur that the Railroad Company availed itself of the *contract. The local telegraph 119
business was enjoyed by the Railroad Company, and the through commercial business left to the Telegraph Company. Telegraph repairs made by the Railroad Company were charged one-half to the Telegraph Company. Ordinary repairs were made by the Telegraph Company at its own cost, and new materials and renewals charged were one-half to the Railroad Company. In 1866 the Telegraph Company furnished 112 miles new wire between Chillicothe and Marietta, and the posts were renewed and the cost of the whole divided equally between the two companies. The correspondence of the parties also recognizes the contract. Letters were produced from the Telegraph Company drawing attention to the fact that the Railroad Company had been supplied with new wire throughout the line under the contract at the joint cost of the parties, and suggesting that the Telegraph Company be permitted to put up a new or third line for itself at the same joint expense; also letters inclosing accounts of the Telegraph Company and referring to counter accounts from the Railroad Company. Upon the other hand, letters from the Railroad Company, inclosing accounts and estimates to the Telegraph Company, also letters referring to the dispute which arose about the new or third wire, and hoping after it was settled they might start afresh. Even down to a period immediately before the commencement of this action, when the wire of the Atlantic and Pacific Telegraph Company, which is now in dispute, was being put up, the Telegraph Company is writing letters to the Railroad Company, or its employes, calling attention to the violation of the contract; and in response there is no disclaimer of the contract, but simply a disclaimer that the work is done by the Atlantic and Pacific Telegraph Company, and a statement that the Railroad Company is putting up a wire for its own business.

These facts admit of no other explanation than that the Marietta and Cincinnati Company, as re-organized, had assumed the place under the contract of the Marietta and Cincinnati Railroad. At the time of the purchase the Marietta and Cincinnati Railroad Company, as reorganized, was not bound by the contract, because the mortgage under which the foreclosure was made was prior to the contract. But the company might have elected to go on with the contract, and when it has done so, and received the benefit of part performance, it can not, we think, escape the burden. *Qui sentit commodum debet sentire et onus.*

The stipulation which it is alleged the plaintiff is not in a condition to perform requires some reference to the relations between the Western

Telegraph Company and the Baltimore and Ohio Railroad Company. The stipulation is that free transmissions of messages of the officers and employes of the Marietta and Cincinnati Railroad Company, exclusively on railroad or telegraphic business, is guaranteed over the lines of the
120 Western *Telegraph Company from Marietta to Baltimore, between any station on said Western Telegraph lines and any station on the Marietta and Cincinnati line. The Western Telegraph Company had a license from the Baltimore and Ohio Railroad Company to erect and maintain, so long as it existed as a telegraph company, a telegraph along the Baltimore and Ohio Railroad, the Railroad Company to put up a line of posts and a wire between Ellicott's Mills and Wheeling, and another wire, if needed, for railroad business, the whole to be at once the property of the Telegraph Company, and, in the event of the dissolution of the Telegraph Company or suspension of operations by voluntary act or process of law, the Railroad Company was to take charge of the line of telegraph for its own purposes until the Telegraph Company shall resume active operations.

The charter of the Western Telegraph Company expired by limitation February 5, 1877, and, it is claimed, the license to maintain the lines ceased at that time, and that they became, not the line of the Western Telegraph Company, but the lines of the Baltimore and Ohio Railroad Company. This, it is claimed, renders the guaranty of fretransmission over the lines of the Western Telegraph Company impossie ble on the part of the plaintiff.

Prior to the expiration of the charter, however, the Western Telegraph Company, being a Maryland corporation, caused itself to be incorporated for a new term of years, under the general law of the state of Maryland, which operated as a surrender of the old charter, and devolved on the new company all the assets and property and the duties and liabilities of every description belonging to the old company. The effect of this on the relations between the Western Telegraph Company and the Baltimore and Ohio Company, in connection with the clause that in the event of a dissolution or suspension by the Telegraph Company of active operations, the Railroad Company should take possession until active operations were resumed, has lately been before the court of appeals of Maryland, and the opinion is expressed "that a re-organization by the Telegraph Company under the general act was necessary in order to prevent its lines from passing absolutely to the Baltimore and Ohio Railroad Company." Sprigg v. Western Telegraph Company, November Term, 1876.

The question is not without difficulty. But while the words "until the Telegraph Company shall resume active operations" in their natural sense would refer rather to the case of the suspension of operations than to a dissolution, the connection in which these words are used leaves no room to distinguish. Indeed, unless they apply as well to the case of a dissolution, the company, by the extinction of its corporate powers, would lose its property, even though as an association of persons it might
121 *continue to be a company and actively resume the business of telegraphing. This result, as it would seem, is what the clause in question was intended to provide against. But, if it was not, and if the property of the Western Telegraph Company passed to the Baltimore and Ohio Company, the lines are still, within the meaning of the guarantee, the lines of the Western Telegraph Company. At the time of the guar-

anty the lines to which reference is made were owned by the Western Telegraph Company, and yet, the words being simply words of description, the lines remain the same lines, although the property in them may have been transferred. Nor do we think that the free transmission of messages means anything more than that they shall be free of cost to the Railroad Company. The undertaking is not that the Telegraph Company shall transmit. It is not an original undertaking, but simply a guaranty, the force of which is that the Telegraph Company either is not in a position or refuses to make those messages free by paying the costs.

Whether the contract conferred an exclusive privilege is the last question. The contract begins by granting the privilege of putting up and maintaining a telegraph wire for general telegraphic correspondence on the line of telegraph posts erected by the Railroad Company along their road from Marietta to Cincinnati, subject to certain terms and conditions. Among those terms and conditions are, first, that, if in putting up the wire it shall be necessary to renew the posts so that they may support two wires, the Telegraph Company shall renew the posts, and, if unable to secure the privilege of putting a wire upon the line of posts from Loveland to Cincinnati, they shall put up a new line of posts on the route for the common benefit of themselves and the Railroad Company; second, that the Telegraph Company may establish stations at Cincinnati and Marietta and elsewhere along the line, as they think proper, and shall have the business of messages between such stations and stations on the lateral or connecting lines, while the local business is to be taken exclusively by the Railroad Company, and where messages are received at the stations of the Railroad Company which require to be re-telegraphed by the Telegraph Company to lateral or connecting lines, and where the Telegraph Company receives from lateral or connecting lines messages destined for points on the railroad line where they have no stations and which require to be telegraphed by the railroad, each company shall charge its own proportion of the costs; third, that the Telegraph Company shall keep up in working order its own wire and the wire of the Railroad Company at its own cost, and all renewals of posts, wires and insulators shall be borne one-half by each company.

It is urged that these terms and conditions do not enlarge the grant, and that the grant does not describe the privilege as exclusive. 122
*This is true. But the words of the grant are, "a wire for telegraphic correspondence," and every part of the contract may be resorted to for the purpose of determining the effect and meaning of the words. The division of business may be referred to on the question whether the use of the line of posts was intended to be confined to the Telegraph and the Railroad Company. The obligations undertaken by the Telegraph Company may serve in some respects to measure the nature of the grant. Like every instrument which is to be construed, this contract must be taken by the four corners.

The line in respect to which the stipulations concerning the division of business are made was the lines of telegraph posts. This is evident from the context, and also evident from the fact that, when the Railroad Company comes to reserve to itself all local telegraph business over the wires, the words are " all local telegraphic business on said line." Such business is reserved exclusively to the Railroad Company, and the business of telegraphing messages from stations of the Telegraph Company to lateral or connecting lines is left to the Telegraph Company, which

can hardly mean that the Railroad Company may set up stations at the same points and bid against it for the same business; and yet, if the Railroad Company could not do this directly, it can not do it by allowing the Atlantic and Pacific Company to intervene. More than this, the contract imposes on the Telegraph Company one-half the burden of renewing the poles and keeping the lines in repair, which, unless the contract is construed as confining the use of the poles to the two companies, would extend the advantages of such renewals and repairs to third persons, not parties to the contract, and subject the Telegraph Company to a burden which could not reasonably have been contemplated at the time.

It is no answer to say that the Atlantic and Pacific Company was imposing no additional burden on the poles, because, if the contract is not to be construed so as to exclude the right to admit another company, that right remains, no matter how great the burden, and the Telegraph Company could not in any case claim relief. Upon the face of a contract, in every particular specific, we can not think it was intended to leave the Telegraph Company under a burden such as might be imposed if the right remained in the Railroad Company to admit third persons to the use of the poles.

The right of the plaintiff to an injunction does not rest, of course, upon any claim for injury to the poles, and it is not required that there should be such injury to entitle the plaintiff to relief. If the contract is violated, as claimed, the plaintiff is entitled to an injunction, because the damages will be such as in their nature can not be estimated, and, therefore, in the sense of the law, irreparable.

123 *In this discussion two things have been assumed—first, that it is within the power of the railroad company to maintain along its road a telegraph, and that this may be done either directly or through a contract with the telegraph company; and while such contract must not be in violation of those principles of public policy which regulate the company in its relation to the public as a carrier, it has, in its ownership of its right of way, no such relation, and may, according to its own views and purposes, devote its right of way to the exclusive use of the telegraph company.

The other point that was assumed was not argued, and has already passed under the consideration of this court; the other point is that, whether or not a railroad may engage in the business of local telegraphing for the public. That was only one of the considerations which was received by the railroad company under this contract, and, apart from that there were sufficient other and legal considerations to support the contract. The injunction will be allowed.

Collins & Herron, and *Judge Coffin*, for the Plaintiff.

Matthews & Ramsey, Hoadley & Johnson and *W. T. McClintick*, *contra.*

* MORTGAGE—SET-OFF. 238

[Superior Court of Cincinnati, General Term, October, 1877.]

Tilden, Yaple and Force, JJ.

MICHAEL HEISTER v. ENTERPRISE INSURANCE COMPANY.

Where a deed of real estate is given, the description of which is recited as bounded upon an alley, which alley at the time was closed and occupied by another party, holding temporary possession, under a claim of right as against the existence of the alley, and a cotemporaneous written instrument given by the grantor to the grantee, that the grantor should institute proceedings to have the alley opened. Proceedings were commenced within a reasonable time for the vacation of the alley, and at the time of the transfer of the notes, no breach of the agreement *had been made. In an action for the foreclosure of a 239
mortgage given to secure the notes, for the balance of the purchase money, in the hands of an assignee before maturity; *Held*, that the grantor had no right of set off against the assignee for damages sustained there having been none against the grantor at the time of the transfer of the notes.

YAPLE, J.

This is a proceeding in error prosecuted here to reverse a judgment of this court rendered in special term, decreeing the foreclosure of a mortgage upon Heister's real estate, owned by the insurance company, and ordering the sale of the property.

Heister purchased the ground in question from one John Slevin, taking therefor a warranty deed, which deed described the lot as bounded on the east by a four-foot alley. The alley was supposed to be four feet wide east of this lot, and eight feet wide thence south to Third street in this city. Heister made to Slevin two notes of $4,541.66 each, payable to Slevin's order in one and two years from date, respectively, dated May 21, 1874, and executed a mortgage on the land to secure the same. The last note Heister paid, and the decree of foreclosure is for the amount due on the first one. Before either note became due, Slevin sold and indorsed the notes and mortgage to the insurance company. At the time Heister received his deed and executed his notes and mortgage, he knew that the alley was closed by a building across it at Third street, which building was occupied by one Lewis Mazza, under a claim of right as against the existence of such alley.

Cotemporaneously with the delivery of the deed, notes and mortgage, Heister accepted a writing from Slevin which, after reciting the sale and conveyance and the length and width of the alley, provided that Slevin should institute "proceedings to have said alley opened for the use of the above described premises without expense to the said Michael Heister, and to cause said alley to be opened to the dimensions above set forth."

Such proceedings, under the provisions of our code, had to be instituted in the name of Heister, and that was done within a reasonable time, and judgment has been obtained in this court against the parties obstructing and claiming rights against the existence of the alley, which judgment has been brought up for review upon petition in error prosecuted by such parties, and the error cause has not yet been decided. Heister claims that there has been a breach of the implied covenant contained in the deed, that such alley existed; that he has been greatly damaged by being deprived of the use of the alley, and that he is entitled, as against the mortgage, to have such damages deducted from

the amount due upon the mortgage, there being no personal judgment asked upon the note.

240 *If it be the rule of law, as claimed, that where premises are described as bounded upon a way, there is an implied warranty that such way exists, this warranty was broken as soon as made, the alley then being closed under an adverse claim of right by a third person. But, we are all clear that the agreement made by Slevin and accepted by Heister, that Slevin would cause the alley to be opened by proceedings at law, at his, Slevin's expense, settled the mode and measure of Heister's redress for such breach of warranty; and we are also clear that when Slevin transferred the notes and mortgages to the insurance company, there had been no breach of this agreement of Slevin's to cause the alley to be opened and consequently, that Heister then had no right of action against Slevin. And the rule of law is well settled, that, 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. If such breach occurs thereafter, the assignee can not be affected by it. We do not think that Slevin has yet broken his written agreement with Heister, though it is not necessary to determine this in order to decide the case.

Judgment affirmed, with costs. No penalty.

Judges Tilden and Force concur.

Stallo & Kittredge, for Plaintiff in Error.

Follett & Cochran, for Defendant in Error.

AGENCY—CORPORATIONS.

[Superior Court of Cincinnati, General Term, October, 1877.]

Tilden, Yaple and Force, JJ.

JAMES S. VINE v. WILLIAM S. MUNSON.

A general agent, employed by the stockholders of a corporation to place its stock, under a contract that he should receive a commission on all the stock so placed, with no restrictions, however, in the contract as to whether he could sell at par or at the market price, or that the corporation or any of its members should not sell or attempt

241 *to sell any of said stock for less than par; the condition of the affairs of the corporation being known or could have been ascertained by the agent, the value of the stock at the time of contract being less than par. When the agent had placed part of the stock at par and members of the company put their own stock on the market and sold it for less than its par value; after which the agent, finding he could place no more stock at par, ceased to make any efforts to place additional stock at any price. *Held:* That he was entitled only to his commission on the amount of stock he had placed and not upon the whole amount of stock to be placed.

ERROR.

TILDEN, J.

The action in this case was brought against William S. Munson, Enos Sellew, D. B. Lupton, I. H. Hoover, R. Laustrom and Alpha Bonney; but all these persons, who were brought in by service, have disappeared

out of the case, except Munson, who, at a trial in the court at special term, was the sole defendant.

The leading facts, material to the consideration of the question arising in this court, as they appear from the pleadings and evidence, are these:

Prior to the 12th of April, 1875, the persons above-named were the owners of the entire capital stock in a corporation, organized and existing under the laws of this state, and styled "The American Gas Tip Manufacturing Company." This company was the owner of a patented improvement in gas tips, which it had derived from Lanstrom, the patentee, and one of the stockholders. The value of its other property and effects does not satisfactorily appear from the testimony. Lanstrom stated as a witness at the trial that, according to a schedule, which was referred to at about the time above stated, the property was estimated at about $47,000. This schedule was present at the trial, but is not part of the record before us. One witness (E. H. Huntington) testified that the property was returned by the company for taxation (on oath, we presume) at about $9,000. This property consisted of stock on hand, and of machinery and fixtures, some of which was found not to be adapted to the uses intended, being too light, and none of which would appear to have been of much value. The company had no working capital, never had paid a dividend, was indebted in the sum of about $58,000, and was, apparently, in the last stages of decay.

In this condition of things it was determined by the stockholders to put their interests on a better footing by the organization of an independent corporation and by merging the old corporation in the new and increasing the working and other active capital. Such independent corporation was accordingly organized and set in operation, assuming the name of the "United States Soapstone Manufacturing Company." Some of the corporators in the new were not members of the old *company. Whether any of them were so we are not able to say from 242
the evidence. But the evidence does make it manifest that the operations of the new, as well as those of the old company, and the adjustment of the terms of the proposed merger of the one into the other were completely and unrestrictedly in the hands and under the control of the old stockholders. It was agreed among them that the property and effects of the old should be transferred to the new company, and, subsequently it was so transferred at a valuation made by them. The stock of the new company was fixed at $225,000, composed of shares of $50 each. The property and effects of the old were transferred to the new at the price of $175,000, and for this amount the stock of the new was issued to the stockholders in the old company and distributed among them in proportion to their interests. The assumed value of the effects of the old company of $175,000 was made up mainly by calling the right to operate under Lanstrom's patent as worth $100,000 and by estimating the value of the machinery and fixtures at $25,000, and of the stock on hand at about $22,000. The right to operate under the patent had been procured by the delivery of the stock of the old company, at the price of $10,000. Under this arrangement only $50,000 of the new stock remained to be placed, and it was expected that this would be disposed of with a view to raise actual and active capital to enable the new company to carry on business on an extended scale.

In this condition of things, and on the 12th of April, 1875, the con-

tract, which forms the basis of the present litigation, was entered into between the plaintiff and the stockholders of the old company, all of whom were, at the beginning, made parties to the action. The contract was reduced to writing, and signed by all of them but one, and by the plaintiff. According to the contract as thus expressed, the plaintiff was appointed to and agreed to accept the office of general agent of the new company; he agreed to place stock and faithfully to devote sufficient time to that service until he should place the amount specified in the contract, or until it should be mutually agreed that his services should cease. On the other side it was stipulated that every facility should be afforded to the plaintiff which should be necessary to forward his efforts, that all printed matter, such as circulars, etc., should be furnished to him free of charge, and that he should be paid for his services a commission of 5 per cent. on the stock of the new company, *i. e.*, on $225,000. The commissions were to be paid in this way: As often as the plaintiff should succeed in placing any new stock and in procuring payment for it, he should be paid a commission of 5 per cent. on the amount so placed, and also a commission of 5 per cent. on a corresponding amount of stock of
243 the old company, *or, as we suppose, a corresponding amount of the stock of the new company, which was issued in lieu of that of the old, and this operation was to be repeated until the new stock, thus to be placed, should amount to the sum of $112,500. In other words, and avoiding the verbiage of the language of the instrument, the substance was that the plaintiff was to be paid, from time to time, as new stock should be placed and paid for, an amount equal to 10 per cent. upon the proceeds of the new stock placed and paid for, and so on until the maximum of $112,500 should be reached, when the plaintiff would have earned the sum of $11,250, the amount, without considering payments, which was claimed in the action.

The plaintiff was aware of the nature of the transactions, which had preceded his employment, and of the purposes and aims of the stockholders, and he was or soon became aware or had the means of ascertaining the true condition and state of affairs of the old company. He entered promptly upon the performance of the duties of his agency, and he pursued them diligently to the end, omitting nothing, apparently, which his contract required him to do. He issued circulars in his own name, setting forth to the public in attractive terms the advantages to be anticipated from the operations of the new company, and personally canvassed for the sale of the stock. In all this nothing appears which shows that he intended to act unfairly toward anybody, and he habitually, or at least on some occasions, referred those who applied for information, to sources capable of affording it. Still it turned out afterwards, when the real facts became known, that the new company was itself under a cloud, and that the value of its stock was greatly less than par, at which it was offered by the plaintiff in the market. Before these facts became generally known, he effected two sales, amounting in the aggregate to the sum of $25,000, and upon this amount he was paid a commission of 10 per cent., amounting to the sum of $2,500, and for this, it was admitted at the trial, the defendant was entitled to a credit. No part of the stock thus sold was that which had been designed as the means of raising working capital. All of it was the stock of certain of the stockholders, which they had received on account of their interest in the effects of the old company. The entire proceeds of the sales was paid to them, and so

far as appears the new company was still without active capital, and as feeble for all the purposes of its formation as the old company had been for the purpose of self-preservation. Very soon it became known that other shares of this class of stock, which is ascertained by the evidence to have amounted to at least $14,000, had been placed on the market and been offered at seventy-five to eighty cents on the dollar. This stopped the sale of the stock at par. *Those who had caused the depre- 244
ciated stock to be placed on the market were remonstrated with by the plaintiff, and they succeeded in their effort to cause it to be withdrawn. But this did not restore public confidence. Suspicion had been awakened, which could not be stifled without investigation, and, as has appeared, such an investigation was not likely to lead to any better impressions with regard to the stock. It was the opinion of the plaintiff that he had no authority to place it at any price less than par. and he acted on that opinion, and found it to be, as he might have anticipated. utterly impossible to effect any further sales. He did effect none, and very soon ceased all efforts to do so.

On these facts the plaintiff, at the trial in special term, contending that he had offered and been at all times ready and willing to perform, but prevented from performing the contract on his part, claimed to recover the stipulated commission of 10 per cent. on the entire residue of the $112,500. The defendant, on his part, whilst contesting this claim, insisted further that the contract itself, so far as it remained executory, had been legally put an end to. Both questions were included in the issues, and both have been submitted in the argument here. It does not appear upon which of these propositions the decision of the court in special term was placed, but the finding generally and the judgment were in favor of the defendant. Exceptions were duly taken, and we are now called upon to review these rulings by petition in error, and it is manifest that we are required to affirm the judgment in special term, if it shall be ascertained that the law is against the plaintiff on either proposition.

CONCLUSIONS.

1. It is, or should be, conceded that performance by the plaintiff was a condition precedent. He was first to place stock; and then, and not before, he was entitled to demand commissions and to maintain an action for a refusal to pay them. It is also true, generally, that a prevention of performance by the party entitled to claim performance, the other party being able and ready, is in the law the same in effect as actual performance in fact. The evidence proves that the plaintiff was willing and able also, as far as he could be by any separate act of his own, and his unsuccessful efforts to place stock, under the circumstances, must be regarded as having been a legal equivalent to a formal and technical offer of performance. The failure of his efforts to place stock at par was undoubtedly occasioned by the depreciation of the stock in the market, and it is not unlikely that, had the defendant and his associates withheld their stock from the market, the depreciation would not have occurred. The act, therefore, of putting the stock on the market was the indirect *cause of the failure of the plaintiff to place it. It does not, how- 245
ever, necessarily, follow that this was such an interference as amounted to a waiver or performance within the meaning of the rule of law on that subject. It certainly was not the latter, unless the act was

wrongful, as it could not have been if authorized by the contract. The stipulation, requiring the defendant to afford every facility to enable the plaintiff to place the stock, did not, in our opinion, operate to curtail any of the common law rights of ownership in respect to other stock to which the contract did not refer. Such a restraint is not to be drawn from doubtful and equivocal words or rested on mere implication. The implication is the other way. If the interest of the plaintiff required that his position should be fortified by a restraint upon the ordinary rights of property, it was incumbent on him to cause such restraint to be embodied in the contract, and, if this had been refused, he would still have been able to protect himself by declining to enter into it. Having failed to take this precaution, we can not say that the performance of the contract on his part was rendered impracticable by the wrongful act of the defendant. Such impracticability may, with better reason, be said to have been occasioned by the occurrence of an unexpected event not provided for, and, in strict language, such event may be called an accident. And it was one of those accidents, which devolves no liability unless assumed by contract.

There is in this aspect of the case another view in which it may be considered, and in which we find further reason for concurring in the conclusions under review. The contract contains no provision limiting the price at which the stock was to be sold, and no such limitation to fix one price instead of any other can be implied. The law implied the duty to exercise reasonable judgment and skill, and the contract contained a promise to use diligence, and that was all. From the nature of the property, which was liable to fluctuation in value, it is impossible to suppose that either party desired to be bound by an arbitrary standard, the operation of which might be, in the course of changing events to arise in the future, to defeat the very objects of the contract. We think that, in view of these circumstances, the fair inference is that it was the intention of the parties, and so part of the contract, that, pursuing his agency with diligence and exercising reasonable judgment and skill, the plaintiff should sell at the best prices he could obtain. It is shown that it was worth greatly less than par, and sales at market rates would have been advantageous to the stockholders, whatever may be said as to the advantages, which would have accrued to the purchasers of the stock. We think, then, that the plaintiff was authorized to sell at best market
246 rates, and that *sales at these rates would have been no violation of the contract and no abuse of the discretion with which he was clothed. There was no pretense that he was prevented by the defendant from selling at these rates or even less rates, and that alone which did impede him is the error of opinion he committed when he determined he was bound to sell at par. There is no evidence that sales could not have been effected at reasonable rates less than par. But, if the facts were otherwise, and sales were even impossible at any rates, the impossibility of performance of a condition precedent, not made so by the wrongful act of the party entitled to claim performance, furnishes, as we have seen, no ground of action. These views make it unnecessary to express our opinions on the other question.

Judgment affirmed.

Judges Yaple and Force concur.

O. M. Smith, Attorney for Plaintiff.

Coppock & Caldwell, Attorneys for Defendant.

AGENCY—BILLS AND NOTES.

[Superior Court of Cincinnati, General Term, October, 1877.]

†HULBERT, TRUSTEE, v. NOLTE ET ALS.

1. When a trustee, who has trust funds invested in a mortgage, which is not yet due, being summoned as defendant in a suit brought by another incumbrancer for the sale of the mortgaged premises, employs an attorney to represent him in the suit, and for that purpose delivers the note and mortgage to the attorney, and the attorney gives back a receipt "received for collection," etc., the attorney is not thereby authorized to make a voluntary settlement of the mortgage before maturity.
2. If such attorney represent to a third party, who is acquainted with him and trusts him, that he has authority to cancel the mortgage, and that he has the note and mortgage in his possession for that purpose; and thereupon, such third party, having faith in the representation, gives the attorney money to pay the principal and interest accrued, and the attorney appropriates the money, the loss is the loss of such third party, not of the mortgagee.

FORCE, J.

This case is reserved from special term upon the pleadings and a certified statement of testimony. The petition is for the sale of premises under a mortgage. The defense is payment. The testimony shows that Nolte, owning the land, gave a mortgage to plaintiff in January, 1872, to secure a note payable in two years. In 1873, plaintiff was summoned as defendant in suit brought in the court of 247
common pleas, a creditor of Nolte for a sale of the land. Hulbert gave his note and mortgage to Charles E. Cist, an attorney, and took a receipt that the note and mortgage were handed to Cist "for collection." Charles, who acted only as attorney, handed the note and mortgage to his brother, Henry, who acted also as barrister and who filed an answer in the suit, not praying for a sale, but, in case the land should be sold, the mortgage should then be paid out of the proceeds.

In January, 1874, the case still pending, the note held by plaintiff came due. He therefore gave Nolte an extension of one year, and took interest notes for the year and put them in bank for collection. At some time, it does not appear when, Cist returned the principal note to plaintiff and took back his receipt.

In the suit in common pleas, after a hearing, the court found that the plaintiff was entitled to a decree. Nolte desired to prevent a forced sale and went to a real estate agent to see if he could not sell at private sale and pay off all claims. Accordingly no decree was entered. The real estate agent went to Cist. Cist applied to Seasongood, who had employed him in various real estate transactions. Cist explained the matter, and told Seasongood of the Hulbert mortgage, but also told him he had the note and mortgage in his possession, had in his possession all the papers requisite to pass a clear title.

Seasongood purchased the premises, gave Cist a check for $3,500 to make all payments and get a clear title. Nolte made a conveyance to Seasongood, the creditor dismissed his suit, and a few days after Cist reported to Seasongood that the title was clear. In fact, Hulbert was out of the city at the time and knew nothing of all this transaction. The interest notes for the extension to Nolte were paid as they fell due, or after a little pushing; but it appears that Cist took care of them. Cist, in fact, appropriated the money that he had agreed to pay to Hulbert and some time after left from the city. The matter thus became known. Hulbert brought this suit upon the mortgage, and Nolte and Seasongood set up that they have already been paid.

As Cist never actually made any payment to Hulbert, or took any steps to satisfy the mortgage, it never was paid off, unless the handing of the check by Seasongood to Cist operated as a satisfaction. Whether or not this did operate as a satisfaction depends upon the relation of Cist to the parties at that time. Whose agent was he in the transaction, at that moment, for the purpose of holding the check?

†Judgment affirmed in Nolte v. Hulbert. See opinion, 37 O. S., 445.

248 What was his relation to Hulbert? Hulbert being summoned *to appear as defendant in an action, put into Cist's hands the note and mortgage not yet due, and took receipt that they were given to Cist for collection. That was an authority to Cist to appear in that action. If Cist had at once taken from Nolte payment of the principal and interest then accrued, and so cancelled the investment before it was due, such action would have been clearly in excess of his authority. He was employed to represent Hulbert in the action, not to terminate the investment. When Hulbert, on the note coming due, gave Nolte an extension of a year and took new interest notes, he showed he was satisfied with his investment, for the testimony shows the mortgage was an investment of a trust fund. And Hulbert, by informing Cist of the fact, advised him that he was so satisfied. When Cist, therefore, in May, 1874, undertook, without consulting his client, to make a voluntary termination of the investment which his client had just extended, he acted in excess of his authority.

Cist was, therefore, not in fact authorized by Hulbert to make the settlement with Seasongood. Hulbert had no communication with Seasongood. Cist did not show the note and mortgage to Seasongood. Seasonwood acted with Cist purely upon the statement made to him by Cist. Hence, there was no holding out, no misleading by Hulbert which would estop him from showing the actual fact as to Cist's authority.

Leaving out of view Cist's relation to Hulbert, what was his relation to Seasongood? In consequence of previous transactions, Seasongood having confidence in Cist, gave him the check to pay off all claims, and get a clear title. He knew it would be some days before he could get the Hulbert mortgage cleared off. Did he intend Cist to pay $2,500 to Hulbert, and then wait some days for a cancellation of the mortgage? Yet if the handing of the money to Cist was itself a payment to Hulbert, Seasongood paid Hulbert in advance. That would not be a usual way of doing business, and yet Mr. Seasongood is certainly a man of at least ordinary prudence. It is clear from his own testimony that he meant nothing of the sort. He testifies that he relied on Cist as an honest man; left the whole matter in his hands, and gave him full charge of it; gave him the money to pay off the mortgage; expected him, after getting the money, to pay off the mortgage; was told by Cist it would take a few days to do so.

This testimony has but one possible meaning. It shows that Mr. Seasongood frankly tells the facts just as they happened. He says that, desiring to make a payment, and having confidence in Cist, he handed the money to Cist to make the payment for him. In such case, Cist holds the money for Seasongood until the 249 payment is made. But the payment never was made. *Cist appropriated the money. The loss, therefore, is Seasongood's.

The mortgage debt has never been paid. The mortgage is a subsisting lien. There must be a decree ordering the land to be sold discharged of all claims of all parties to the action.

Hoadly, Johnston & Colston, for Plaintiff.

J. & W. Jordan and *T. McDougal*, for Defendants.

---

255 ## *RECEIVER—PARTNERSHIP.

[Hamilton District Court.]

JOSEPH GHIRADELLI v. C. LEVERONE.

Where a receiver of a partnership was ordered by court to give five days, notice of sale of personal property, there being no law prescribing the notice to be given in such cases, if the receiver varies from the order of the court, by consent of the parties by giving only three days notice, and the sale is a fair one, and for full price, it was competent for the court to confirm it.

BURNETT, J.

This was a petition in error to reverse an order of the court of common pleas confirming a sale of personal property made by a receiver. The plaintiff and defendant were partners in the confectionery business,

and the defendant in error (plaintiff below), filed a petition in the common pleas for a dissolution of the partnership, and a sale of the partnership assets for the benefit of creditors, and an adjustment of the accounts of the firm. A receiver was appointed, and a sale made by him under an order of the court. The order required five days' notice of the sale to be given, while in fact only three days' notice was given. In the court below the confirmation of the sale was resisted on this ground. Upon the hearing of the motion, proof by affidavits was offered that the notice for three days instead of five was given upon suggestion of Ghiradelli's attorney, and by mutual consent of the parties. There were counter affidavits, and it was shown that on the day of sale, and after the company of bidders were assembled, Ghiradelli refused to concur in the change. The court, passing upon the affidavits, found that the three days' notice was by consent of parties, and confirmed the sale. This is now assigned for error. No law prescribes the notice to be given in such case, but the receiver is an officer of the court, and may sell as the court directs. The court below having found that its officer varied from the order of sale by consent of parties, and that the sale was a fair one, and for full price, it was competent for the court to confirm it.

Judgment affirmed.

---

*TRANSCRIPT—AMENDMENT. 263

[Hamilton District Court.]

WM. J. BERNE v. ISAAC BRITTON.

A transcript of the proceedings of the trial had before a justice of the peace, made out by the justice's clerk as an appeal case in the court of common pleas within thirty days, not signed by the justice. *Held*, that such a defect could not be cured, that a copy of the proceedings without the certificate of the justice was not a valid transcript.

ERROR to the Court of Common Pleas.

LONGWORTH, J.

The original action was before a justice, prosecuted by Berne against Britton, in which Berne recovered a judgment for $300 and $3.85 costs. This judgment was rendered in the month of May, 1876. There is a dispute as to whether it was rendered on the 9th or on the 11th of May, but this is unimportant.

On the 23d of May, the defendant in this suit filed in the office of the *court of common pleas a certain paper purporting to be a transcript of the proceedings before said justice, dated May 20, 1876, and 264
his appeal was docketed case No. 49,234. This paper was, however, neither certified to nor signed by the justice, and the bill of exceptions shows that it was not even written by him, but by his clerk.

A properly authenticated transcript was afterward filed by the plaintiff, and he moved the court to dismiss the appeal and to remove the cause to the justice to be proceeded in as though no such an appeal had been taken.

This motion was overruled and a bill of exceptions taken and allowed, to reverse this order the petition in error is prosecuted.

In order to perfect an appeal, the statute provides that the appellant shall file in the office of clerk of the court of common pleas a *certified* transcript of the proceedings before the justice on or before the thirtieth day from and after the rendition of the judgment. The filing of such certified transcript is a prerequisite to the jurisdiction of the court above unless such transcript be filed—and filed within the time prescribed by law, the court of common pleas can not acquire jurisdiction to try the cause on appeal. Even if the transcript be regular, but filed out of time, the court is in duty bound, upon motion, to dismiss the appeal. Lindsay v. Thompson, 10 O. S., 452.

It is contended that the filing of a transcript is a proceeding in an action in the sense contemplated by sec. 137 of the civil code, and that under the authority of Irwin v. Bank of Bellefontaine, 6 O. S., 81, an amendment of the transcript might and should have been allowed.

This argument, we think, might have been tenable had there been any transcript in this case to be amended, the difficulty was that no such transcript as that prescribed by the statute was ever filed at any time. Had a transcript been filed which turned out to be in some respect defective, then the question as to the power of the court to correct such defect, by granting leave to amend, might perhaps properly arise. But here there was absolutely no transcript at all. It is true a paper was filed purporting to recite the proceedings before the justice, but which was neither signed nor certified to by him, and which, as the testimony shows, was in fact not even written by him. There was therefore, no transcript on file.

It can not be contended that the power of the court to grant leave to amend extends so far as to authorize the court to permit a party to make a transcript out of a mere piece of waste paper, and to acquire rights which under the law he had lost by not filing a certified transcript within the proper limit of time. This, we think, is clear. The appellant had, therefore, wholly failed to perfect his appeal.

265 *The appellee filed a proper transcript in the court of common pleas, and moved the court to dismiss the appeal and to remand the cause to the justice, to be proceeded in as if no such appeal had been taken, which motion the court overruled, and to this order error is now prosecuted.

The statute (S. & S., 419) makes it the duty of the court in such case either to enter judgment in favor of the appellee similar to that rendered by the justice, or to remand the case with the appellee's consent to the justice to be proceeded in as though no such appeal had been taken.

In refusing to grant the motion of the appellee the court below, therefore, manifestly erred, and for this error the judgment must be reversed.

CONTRACT.

[Hamilton District Court.]

W. C. MITCHELL v. C. & I. R. Co. ET AL.

Where, in consideration of a grant of a right of way to a railroad company, the company, among other things, gave to the grantor and his family residing at his

homestead at S., the right to ride free of charge, it was held as against a member of a family who had removed to another town, that the words "residing at the homestead" was not a description of the persons, but that the right to ride free was appurtenant to the occupying the homestead, and ceased when one moved away and was no longer a member of the family.

Cox, J.

The case came up by appeal from a judgment of the common pleas sustaining a demurrer to the petition of the plaintiff. The suit was brought to enjoin the railroad company from collecting from the plaintiff railroad fare between Short Hill and Cincinnati, and also to require the defendant to issue a free pass to him on the road, and for damages in the sum of $249 for fare paid from the 1st of January, 1874. The plaintiff in his petition claims that in 1863 a contract was entered into between John Cleves Short and the Cincinnati and Indiana Railroad Company, by which, in consideration of Short releasing the right of way over his land in this county, the company gave to him and his representatives certain privileges in relation to the carriage of freight at specified rates; also, in relation to the stoppage of trains adjacent to his lands, and, in the fourth item in the contract under which the suit was brought, gave to Judge Short and his family, residing at his homestead on Short Hill, the right to travel free of charge; that the plaintiff, a step-son of *Judge Short, at the time of the contract was a member of the family, and received one of the five free passes, which he continued 266
to use until the 1st of January, 1874; that in September, 1873, he removed to North Bend, continuing to ride on his free pass until the 1st of January, 1874, when the company refused to renew it. It was claimed by the plaintiff that this clause of the contract specifying "the family occupying the homestead," was simply a description of the persons then resident there, and did not require that they should continue to reside there, but that if at the time of the contract the plaintiff was a member of the family, and did then occupy the homestead, he was entitled for all time, wherever he might live, to travel on the road free.

The court did not think this the proper construction of the contract. In their opinion the right to use the road free was appurtenant to the occupying of the homestead, and that when the plaintiff ceased to occupy the homestead, and be a part of the family, his right to use the road free ceased also.

Judgment affirmed.

Wm. Disney and *J. C. Hart*, for Plaintiff.

Hoadly, Johnson and *Colston, contra.*

---

*MUNICIPAL CORPORATIONS—CONTRACTS. 279

[Hamilton District Court.]

†RYAN & CO. v. CITY OF CINCINNATI.

Where an assessment for a street improvement is delivered to contractors, but by reason of deficient value of the property is only partly collectible, the city's liability for the uncollectible balance is not affected by the fact that at the time

†A judgment of the Hamilton circuit court was affirmed in Cincinnati v. Ryan by the supreme court without report, Oct. 29, 1880. 24 B.. 371.

of making the contract there were no funds in the city's treasury especially set apart for this purpose. The Worthington law does not apply to the provisions of the municipal code governing this class of contracts.

ERROR to the Court of Common Pleas.

LONGWORTH, J.

The plaintiff's in error brought their certain action in the court below against the defendant, setting forth that in June 22, 1875, they entered into a contract with defendant to improve a certain street in Cincinnati; that they performed the work according to the terms of the contract, and to the satisfaction and acceptance of the city; that on November 25, 1875, an ordinance was passed by council assessing the abutting property for said improvement, and said assessment was *delivered* to the plaintiffs, who collected a part thereof and instituted suits against the lot owners to collect the balance, some of which suits are still pending; that the plaintiffs thus far have realized a portion of the contract price, leaving a balance alleged to be due from the defendant of $1,209.31, payment of which has been demanded and refused.

It appeared further, upon the petition, that the property was insufficient in value to pay the whole assessment and that 25 per cent. of the value was the extent of the collection.

The defendant answered, admitting the contract and the performance
280 *of the work under it, and the acceptance of the work by the city and the assessment upon the abutting property. It is denied that the assessment was invalid, but on the contrary averred that the same is a sufficient lien and ough to be enforced.

It was further stated that at the time of the execution of this contract there were no funds in the treasury specially set apart for this expenditure, and that the auditor had not certified to counsel that there were.

To this answer the plaintiffs demurred.

The court below sustained the demurrer, and the defendant not desiring to amend her answer, judgment was rendered in favor of the plaintiffs for the amount of their claim. To reverse this judgment these proceedings in error were instituted. The alleged error being that the judgment is contrary to law.

The petition of the plaintiffs sets forth a contract made by the city with them for the improvement of a street. The city has power to make contracts for the improvements of streets, and of this fact the court takes judicial cognizance. It appears, therefore, from the petition that the contract referred to was within the corporate power of the city to make, and it is averred, and not denied, that the contract was performed by the plaintiff's, and that the defendant failed to perform her part by paying the cost of the improvement as agreed upon. It is true that the petition does not state how much or what specific sum of money the city had agreed to pay under this contract, but the claim upon a *quantum meruit* is clearly good.

Upon the petition taken alone, the plaintiffs would certainly be entitled to a judgment for something in the absence of a defense. They aver that this amount is $1,206.31 with interest. There is nothing to be found in the pleadings to show that the assessment was given to the plaintiffs as payment under the contract, but the fact appears simply that the assessment was delivered to the plaintiffs and that they were un-

able to collect the whole of it. Where there is an expressed contract between parties, none can be implied. The maxim, *expressum facit cessare tacitum*, applies in such case, and accordingly it has been held that where it appeared by the terms of a contract that the costs of the improvement should be assessed by the city, and the assessment assigned to the contractor, that no further liability on the part of the city should be presumed, nor would courts take it for granted that there was any guarantee by the city of the sufficiency of the assessment. 18 O. S., 447.

Now, in the case at bar, it is not averred that the assessment was assigned as payment for the work; it is simply stated that work and labor were performed at the request of the city, and under a contract made between plaintiffs and defendant; and *that the defendant delivered an assessment to plaintiffs, the whole of which they (the plaintiffs) were unable to collect. It is nowhere 281
stated in the record that the delivery of this assessment was in satisfaction of the contract, and in the absence of such averment, and to presume it, would be to find that the contract was made in evasion of the provisions of section 543 of the municipal code. (See Walker v. Toledo, 18 O. S., 452). Such fact can not be presumed, nor does it appear whether the suits brought by the plaintiffs, referred to in their petition, were instituted by them individually, or in the name of the city, in their behalf.

We can not presume that there was an accord and satisfaction where none is pleaded, and the conclusion is irresistible from the admission of this record that there was an obligation to pay upon the part of the city, which has been duly partially fulfilled.

The court below found the amount due to the plaintiffs. There was no demand made by defendant to have this amount determined by a jury, and where the right of trial by jury is waived, the court is authorized, under section 376 of the code of civil procedure, to find the amount and render judgment therefor.

It was stated in the argument of counsel that the only question in this case was, whether in a suit brought by a contractor in the name of the city to collect an assessment, and where there was a failure to collect the full amount by reason of the property assessed being of a value insufficient to satisfy the assessment, the city is estopped to deny in another proceeding, between the contractor and herself, that the value of the property, so found, is the true value. It is plain from the statement of the case that this question does not and can not arise. It is fraught with many difficulties, and which will be decided when properly presented to the court. The defense made under what is known as the Worthington law, viz.: That at the time of entering into the contract, there was no special fund set apart for the payment of the cost of improvement and that the city auditor had not certified, is untenable. This law does not apply to contracts of this description, which are wholly governed by special provisions of the municipal code which the Worthington law is not intended, and does not purport to repeal.

We can find no error in the proceedings of the court below, and the judgment will, therefore, be affirmed.

Long, Kramer & Kramer, Attorneys for Plaintiffs.

City Solicitors, Attorneys for Defendants.

282 *HUSBAND AND WIFE.

[Hamilton District Court.]

BIEDINGER & HOF v. TERESA GOEBEL.

A promissory note given by a husband and indorsed by the wife in the words: "I hereby bind and charge my separate estate for the payment of this note." *Held*, that the indorsement upon which the credit was given was sufficient consideration to support the contract, and because the note was given and accepted under the circumstances, the debt is considered in law to have been contracted for her benefit, and her separate estate will be held liable for the payment of the note.

ERROR to the Court of Common Pleas.

AVERY, J.

The plaintiffs in error filed their petition in the court below against the defendant, Teresa Goebel and her husband Charles Goebel, jointly, setting forth that Charles Goebel on the 3d day of October, 1876, executed his promissory note for $444.48 to the plaintiffs, payable in sixty days after date, and indorsed as follows: "I hereby bind and charge my separate estate for the payment of this note, Teresa Goebel," upon which note (the same having been unpaid) they prayed a joint judgment.

To this petition a demurrer was interposed by Teresa Goebel, and sustained.

The plaintiffs thereupon filed an amended petition, showing, in addition to the facts recited in the original petition, that at the time of executing the note, Teresa was possessed, and still is possessed, of certain land in this city in her own right and as her separate estate.

To this petition Teresa filed her separate answer, pleading coverture, and further stating that she signed the note sued on only as surety for her husband, and that she never received any consideration therefor, all which was well known by the plaintiffs.

To this answer the plaintiffs demurred and their demurrer was overruled and judgment was rendered in favor of plaintiffs as to Charles Goebel, and the action dismissed as to Teresa.

To reverse the action of the court of common pleas in dismissing the cause as to Teresa Goebel, this proceeding in error is instituted.

At common law a married woman is utterly incompetent to contract in her own name. Whatever may be the reason of the law, the rule is maintained that the legal existence of the wife is merged in that of the husband, so that in law, the husband and wife are one person.

Courts of equity, however, do not fully adopt this theory. A fundamental distinction exists at the very threshold of their jurisprudence.

283 *A married woman has, from the earliest time, been considered capable of acquiring and holding property, for her own use, and as to such property courts of equity devise for her a separate estate over which her husband can exercise no manner of control.

The very object of vesting such a separate estate in the wife is to permit and enable her to deal with it as though she was discovert.

The *jus disponendi* is an incident to her absolute ownership of property. Although, in the different states in the union, there is great diversity of opinion upon this subject, and especially as to the manner in

which a married woman may charge or dispose of her separate property; in Ohio the rule is well settled that a married woman may charge her separate estate with her debts to the extent that the liabilities may be incurred for the benefit of such estate, or for her own benefit, upon the faith of her separate property, and that her intention to charge her separate estate may be either express or implied.

In the case at bar the intention of Teresa to charge her separate estate is expressed in the body of the instrument executed by her in the words, "I hereby bind and charge my separate estate for the payment of this note." The intention is manifest, and it therefore remains to be determined simply whether the debt contracted was for her own benefit—she having signed only as surety for her husband and having received no consideration for such signature.

It may be said with truth that it rarely happens that one who signs simply as surety for another, and for his accommodation, receives any consideration for his signing except that the credit is given and the note executed, yet no one would for a moment doubt but that this fact constitutes in law a consideration amply sufficient to support the contract. That the indorsement of Teresa was the consideration—or a portion of the consideration—for giving the credit in this case is apparent from an inspection of the instrument sued on, and the fact that the note *was given* is clearly a sufficient consideration to support an action upon her promise to see that it is paid. The debt is, therefore, considered in law to have been contracted for her benefit.

We do not think that under the law of Ohio concerning this subject, there can be any sound distinction between the case of a married woman signing a note as surety for her husband, and when she signs as surety for somebody else. In both cases the debt is supposed to have been contracted for her own benefit, where the note shows upon its face such declared intention.

It is true that our supreme court, in the very late case of Herman Levi v. Earl et al. say that the mere fact that a married *woman in- 284
dorses a promissory note as surety for her husband, and without any actual consideration moving to her, is not sufficient to justify a court of equity in presuming that it was done upon the credit of her separate estate; but in the case at bar no such presumption is necessary, the intention being expressed, not implied.

ASSIGNMENT FOR CREDITORS.

[Hamilton District Court, 1877.]

†HERMAN GOEPPER, ASSIGNEE, v. CHRISTIAN HECKLE.

An action on a joint note, one of the makers of which has assigned for the benefit of creditors, need not be brought against the remaining solvent parties and the assignee jointly, and in a proceeding against the assignee alone to compel him to allow the notes is not demurrable for want of parties, nor does it affect the liability of the remaining parties, nor merge the notes in the judgment, though if the estate pays more than its share it could enforce contribution.

†Affirmed by supreme court, without report, as Goepper v. Herold.

These cases, involving the same questions, were disposed of together. They came into this court on petition in error. The plaintiff is the assignee of George Klotter, Sr., and the trust is being administered in the probate court. Heckle held two notes for $1 000 each against the assignor, and Mrs. Herold one note for $2,000. The notes were made by Klotter's sons, with the name of George Klotter, Sr., written across the back before the delivery to the payees. The assignee declined to allow any of the notes, and thereupon the defendants in error instituted suits under the statutes regulating the administration of assignments, and asking that the assignee be compelled to allow the claim as valid against the estate of George Klotter, Sr.

A demurrer was interposed by the assignee on the ground that the obligation of George Klotter, Sr., and of Klotter's sons was a joint obligation, and that there was a defect of parties in that the defendants in error failed to join Klotter's sons in the action against the assignee of George Klotter, Sr. The court below overruled the demurrer, and the defendant, having no further answer to make, judgment was rendered against the assignee, ordering that he should allow the notes as a valid claim against the estate of George Klotter, Sr.

JOHNSTON, J.

At common law on the decease of a joint obligor the action did not survive, and the holder was obliged to look only to the surviving obligor. If after having exhausted completely the surviving obligor then by proceedings in chancery he had a right to pursue the legal representative of the deceased obligor. So the law remained until the statute of 1840, governing the estates of deceased parties, when it was provided, sec. 90, that on the decease of one, of two or more joint obligors, the holder of the note had the right to proceed against the representative of the deceased obligor. Separately, and by virtue of section 38, the holder might proceed against the surviving obligor, and the executor or administrator of the deceased obligor, in
285 * the same suit or separately. This right was given to the holder by virtue of a special statute; but the court was unable to find any statute that authorizes or requires the holder of an obligation, where parties are jointly obligatees, and one makes an assignment, to bring an action against the survivors and the assignee of the co-obligor jointly.

These suits, however, were not to recover on the notes, but a proceeding under a statute govering the administration of the assets of insolvent debtors—an action separate and apart from the note or obligation itself—simply asking that the notes be allowed as valid claims and it does not require, authorize or permit the joint obligors, who have not assigned in that proceeding, to become parties. It does not affect their liability on the paper, the notes are not merged in the judgment, and after the trust had been administered, the right remains to the holders of the notes to institute suits against all as joint obligors. Of course, if the trust pays more than half of the obligations, it would be the right of the assignee to enforce contribution against the co-obligors. In the opinion of the court, the common pleas decided correctly in overruling the demurrer of the plaintiff in error. Judgment affirmed in both cases.

C. D. Coffin and *C. L. Mitchell*, for Plaintiff in Error.

Champion & Williams, contra.

SEWER ASSESSMENTS.

[Hamilton County District Court, April Term, 1877.]

CITY FOR THE USE OF NOLTE v. MCDERMOTT ET AL.

1. It is no defense to an assessment for a sewer, that the sewer was too small, nor that it was of no benefit, because the surface level of the lots was below the bottom of the sewer.
2. The exercise of the power of assesement presupposes the question of benefit to have been determined by the city council, in whose discretion it is left, and further inquiry is precluded.

AVERY J.

The property of defendants was assessed to pay for a sewer in front of their premises, the assessment being at the rate of $2 per front foot. The judgment of the court below was in favor of the defendants. To reverse that judgment this petition in error was instituted.

The petition set out the assessment, together with all the steps required in making an assessment. The answers denied the allegation of the petition and set up that the sewer was too small, and further, that it was insufficient for drainage, in that the surface of the lots was below the bottom of the sewer. Upon the trial the plaintiff produced the recommendation of the board of sewer commissioners, recommending the improvement the resolution of council declaring the improvement, necessary, the ordinance directing the improvement, the contract, the certificate that the work had been done, and the assessment. The only other evidence was the value of the lots, and the levels of the lots as compared with the level of the sewer. The lowest estimate of value was $4 per foot; but, while this might have operated to reduce the amount of the assessment, it could not * entirely defeat the recovery. The surface level of 286
one of the lots was also shown to be below the bottom of the sewer. But if this had been the case with all the lots, it would not have defeated the assessment. The power of assessing for a sewer improvement is conferred by the legislature, and proceeds upon the theory that special benefits result to the property assessed. But the exercise of the power presupposes that question to have been determined by the city council, in whose discretion it is left, and further inquiry is precluded. In the case of the City for the use of Bickwell and Purcell, 26th O. S. 49, the bottom of the cellars was below the level of the sewer, and there were irregularities affecting the assessment, which made it necessary for the court to render judgment for what should have been a proper charge upon the property, and yet even in that case it was held that the proportion properly chargeable was not measured by the amount of benefit to the property, but was the *pro rata* proportion of the cost.

Judgment reversed.

Morrill & Strunk and the *City Solicitors*, for the Plaintiff.

Mallon & Coffey, *Contra.*

NEW TRIAL.

[Hamilton County District Court, 1877.]

ROBERT W. BADGELY v. DANIEL G. H. BADGELY, ET AL.

Where, in an action to set aside a conveyance a rehearing after the term at which judgment was rendered having been obtained under code, section 586, and the record shows by *consent of parties*, the whole controversy was submitted to the court in the action for rehearing though strictly the question involved should have been tried in the original action, yet such consent gave the court jurisdiction and its judgment is evidence as to the title.

JOHNSTON, J.

Where the record shows that the title to land had been in controversy in another suit, and by *consent of parties* the whole question in contro-

versy was submitted to the court, the party having been served and not having answered: *Held*, That in a subsequent action involving the ownership of the law, the court below erred in not admitting the record to be introduced as evidence.

The action below was ejectment, the property in controversy being forty acres of land in Millcreek township. In the trial of the case the defendants offered in evidence the records of a previous suit to which the plaintiff was a party, in which it was found that he had no title to the property to which he laid claim in the suit below. To the introduction of this evidence the plaintiff objected, and his exceptions to its introduction formed the main ground of error in this partition in error.

It appeared that Wm. W. Badgely, the father of the parties to this suit, in 1853, conveyed the tract in controversy to the plaintiff in consideration of $15,000 of his father's indebtedness. In 1854 the father brought suit to set aside the conveyance for fraud and failure of the plaintiff to comply with the contract, the plaintiff in the meantime having mortgaged ten acres of land to one Fuller. This petition was subsequently dismissed by Wm. W. Badgely, the plaintiff, but reinstated by Fuller, for the foreclosure
287 *of his mortgage on cross petition. In that suit the petition of Wm. W. Badgely was dismissed for want of equity. In 1859, Wm. W. Badgely obtained a rehearing of his case, and service was had upon the plaintiff and his wife. In that suit the plaintiff was ordered to reconvey what was left of the property, after deducting the ten acres sold by Fuller. It was claimed by the plaintiff that he was not bound by that proceeding, because his father had dismissed the suit generally, and when it was reinstated, it was simply for the purpose of Fuller's foreclosure.

The rehearing was obtained under section 586 of the code by petition, the term having passed. Robert Badgely having been regularly served, he should have answered denying his father's right to a hearing, if the right did not exist. We find, from the record, that he not only did not answer, but that the record offered presents the fact that on the plaintiff obtaining the rehearing that by *consent of parties* the whole question in controversy was submitted to the court in the action for rehearing, and the court found against Robert Badgely. According to the strict rules of practice under the code on obtaining a rehearing under said section, the questions involved should have been tried in the original action between the parties. But this action for a rehearing is virtually a branch of the original case. The supreme court have decided that it is a special proceeding *in an action* after judgment and not appealable. It may be reviewed on error only. 12 O. S., 169. But, as already stated, the record offered shows that the parties *consented* to proceed after the rehearing in that action, to submit all questions involved to the court. The court thus properly acquired jurisdiction in the premises, and the record offered was, in our opinion, properly admitted in evidence to the jury by the court below.

Judgment affirmed.

Crapsey, for Plaintiff in Error.

Harmon & Maxwell, for Defendant in Error.

*COMMON CARRIER—NEGLIGENCE—RECEIVERS. 288

[Superior Court of Cincinnati, General Term, October, 1877.]

Tilden, Yaple and Force, JJ.

HARRIET A. ELLIS, EX'R., v. I., C. & L. R. R. CO.

Upon a suit brought against a railroad company for failure to deliver goods under a contract made with the agent of the receivers for their transportation and safe delivery: *Held:* That no action will lie against the railroad company for any alleged breach of contract made with the receivers.

YAPLE, J.

This case comes before us upon two motions reserved from special term for decision here. The first is a motion made by the defendant for a new trial, and the second is for judgment upon the pleadings in favor of the defendant, notwithstanding the verdict.

The petition averred that the defendant, by its authorized agent, Wm. D. Scott, on the 28th day of June, 1871, contracted with the plaintiff by her authorized agent, R. G. Ellis, to convey from the city of Cincinnati, Ohio, to the city of Chicago, Illinois, certain specified goods of hers, amounting to half a car load, of the value of $2,580.81, in consideration of $25, to be paid by the plaintiff to the defendant, or its authorized agent, on the delivery of the goods by the defendant to the plaintiff or her agent, at said Chicago, within a reasonable time thereafter, that is, on or about July 1, 1871; that in pursuance of this contract, the plaintiff, on June 28, 1871, delivered the goods to the defendant at Cincinnati, for such carriage, duly marked for delivery to F. W. Test, the agent of the plaintiff at Chicago, etc.; and that the defendant has wholly failed to deliver such goods at Chicago, or any part of them.

The defendant answered among other things, that, at the time of the alleged contract and supposed breach, it had no possession of its railroad or cars, but that the same were in the exclusive possession and under the control of T. A. Morris and D. M. Ingalls, who were receivers duly appointed by the circuit court of the United States, within, and for the southern district of Ohio; that they, as such receivers, made, by their agent, H. J. Page, the contract of carriage and undertook the same; and that before suit brought such receivers had fully settled the business of their receivership with, and been discharged by, such court.

*The reply admits these facts. The circuit court, however, has granted the plaintiff leave to prosecute this action against the defendant. 289

The defendant then denied the contract alleged in the petition, and averred that it was only agreed to carry such goods to the end of its road, Lafayette, Indiana, and to forward them thence to Chicago, by way of the New Albany and Chicago railroad, whose track connected with its own at Lafayette, and that the goods were safely carried to Lafayette and there delivered in good order to the New Albany and Chicago road for carriage to and delivery at Chicago.

A bill of lading was delivered to plaintiff's agent on the 28th of June, 1871, after the goods had been loaded in the car, and before the car actually left the depot for Chicago. The bill read: "From Cincinnati

to Chicago, Ill., via I., C. & L.," and contained the following printed clause: "To be transported over the line of this road to the company's freight station at * * * and deliver in like good order to the consignee or owner at said station, or to such company or carriers (if the same are to be forwarded beyond said station) whose line may be considered a part of the route to the place of the destination of such goods or packages, it being distinctly understood that the responsibility of this company, as a common carrier, shall cease upon the arrival of the same at the station where delivered to such person or carrier," etc.

At the trial the plaintiff claimed that as Lafayette station was left blank, the construction to be put upon the bill of lading was that this printed clause was to be taken as no part of it, which claim the court overruled. The plaintiff then insisted that there was a complete and express contract of carriage from Cincinnati to Chicago proved; and that to make out a defense, the defendant must satisfy the jury that the plaintiff's agent had notice of, and assented to such printed condition; and the court held that if such express contract was proved and the bill of lading delivered after the goods were loaded upon the car, the jury must be satisfied of such notice to, and assent by, the agent of the plaintiff of such condition to enable the defendant to avail itself of it. The defendant, also, at the close of the plaintiff's evidence moved the court to direct the jury to return a verdict in its favor, which motion the court overruled and the defendant excepted.

There was also evidence admitted and excluded, and charges given to the jury and refused, to which the defendant excepted. The jury returned a verdict for the plaintiff for $1,900.

The question in relation to the defendant not being liable because the road, at the time of the occurrence of the entire transaction, was in the exclusive possession of the receiver, was not raised until after the
290 trial, when the motion for judgment for the *defendant upon the pleadings, notwithstanding the verdict, was filed as provided in section 384 of the code.

The questions presented by the motion for a new trial in this case are difficult and of great importance; but, if the motion for judgment upon the pleadings, notwithstanding the verdict made by the defendant, be well taken, none of those questions are properly before us.

A railroad corporation's road in the hands of, and managed and controlled by a receiver appointed by a court of competent jurisdiction, is in the custody of the law, the receiver is the law's agent and not, in the legal sense of the term, the immediate agent of the company or of any of the parties, though he is designed to act for the common ultimate benefit of all.

High on Receivers, sections 1 and 2. "It would seem clear upon principle, and in the absence of any absolute liability created by statutes that the corporation itself can not be held responsible for * * * a receiver operating the road. The receivers' possession is not the possession of the corporation, but is antagonistic thereto, and the company can not control either the receiver or his employes." High on Rec., sec. 396, O. & M. R. Co. v. Davis, 23 Ind., 553, and see R. Co. v. Brown, 17 Wal., 450. In the case at bar, the contract was made by the receivers' agent, and in the name of the receivers, the company not having, in any way, the right or power to object to any term of such contract. Could it have done so, it might have refused to make the alleged verbal contract for the

carriage of the goods by it through to Chicago, and have insisted upon its right to carry them only to the terminus of its road, and safely forward them thence to their destination, in which event, it would not have been liable in this case.

The action will only lie against the receivers upon leave granted to sue them, given by the court appointing them, and in such event no personal judgment could be rendered against them, but only as receivers. The fact that they have been discharged by the court appointing them, upon full settlement of the affairs of their receivership, does not prevent the bringing of an action against them by leave of the circuit court. High on Rec., sec. 268. But as they settle the affairs of their trust with the court appointing them, and as they are not personally liable, it is not for this court now to determine how the plaintiff might secure the fruits of a judgment obtained against them.

The plaintiff might have gone into the court appointing such receivers, and applied to it for the very relief sought by this action against the company; or, with permission of that court, might have sued the receivers, and the court would doubtless have awaited the determination of such suit before finally settling *the receivers' accounts and discharging them. High on Rec., sec. 255. Obviously, the plaintiff should have pursued one of such courses. In the absence of express legislation authorizing it, the plaintiff can not maintain this action against this corporation, for such alleged breach of contract made by such receivers. 291

Judgment upon the pleadings, notwithstanding the verdict, must be rendered for the defendant.

Judges Tilden and Force concur.

Hoadley, *Johnson* and *Colston*, for the Motion.

Wilby and *Wald*, Attorneys for the Plaintiff.

---

*PRISON BOUNDS. 300

[Hamilton Common Pleas.]

WILLIAM KIRKUP v. DAVID H. STICKNEY.

1. A judgment debtor who has given bond to remain in prison bounds is entitled to be fed and lodged at the jail, if he so desire, at the expense of the judgment creditor.
2. The prison bounds are co-extensive with the county, and, in contemplation of law, an extension of the prison walls to the county lines.
3. The kind of subsistence at the jail which the debtor is entitled to claim is only that provided by law for other prisoners.
4. If the judgment creditor refuse to pay the prison fees in advance when demanded, the debtor would not commit a breach of his bond by going out of the prison limits.

Cox, J.

This case came up on the question of the liability of the plaintiff for certain jail fees incurred by the defendant, who is a prisoner for debt upon prison bounds. The defendant was arrested some time ago on the charge of having converted certain real estate into bonds, after the plain-

tiff had obtained a judgment against him, which bonds he concealed to prevent the plaintiff from levying on them. Subsequent to his arrest he was admitted to prison bounds, upon giving security to the satisfaction of two of the judges of the court of common pleas that he would remain within prison bounds. These prison bounds are co-extensive with the limits of the county. Since the giving of the bond the defendant has not been confined to the jail, but has been within the prison bounds. He claimed, however, his right to take his meals at the county jail and to lodge there at the expense of the judgment creditor, and the sheriff claimed that if the defendant had the right to board and lodge at the jail, the plaintiff must pay in advance his fees each week. It was claimed upon the part of the plaintiff, that Stickney, being at large in prison bounds, and not actually confined in jail, was not entitled to board or lodging at his expense, not being in fact a prisoner.

The court, in disposing of the matter, remarked that cases of this kind were very rare under our present constitution, which forbids imprisonment for debt except in cases of fraud. Under the old constitution and former laws, in the early history of the state, they were of more frequent occurrence, and the law seems to have been considered in a great many cases as bearing upon this point. In the case of Buttles against
301 Carlton, 1st O. R. 34, a *case heard about 1822, the supreme court held that where a party had obtained the right to prison bounds by giving bonds he was still actually in prison; that prison bounds were simply extending the walls of the jail to the limit of the prison bounds, and the prison bounds being the county lines, in contemplation of law, the jail walls were extended to the limits of the county, and the party was still in prison and was entitled to board and lodging in the house of the jail at the expense of the judgment creditor. Our present statute, section 173, provides that any person causing another to be committed to jail under its provisions, shall, if required by the jailer, pay such fees weekly in advance, such fees so paid to be a part of the costs of the case. It was, therefore, the duty of the plaintiff, if the jailer should require it, to advance the jail fees weekly, and if he did not do so, the sheriff was not bound to keep the party in jail. The bond to keep within prison bounds was an obligation that he would not go outside of prison bounds. The plaintiff's bond became forfeited if he did. The same rule should apply to furnishing him subsistence while he is upon prison bounds as applies while he is actually in jail. If the sheriff may discharge him from the jail when the judgment creditor does not furnish the fees required by law, then being upon prison bounds, which is to all intents and purposes in prison in the county; if the judgment creditor refuses to pay the jail fees when demanded, it will be no violation of the bond if the defendant go outside of the prison limits.

Another question arose in the case, as to how much the judgment creditor should be required to furnish the jailer. The debtor claimed that he was not bound to subsist upon the ordinary prison fare, but that he was entitled to extra subsistence; that he had a right to have good board, and the bill which the sheriff presented to the judgment creditor was for board at $6 per week. The statute provides that the county commissioners may allow any sum not exceeding fifty cents per day for each prisoner for subsistence. By an order the commissioners have allowed forty cents per day. Under that order the sheriff would not be permitted to charge, nor the plaintiff required to pay, more than the amount

allowed by law for the ordinary subsistence of prisoners in jail which was forty cents per day.

Judgment accordingly.

N. E. Jordan, for the Plaintiff.

S. F. Hunt and *Smith Stimmel, contra.*

---

*ASSESSMENTS. 334

[Superior Court of Cincinnati, General Term, October, 1877.]

†CITY OF CINCINNATI v. HENRY P. DIEKMEYER.

1. A contractor having received from the city an assessment on abutting property to pay him for street improvement, and the contractor having *failed in a suit prosecuted by him in the name of the city, with due diligence and good faith to recover the whole amount, because the whole amount exceeded twenty-five per cent. of the value of the abutting property, the city is bound by this adjudication, though not actually notified of the suit. 335
2. Where the contractor in an action against the abutting owner to collect such assessment, prosecuted without laches and in good faith, fails to recover the full amount of the assessment because it exceeds twenty-five per cent. of the value of the assessed property, after the improvement is made, the city is bound by such judgment, although it had no actual notice of the pendency of the action.
3. Where a municipal corporation agrees with a contractor to pay a specified sum for a street improvement; in assessments upon the abutting property, and the assessments levied and assigned to the contractor exceeded twenty-five per cent. of the value of the property, after the improvement is completed the city is liable to the contractor for the deficiency.

FORCE, J.

Diekmeyer, under a contract with the city, made a street improvement; received an assessment from the city, brought suit upon it, failed to recover the full amount because it was found that the assessment exceeded twenty-five per cent. of the value of the property, and then brought suit against the city to recover the deficiency. The city answered that Diekmeyer had received an assessment which was valid and could be collected, and denied that it exceeded twenty-five per cent. of the value of the property. To this answer Diekmeyer demurred. The demurrer was sustained and judgment entered, and the city now brings petition in error to reverse the ruling and judgment.

The city, by its demurrer, admits that a judgment was rendered in the suit brought by Diekmeyer in the name of the city. But the petition does not aver that Diekmeyer notified the city of his action, and the question presented is, whether the city is bound in the absence of such notice.

A contractor holding an assessment is the assignee of a non-negotiable obligation. An assessment is a special tax; and like all taxes, is due to tax levying authority. Though it be the custom in Cincinnati in the assessing ordinance to make the assessment payable to the contractor, that does not change the nature of the transaction, which is a transfer of the tax to the contractor; it merely affects the form of the transfer.

The municipal code, requiring actions for assessments to be brought in the name of the city, is a repeal *pro tanto* of the code of procedure, which requires all actions to be brought in the name of the real party in interest. The action to recover an assessment is therefore precisely like an action under the old practice by the assignee of a non-negotiable chose in action.

---

†The judgment in this case was affirmed by the supreme court, by refusal to allow motion to file petition in error. See opinion, 31 O. S., 242.

Such an action was brought in the name of the assignor. It was not necessary to name the assignee. Though it was used to entitle the suit as brought for the use of the assignees, that form of title did not affect the fact that the assignor was sole plaintiff, and the assignee was not a party to the action. 2 O. R., p. 24; 6 O. R., p. 152. And the action was accordingly sometimes brought simply in the name of the assignor without any reference to the assignee, as in Dawson v. Coles, 16 Johns, 51. But if the assignor by fraud and collusion with the debtor brought the suit himself, not only in his name, but for his own benefit, a judgment in the action would not
336 bind the assignee; *would not be a bar to a subsequent suit instituted by the assignee for his use, though the parties and the cause of action were precisely the same in the two suits. The fraud invalidated the first judgment. Dawson v. Coles, 16 Johns, 51.

Hence, in the absence of fraud, where an action is brought by the assignee in the name of the assignor, the judgment in such action is conclusive between the assignor and the debtor, and also between the assignee and the debtor. As the assignee is authorized by the fact of the assignment to bring such suit, the judgment is also for that reason conclusive for most purposes between the assignor and the assignee.

But when the chose in action is assigned to pay a fixed sum, and in case it fails, the assignor is bound to make up the deficiency, then the conclusiveness of such a judgment on the assignor depends upon a different principle. It is not true that an indemnitor can in all cases dispute a judgment which fixes his obligation in an action to which he is not a party, and of which he is not notified. Taylor says (Ev. vol. 2, sec. 1500), the later tendency of the courts is to enlarge the obligation of a judgment as against persons really interested in the litigation, though not parties to the record. The rule as stated by Freeman (on Judgments, p. 146, sec. 176) is that persons not parties to a litigation, nor notified of it, are bound by the judgment, if they have agreed to be so bound, or if such responsibility is placed upon them by law.

Bail, surety on appeal bond, etc., are bound conclusively by the result of the suit to which they are not parties, because they have expressly agreed to be. A debtor who gives negotiable choses in action to his creditor as collaterals, is bound by the finding and judgment in an action brought or carried on in good faith by the creditor to collect them, by reason of his implied agreement to be. The case of Chicago v. Robbins, 2 Wall, and Robbins v. Chicago, 4 Wall., is an example of the other branch of the rule, the responsibility placed by law; and is, at the same time, an illustration of Taylor's remarks upon the latter tendency of the courts. A person injured by the falling into an excavation in a sidewalk sued the city for damages. The city attorney called on Robbins the property owner, who had made the excavation, as a person likely able to give information and suggest witnesses. Robbins was in this way informed that an action had been brought against the city, but was not informed in what court the suit was brought, nor was he advised that the city would look to him for indemnity in case judgment shall be rendered against the city. Judgment was given against the city, and thereupon the city brought suit against Robbins for indemnity. The supreme court of the United States, avowedly enlarging the signification of the
337 *phrase, "parties to an action," and extending the scope of the maxium, it is for the public interest to have an end of litigation, held Robbins liable.

In the present case, the city agreed by its contract to pay Diekmeyer a certain sum, and handed him the assessment in order to pay it. The city well knew it was liable to make good any deficiency which should arise by reason of a defect in the assessment, and knew Diekmeyer was authorized to use the city's name to collect by suit. The city is bound both by its implied agreement, and by obligation of law, to make good the deficiency ascertained by judgment in such suit brought and prosecuted by Diekmeyer in good faith; the city is bound by the litigation whether notified of its pendency or not.

Judgment affirmed.

Perkins, for Plaintiff in Error.

Kramer, for Defendant in Error.

SET-OFF—BANKRUPTCY.

[Superior Court of Cincinnati, General Term, October, 1877.]

CHAS. P. WILLIAMS v. HENRY F. PULTZE.

1. When, in an action against a partnership, only one of the firm is sued, he can not set off a claim held by him individually against the plaintiff.
2. The rule that equity will allow a joint claim to be set off against a separate claim when the plaintiff is involved, is not absolute. It is allowed for the purpose of securing equity, and will not be allowed when the allowance would work injustice.
3. When a person desiring to file a petition as a voluntary bankrupt, and needing the advice of counsel, makes an absolute payment to an attorney, who, then, in consideration of such payment renders services, according to the weight of the reported decisions of the federal courts, such payment, if reasonable in amount, and made in good faith, is not in fraud of the bankrupt law, and a state court will hold accordingly.

Petition in error to reverse a judgment of special term.

FORCE, J.

Pultze brought action against Williams and one Parker, late partners as Williams & Co. The claim is money due on an account stated between the firm of Williams & Co., and one Cyrus M. Williams, by which a determined amount was agreed to be due to Cyrus, and which account and claim Cyrus had assigned to Pultze. Parker was not served, and Charles P. Williams answering, set up two defenses. First, set off; and second, that Pultze was not entitled to maintain his action, because Cyrus, a bankrupt, had assigned the claim to Pultze, his attorney, *in con- 338
templation of bankruptcy, within four months preceding the proceedings in bankruptcy, for legal services to be performed about the proceedings in bankruptcy. Pultze, in reply, states the claim was so assigned to him, in good faith, and denies all other allegations. Judgment being rendered against Charles, the defendant served, this petition in error was filed.

This claim sued on, being one that was originally in favor of Cyrus Williams against the firm of Williams & Co., the defendant, Charles, claims to set off against it a debt due from Cyrus Williams to a wholly different firm, the firm of Williams & Mitchell, another firm to which Charles belonged. It is charged that Mitchell has deceased, and Charles as surviving partner, sues and defends alone all the matters pertaining to that firm; also, that he has alone been sued in the present action. He is sole defendant; and hence, being prosecuted as sole defendant, and being as survivor sole owner for the purposes of litigation of a claim against Charles, he can set up that claim against the assignee of Charles' non-negotiable claim.

The defense is ingenious and was warmly urged; but there are some objections to it. It is true that a surviving partner when sued upon his individual debt, may set off a debt due from the plaintiff to the late firm of which such defendant is survivor. It is also true that the supreme court of Vermont *held* (Shaw's Case, S. Ver., 301), that where two sued on a joint debt and only one defendant is served, he may set off a debt due to him individually from the plaintiff. But the court in that case bases this opinion on the language of the Vermont statute that the de-

fendant may set off, and the fact that the party alone served was the defendant before the court. But the court adds, however, that may be their judgment to affirm the case before them would be the same, because the record did not show that the set-off had been allowed.

But this case in Vermont stands entirely alone, and is not sound in principle. Though only one of joint debtors is served with process, yet the claim prosecuted against him is a joint claim; his set-off must be in the same right; and it is entirely settled, that though he is alone served, yet he can set off a claim due by the plaintiff to him jointly with the defendants not served. The case of the surviving partner is different. In law, he does not sue in his own right. He is liable individually for all the debts of the firm, and can collect all the credits of the firm. A court of law takes no notice in such litigation of such an equity as the right of the representatives of the deceased partner to make him account.

Hence, though Charles may set up in a suit against him individually, a claim owned by him as survivor of the firm of Williams & Mitchell, he cannot set off such claim when he defends
339 *in a suit brought against the firm of Williams and Co., a wholly distinct firm, even when he is the only one of that firm brought into court by that process.

It is further urged if this be so, yet as the plaintiff's assignor was insolvent when the present suit was begun, the defendant may, in accordance with the rules of equitable estoppel, set off a joint claim against the individual claim sued on. Courts of equity do extend the right of set off beyond the limits prescribed by courts of law, and do permit joint claims to be set off against separate claims when it is necessary to do so to prevent injustice; and the defendant under the code can claim such right of set off as is recognized in equity. But the right to set off a joint claim against a separate claim, when the plaintiff is insolvent, is not an absolute rule; it is only an example of the rule that equity will extend the right of set off for the purpose of doing equity. The rights of all parties concerned must be considered in order to determine what is equity. Now it appears that Charles, though surviving partner of Williams & Mitchell, was the debtor partner. He owed his partner $6,000. Hence, though he collects the assets, he in fact collects them for the benefit of the representatives of Mitchell. And it is not at all clear that while he is already so far in the debt of these representatives it would be equitable to allow him to use up more of the assets of those representatives to pay his own debts.

There is another objection against the set off. A defendant in order to make out a set off, must show that he owned the claim which he offers as a set off, before he had notice of the assignment to the plaintiff of the claim sued on. But the defendant below neither averred nor proved any such fact. Indeed, admitting his right to be complete in other respects, it did not accrue till the death of his partner, Mitchell. It came into existence by his becoming surviving partner upon Mitchell's death. It appears from the testimony that Mitchell died some years after the claim sued on was assigned to Pultze; but there is no testimony where notice was given of the assignment.

There is yet another objection. Pultze, in his reply, denies that the debt which is offered as a set off ever existed. The defendant was bound to prove it. There is no such proof. It is in proof that Williams & Mitchell claimed that Cyrus was in their debt, and that Cyrus named

their claim in his schedule in his bankruptcy proceedings. But in his testimony in this case he utterly denies that he in fact owed them anything, and there is no other testimony.

On the whole it does not appear that the court in special term erred in finding that no valid set off was proved.

The other defense is that Pultze can not maintain his action because the claim sued on was assigned to him in fraud of the *bankrupt law. 340
The facts are that Cyrus, desiring to file his petition as a voluntary bankrupt, and desiring the legal services of Pultze in the proceedings, assigned to him the account sued on, and in consideration thereof Pultze acted as his counsel. Pultze, therefore, never was a creditor of Cyrus. The statute, by allowing voluntary bankruptcy, allows such a petitioner to employ counsel. If he promises to pay, a debt is created which must be proved like any other debt. But if the transaction is simply a payment on the one hand and subsequent service on the other, such payment, if made in good faith and if reasonable in amount, appears to be sanctioned by the necessary implication of the bankrupt act.

The rule is so stated in Bump on Bankruptcy, 8th Ed., p. 237; and it has been so held by a state court—Lyon v. Marshall, 11 Bark., 241. But upon these questions we follow the rulings of the federal courts. It was so distinctly decided by the district court, district of New Jersey. *In re* Rosenfield, 2 Nat. B. Reg. Rep. (8 vo. ed.) p. 116. The cases cited to the contrary are not precisely in point. *In re* Hirschburg, 1 Nat. B. Reg. Rep. p. 642, and in *In re* Jaycox & Green, 7 *ib.*, 140, the bankrupt having given his note to his attorney for services, the attorney claimed this was a preferred debt, and the court held it was not a preference debt. *In re* Evans, 3 *ib.*, 261, the bankrupt having given his note to his attorney for services, executed a mortgage to secure the note. It was held that the mortgage being given to secure a debt was against law and void. This case is, however, questioned by Bump in his book on bankruptcy. The claim of Pultze seems sound on principle and supported by authority, while there is no direct decision against it.

Judgment affirmed.

Goodman & Storer, for Plaintiff in Error.

Baldwin, for Defendant in Error.

JUDGMENT—SET-OFF.

[Superior Court of Cincinnati, General Term, October, 1877.]

† ALBERT STEIN v. CROSLEY, ADM'R. OF BENSON.

Where a defendant admits the amount of his indebtedness to the plaintiff and pleads a set off, an issue is joined on the set off, a judgment rendered upon the pleadings, on the motion of the plaintiff, for the amount admitted to be due, less the amount of the set off, is erroneous.

TILDEN, J.

James Good, claiming to have been half owner of the steamer Diamond and two barges, part in his own right, and the other in that of John Good, and further

† Motion for leave to file a petition in error to review the decision was overruled by the supreme court in Benson v. Stein. See opinion 34, O. S., 294 A subsequent decision found 8 B. 568.

claiming to have become half-owner of the steamer, P. W. Strader, into which the Diamond and the two barges and their earnings had been transformed, brought
341 his action against the plaintiff in error who was the owner of* one-fourth part, and subsequently became the managing owner of the Strader, and against John Good and John G. Benson, the latter of whom was the owner of the remaining one-fourth part. The object of the action, as against Stein, was to compel an account of earnings of the two steamers and two barges, and the proceeds of the wreck Diamond, which had been lost or dismantled, and to litigate an adverse claim which Stein was alleged to have set up against the other part owners, who were made parties defendant to enable them also to claim similar relief against Stein. Benson, who has since deceased, filed an answer in his life-time, substantially repeating the allegations of the petition and demanding similar relief. Stein made answer to the petition of James Good and to the cross petition of Benson, setting forth the facts as he understood them, and as against each, contesting the claim to recover in the action. This answer further stated that the interest of each in the barges and in the Diamond had been adjusted by mutual agreement, under which certain amounts were found in their favor by a referee mutually chosen, and these amounts were admitted to be due from him to them respectively. The answer further set up by way of set off certain liquidated demands, and, as against the plaintiff alleged that Stein had been served with process in a creditors' suit, and garnished under proceedings in attachment by a creditor of Benson. After these pleadings were filed the administrator of Benson appeared, put in an answer claiming to recover for the amounts admitted to have been due and payable to his intestate. In this state of the pleading the case was presented to the court in special term on the motion of the administrator of Benson for judgment against Stein for the amount admitted in his answer to be due to the estate of Benson, and for an order to pay such amount into court to abide the further order of the court. This motion was disposed of by an entry upon the journal of the court, affirming the right of set off of Stein for the full amounts claimed in his answer and finding the amount due to the administrator of Benson, after having applied the amount of the set off and then concluding in these words: "It is, therefore, considered that the said Powel Crosley, as administrator aforesaid, recover of said Albert Stein said sum of $2,243.50, and the said Albert Stein is ordered to pay said sum into court within ten days or execution shall issue therefor, and when recovery shall be had upon said judgment it shall be paid into this court to await further order of the court; to all which action of the court the said Stein excepts, and demanded to have said cause tried. The court reserves all other matters." To these proceedings it is objected by the petition in error that it was error to give judgment without trial and
342 without hearing the case *upon testimony; and, stating the same proposition in a different form, that it was error to render the judgment on motion against the objection and protest of the plaintiff in error, and without the introduction of evidence or a trial of the cause. It is further assigned that the findings were contrary to the evidence and against the law.

1. It is apparent that it was the real purpose of this order to convert the indebtment of Stein into money, and to retain the money when collected on execution by the sheriff, in the registry of the court, thereto remain until the determination of the claim of the attacking creditors of Benson. It is probable that the motion was framed with a view to the practice in equity cases on applications for interlocutory orders for the payment of money into court. But in the present case, the entry of the order made for that purpose combines also language, which, standing alone and not coupled with the order, would amount, in legal effect, to a final judgment. We are, therefore, first to consider the effect of the entry in this aspect. For it is only by finding that the entry contains final judgment against the plaintiff in error that we can consider ourselves authorized to inquire whether error intervened in the proceedings which resulted in the judgment. And so, too, notwithstanding that the entry contains the technical language of a judgment, still, if we are able, upon a fair construction of the whole language of the entry, taking it together, to hold that the judgment was not final, and such as to prevent any further adjudication upon the issues made as between Stein and the administrator of Benson; or, in other words, if the entry was intended, and can be fairly regarded as having operated as a means, merely, of compelling the payment of money into court, and as not having concluded the rights of Stein, from whom the money was to be compulsorily obtained, then we must hold that the entry operated merely as an interlocutory order, not final or conclusive of the rights of Stein, and that the order furnishes no proper basis for proceedings in error. This question arises under circumstances which we suppose are of unusual occurrence in our practice in the com-

bination in which they occur. It involves the application of the rules of practice of courts of chancery on similar occasions, and of the rules governing the proceedings of the courts in actions brought for the enforcement of rights at common law. It includes also the question of the right of an attaching creditor, who has obtained service under an attachment, to abstain from all further proceedings provided for by the statute governing attachments, and invoke the aid of a court of general jurisdiction, not proceeding in the modes prescribed by the statute, and thus obtain an adjudication in his action under the attachment against the attaching debtor, and then, claiming *to have acquired a lien by the service under the attachment, obtain further 343
an adjudication establishing and enforcing the lien. These circumstances have made it appear to be proper for us, and even incumbent on us, to consider and to express our opinion upon the question of our jurisdiction. That question has not, however, occasioned us very much difficulty, and our conclusion is that the judgment against Stein was final for all the purposes of the present inquiry; that part of the entry, which expressed the results of the adjudication of the court upon the issues as between Stein and the administrator of Benson, was quite distinct from that part of it which intercepted the fruits of the judgment in the hands of the sheriff, and placed them under the control of the court. No relation of this kind is expressed in the entry itself; and we are of opinion that there was nothing in the nature of the proceedings before the court, or in the relations of the parties to them, to enable us to say that the order for the payment into the court at all qualified the judgment or rendered it less final than it was by its own terms. These terms were technical, and clearly such as to make it final. The reservation was confined to questions of distribution, and every question which could have been raised on the trial of the issues submitted to the court were concluded by the judgment, which, indeed, terminated the authority of the court itself.

2. To these proceedings the assignments of error raise three principal objections: One, that the case was heard on motion, without evidence and against the protest of the plaintiff in error; another, that the judgment was rendered, not only notwithstanding the absence of all evidence, but also without any trial at all —that is, we suppose, without any proper trial according to the usual course and practice of the court; and, finally, that the findings of facts were against the evidence, and the decision of the court against the law governing the facts deducible from the evidence.

The two first propositions depend, substantially, upon the same grounds, and, being substantially identical, may be considered together. It is, then, not correct in point of fact, as we find from the record, to say that the judgment was rendered without evidence. The court had before it the answer of Stein, and this contained evidence directly to prove the issue which was on trial. And, even if it was not evidence or not formally offered as such, still, as no bill of exceptions, informing us of what took place at the trial, was taken to make part of the record, we are bound to presume, if evidence, *dehors* the record, was necessary to warrant the judgment, that evidence was received and duly considered. The same reasoning applies also to the next assignment. It is not correct, in point of fact, to say that there was no trial, for the judgment entry shows that there *was, and this circumstance 344
suggested the further and conclusive answer that the assignment contradicts the record, and is itself, therefore, objectionable. The record proves that the case was tried, and the record is conclusive evidence of the truth of the fact. The act of a court in any case—what it did—is a thing depending upon its own consciousness and not upon extrinsic proofs. Its acts are a part of the record and involved in its existence, and of its own existence it is always conclusive and never liable to be impeached or contradicted, or called on question by averments against it. The objection that the case, if tried at all, was tried on motion, raises a question of order in the dispatch of the general business pending in court. We do not understand that the statute, prescribing the order in which cases are to be brought into court through the appearance docket, and the order in which the clerk is required to enter them in a trial docket for the use of the court, has in contemplation any restraint upon the reasonable discretion of the court, and every day's experience attests its utility and the necessity of its frequent exercise. Besides, cases standing on default and those which stand on the admissions of the pleading can not be regarded, and are not, generally, regarded, as falling within the reason of the rule of order in the litigated cases. The right to bring before the court any subject by motion, upon which the court has authority to act on motion, is as clearly given as the right to take any other step in a cause, and the rule of order just referred to having interposed no obstacle, and no other obstacle having been suggested or

being known to us, we conclude that the court, in hearing the motion for judgment, violated no rule of law in proceeding to inquire whether such a judgment ought to be rendered.

We are also of opinion that the findings were not against the evidence, as claimed under the third assignment. These,we think are sufficiently supported by the presumption before referred to. On the case presented by the record we must infer, not only that there was evidence before the court, but also that such evidence was sufficient in amount to warrant the findings. But more than this—the answer of Stein contained an express and distinct admission of all the facts necessary to be shown, and the court was bound to act upon it and to find as it did. Such being our opinion of the evidence, and not being aware of any principle of law which was violated, and none having been pointed out to us, we must necessarily affirm the judgment, and this we do with costs, but without penalty.

Hoadly, Johnson & Colston, for Plaintiff in Error.

Butterworth, Vogeler & Crossly, for Defendant in Error.

---

355 *POWER OF ATTORNEY—BANKRUPTCY—JUDGMENT.

[Logan Common Pleas, November Term, 1877.]

GRAYSON DYE v. J. W. BERTRAM.

1. A discharge in bankruptcy revokes a power of attorney to confess judgment, and an execution on such judgment rendered after such discharge will be enjoined.
2. A power of attorney to confess a judgment is not revived after bankruptcy by a new promise which revived the debt, this not being an incident of the debt, but a separate matter creating an agency.

1. BANKRUPTCY—WARRANT OF ATTORNEY.—A certificate of discharge under the bankrupt law revokes a warrant of attorney previously given to confess judgment.

2. INJUNCTION.—Where judgment has been confessed on such warrant of attorney, after a discharge in bankruptcy, a court of equity will enjoin execution thereon.

3. Whether an injunction should be granted in such case, merely because the judgment was so confessed, even if there had been a "new promise" to pay. *Quære.*

4. CIVIL CODE, SECTION 536.—The remedy given by the code, section 536, is *cumulative* to previously and otherwise existing remedies.

5. Where a judgment is confessed by virtue of a warrant of attorney, which has previously been discharged by an order of bankruptcy, the judgment debtor may pursue his remedy in equity to enjoin execution, or proceed under the civil code, section 536. If he choose to accept this latter remedy, he may do so; but he is not bound to pursue it, and subject himself to a jurisdiction, in which he could not otherwise be brought in the action in which judgment is taken.

356 *6. A "new promise" must be *clearly* proved to maintain an action on a claim previously barred by a certificate in bankruptcy.

On the 18th of April, 1869, Dye executed a promissory note to "J. Merrill & Co.," or order, payable one day after date, for $89, with a warrant of attorney authorizing judgment to be confessed thereon. J. Merrill & Co. was a partnership firm composed of J. Merrill and J. W. Bartram. On the 18th of November, 1873, Dye received a certificate of discharge under the bankrupt law.

On the 30th of April, 1874, judgment was entered in favor of J. W. Bartram against Dye in the court of common pleas of Logan county, for $115 and costs on said note, purporting to be by virtue of said warrant of attorney. The warrant authorizes any attorney at law to confess judgment "in favor of the legal holder" of the note. On the note there is an indorsement: "Pay to J. W. Bartram," signed "J. Merrill & Co." Dye resides in Miami county and Merrill in Marion county, Ohio. February 16, 1876, Dye filed petition in the common pleas of Logan county, in a form to meet the requirements of the civil code, section 536, to vacate the judgment, and to be let in to defend the action on the note, and it also asks the exercise of the general equity powers of the court to enjoin the judgment upon the ground that it is unauthorized.

The answer of Bartram admits the discharge in bankruptcy, but alleges a subsequent "new promise" by Dye to Merrill & Co., and alleges the indorsement to Bartram.

Reply denies "new promise."

November 22, 1877, case heard to court with evidence tending to prove and disprove the "new promise."

Wm. Lawrence, for plaintiff.

The plaintiff's proper remedy is by injunction on general equity principles, without reference to the code. The bankrupt discharge *barred* any right of action on the note, and the warrant of attorney, became inoperative. A "new promise" could not revive the warrant of attorney. The judgment purporting to be confessed by virtue of it was unauthorized, just as if there had been no warrant. In such case the code, section 536, cannot apply, because it only relates to cases where there *is* a valid warrant. But if the code is to be so liberally construed as to *permit* Dye to avail himself of the code, section 536, it is only a *cumulative* remedy, and he is not bound to pursue it, but may have an injunction under the general equity powers of the court. To give jurisdiction to *this court* to open up the judgment *and require Dye to defend*, would bring him into a court where he could not be brought by summons, and thus would give a *dead* warrant of attorney all the force of a valid one, and *would give 357
this court a jurisdiction operating as a fraud on Dye.

a. As to Right in Equity to Enjoin. Turner v. Gatewood, 8 B. Monroe, 613; Carrington v. Holabird, 17 Conn., 530; Starr v. Heckard, 32 Md., 267, overruling; Katz v. Moore, 13 Md., 566; Babcock v. McCamant, 53 Ills., 214; High on Injunctions, 109, 118, 170. Griffith v. Reynolds, 4 Grat., 46. Devoll v. Scales, 49 Me., 320.

If the code (section 536) could apply, it is not an *exclusive* remedy, it is only *cumulative* to the remedy in equity by injunction. Darling v. Peck, 15 Ohio, 71; Wheeler v. White, 4 West Law Monthly, 110; 2 Walker & B., Ohio Digest, 1187.

b. Bankrupt Discharge at Bar. Rev. Stat. U. S., sec. 5115; Otis v. Gazlim, 31 Me. (1 Red.), 567; Pelten v. Ellingwood, 32 Me. (2 Red.), 163; James' Bankrupt Law, 146; Mitchell v. Singleterry, 19 Ohio, 291.

The bankruptcy revoked the agency of warrant of attorney (Story on Agency, secs. 349, 408, 482, 483). The warrant of attorney is not an *incident* of the debt, but is a separate, distinct matter, and hence could not be revived by a new promise.

It originally created an agency, a power coupled with an interest. When such agency and power are revoked by operation of law, they are

dead. They can only be again created or exist by the execution of a new power.

c. "*New Promise*" *Immaterial.* The warrant of attorney became inoperative by the bankrupt discharge, and is not revived by a new promise. The judgment on it is a fraud on the jurisdiction of the court in Miami county, where alone Dye could be sued on a new promise. He is entitled to have the judgment enjoined, *even if there was a "new promise."*

d. If there had been a "new promise," and judgment in favor of Bartram against Dye, either on warrant of attorney or on process, payment by Dye would not protect him against Merrill, or Merrill & Co., because (1) the "new promise," even if salable, is not negotiable; the indorsement did not make Bartram the "legal holder," but, at most, only an equitable holder; and (2) Merrill was, therefore, a necessary party, because he may deny the indorsement or show reasons for cancelling it; and (3) for this reason this judgment must be enjoined, and because (4) the action by an assignee must be on the "new promise," even if the payees could sue on the original note.

Authorities: (1) Act Feb. 25, 1820, 1 S. & C.; Stat., 862, Civil Code, sec. 26; (2 Civil Code, secs. 25, 34, 35; (3) Griffiths v. Reynolds, 4 Grattan, 46; High on Injunctions, sec. 117; and cases above cited as to right in equity to enjoin; (4) Turner v. Chrisman, 20 Ohio, 332.

Here, then, are four reasons why the judgment should be en-
358 joined,* even if there was a new promise: (1) The warrant of attorney was revoked, and the judgment unauthorized; (2) to permit it to stand would be a legal fraud on the jurisdiction; (3) no judgment could protect Dye in its payment, unless Merrill was a party, and (4) an action by an *indorsee* must be on the new promise.

e. If it be possible to reach the question of a "new promise," it must be proved as an *express* promise, by evidence which not merely renders it *probable*, but makes it *clear*, and *clearly* proves its terms. Stark v. Stinson, 3 Foster, N. H., 259; Yate v. Hollingsworth, 5 Har. & J., 216; Maxcin v. Morse, 8 Mass., 127; Badger v. Gilmore, 33 N. H., 361; La Tourette v. Price, 28 Miss., 6 Cush., 702; Brown v. Collier, 8 Humph., 510; James' Bankrupt Law, 146, 147.

John A. Price, for defendant.

I. Suit may be brought on the original liability—the note; and the plea of the discharge in bankruptcy may be overcome by proof of a subsequent promise to pay the debt.

II. If the subsequent promise to pay the debt was made while it was the property of the original payees, their assignee can avail himself of such promise, to the same extent that the original payees could have done.

Turner v. Chrisman, 20 O. R., 332; Pratt v. Russell, 7 Cushing, 462; ———, 13 American R., 543; Bassett v. Avery, 15 O. S. R., 299; Ruan, v. Admr. of Clarkson, Cincinnati Com. Pleas.

III. When a person has been discharged in bankruptcy, and judgment is afterward recovered against him on a judgment note given prior to the discharge, a court of equity will not aid such debtor, by the extraordinary remedy of injunction, to prevent the collection of such judgment.

Mitchell v. Comos & Co., 91 U. S. R., 206.

JOHN L. PORTER, J.

A "new promise" must be *clearly* proved, and it is not. Bartram, therefore, has no right to a judgment, or to enforce the judgment entered on the warrant of attorney. It is unnecessary to pass on the four reasons urged in support of the injunction, in case a new promise had been proved. The discharge in bankruptcy by operation of law, revoked the warrant of attorney, and it could not be revived by a "new promise." It is not an *incident* of the debt, but a separate matter, which created an agency, or power coupled with an interest, until it was revoked by operation of law, by means of the discharge in bankruptcy, but no longer.

The remedy provided by the code (section 536) is *cumulative* to the remedy by injunction on general equity principles.

The plaintiff is entitled to a perpetual injunction.

---

*SERVICES 359

[Superior Court of Cincinnati, General Term, October, 1877]

Tilden, Yaple and Force, JJ.

†SILAS H. BASCOM v. JOHN SHILLITO & Co.

When a clerk in a store was hired at the rate of a certain sum per year, after having been once before hired in the same store, generally, and discharged during the year with his assent, and afterward rehired at a certain rate of wages, which was increased by the last hiring while he was in service: *Held*, that such last hiring was not, in legal contemplation, a hiring for a year certain, but was, *prima facie*, a hiring at will.

YAPLE, J.

The plaintiff in error, who was plaintiff below, prosecutes this petition in error to set aside a verdict and reverse a judgment rendered in this court at special term against him, and in favor of the defendants in error, the defendants below. The plaintiff, in his petition, claimed that he was hired as an entry clerk of the defendants in their store, for one year from the first day of March, 1875, at a salary of $1,100 per year, payable in equal semi-monthly installments; and that he was dismissed from such employ by the defendants, without cause, on July 30, 1875; and he prayed to recover the balance of the year's salary. The defendants denied such hiring for one year, or for any definite time. At the trial, which was by a jury, the plaintiff testified that he was first employed by the defendants as an entry clerk in the fall of 1873, and remained in their employ for about six months, when he left, but was not discharged by them; that in the fall of 1874 he was again employed by them in the same capacity at a salary of $75 per month; that some time in February, 1875, he spoke to the agent of the defendants, who had authority from them to employ such clerks, and said to him that he wanted his situation to be made more permanent and his salary increased, when such agent asked him how much he wanted, and he, plaintiff, said $1,200 a year, and the agent said he would take the matter under advisement; that he spoke to the agent again in a few days, and was informed that the firm would give him $1,100 a year; that he said he would take it, and that he was paid at that rate up to his discharge. This agent for the defendant testified that he had been the superintendent for the defendants for six years prior to March, 1877, and as such gave employment to the plaintiff; that the plaintiff came to him in October, 1874, asking to be employed as an *entry clerk, which position he had formerly filled in the house; that he agreed to give him $75 360 a month, which he accepted; that, in February, 1875, *he asked for an increase of salary*, saying he wanted $1,200 a year; that after considering the matter, the wit-

†The judgment in this case was reversed by the supreme court. See opinion 37, O. S., 431.

ness told him they would give him $1,100 a year, with which he said he would be satisfied; and the arrangement went into effect from March 1, 1875; and that he had no recollection of plaintiff's telling him that he wanted his situation to be made more permanent.

This was all the evidence as to the contract. The residue of the testimony related solely to the discharge without cause, and the basis and measure of damages, which it is not necessary to notice, as no question has been made concerning it.

The testimony and arguments of counsel being concluded, the plaintiff's attorneys asked the court to charge the jury as follows:

"If the jury believe from the testimony that the *plaintiff stated* to Mr. Colchester (who was the defendants' superintendent and authorized agent above mentioned) that he desired his employment to become more permanent, and that upon this statement an agreement was made to pay the plaintiff $1,100 a year, then the jury have a right to infer that this constituted a contract for a year," which charge the court refused to give, and the plaintiff excepted.

And thereupon the defendants' attorneys requested the court to charge the jury that "if nothing was said as to the duration of the service, the defendants were entitled to dissolve the relationship between the plaintiff and themselves at the end of any month after the date of the contract," which charge the court gave, and the plaintiff excepted. The court then charged the jury upon this branch of the case as follows:

"That the issue presented was purely one of fact, and that it was for the jury to say whether that which took place between the parties, as detailed by the witnesses, constituted a hiring for a year; that this was a *question of intention* to be determined with reference to all the circumstances and facts of the case, that the jury should consider the previous relationship of the parties—*all* that was said between Colchester and the plaintiff at each interview, and determine from these and all the circumstances, whether it was *the intention of the parties* that there should be a yearly hiring; that to entitle the plaintiff to recover, it was necessary that he prove, by a preponderance of testimony, that he contracted with the defendants for his services at a fixed salary, for a certain definite period of time, as set forth in his petition; and unless the jury were satisfied from the testimony that a definite time was agreed upon between the plaintiff and the defendants, then the verdict of the jury must be for the
361 *defendants; that a contract for a year will not be implied unless it was definitely agreed upon between the parties, and it devolved on the plaintiff to prove that such an agreement was made; and that if the jury found, from the evidence, such agreement was made, and the plaintiff discharged before the expiration of the year, then he would be entitled to recover such damages as the testimony showed he had sustained," etc. To this charge the plaintiff excepted.

The verdict of the jury being rendered for the defendants, the plaintiff filed a motion for a new trial, assigning, as grounds therefor, such charges of the court and its refusal to charge and that the verdict was against the evidence and the law. The motion was overruled, and the plaintiff excepted, and took a bill of exceptions setting out all the evidence.

He assigns here each and all foregoing rulings and holdings of the court as grounds of error.

Before noticing the charge asked by the plaintiff and refused by the court, and the charges given by the court to the jury, we shall state what the plaintiff claims to be the rule of law upon the subject, as embodied in section 1290, 2 Story on Conts., 5th ed., where most of the cases relied on by the plaintiff in error are cited:

"And in the first place, as to the *term of service* for which the contract is made, where there is a *general hiring*, nothing being said as to its duration, and no stipulation as to payments being made which may govern its interpretation, the contract is understood to be for a year; and the reason for this rule is said to be that both master and servant may have the benefit of all the seasons. This rule applies to the hiring of all menial and household servants, trade servants, reporters of newspapers, servants in husbandry, etc." All the cases he cites are English. The section then proceeds: "*But there is no inflexible rule that an indefinite hiring is for a year; it is a question for the jury in each case.* A hiring for an indefinite time *is only at will*, and an agent under such hiring may be discharged without notice."

In support of the proposition that there is no inflexible rule, but that the question is one for the jury in each particular case, the author cites the case of Fairman v. Oakford, 5 Hurl. & Nor., 635, decided in 1860 by the English court of Exchequer. That case was as follows:

"At the trial before Channell, B., at the London sittings in this term, it appeared

that the defendant was a ship-broker, and the plaintiff stated that on the 26th of July, 1859, he entered into the service of the defendant as a clerk at a salary of £250 *a year*, which was paid weekly. *No time was mentioned.* On the 20th of January following, the defendant gave him a month's notice, and dismissed him on the 20th of February. On cross-examination *he said that *the plaintiff had been previously in the service* 362
of the defendant, and, when discharged, was paid a month's salary in lieu of notice. The defendant stated that when the plaintiff was engaged on the second occasion, the terms were the same as on the former occasion, except as to the amount of salary. The learned judge having left it to the jury to say whether the engagement was for a year, they found that it was not a hiring for a year, and a verdict was accordingly entered for the defendant.

Doyle now moved for a new trial on the ground of misdirection, and that the verdict was against evidence (before Pollock, C. B., Bramwell, B., Channell, B., and Wilde, B). He claimed that "the learned judge should have told the jury that if there was an indefinite hiring, it was a hiring for a year," and cited, among others, the cases referred to by Story, in section 1,290 of his work on contracts, above quoted.

Pollock, C. B. There will be no rule. The learned judge's direction was correct, and no fault is to be found with the verdict of the jury. The plaintiff was hired as a clerk at a salary of £250 *a year*, and dismissed at a month's notice. When he quitted the defendant's service *on a former occasion*, he accepted a month's salary in lieu of notice, and the jury were warranted in finding that the second engagement was on similar terms. As to the other point: There is no inflexible rule that a general hiring is a hiring for a year. Each particular case must depend upon its own circumstances. * * * I have come to the conclusion that usually the indefinite hiring of a clerk is not a hiring for a year," etc.

In Kirk v. Hartman, 63 Pa. St. R. 97, it is held Sharwood, J., pronouncing the opinion that where one is employed as an agent, etc., for no definite time, "it is a hiring at will of both parties, and he may be discharged without notice." It is true that in that case there was a hiring for a year by a written agreement, signed by both parties, stating, "we agree to pay him three thousand dollars in equal quarterly payments." The court say that he could not be paid $3,000 in equal quarterly payments in less than a year.

In this case, the remarks of Strong, J., in Coffin v. Landis, 46 Pa. St., R., 10 Wright, pp. 433—4, are quoted with approval: "No doubt there is a class of contracts for the employment of servants where the law presumes the contracts to intend a yearly or monthly employment, though nothing is said of the duration of service. They are more numerous in England than in this country. They relate to contracts of hire of menial, domestic and husbandry servants. They are so construed *because hirings are customarily for a year or a month*, and the English courts *recognize the custom*. It is needless to inquire whether *they are fully applicable to contracts of hire in this state *where usage is so* 363
various, for the present is not one of them." See also Peacock v. Cummings, 46 Pa. St., 434, where a *general hiring* of a publisher, the hirers having authority to hire for a period not exceeding five years, was held, Strong, J., pronouncing the opinion not to be a hiring for a year.

Many other American cases might be cited to the same effect; but no case can be found so nearly like the one at bar as the English case of Fairman v. Oakford, above referred to.

Now, "in order to create a contract, it is essential that there should be a *reciprocal assent* to a certain and definite proposition." 1 Story on Contracts, 5th ed., sec. 490.

Keeping this rule in mind, it is easy to see in view of the evidence before the jury, that the charge asked by the plaintiff was misleading. It was calculated to permit the jury to find for the plaintiff, though the defendants' agent may in view of the former course of dealing between the parties, have understood that the wages of $1,100 a year, asked by plaintiff, related only to an increase of wages at the rate of $200 per year, and did not relate to the term of employment, and the jury might so find if they believe the plaintiff said he desired more permanent employment, whether the defendants' agent heard the remark or not, which he testified he did not recollect of the plaintiff making. This charge was properly refused. In view of the previous hirings of the plaintiff by the defendants, the charge asked for by the defendants, was properly given; and for the same reason the main charge of the court was correct; and the burden of proof was upon the plaintiff. The verdict was not against the evidence. The words "one thousand one hundred a year," in

view of the past hirings of the plaintiff, might well be held to mean at that rate, payable semi-monthly.

The judgment will be affirmed with costs.

Judges Tilden and Force concur.

Moulton, Johnston and *Levy*, for Plaintiff in Error.

Matthews, Ramsey & Matthews, for Defendants in Error.

---

364 *CONTRACTS—CUSTOM AND USAGE.

[Superior Court of Cincinnati, General Term, October, 1877.]

† DEWEY, VANCE & CO. v. SWIFT'S IRON & STEEL WORKS.

A contract to deliver ore on the landing of C. may be shown by a settled and well known usage to mean that the quantity is taken from the pile there and put on buyers' boats, and that no other kind of delivery is permitted or practicable, and hence, if the buyer fails to have boats there he can not complain for a refusal to deliver.

FORCE, J.

This is a motion for a new trial reversed from special term. The grounds for new trial are various alleged errors, all of which raise, in different forms, certain questions as to the interpretation and obligation of the contract sued on.

An agreement was made in writing in the following words:

"CINCINNATI, OCT., 1, 1872.

"We propose to deliver to you on the landing at Carondelet, 1,000 to 1,200 tons Iron Mountain ore, near St. Louis, you to take it away during 1872, paying for the same $5.50 per ton cash, it being understood that you are to deliver to us next spring at the same place the same quantity of ore at the same price.

Yours truly, "DEWEY, VANCE & Co.

"Accepted, ALEX. SWIFT, Pres't."

The Iron Mountain Co. of Missouri, are the sole producers, and have the entire monopoly of the Iron Mountain ore. This company take the ore from the mine to Carondelet landing, where they always keep an ore pile containing some thousand tons. Purchasers take it thence by barges. It is claimed, and there is some testimony to the effect, that it could be hauled away by wagon. But it has never been so hauled away; and no heavy wagon has ever been on the landing (which is merely the river bank under the bluff) for any purpose.

About the close of every year the company fix the price at which the ore will be sold during the ensuing year, and send out circulars. Contracts are made on the condition that they are good only for ore taken away during the year, and as to any ore not removed during the year, the contracts will stand cancelled. Contracts are entered on the books of the company; and any person having such a contract with the company, and desiring to sell Iron Mountain ore gives to his purchaser an order on the company, on which a transfer is made on the books of the company to such purchaser. Any one desiring to purchase Iron Mountain ore in any quantity, must purchase in this manner from some one having a contract with the company, or else directly from the company.

When ore is taken by a purchaser from the ore pile at Carondelet and put on to barge, the amount is roughly estimated there; on arriving at its destination it is weighed, and payment made upon the weight thus ascertained.

365 *Dewey, Vance & Company gave defendant an order on the Iron Mountain company, who made a transfer on their books. Defendant did not go for this ore until November, when navigation was so impeded by ice that boats could not be taken to Carondelet. The river remained in this condition till January. Defendant's agent remained some time in St. Louis, trying to get the ore. He asked the company to deliver it by rail in St. Louis; this was refused. He asked that he

†The judgment was affirmed by supreme court in Steel Works v. Dewy. See opinion, 37 O. S., 242.

might take it from the landing by wagon. The testimony is conflicting whether this was absolutely refused, or whether it was refused unless it should be first weighed on the landing. There was an abundance of ore on the landing, and it remained there until January, when the Iron Mountain company notified defendant of the cancellation of the contract.

In the spring Dewey, Vance & Company demanded of defendant, at defendant's office in Cincinnati, performance of their agreement to deliver ore. Dewey & Company were able and willing to pay the stipulated price, but made no tender of money, and had not the amount of cash in Cincinnati, though abundantly able to raise the cash there at any time. No demand was made at Carondelet. Defendant did nothing and gave no positive answer till the summer, and then refused.

Dewey, Vance & Company then brought this action for damages for non-delivery in spring, 1873. Defendant answers denying their liability, and also files a cross petition claiming damages for D.'s non-delivery in the preceding November and December. The price of the ore had risen in the market, and in October and November it brought on sales such as is now sued on $8 per ton. After the first of January the market price was $10 per ton. The jury gave a verdict for the plaintiff for $2,500, and defendant made a motion for a new trial.

The paper sued on contains two contracts—the contract of plaintiff to deliver ore in 1872, defendant to pay cash for it, and the contract of defendant to deliver ore in 1873, plaintiff to pay cash for it. The making of each contract, not its performance, is the consideration for the making of the other. Upon the acceptance of plaintiff's proposition by defendant, both contracts were made. Each was absolute and independent. The performance of one did not depend upon the performance of the other, but each contained its own measure of damages for breach of its terms. Strictly, the making the contract to deliver in 1873, is by the language of the instrument, the consideration for plaintiff's agreement to deliver in 1872.

The circumstances in connection with which the contract was made and the established and recognized usage in the business of Iron Mountain ore, are competent to fix the meaning of the words "deliver" and "cash" in the contract. It thus appears *that the first step toward a delivery of the ore, was giving to the purchaser an order on the Iron Mountain company. This did not constitute a delivery, but it was the first step to be taken toward it. That was not to be performed at Carondelet, but was to be performed before the purchaser could go to Carondelet, and hence the demand for it was not to be made at Carondelet. 366

Cash payment was not to be made on delivery of the order, or on receipt of the ore at Carondelet, but after the ore should be weighed on arrival at its destination. Hence (Lowry v. Barelli, 21 O. S., 324), tender need not be made at time of the demand.

Hence, defendant was in default in failing to deliver in spring, 1873, and plaintiffs were not in default for failing to make an actual tender of payment. And hence the jury were right in finding for the plaintiffs on the contract to deliver in 1873.

The amount of the verdict shows that the jury also found that the plaintiffs failed to deliver in 1872, and by finding the market price was then $8 per ton, and was $10 per ton in 1873; the difference between the respective damages allowed, with interest, made the amount allowed to the plaintiffs in the verdict. To determine whether or not the jury were right in this, would require a careful discussion of what constituted a delivery under the contract. But this is unnecessary, as in any event there would be no error in it to the prejudice of the defendant, who is the party alleging error.

We find no error to the prejudice of the defendant in the charge or in the verdict, and the motion for new trial is overruled.

Follett & Cochran, for Plaintiffs.

Hoadly, Johnston & Colston and *J. Johnston*, for Defendant.

PLEADING.

[Superior Court of Cincinnati, General Term, October, 1877.]

JACOB KNAUBER v. WM. WUNDER ET AL.

In an action upon an account for money due, the defendant set up in answer that the whole claim had been paid in full. No reply filed.

Held: That the answer was not a denial of the plaintiff's claim, but was new matter constituting a defense, and a reply was necessary, or the law would regard it as admitted.

367 *YAPLE J.

This is a petition in error, prosecuted here to reverse a judgment of this court rendered in special term, upon an account in favor of the defendants in error, and against the plaintiff in error, for $945.24 and costs.

After verdict, the defendant (plaintiff in error here) moved for a new trial; and in the event of its being overruled, for judgment in his favor upon the pleadings, notwithstanding the verdict, in accordance with sec. 384 of the code. These motions were overruled, exceptions taken, and judgment rendered upon the verdict.

In answer to the petition upon the account, which was dated May 29, 1876, the defendant alleged: "On the 31st of May, 1876, defendant paid to plaintiff their claim and demand, set forth in the petition, in full."

To this answer there was no reply. This answer was not a denial of the plaintiff's claim. It admitted its valid existence, but it was new matter constituting a defense, and under our code, a reply to it was necessary, or the law would regard it as admitted. This has been expressly decided by our supreme court in the case of Fewster v. Goddard. 25 O. S., 276. The court held:

"In an action upon a promissory note, alleging that there *is* a specified amount due thereon, from the defendant to the plaintiff, an answer by the defendant, alleging payment of the note in full, is an answer setting up new matter, and must be taken as true in the absence of any reply thereto," and the court, in that case, reversed both the court of common pleas, rendering judgment for the plaintiff upon such a state of pleadings, and the district court, which affirmed such judgment of the common pleas.

The judgment is reversed with costs.

Judges Tilden and Force concur.

Smith, Crawford & Young for Plaintiff in Error.

E. P. Bradstreet for Defendants in Error.

*TRUSTEE. 377

[Hamilton District Court, 1877.]

DENNIS J. FOLEY v. WILLIAM M. PETERS.

A father's agreement to give his children one-half of the income of real estate held by him as tenant by the curtesy, authorizing the plaintiff to collect the rents and agreeing to execute the necessary papers, does not make the plaintiff or the father a trustee, for the voluntary settlement, being incomplete, is revocable.

LONGWORTH, J.

This is an application for an injunction *pendente lite*, the cause having been appealed from a judgment of the court of common pleas in favor of the plaintiff.

The petition sets forth that Henrietta Peters, wife of the defendant, died intestate and seized of certain land on the northeast corner of Third and Elm streets, in this city, leaving her husband and two children surviving her; that her said husband was entitled to an estate by the courtesy of said land, and the children to the remainder.

That on the 29th of November, 1873, the defendant, for the purpose of supporting and educating his said children, entered into a certain agreement in writing, wherein, in consideration of natural love and affection, and of $1, he agreed to give to his children, during his life, one-half of the net rents of the property. He further authorized the plaintiff, Foley, to collect the rents, and, after paying taxes, etc., to pay over one-half of the amount remaining in his hands to the children, and the other half to the defendant himself. The defendant further agreed "to execute all necessary papers to carry into effect the above intention."

The plaintiff states that by virtue of this instrument, the children became entitled to receive one-half of the net rents of said land during the life of their father, and that plaintiff became a trustee under the contract.

It is stated that plaintiff became guardian of the children, and entered into possession of the land, and has received the rents and profits thereof. One of the children has since died.

It is alleged that Peters has repudiated the agreement, and has notified the tenants in possession to pay rent to him, and not to the plaintiff, and is threatening to oust certain of the tenants by proceeding in forcible detainer before a justice of the peace. An injunction is prayed.

There is no rule better settled in equity than this—that to entitle a party to an injunction his right must be clear. The writ of injunction is abolished by the code, but sec. 238, which provides for this provisional remedy, *pendente lite*, enacts that the plaintiff shall only be entitled to this remedy "when it appears by the petition that he is entitled to the relief demanded." (2 S. & C., 1,012).

Certainly no trust was created by the instrument sued on, unless such trust was in the defendant. No title passed out of *him. He 378
still remained the legal owner of the whole life estate. He promised that, during his life, his children should receive half the net profits of the land, and appointed the plaintiff to receive and distribute these profits, but he did not rest in the plaintiff any title to, or interest in, the land whatever. In no possible view of the case can the plaintiff be regarded as a trustee of this land, or of the profits thereof, except in so far as such

profits have already been received by him. If there is a trust in any one —by virture of this contract—it must be in the defendant, Peters, in whom the title abides. In other words, the contract must operate somewhat in analogy to the ancient assurance know as a "covenant to stand seized to the uses." It is, howevei, an unimportant consideration who may be the trustee, or whether there be any trustee at all, since the rule is that in chancery, a trust shall never fail for want of a trustee.

Is there, then, a trust created by this contract? We think not. However meritorious such settlements may be, and however ably they should be carried into effect, it is well settled that a trust is not perfectly created where there is a mere intention or voluntary agreement to establish a trust, the settler himself contemplating some further act for the purpose of giving it completion.

Lloyd v. Brooks et. al. 34 Md., 27.

This principle is too clear and well established to be seriously controverted.

Bayley v. Boulcott, 4. Russ., 345.

Lister v. Hodgson, Law R. 4 Eq. Ca., 33.

Gardner v. Merrill, 2 Md., 78.

In the case at bar the defendant had simply *agreed to create a trust* in the land in favor of his children. He had promised that during his life one-half of the net profits should be paid over to them, and he had further agreed to execute such conveyance as should be necessary to carry the promise into effect, and convert it into a trust, but this has never been done. We are constrained to hold that defendant can not be compelled to carry such a promise into effect, but that he has a right to revoke it, as he has done in the present instance.

It is claimed that defendant is a man of bad and intemperate habits. This is unnecessary to determine, because no matter how desirable it may be that a man should provide for his children by settlement upon them, and no matter how unfortunate it may be that the children's bread be taken from them and thrown to the dogs, we have no power, sitting as a court of justice, to take a man's property away from him and give it to others, simply because he refused to make such a disposition of it as in justice and right we think he ought to make, but which he is not bound by any rule of law to make against his own will.

The motion for injunction will be overruled.

---

379 *INSANITY OF JUDGMENT DEBTOR.

[Hamilton District Court, October Term, 1877.]

†JOHN A. POMEROY v. C. G. PEARCE ET AL.

Where a proceeding in aid of execution has been commenced, and the judgment debtor is afterwards adjudged to be insane, the guardian of such debtor cannot resist a decree preferring such creditor, by showing that his ward was insane before the commencement of the proceeding, and that his estate is insolvent.

† This case was affirmed by supreme court, by refusal to allow a motion for leave to file a petition in error. See opinion. 31 O. S., 247.

Cox, J.

The suit was brought to subject the equitable interest of Pearce in certain stock of the Mail Line company to the payment of a judgment for $2,900. The execution was returned: "No goods or chattels," and it was asked that the equities of the judgment debtor in this stock be subjected to the payment of this judgment. Subsequent to the filing of this petition a guardian was appointed in the probate court, for C. G. Pearce, on proof of his lunacy, and the guardian filed an answer that at the time of the judgment Pearce was a lunatic, and also that he was insolvent. It was claimed that the court had no jurisdiction to render judgment against him, because he was a lunatic, and no guardian had been appointed. Our statute provides that a lunatic may be sued the same as any other person, and a judgment rendered against him. The only difference in the proceeding is this, that under section 7 of the act for the organization of courts, it is provided that in the case of any insane person, for whom no guardian is appointed, it is the duty of the court to appoint a suitable person to appear as a trustee for him.

This is a proceeding to attack the judgment collaterally. Section 534 of the code points out the manner in which a judgment of this kind may be set aside, and section 538 further provides one of the conditions on which the judgment may be opened up—that there is a valid defense to the action. It is not pretended here that there was a valid defense to the judgment, or any other defect at all, except that no guardian was appointed. The proceeding, therefore, does not come within that class of cases in which the judgment can be opened up.

It was claimed that the equities could not be subjected because the lunatic is insolvent; that the claim should have been presented to the guardian, and could only come in as one of the claims allowed against the estate. But here is a claim already adjusted, and did not require presentation to an administrator or guardian to have it allowed or fixed. The insolvent act does not impair the right of the plaintiff, who has the right after having obtained his judgment to proceed to subject the equitable assets of the defendant. The petition was properly filed and the claim of the plaintiff should be sustained.

W. H. Mackoy, for Plaintiff.

J. Johnson, for Defendant.

---

*AMENDMENTS—SET-OFF. 380

[Hamilton District Court, April Term, 1877.]

† JACOB BROCH v. AUGUST BECHER.

1. When a defendant's original answer admitted the claim sued on, but sought to avoid it by averring new matter, and a demurrer to it is sustained, it is not an abuse of discretion in the court to refuse to allow him to file an amended answer alleging payment of the claim he had thus previously admitted.
2. To an action on a note and mortgage, the answer and cross-petition stated that plaintiff owed defendant a specific sum, the value of certain articles which plaintiff fraudulently appropriated to his own use, as it does not set up any claim growing out of the transactions set forth in the petition, and being counted on as a tort, cannot be treated as a legal set-off.

ERROR to the Court of Common Pleas.

LONGWORTH, J.

On the 2d of March, 1877, the defendant in error, Becher, filed his petition against the present plaintiff in error, who was defendant in the court below, to foreclose a purchase-money mortgage upon a lot in this city, made to him by the defendant, Broch.

To the petition the defendant answered, admitting the execution of

† See also Brock v. Becker, 6 B., 755, and 9 Rec., 482.

the mortgage, and the notes which it was given to secure. He alleged that for some years prior to the execution of the mortgage the plaintiff had carried on a confectionary business, in which he had established a good reputation, and wishing to retire from said business, agreed with the defendant if he would buy him out that he would not go into the same kind of business again in the city of Cincinnati.

That as soon as the purchase and sale were completed the plaintiff bought other property and commenced the same kind of business on the corner of Fourth and Broadway, in Cincinnati, and has continued to carry on the said business.

The defendant further stated—by way of cross-petition—that the plaintiff owed him $5,000, "for the price and value of certain chairs, marble-topped tables, ice-cream stands, etc.," which the plaintiff secretly and fraudulently took and appropriated to his own use.

To this answer and cross-petition the plaintiff below demurred, and the demurrer was sustained; the defendant tendered to the court his certain amended answer and cross petition, which he asked leave to file, and leave was refused. Judgment was thereupon entered up in favor of plaintiff, decreeing a foreclosure.

The errors alleged are:

1st. Sustaining the demurrer.

2d. The refusal to allow the amended answer and cross-petition to be filed.

3d. Error in the judgment.

The bill of exceptions shows that the amended answer and cross-petition differed from the original in one respect only, viz.: That it pleaded payment in full of the note referred to in the petition.

An application for leave to amend is addressed to the sound discretion of the court, and, unless there appears to have been an abuse of that discretion, the action of the court is not the subject of review upon error. We think it clear that the court
381 *below exercised its discretion properly in refusing to permit the defendant to so amend his answer as to plead satisfaction of a claim which he had previously confessed and sought to avoid.

The original answer admitted the execution of the note and mortgage sued on, but sought to recover by reason of breach of contract on the part of plaintiff. The argument of the plaintiff was that he should not again enter into the same kind of business in this city. This is an agreement that he will *never* enter into the same kind of business in Cincinnati, and as such is within the provisions of the statute of frauds.

Gottschalk v. Wilter, 25 O. S., 76.

The answer, however, simply sets forth that there was such a contract between the parties, and it is a well established principle of law that it is to be presumed when such a contract is declared on, and demurred to, that it shall be presumed that it was in writing.

1 Chitty Pleading, 213.

"When a promise is required to be in writing it may be declared on *generally* in the declaration, but a plea must be more certain and show the promise in writing, or such plea will be bad on demurrer.

Woods v. Fille, 11 O., 455; Robinson v. Hathaway, 5 W. L. M., 105; McCollough v. Tapp. Ib., 575; Hedington v. Neff, 7 O., 229, 231.

In the case at bar the answer is not in the nature of a plea. It is

not a denial of any specific or general allegation in the petition, but confesses all its charges and seeks to recoup from this sum claimed to be due by reason of a collateral contract not recited in the petition. In this respect it is not an answer, but a cross-petition or counterclaim.

The averment contained in it that there was such a contract is therefore to be treated as the count of a declaration, and not the averment of a plea. Upon demurrer the contract not to enter into business, etc., will be presumed to have been in writing.

The contract pleaded in this case is not one of that class which is in restraint of trade. It has been adjudged by a long line of decisions that contracts not to enter into a certain business within a certain time, or within the certain and specified boundaries of a limited territory, are not in restraint of trade, and may be upheld in law.

The second defense in the answer does not set up any claim growing out of the same transaction as that set forth in the petition, nor is it founded in contract, but it is counted upon as a tort, and, therefore, can not be treated as a set-off. The demurrer to the defendant's cross-petition was therefore properly sustained.

*We are satisfied, however, that the court erred in sustaining the demurrer to the first defense in the answer, and for this error 382
the judgment of the court below must be reversed, and the cause remanded for further proceedings.

CORPORATIONS—LIBEL.

[Hamilton District Court, 1877.]

UNION CENTRAL LIFE INS. CO. v. MUTUAL BENEFIT LIFE INS. CO. ET AL.

An action brought by one insurance company against another for damages, because of malicious and libelous advertisements published by its general agents, *on demurrer held:* that a corporation should be held to the same accountability as a natural person; that an action for libel could be maintained against a corporation; when the language of the article is ambiguous or equivocal, it should be left to a jury to decide whether the language used is libelous or not.

JOHNSON, J.

In this case, which came up by petition in error, to reverse a judgment of the common pleas, the action was brought to recover damages of $50,000 for the false and malicious publication by Robert Simpson & Co., general agents for the Mutual Benefit Life Insurance Company, of an article in several newspapers of this city, charged to contain libelous matter of and concerning the plaintiff. The court read the article as published, which in substance as claimed, undertook to classify the plaintiff with a number of other companies mentioned in the Massachusetts reports, which were weak, and two of which, the publication says, had failed disastrously; and it was averred that, though the plaintiff's name did not appear in the Massachusetts reports, it was pointed out as a company not permitted to do business in Massachusetts, the fair import of the language used being that it was not a company entitled to credit. A general demurrer was filed by the defendants to the petition, on the

ground that it did not contain facts sufficient to constitute a cause of action, and the court below sustained the demurrer. The plaintiff not desiring further to amend, a judgment was rendered, dismissing the petition, to
383 *which the plaintiff, excepting, prosecuted this petition in error. Two questions were argued in the case: First—Whether the defendant, being a body corporate, could be held liable for the publication of a libelous article; and next if it be so held, whether the publication contained any libelous matter of and concerning the plaintiff. The record does not show on which of the two grounds the court sustained the demurrer, the judgment being general.

As to the first proposition, whether a body corporate can be held liable through its directors for a libelous publication. the court was reminded of the trite saying, that a corporation has no soul, that by reason of the fact that it is an artificial body, acting through officers and agents, and that one of the essential averments must be that the libelous publication was malicious, the defendant contended that this artificial body, having no mind or soul, can not be made amendable to a charge of libel.

The tendency of the courts has been to hold corporations liable for the wrongs and injuries done by their directors, officers and agents in the same way as a private individual is held liable for his acts, and especially has this been the tendency since it has become so popular for natural persons to unite their capital and energies in a corporate capacity for the transaction of business. While it was usual heretofore to railroad corporations almost exclusively confined, express companies and the like, it has now become popular and customary, in every species of business, for bodies to organize and become bodies corporate under the laws of the states. Such being the condition of affairs at the present time, the tendency of the court has been to hold that these corporations, composed after all of natural persons, should be held to the same accountability as natural persons; for it would be strange, if an individual publishing a matter in a public journal to-day amounting to a libel, might be held responsible, yet if in the next week he becomes one of a body corporate, he could not be held liable for the said publication. It has been held in several well adjudicated cases in England and in this country, that the wrongful acts of the officers, the directors, the agents of these corporations may be imputed to the corporation, and the corporation held liable in damages. A great many of the journals published in large cities are organized as joint stock companies, and nothing is more common than to hold them liable when guilty of publishing matters concerning the occupation, business, or character, of persons that tend to their damage. The court cited 22 Conn., 580, touching the question as to whether a corporation can be held liable for libel. This court was of the opinion that, so far as the right to maintain an action of libel against a corporation was concerned, it can be done, and that opinion is sustained by high authority.

384 *The next point was, whether, taking the entire publication, it contained facts sufficient to constitute a cause of action. A distinction was taken where there was ambiguity in the publication, and where it was clear and unequivocal on its face. Where the language of the article was unequivocal, it was for the court to place its construction on the question as to whether libelous or not. And where it was not clear, where it was ambiguous or equivocal, then it is the province of the

jury to say, after hearing the evidence, and the relation the parties bore to each other at the time of the publication, whether or not the language used was libelous. That doctrine was laid down in 2 Greenleaf, section 411. The court is not bound to tell the jury whether the article is libelous or not, but it is left with them to determine whether it falls within the definition which the court gives them, of a libel. If it refers to the business and trade of the party, and the necessary and proximate result is to subject him in his business, name or reputation, to pecuniary loss, such publication is in law *prima facie* libelous. Where the article in question undertakes to quote from the Massachusetts reports, for some reason that the defense may be able to explain, it publishes not only the names published in the Massachusetts reports, but it seems to strike at the plaintiff, and this is done by the means of an obelisk. What the purpose was of referring to the plaintiff is not clear. It may have been for an innocent purpose, or the article may bear the other interpretation —that the plaintiff did not have the credit, standing, or financial ability to enable him to do business in the state of Massachusetts. The court was of the opinion that the article was equivocal to such an extent that the question should have been submitted to a jury, and the defendant be required to answer. The judgment of the common pleas would, therefore, be reversed and the case remanded for further proceedings.

Matthews & Ramsey, for plaintiff.

Sayler & Sayler, contra.

---

* MOTION TO DISSOLVE AN INJUNCTION. 415

[Pickaway Common Pleas, November, 1877.]

CONRAD ETT V. SNYDER AND NOTHSTINE.

1. That an injunction can not be allowed upon the petition alone, unless the petition be sworn to *positively.*
2. That where the *gravamen*, if the bill is, that a public highway is about to be obstructed—*Held:* That the petition must affirmatively show that such obstruction would be an *unlawful* one.
3. That where a nuisance or obstruction is about to be erected in a *public highway—*Held:* That a private individual can not maintain an action to restrain its erection unless it appear that special damages are apprehended, peculiar to himself, and distinct from the public at large. 416

COURTRIGHT, J.

On the 7th day of December last the plaintiff filed his petition herein, and upon the same day obtained a temporary restraining order, enjoining the defendants from placing certain obstructions in a public highway in Walnut township, this county, and this cause is now heard upon the motion of the defendants to dissolve the injunction, for the reason that the facts stated in the petition are not sufficient in law to justify the issuing of the same.

The *gravamen* of the plaintiff's bill is that, being a resident of said Walnut township, a freeholder and tax-payer, and having an interest in the public highways located and established in said township; the defendants threaten to place an obstruction in and upon one of the public

highways of said township, known as the "Ett road" (for the establishment and location of which the plaintiff was the principal petitioner, and expended in that behalf the sum of one hundred and fifty dollars), by building a post and rail fence thereon; that the erection of said fence will be an obstruction to the travel upon said highway and a nuisance to the plaintiff and to the public generally, "and thereby become a great and irreparable injury to the said plaintiff, by cutting off his right to the use of said public highway."

The facts upon which the plaintiff relies are all incorporated in his petition; no separate affidavit is filed in support thereof, and the verification is in the usual form—*on belief.*

The defendants urge that the bill should be dismissed, and the injunction dissolved, for three several reasons, viz.:

1. That the facts are not alleged or verified *positively*, but only *on belief.*

2. That there is no allegation that the proposed obstruction would be in violation of law; and

3. That there are no allegations of special or peculiar damage, which would not be experienced in common by other citizens.

Section 239 of the code provides that "The injunction may be granted * * * * * * upon its satisfactorily appearing to the court or judge, by the affidavit of the plaintiff, or his agent, that the plaintiff is entitled thereto."

As before stated, no separate affidavits are filed in support of the allegations of the petition. The petition, then, is in *legal effect*, although not in *form*, an affidavit.

417 It has been held that the injunction can not be allowed on *complaint alone, though it appears from the facts set forth in it that the plaintiff is entitled to an injunction, unless such complaint *be duly verified*, so as to make it, in legal effect, if not in form, an affidavit. Penfield v. White, 8 Pr., 87.

The code requiring that the restraining order shall be based upon the affidavit of the plaintiff or his agent, we must then of necessity look to the *character* of the affidavit, or verification, attached to the petition. Its language is: "Conrad Ett, being duly sworn, according to law, says that the facts stated, and allegations in his foregoing petition are true, as he verily believes." Here, then, we find that the plaintiff obtained the restraining order *upon mere belief.* Injunctions are not issued upon information or belief. If the plaintiff does not *know* of their truth he must produce the affidavits of others who do know it. 3 Pr., 327; 8 Pr., 439.

In the case of Atchinson v. Bartholow, 4 Kan., 124, it was held that where the verification by the plaintiff is only according to the best of his knowledge and belief, it is not sufficient.

Then, under the authorities we have cited, and the rule we had supposed generally obtained, the petition is not sufficient, inasmuch as the plaintiff swears *according to his belief*, and the facts on which an injunction may be granted must *be sworn to positively.*

This is our decision of this case, and we would pursue our inquiries no further, were it not for the fact that the remaining questions are of interest to the profession, and upon one of which there has been much discussion by the elementary writers, as well as by the courts, both of England and America.

The erection of a fence within the line or limits of a public highway, is not *per se* a nuisance. The legislature have provided that owners or occupiers of any lands bordering upon any public road may set or plant a hedge or live fence precisely on the line of the road or highway, and may also place along the margin of such road a protection fence, occupying not more than six feet of the margin or edge of the road; and no one is permitted to disturb or remove such fence against the wishes of the owner, or occupier, for the term of seven years. And an indefinite length of time, in which the protection fence may remain there, may be granted in writing, by the trustees of the township.

I. & C. Statutes, vol. 1, p. 687, chap. LIII. There is no allegation in the petition that the proposed construction of the fence would be in violation of law; for aught that appears in the petition, the fence which it is alleged is about to be erected, may be for the express purpose of protecting a hedge or line fence, which has been set out or planted on the line of the public road in question. There is no allegation that the fence will occupy *more than six feet of the margin or edge of the road. And we are not at liberty to *presume* that a nuisance is about to be committed. The petition must show affirmatively all of the facts necessary to authorize the chancellor to interfere; and in the particular just named, we think it falls short. For this reason, likewise, we think the bill should be dismissed. 418

We will now briefly consider the last question presented.

No one can have an action for a nuisance or obstruction in a common highway, without assigning some particular damage to himself individually, independent of the general inconvenience to himself as one of the public. Addison on Torts., vol. 1, p. 241, and cases there cited.

And though one person may suffer more inconvenience than others from the obstruction, by reason of his proximity to the highway, that will not entitle him to maintain the action. Pierce v. Dark, 7 Cowan, 609.

The damage must be different, not merely in degree, but different in kind, from that suffered in common.

Stetson v. Faxon, 19 Pick., 147; Thayer v. Boston, 19 Pick., 511–514; Quincy Canal Co. v. Newcomb, 7 Metc., 283; Honck v. Wachter, 34 Md., 265; Hatch v. Vermont Central R. R. Co., 28 Vt., 114; McLaughlin v. Charlotte and South Carolina R. R. Co., 5 Rich., 583; Hartshorn v. South Reading, 3 Allen (Mass.), 501.

To entitle a private individual to invoke the interposition of a court of equity to restrain a public nuisance, he must show special damage apprehended or sustained peculiar to himself, and distinct from that suffered by the public at large.

Allen v. Board of Freehold, 2 Beasley (N. J.), 68; Hinchman v. Patterson Horse R. R. Co., Green, (N. J.), 75; Bechtel v. Corslake, 3 Stoct., (N. J.), 500; Bigelow v. Hartford Bridge Co., 14 Conn., 565; Black v. Philadelphia, etc., R. R. Co., 58 Penn. State, 249.

We regard it unnecessary to pursue the subject further; and although the authorities we have examined and cited are all American, yet we find that the same general doctrine is held by the courts of England. Nor do we think the case of the Mayor and City of Springfield v. Ninian W. Edwards, recently decided by the supreme court of Illinois, to which our attention has been called by plaintiff's counsel, contravenes the general doctrine we have announced. In that case the plaintiffs in error were

enjoined from the collection of a tax, which the court held was levied in violation of the constitution of the state, and therefore illegal and void.

Then it not appearing from the petition that the plaintiff will suffer any more inconvenience than others from the obstruction, or that his
419 damage will be different in degree or kind from *that suffered by others, or that he will sustain special damage peculiar to himself, and distinct from that suffered by the public at large, the bill will, for these reasons, likewise be dismissed, and the injunction dissolved.

Judgment accordingly.

---

440 *MORTGAGE—CROSS PETITION.

[Superior Court of Cincinnati, General Term, October, 1877.]

Tilden, Yaple and Force, JJ.

CHARLES BUKHEIMER v. SAMUEL S. ASHCRAFT.

1. A final decree in a foreclosure proceeding having been rendered, a cross-petition unpaid can not, after waiting fifteen years, take judgment without notice to the defendant therein.
2. In 1862 there being no law authorizing personal action on a note to be joined with a suit to foreclose a mortgage, a personal judgment would have been void.

FORCE, J.

H. N. Wenning filed a petition 4th of May, 1861, against Charles Bukheimer and others, to foreclose a mortgage given by Bukheimer, 23d of October, 1861. Ashcraft was made a party and filed his answer and cross-petition, averring that he was the owner of one of the notes secured by the mortgage, and praying for a sale and payment out of the proceeds. Judgment and order for sale was rendered 14th of October, 1861; March, 1862, there was a decree of confirmation and distribution. After this was a further sale; and 31st of May, 1862, final decree of distribution, which left Ashcraft's claim wholly unpaid.

Nothing further was done until 18th of June, 1877, when Ashcraft filed his note and took judgment by default. Petition in error is brought to reverse that judgment.

When the action was brought and when Ashcraft filed his answer, and for some years after, a personal action on a note could not be joined with a suit brought to enforce the lien of the mortgage which secured the note. Ashcraft's answer was
441 *framed accordingly, simply to enforce his mortgage lien. No process was issued upon it.

Upon this state of facts, three propositions seem clear.

If the original decree had contained a personal judgment in favor of Ashcraft, such judgment would have been erroneous, and would be reversed on error.

Even if Ashcraft's pleading had contained an article setting forth a personal cause of action, yet, as no process issued, the court had no jurisdiction to render a personal judgment.

Finally, a final decree having been rendered in 1862, and the cause recorded, Ashcraft could not, even if he had a right in other respects, come into court after the lapse of fifteen years, and, without notice to Bukheimer, take a judgment against him.

Judgment reversed.

Stallo & Kittredge, for Plaintiff.

Powell, for Defendant.

CHECKS.

[Superior Court of Cincinnati, General Term, October, 1877.]

†SIMMONS V. CINCINNATI SAVINGS SOCIETY.

Tilden, Yaple and Force, JJ.

If a person having money in a bank deliver a check on such bank therefor to another, intending to give such other the money, and die before the holder presents the check to the bank for payment, or obtains its acknowledgment of liability thereon to the holder, such death revokes the authority of the holder to draw the money from the bank on the check, which the bank may refuse to honor; and it may pay the money, after such a demand, to the administrator of the deceased.

YAPLE, J.

This is a petition in error by which it is sought to reverse the judgment of this court in special term, rendered upon the verdict of a jury, in favor of the defendant in error, who was defendant below, and against the plaintiff in error, who was plaintiff below.

The facts of the case are substantially these: Mrs. Rhoda Wylie, the mother of the plaintiff, at whose house the mother was living and lying sick, had three hundred dollars on deposit with the defendant, the bank. The mother sought to give the plaintiff this money. To effect this object, the plaintiff, about two weeks before her mother's death, went to the bank and told its officers that her mother intended to give her this money, whereupon the bank gave her a blank check to be filled up and signed by the mother for the amount, telling her at the same time, that it would honor the check on presentation, and she could draw the money or re-invest it in her own name. On September 15, 1875, the husband of the plaintiff filled up the blank check for the $300, and Mrs. Wylie signed and delivered it to the plaintiff. Mrs. Wylie died before the check was presented to the bank. Before it was presented, and before the *bank knew it had been given to the plaintiff, an administrator of Mrs. Wylie, her eldest son, D. Wylie, was duly appointed ad- 442
ministrator of the deceased. He went to the bank and notified it not to pay this check. Two days afterwards the plaintiff presented the check to the bank and demanded payment, which was refused, the reason of the refusal being stated to the plaintiff and her husband. The bank afterward paid the money to the administrator on his check as such. The plaintiff then brought this suit to recover the money from the bank.

The court charged the jury, in substance, that if the check was without consideration other than an intended gift of the money to the plaintiff, the drawer of it could have countermanded it before its presentation to, or acceptance by, the bank; and that the administrator had the same right to forbid payment by the bank that the deceased would have had. The plaintiff excepted to such charge Also, during the argument to the jury by counsel, a dispute arose between them as to what a witness had testified to upon a material point. The court was appealed to under the provision of section 270 of the code, to "give its recollection as to the testimony on the point in dispute," the parties, by their counsel, being present. The court's notes of the evidence were not full; and such witness being present, the court permitted him to be called and asked what he had stated in his testimony upon the matter of fact in dispute, and he stated what he had sworn to. Exception was taken by the plaintiff to this. The jury found for the defendant.

We think there was no error in law in the charge of the court. Byles on Bills, 6th ed., notes by Sharswood, top p. 45, 25 marg., states the rule thus: "It seems the death of the drawer of a check is a countermand of the banker's authority to pay it. But that if the banker do pay the check before notice of the death, the payment is good." And at page 277, top, 175 marg., the same author says that a bond, a policy of insurance, a bank note, or bill of exchange, or promissory note specially indorsed to the donee or made payable to bearer, may be the subjects of a *donatio mortis causa;* "but a check drawn by the donor upon his own banker can not be the

†The judgment in this case was affirmed by the supreme court, by refusal of leave to file petition in error. See opinion, 31 O. S., 457.

subject of such *donatio mortis causa*, because the death of the drawer is a revocation of the banker's authority to pay." This author and his editor, Judge Sharswood, cite all the authorities except Bank, etc., v. Williams, 13 Mich., 282; and a special citation of the cases here is deemed unnecessary.

The evidence of the plaintiff herself clearly shows that this money was intended as a gift to her by her mother. The verdict, therefore, was not against the evidence upon this point.

The restatement by the witness during the progress of the argument to the jury, by permission of the court, of what he
443 *had testified to, that, being in dispute between the counsel, was a matter purely within the discretion of the court. The court could have told the jury that it was for them to remember what the witness had testified, or it could have stated to them, under sec. 270 of the code, its recollection of such testimony; or, the witness being present, it could permit him, as is often done in court, to state what he had sworn to when examined. This is, perhaps, the best practice in cases where the court has observed that the witness was candid, intelligent and free from bias. If a witness has shown himself not to be so, the court can refuse to permit him to state what he testified when on the stand, and resort to one of the other modes of ascertaining his evidence.

Finding no error in the record, we affirm the judgment with costs.

Judges Tilden and Force concur.

Milton Sater, for Plaintiff.

Storer & Goodman, for Defendant.

---

452 *LIFE INSURANCE—EXECUTIONS.

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

†UNION CENTRAL LIFE INS. CO. v. CATHERINE ECKERT, ET AL.

1. The first section of the act of February 8, 1847, entitled "An act relating to insurance on life for the benefit of orphans and widows"—1 S. & C., p. 737—is not repealed by the act of April 27, 1872, entitled "An act to regulate insurance companies doing an insurance business in the state of Ohio," 3 Say's Stats., 2721. The first act applies to contracts of life insurance made out of the state, by and with companies which do not do business in this state; and the second act applies to all contracts of life insurance made by and with insurance companies which do business in Ohio.
2. A contract was made by a husband, in the sum of $10,000, upon his life, the annual premium being $630, for the benefit of his wife, in an Ohio company, before the passage of the act of 1872; and after the passage of that act, the husband and wife, with the consent of the insurer, surrendered this policy of insurance to another Ohio insurance company, which issued its policy for the same amount, at the same rate of premium as the first. The husband died, the widow living; the husband all the time believing himself to be solvent; but suit has been brought, and is still pending against him, as alleged surety on a bond, for $68,000 and interest from 1858, which, if decided adversely to the estate, may render it insolvent. The husband paid all the premiums. The insurance company paid the widow, under the act of 1847, such portion of the $10,000 as $150 bears to $630, and filed a bill of interpleader against the widow and the deceased husband's administrator, to ascertain how and to whom the residue should be paid. The widow claimed all and the administrator all.

453 **Held*—That under the 30th section of the act of 1872, the administrator was entitled to retain only the amount of the premiums, with interest paid by the husband for four years prior to his decease, four years being the statute of limitations in such cases, and apply that to the intestate's debts, if found to be necessary, and if not, to repay it to the widow; and that the insurer should pay to the widow the residue.

Held, further, that a gift or payment of money as a premium for insurance on his

†This case was cited in Weber v. Paxton, 48 O. S. 266, 272.

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, under the 30th section of the said act of 1872, the same as it would be under the statute of frauds.

YAPLE, J.

This is an action brought by the Union Central Life Insurance Company of Cincinnati against Elizabeth Eckert, widow, and Louis Ballauf, administrator of Michael Eckert. The petition is one of interpleader. The insurance company admits there was a policy of insurance issued by it on the life of Michael Eckert in the sum of $10,000, and that Michael Eckert died in July, 1877, and that the beneficiary or the administrator is entitled to the balance of the $10,000, it having already paid to the widow as much of the face of the policy as $150 of the annual premium would bear to the entire premium, which is $630 per year, and it avers that it retains the balance in its hands, but it is ready to pay it over to whoever is entitled to it; and that these two parties, the widow and the administrator, claim it, and, therefore, it asks that they be compelled to interplead, and that it may have the order of the court to protect it in what it does.

It appears that on the 27th of July, 1871, the Cincinnati Mutual Life Insurance Company, in consideration of a premium then paid and to be paid annually thereafter by Michael Eckert, insured the life of Michael Eckert, and made the loss, if any, payable to his wife, Elizabeth Eckert. This was on the 27th of July, 1871. At that time the only law on the statute book of Ohio was the first section of the act relating to insurance on life for the benefit of orphans and widows, passed February 8, 1847, and found in the first volume of Swan & Critchfield's Statutes, on page 737. That act provides 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 enure to the sole benefit of his wife and children, as he may cause to be appointed or provided in said policy, and the sum or net amount of insurance becoming due by the terms of the insurance, shall be payable to his widow or to his children for their use as may have been provided in the policy, exempt from all claims by the representatives and creditors of such person, provided that the amount of premium annually to be paid on such policy shall not exceed the sum of $150, and, in case of such excess, *there shall be paid to the beneficiaries named 454
in the policy such portion of the insurance as this sum of $150 will bear to the whole annual premium, and the residue to the representatives of the deceased.

I am not aware that this statute has ever been expressly repealed. Counsel has not pointed it out if it has been.

Mr. Follett.—We make no question on that.

The Court.—And it yet stands unrepealed in its terms.

After this policy had run for some time, the Cincinnati Mutual Life Insurance Company retired from business, and transferred, validly, so far as these parties are concerned, they having recognized the transfer and acted upon it, all its business to the Union Central Life Insurance Company. On the 12th of December, 1872, the Eckert policy was surrendered by the beneficiary, and with the consent of the Mutual Company, to the Union Central Company, who insured the life, varying to this extent in its terms: In consideration of the repre-

sentations made in the application for insurance in the Cincinnati Mutual Insurance Company and of the surrender of the policy by Elizabeth Eckert, wife of Michael Eckert, and of the payment of $630 annually on or before the 27th of July, 1872, or within thirty days thereafter, or annually thereafter, they insure the life of Michael Eckert of Cincinnati, in the sum of $10,000 for the benefit of Elizabeth Eckert, his wife.

The difference between the two policies is, that Michael Eckert, in the first one, insured his life for the benefit of his widow in case she should survive him; in this policy, it recites that Elizabeth Eckert surrenders the policy, she being the beneficiary, and they insure for her the life of her husband. That is the difference between the two. The agreed statement of facts does not show specifically who paid the premium to the Union Central Life Insurance Company; whether the widow, out of her separate estate, or whether the husband paid it. But I understand it will be agreed that the husband paid it.

Mr. Follett.—I supposed that was inserted; but if not, it will be recited.

The Court.—A different form of policy might raise a different presumption.

Now, before this last policy was taken out, another statute had been passed, the act of April 27, 1872. This is styled An act to regulate insurance companies doing an insurance business in the state of Ohio, and, under the constitution, the title of an act is to be taken as part of it so far as the subject it provides for is concerned. The title of the other act is "An act relating to insurance on life for the benefit of orphans and widows," and would apply to every insurance company, no matter where you made the bargain, in London, Connecticut or New York,
455 *and undertook to enforce the policy in Ohio at the time of the death. The case of Dr. Blackburn that was tried in this court some time ago, was a case of that kind. It is true it was before the act of April 27, 1872. His insurance was effected in Connecticut, and the administrator took all of the money covered by the policy except the amount that $150 of the premium represented, and there may be acts passed to give to New York, Massachusetts or New Jersey an authority where the company does not do business in Ohio.

But this is an act to regulate insurance companies doing business in the state of Ohio, and it applies by express provisions to foreign corporations. The 30th section of that act, found in volume 3, Sayler's Statutes at Large, page 2746, enacts as follows: "It shall be lawful for any married woman, by herself and in her own name, or in the name of a third party 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 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 her husband, or of any of his creditors.

Now this act, so far as I have read it, differs from the one of 1847 in this: There the husband may insure his life for the benefit of his wife; here, the wife may insure her husband's life for her benefit; and it would seem to follow that the wife should mainly provide the means for paying the premium. The Union Central policy is worded like this.

But there is another clause, as follows: "And a policy of insurance on the life of any person duly assigned, transferred or made payable to any married woman, whether such transfer, using the word transfer, be by her husband or other person, shall enure to her separate use and benefit and that of her children, independently of her husband's or their creditors, or of the person effecting or transferring the same, or his creditors. The amount of such insurance may be made payable, in case of the death of the wife and before the period at which it becomes due, to his, her or their children, for their use, as shall be provided in the policy of insurance; provided, 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 enure to the benefit of said creditors, subject, however, to the statute of limitations." That gives the creditors of such person who procured a policy with the intent to defraud his creditors no right in the benefits accruing from the policy, but only gives them a right to the debtor's money that he has paid out of his estate, and the interest on that. But *it says, subject, however, to the statute of limitations. The statute of limitations for any property given in fraud of creditors is four years. By express provisions, relief is to be sought in four years. 456

The first question now to be determined is whether the Cincinnati Mutual Life Insurance Company's policy was executed before the enactment of this law, or the Union Central Company's policy, which took the contract in 1872, after the passage of the law, governs the transaction.

So far as the representations on which the life was insured are concerned, they must be sought in the Cincinnati Mutual policy. But the policy of 1872 was a new contract— a novation. The three parties got together; the Eckerts agreed to surrender the policy and release the Mutual Company. It agreed to that. It agreed and surrendered to the other, and the other agreed to effect a contract of insurance, binding itself in 1872, and, therefore, so far as the substantial rights of the parties are concerned, the transaction is under this law.

Now, Michael Eckert died in the supposition that he was fully solvent, and no doubt will be largely so if a certain action now pending against him in this court should not be decided adversely to him for a large amount of money. It appears that in May, 1858, a man named Jacob Hust became the treasurer of a certain religious or charitable organization which had a large amount of funds, and it seems that Eckert went his security for the faithful administration of his duties, and in that same year, December, 1858, Hust resigned the office of treasurer, and it was claimed by the secretary that he was a defaulter, and they obtained a judgment against him, Eckert, he being no party at all to the suit; nor was anything done against him until the 13th of February, 1873, more than fourteen years after the resignation of Hust. The suit was brought against Eckert for $68,000, perhaps over that with the interest. That suit is still undetermined.

The right to bring the suit on Hust's bond exists for fifteen years, and the suit was brought within time. In that view of the case, the administrator, to protect himself, desires to pay to Mrs. Eckert only so much of the proceeds of the policy as she is clearly entitled to, and to hold the residue for exigencies that may arise out of the suit on the bond, but he hopes to entirely defeat that suit.

The insurance by Eckert for the benefit of his wife, it is said, was in

fact and intention in the highest good faith; that is he had no intention to defraud any creditor. But this question arises. If a man is in debt and takes his own means and gives them to his wife or children, or any one, and it should turn out that he was taking the means his creditors would
457 have a right to, *would the law, notwithstanding any statute which makes a transaction done with the intent and purpose of defrauding creditors, make such a transaction, or this a fraud by construction?

It is claimed here that the policy must have been actually procured with the intention of fraud. That, on the principles of law, I do not think is the case. The old statute of Elizabeth, providing for the setting aside of fraudulent conveyances, specifies those conveyances that are made with intent and purpose. It would seem that that would cover nothing but actual fraud. But the English courts now hold that that covers constructive fraud. The same principle is determined in the case of Jamison v. McNally, 21 O. S. R., where, under our assignment law, the making of a conveyance, if it is done with intent to defraud creditors, is declared fraudulent, yet if a man gives away his property without providing for his creditors, it is constructively fraudulent.

The question then is, whether this administrator should hold any of this money for this contingency, and if so, how much? After a careful consideration of the case, I have concluded that his rights are these: That the administrator will be entitled to retain an amount of money from the proceeds of this policy equal to the amount of the premiums for a period of four years back from the death of Mr. Eckert, with interest, and that amount is to abide the result. In case it should turn out that there is no liability, or that the estate is solvent, then the administrator will pay the money to Mrs. Eckert, but in the meantime he will retain it.

Mr. Follett—That is, the money actually paid for premiums?

The Court—Yes, the money actually paid; the creditors have no rights in the dividends or profits. The statute cuts them out of all that. The administrator will invest the money he retains.

Matthews, Ramsey and Matthews, for Insurance Co., Plaintiff.

Follett & Cochran, for Administrator.

Dawson, for Mrs. Eckert.

---

464 ***SUMMONS.**

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

MIAMI POWDER CO. v. GRISWOLD.

One who induces another into the jurisdiction to consult over their controversy cannot have him served with a summons until after a reasonable time for departure from the jurisdiction, after the termination of the business on which he had been invited to come.

YAPLE, J.

BY THE COURT:

These cases are now to be determined upon motions, in each, to set aside the service of summons upon the defendant, and to dissolve the temporary injunction heretofore allowed, restraining the defendant from

attaching, anywhere, the property of the plaintiffs, in suits threatened to be brought by the defendant, for damages for alleged breaches of contracts for powder, which the plaintiffs claim, in their petitions, to have been obtained by fraud of the defendant, and for which reason, they ask to have such alleged contracts declared void.

The defendant asks to have his motions granted on the ground that he is a resident of the city of Buffalo, in the state of New York, and that the agent of the plaintiffs, A. O. Fay, fraudulently induced him to come from there to the city of Cincinnati upon a pretense of business, and that when he came, caused summons to be served upon him in these actions.

The affidavits show clearly, that, on December 29, 1877, Fay telgraphed from Cincinnati to Griswold at Buffalo, where the latter resides, stating that he was informed that he had made demand of the powder under his alleged contracts, asking him when he could come to Cincinnati to talk over or consult about the matter, and telling him to send answer to the Grand Hotel, Cincinnati; Griswold replied, by telegraph, that he would come on January 2 or 3, 1878. He came on the 3d of January, and met Fay, to whom he proposed to take $2,250 in settlement and satisfaction of his claims. This was refused, and he finally proposed to take $1,500. Fay asked until the next day, January 4th, until 11 o'clock A. M., or until the train from Xenia should *arrive at Cincinnati, to answer this proposal, he saying that he desired to go to Xenia to consult parties interested, before giving Griswold a final answer; and he objected to Griswold accompanying him, as Griswold proposed to do. The parties were to meet at the Gibson House on the 4th. Fay did not meet Griswold the next day, or inform him that the proposal made the day before was refused, he, as he says, having made up his mind, as did the parties at Xenia, not to accept Griswold's offer of compromise. 465

At about noon, on January 4, 1878, Griswold was served at the Gibson House, with the summons and temporary restraining orders in these cases. The petitions were all prepared, and sworn to, by Fay, and two of them placed in the hands of the judge to obtain an allowance of temporary injunctions, in the early evening of January 3d, and the temporary restraining orders were granted next day.

Held: That the motions of the defendant must be granted; that, upon the facts of this case, the plaintiffs could not validly serve any writ of summons upon the defendant until a reasonable time to depart this jurisdiction should elapse after the final conclusion of the business upon which the plaintiff's agent had invited him to come within such jurisdiction, which reasonable time had not elapsed when such service upon the defendant was made.

Service of process set aside, and summons not to be served until after the lapse of a reasonable time for the departure of the defendant from this jurisdiction; temporary restraining order vacated; and injunction denied, all at the cost of the plaintiffs.

Stephen Coles and *Howard Douglass*, Attorneys for Defendant for the motion.

E. P. Bradstreet and *Coffin & Mitchell*, Attorneys for Plaintiffs, *contra.*

466 *SPECIFIC PERFORMANCE.

[Superior Court of Cincinnati, Special Term, December, 1877.]

MOORE V. MOULTON.,

On the 17th day of May, 1873, A made a contract with B to sell him "forty-two acres of land, more or less, on Mt. Ida, recently bought from C," for the sum of $36,000—$10,000 cash and the balance in five yearly installments, to be secured by mortgage on the premises—the offer to be open for thirty days.

B, within the thirty days, tendered to A the $10,000 in lawful money, and then and there offered to execute and deliver the mortgage notes upon the presentation by A to B of the deed. A refused to accept the $10,000 and refused to deliver the deed.

Held: 1. In a suit for specific performance of a contract neither party is entitled to a trial by jury as matter of right. Special issues, framed under the direction of the court, are for the aid of the court upon matters of fact for the court to try in equity, and the findings of the jury are not binding upon the court as a verdict. And objections to such findings are not raised by motion for a new trial, but are to be considered upon the hearing of the merits upon the pleadings and all the evidence.

2. That the tender of the $10,000, the cash part of the consideration, and the offer, on receiving a conveyance, to make and deliver the mortgage notes, was sufficient to compel a specific performance.

3. That a contract to sell a definite parcel of real estate includes, by necessary implication on payment of the price, to convey such real estate in such manner as will embrace all of it and every incident to it.

And, if there is a dower interest in the land, or any other charge upon it, the purchaser will be indemnified or compensated for any damages resulting therefrom.

4. A party retaining possession of real estate after making a contract to convey the same, and who has always refused to receive the consideration, is not entitled to interest.

TILDEN, J.

At a former preliminary hearing of this case, it was ascertained that certain questions of fact were involved, of such exceptional nature as that, in the judgment of the court, they were proper to be submitted on the evidence for the opinion of a jury. Certain special issues of fact were accordingly framed under the direction of the court, and the further hearing of the cause was suspended to await the result of a trial of them. Such trial subsequently took place. The verdict was followed by a motion for a new trial, assigning for cause that the findings of the jury were against the evidence, and this motion was followed by a second one for a like object founded on a suggestion of newly-
467 *discovered evidence. Neither of these motions has been brought to a hearing, and in the final submission of the case they were not in terms insisted on. At the last June term the case was further and finally heard upon the findings of the jury, the pleadings and proofs, and it is now to be disposed of by a final judgment on the merits.

1. Although the objections intended by the first of the two motions for a new trial may be regarded as having been waived, yet I have thought proper to consider and to refer to them in disposing of the case. I presume it may be assumed that the power, given to the court by section 264 of the code, is in its nature and operation the same as that formerly possessed by the courts of this state when sitting in chancery. According to the former practice in chancery, the granting of an issue was

discretionary with the court, and now it is expressly made so by the provision of the code just referred to. The same discretion is exercised after verdict. The object of an issue is not to bind the court, but to satisfy its conscience. If, therefore, the verdict in view of the evidence does not afford satisfaction, a new trial will be directed, and this, although there be no fraud or surprise, nor miscarriage, and the verdict be one which at common law would not be disturbed. And, although no new trial is sought, yet, when the cause comes on to be heard, the court, if it thinks that the issues do not answer the purpose intended, may direct a new one to be framed, or may on consideration of the evidence decide against the verdict. On the other hand, if the court is of opinion that the findings are warranted by the evidence, it will proceed to a final hearing and judgment on the footing of such findings. Adams on Eq., 377. In this view of the subject it is apparent that the motions for a new trial were unnecessary and they may be regarded as irregular. The very question intended to be raised by the motions is involved in the more general question of whether or not, upon the whole case, the plaintiff is entitled to the relief sought by the action.

2. The object of the action is to enable the vendee under a real contract to obtain specific performance.

The alleged contract was formed by the acceptance by the plaintiff of a written offer made and signed by the defendant on the 17th day of May, 1873, by which the defendant proposed to sell to the plaintiff the land in controversy for the sum of $36,000, the sum of $10,000 to be paid in cash and the balance in five yearly installments to be secured by mortgage on the premises described in the offer, and the offer was declared to be open for thirty days. The plaintiff claimed to have accepted this offer within the period named in it, and to have notified the defendant of that fact also, within the thirty days. He claims also to have been ready and willing, and to have repeatedly within the *thirty days offered to perform the contract on his part, and especially that on the 11th of 468
June, 1873, he tendered in lawful money the cash payment of $10,000, and demanded a conveyance, and then offered to give his notes and execute a mortgage for the deferred payments. These facts are contested by the defendant, and were regularly put in issue by the pleadings; all of them were considered and passed upon by the jury, and all of them were found to be true, as claimed by the plaintiff, the jury further returning by their verdict that the reason given by defendant for declining the tender was that there was no contract. Having personally presided at the trial before the jury, and listened attentively to all the details of the evidence and still further considered it, I am now able to conclude, with considerable confidence, that, had this been the trial of an issue at law, I should be able to find no reason to warrant me in interfering with the verdict. But full justice to my real convictions requires me to add that in my judgment the evidence very strongly preponderated in favor of the findings. On one fact only was the evidence in any embarrassing degree conflicting. Upon that question—that is, upon the question of the making of the contract—I cannot resist the conclusion that the defendant was, in his testimony, mistaken. If he was not, then it necessarily follows that the plaintiff was not merely mistaken in his testimony affirming the making of the contract, but he has exposed himself to the more serious charge of having deliberately fabricated the document which contained the terms of the contract. Such an inference cannot be admitted.

It would be inconsistent with the high character in which the plaintiff is presented by the evidence, and to hold so would be to set aside the settled principle of evidence which requires, even in civil cases, that evidence, to authorize the imputation of crime, should be such in amount as to establish the fact beyond any reasonable doubt. On the other hand, the evidence of the defendant, whose character and standing in the light of the evidence before the court equally entitle him to consideration confidence, offers no embarrassing alternative, because all his statements may be accepted as having been honestly made, and still it is not beyond the range of a very reasonable probability that he may have been mistaken.

He admits that he signed and delivered to the plaintiff a memorandum in writing (in pencil) on the subject of the sale of the land, although he thinks, I have no doubt honestly, that the terms and stipulations of it were substantially different from those contained in that insisted on by the plaintiff. When, however, we consider how very much depends in an inquiry of this sort upon the degree of attention required to the terms and language of a pending treaty, the amount of intelligence and
469 *caution involved in the construction of such language and in the operation of reducing it to writing, the circumstances of suddenness, haste and informality under which the transaction took place in the present instance and the influence which the strong motives of self-interest invariably have in moulding our thoughts and impressions, the supposition of mistake and error is far more probable than that of the commission of a deliberate act of crime or wilful perjury in attempting to carry out the purpose of such. I am, therefore, required to accept the finding of the jury as furnishing the data so far as they go for the determination of the case, and, on that basis, and coupling the facts so found with such other material facts as may be developed by the evidence, it remains only that I inquire of the law governing the case.

3. It is objected, in behalf of the defendant, that the plaintiff has failed to obtain any proper standing in a court of equity. It is contended that the proposition of the defendant was not for an executory, but for an executed contract, the offer not having been open for acceptance, but only for full performance for thirty days. It is further argued that the cash payment and the giving of the notes and mortgage were to be contemporaneous acts, that together they formed one inseparable consideration, and that, therefore, the mere tender of the cash payment, followed by the distinct repudiation of the contract by the defendant, was not sufficient. It appears to me that this reasoning, which is founded alone on the construction of the contract, is, were it correct, the expression merely of the common law view of the subject, and not of that which obtains in courts of equity. I doubt, however, if it is correct in any view. In my judgment, according to the suggestions of reason and to the best considered authorities, the law should be assumed to be that where the contract contains mutual stipulations, originating the duty of contemporaneous performance, the repudiation of the contract by one of the parties, communicated to the other, so long as it remains unretracted, relieves the other party from the duty to take any further steps. Such act of repudiation is itself a breach of the contract. Any further steps on the other side become vain and useless, and these the law does not require to be taken. Such, then, in my opinion, is the rule at law. I do not stop to notice the cases which have been cited in the argument. I have con-

sulted most of them, and it appears to me that they sustain me in the conclusion to which I have come. But, at all events, the rule in equity is clear. The effect of a concluded binding contract of purchase of land is, in equity, to work a conversion of the purchase money into land and of land into money. The moment the contract becomes binding in law the purchaser is, in equity, regarded and treated as owner, and, *on his death, the land descends to his heirs. His right to resort to the court to compel the execution of a conveyance is itself a title, and the sole object of the remedy thus invoked is to change the form of the evidence of title by compelling the conveyance of the legal estate. Here the question is not, as at law, one as to the construction of the contract, for the rules for the construction of the written instruments are the same in equity as at law. The real question is such as to involve only the principle upon which equity exercises jurisdiction. It is commonly said that the jurisdiction is discretionary. In the beginning of equity it was strictly so, and now it is so with the qualification only that the court is bound by precedent and settled forms. In the application of this rule of judicial discretion, in cases of specific performance, equity aims to carry into effect the actual intention of the parties to the contract. It looks to the substance and intent of its stipulation, disregarding all deviations in matters not of the essence of the contract, or making compensation for them where the case admits of that, and then compels performance in the way it finds the parties intended. In such case, as in all others, the party seeking the active interference of the court must himself be free from fault. He must not unreasonably delay his application. But, if he can not be resisted on some such ground, and, if his equitable title is otherwise such as to entitle him to relief, it is no objection, if he is a vendee seeking specific performance, that he has omitted a technical offer of performance before suit brought. It is enough if he can fully perform at the time of the decree the court, taking care in a proper case, in awarding costs or otherwise, to make amends for any such formal omission. Hunter v. Daniel, 4 Hare, 433; Broch v. Hidey, 13 O. S., 310. In the present case the plaintiff, having made a sufficient tender of the cash payment and offered, on receiving a conveyance, to make and deliver his notes and a mortgage for the deferred payments, did apparently everything which he could do. It would have been simply a farce to have gone through the ceremony of making the notes and the mortgage, the defendant having declined in advance to receive them. The failure to bring the money into court is a circumstance which is material only on the question of interest, and all the benefit intended by the securities for the deferred payments can be secured to the defendant by the final judgment.

*470

4. I have already expressed the opinion that the defendant, in his testimony, denying the making of the contract, was acting under a mistake and misapprehension of the facts. This circumstance is, however, made the basis of another objection to relief. It is true that to the formation of a contract the minds of both parties must come together, and, if this requisite is wanting in any case, the contract is incomplete in equity as well as at law. *It is also true, the remedy in equity being discretionary, that specific performance will be refused where the defendant has, by mistake not originating in mere carelessness, entered into a contract framed differently from his own intention, notwithstanding there is no unfairness on the plaintiff's part, and no defect or doubt in his title. Adams

*471

on Eq., 85. In the present case, however, the jury have found that the minds of the parties did come together, and that there was a concluded contract, and, as to the objection of mistake, the answer seems conclusive that the defense not only was not made by the pleading, but it is irreconcilably inconsistent with the defense which is so made. I know of no principle upon which this impediment to a hearing of the objection can be obviated by amendment or otherwise, and, considering the case upon the pleadings merely, as I am bound to do, I am forced to conclude that the objection is unavailable, and, if the views already stated are correct, the more general conclusion necessarily follows, namely, that the plaintiff, on the whole case, is entitled to the relief sought by the action. In the adjustment, however, of the details of the relief to be awarded, there are certain points which have been made subjects of discussion, and which require separate consideration.

5. One of these questions involves the nature of the title which the plaintiff has a right to call for. It is contended in behalf of the defendant that the plaintiff, at the time of making the contract, knew that the defendant had a wife, who might become entitled to claim dower; that, if this was a defect, it was a patent one, and, the contract being silent as to dower or incumbrances, the plaintiff can only claim such a title as the defendant actually has, and that he is not entitled to have the defendant compelled to procure a release from his wife, or to submit to an abatement from the price in lieu of it.

It is obvious that the question here presented is purely one of construction of the contract; and that must be the same as it would be in an action to recover damages for the breach of it. The contract does not, in terms, refer to the dower of the defendant's wife, nor does it specify in any particular the nature of the title to be conveyed.

It does not even provide that an estate in fee simple or any larger estate than an estate at will shall be conveyed. In fact, the contract does not promise that any conveyance whatever shall be made. It simply promises to sell forty-two acres of land, more or less, "on Mt. Ida, recently bought of Jonathan Bassett." But the intention of the parties to any particular transaction may be gathered from their acts and deeds in connection with the surrounding circumstances as well as from their words, and the law, therefore, implies from the silent language of men's
472 actions *and conduct, contracts and promises as forcible and binding as those that are made by express words or through the medium of written memorials. If a ship is insured for a particular voyage, the law implies a proviso that the ship is seaworthy at the time of the commencement of the voyage. There may be a covenant contained by necessary implication in terms which do not directly amount either to a covenant or agreement. In such case the law, in order to give a proper force and effect to the contract, to promote good faith and make men act up to the spirit as well as to the letter of their engagements, will create and supply, as a necessary result and consequence of the contract, certain covenants and obligations, which bind the parties as forcibly and effectually as if they had been expressed in the strongest and most explicit terms in the instrument itself. A comprehensive undertaking to sell a definite portion of real estate includes, by necessary implication, a promise on payment of the price, to convey such real estate in such manner as will embrace all of it, and every interest in it and every incident to it, and to that end to execute in due form an instrument which shall convey and assume and

maintain the ownership of the purchaser. Here the words, literally construed, include all this. The promise was made upon a valuable and upon what the parties regarded as an adequate consideration, and the inference is fairly deducible from the nature and circumstances of the transaction that both parties contemplated the purchase and sale of the entire Bassett estate, as it was constituted at the date of the contract, and the conveyance of such estate by an instrument containing all the covenants of title usual in such cases. Addison on Cont., 49, 50; Soutre v. Drake, 27 E. C. L., 250; Clark and others v. Redman, 1 Blackf., 379; Lawrence and Parker, 1 Mass., 381; Paul v. Young, 4 Am. Reg., 412, and other cases cited by the counsel. In some of these cases the contract contained an express covenant for a title or to include covenants of warranty in the deed. But I do not regard this circumstance as making any difference, for, as already observed, a covenant by implication of law has all the effect and operation of one expressed in the written contract in the very language of the parties. Moreover, the real covenants in a deed do not thereby merely afford a remedy by action in case of breach, but, operating by way of estoppel and rebutter, they fortify and are in reality part of the title.

6. I am further of opinion that, upon the construction just given to the contract, the plaintiff is entitled to be relieved against any claim hereafter to mature in behalf of the defendant's wife. The circumstance that the plaintiff, when he entered into the contract, was aware that the defendant had a wife can, in my judgment, exercise no proper influence on the construction *of it. The circumstance is one which occurs in many transac- 473
tions. The very fact that the plaintiff knew that the defendant had a wife may have been the reason why he required and the defendant consented to enter into a covenant against her contingent claim. Mortlake v. Buller, 10 Vesey, 316.

The defendant's wife has not been made a party, and, of course, there can be no judgment against her. But had she been so made a party, it not being pretended that she ever entered any contract, or that she would be legally bound by such, it is apparent that the court can take no action to affect her rights. But that is not claimed. The remedy sought is exclusively against the husband, and the only way in which this remedy can be literally applied in equity must be by an order compelling the husband to procure the wife to join him in the execution of the deed. But this remedy, although the contract is binding upon the husband, has long and constantly been considered and treated by courts of equity as being contrary to the policy of the law, which is that a wife is not to part with her property, but by her own spontaneous free will. The purchaser is bound to regard the policy of the law, and what right has he to complain, if she, who according to law can not part with her property, but by her own free will takes advantage of the *Locus Penitentioe*, and why is he not to take his chance of damage against the husband. Ld. Elon in Emery v. Wase, 8 Vesey, 514. According to this view the former practice in equity was, as appears from the cases cited by one of the counsel for the defendant, to refuse specific performance, and to refer the parties to their action at law. Morton v. Mitchell, 2 Lae. & W., 425; Howell v. George, 1 Madd. ch. R. I. *In re* Hunter, 1 Edw. ch. 6. But under our practice such a reference would be but an idle ceremony. The operation of it would simply be that the same court making the reference

would be the court to try the question referred, and it would have to be determined upon the same principles and rules of those governing the court making the reference. The modern cases too, maintain the authority of the court, having before it the subject of the contract sought to be specifically enforced, to act finally on all the questions involved. The only point of dispute is whether the court will award compensation or require indemnity. The principle on which courts of equity award compensation for defects when a contract has been made for the sale of an estate which can not be literally performed in toto, is, that it is against conscience to take advantage of small circumstances of variation. But the defect must be one admitting a compensation, and not a mere matter of arbitrary damages. And the compensation given must be really compensation for a *present* loss, and not indemnity against a future risk.
474 Adams *on Equity, 91–92. Considering the nature of the contingent right of dower of a married woman, whose husband is living, it is not easy to hold on this principle that the court, calculating the probabilities of the survivorship of the wife, and the probable duration of her life, can deduct from the purchase-money the amount so estimated. On this question the cases are not all agreed. In a case decided in the supreme court of Massachusetts, in 1867, Davis v. Parker, 14 Allen, 98, 104, it seems to have been taken for granted that the law was settled in favor of this form of relief. In a case in the supreme court of Pennsylvania it was considered that no abatement could be made in the price on account of the wife's right of dower, which would be just to both parties and would not amount to the making of a new contract for them, and the purchaser was left to his election to pay the full purchase-money and accept a deed without the wife, or to resort to his action at law for damages. Riesz's Appeal, 73 Penn. St., 485. This case was afterward followed in Benki's Appeal, 75 ed., 141, and it was further laid down as a general rule that a purchaser from a husband takes the risk of the wife joining in the deed or his action against the husband for damages. And see Hanna v. Phillips, Grant's cases, 253, and Weller v. Weyand, 2 id., 103.

In some of the cases where, as in the present one, an estate has been liable to a contingent charge, a purchaser has been compelled to accept the title with a security protecting him against the charge. It has been doubted, however, whether the doctrine of these cases was sound, and whether in the absence of an express contract the court ought to compel a vendor to give, or a purchaser to accept, an indemnity. Adams 91, Fields v. Hooker, 3 Madd. C. R., 193; Aglett v. Ashton, 1 M. and C., 105–14. But the reason for this doubt in England was one of jurisdiction growing out of the separation of law and equity. The remedy at law by an action for damages was clear and equity declined to act because it was so. But this reason can have no influence in a court where this distinction does not exist, and I am of opinion that, in a proper case it is entirely competent for the court to require indemnity. It may be doubtful whether such relief would be afforded in behalf of the vendor, but in favor of the purchaser the equity is of wider application, and if he chooses to take as much as he can get he has generally a right to insist on that, with compensation or indemnity in lieu of damages in case of a contingent charge. I find these views very ably supported by the opinion of the chancellor of New Jersey in a case decided in 1855. I presume the case can be found in the New Jersey reports, but the case

was reported also in vol. 4, Am. Law Register, 412. I barely refer to it as a case distinctly maintaining the grounds on which I rest my decision, and see Wonal v. Mann, 38, N. Y. R., 121.

*7. The tender of the cash payment has not been followed up by bringing the money into court and the notes and mortgage for 475
the deferred payments have not been executed. On these facts it is contended for the defendant that the notes for the deferred payments should have relation back to 1871, thus giving to them the same operation as they would have had if they had been accepted when offered, that as they have matured all the purchase money has come to be due, and that the principal amount of these, and the amount of the cash payment and interest should be paid into court, for the use of the defendant as the condition of any relief which may be awarded in the case.

1. The claim of interest is placed in the argument on the principle of equitable conversion. It is certainly true, as a general rule, that when the contract is silent as to interest the purchaser pays interest from the time the purchase money becomes due. But it is also true that the refusal of an offer to pay the principal, which produces the interest, is legally equivalent to the actual payment of the principal itself. Such offer and refusal are circumstances which impute the fault to the opposite party, and so long as such party continues in his refusal to accept performance. To permit a party thus refusing, afterward to claim the same benefits he would have realized but for his wrongful refusal, would be to aid him to take advantage of his wrong. In the present case the defendant declined to accept the offer made by the plaintiff, now offering no evidence to prove that the plaintiff has, in point of fact, made any profitable use of the purchase money; he has steadily and constantly persisted in resisting the legal remedy invoked by the plaintiff to compel the acceptance of his offer, and during all this time the defendant has continued to occupy and enjoy the property which the court now ascertains and declares to be the property of plaintiff. Under these circumstances and for the reasons here given I am of opinion that the doctrine of equitable conversion does not apply. The object of that doctrine is, not to defeat, but to protect and enforce equitable rights. In its application in cases like the present, while the general rule is that the parties are, so far as possible, to be placed in the same situation as they would have been, had the contract been performed according to its terms, and while to that end, the vendor will be regarded as trustee of the land for the benefit of the purchaser, and liable to account to him for the rents and profits, and the purchaser will be treated as trustee of the purchase money, if not paid, and will be charged with interest thereon, yet the rule on this subject is general, but not inflexible.

A court of equity moulds its relief, and gives redress according to the circumstances of the case. It has, on these grounds, therefore, been held by the courts, almost or quite *uniformly, that where the non- 476
payment of the purchase-money is attributable to the act and default of the vendor, the interest on the purchase money should be suspended until, by the decree of court, the purchaser is enabled to pay it, where the vendor retains possession receiving the rents and profits, to which, by the operation of the conversion, the vendor is entitled, the vendor is considered as being doubly in fault, first in preventing the payment of the purchase money, and next, in wrongfully appropriating the property. In such a case it has not been thought to be material to

inquire whether interest should cease, or damages imposed upon the vendor for an amount sufficient to cover the claim for interest. Thus, in one case, the principal value of the land consisted in the deposits of clay, adapted by the consumption of the clay in the manufacture of bricks on the premises. A referee, to whom the case had been referred, had undertaken to ascertain how much the purchaser might have received for the privilege of making brick on the land, and having come to the conclusion on this point, the referee awarded interests to the purchaser on such possible receipts from year to year, as damages.

The court rejected this rule of damages as being too speculative. The use of the land would, by the manufacture of clay into brick, amount to a consumption of it. But the clay had not been disturbed and would pass to the purchaser on the completion of the contract. The court held that the purchaser was entitled to be completely indemnified. The court further held that the general rule, which allows interest to the vendor, and to the purchaser the rents and profits, did not apply. And further, that the purchaser was entitled to be indemnified by any definite and certain mode which would ascertain the amount of it, and that such indemnity would be afforded to the purchaser by relieving him from the payment of interest. This case, Morrall v. Munn, 38 N. Y., 137, which cites several English decisions, I regard as being an authority, and as quite in point, and see Foster v. Deacon, 3 Madd R., 394.

This question, unaccompanied by the circumstances of the reception by the vendor of the rents and profits, has been frequently before the English courts of equity; and the general rule there may be stated to be that, when the contract is silent as to the payment of interest on the purchase money, the purchaser is not bound to pay interest unless the delay in completing the contract was occasioned by himself. Jones v. Mudd, 4 Russell 118; Munk v. Hutchinson, 1 Sim. and Stu. 122, DeVisme v. DeVisme, 1; McNaugh and Gordon, 336; Easdale v. Stevenson, 1 Sim. and Stu., 122. In England, where there is no general system of registry of deeds, it is an implied term of every contract of sale, that the vendor is bound to show title,
477 *and until he does so he is not entitled to claim the purchase money. Any avoidable delay in this respect on his part is considered as his fault, and until he puts an end to the delay, and offers to show title, interest does not run on the purchase money. The principle which governs here is general and necessarily, in all cases, must apply where the non-payment of the purchase money is directly attributable to the act of vendor, Hart v. Brand, 1; A. K. Marshall, (Ky.) 162, 119.

2. According to the offer of the defendant the price was to be $36,000, of which $10,000 was to be paid in cash, "balance in five equal notes, with six per cent. interest, of one, two, three, four and five years, secured by mortgage on the property." This offer having been accepted the time implied by law for the execution of the contract was the day of acceptance allowing a reasonable time for the preparation of the conveyance. Had these been executed, all the notes for the deferred payments would have matured and it would have become incumbent upon the plaintiff to bring all the purchase money into court. But the offer of performance on his part was refused by the defendant who, denying the making of the contract has continued to occupy the land, and constantly resisted the execution of the contract down to the present moment. He may well, then, be regarded as having wilfully and wrongfully rendered

it impossible to execute the contract according to its terms. It does not, therefore, become the defendant to complain; he might have executed the contract and thus have prevented a waste of time and he might at any moment in the process of this litigation, by an offer to perform the contract, have prevented further delay.

But the case being now in a court of equity, in which time is not regarded as of the essence of the contract, it is for the court, in the exercise of a sound legal discretion, to prescribe the conditions upon which the performance shall be enforced; and under the circumstances stated, the stipulation as to time having been waived by the defendant, I am of opinion that a contemporaneous performance of the contract by both parties, to the respective parts, must be enforced by the court. Hunter v. Daniel, 4 How., 434; Hart v. Brand, 1 A. R. Marsh, 162; Jones v. Mudd, 4 Russell, 118; Carrodus v. Sharp, 20 Beav., 56; DeVisme v. DeVisme, 1 McN. & G., 336; Easdale v. Stephenson, 1 Sim. & Stu., 122; Ruck v. Tallman, 1 Simons, 530.

Coffin & Mitchell, Attorneys for Plaintiff.

Hoadly, Simrall & Hosea, Attorneys for Defendant.

---

*CHATTEL MORTGAGE. 478

[Superior Court of Cincinnati, General Term, October, 1877.]

Tilden, Yaple and Force, JJ.

IGNATZ DROEGE v. A. IPSHARDING ET AL.

1. If the law of May 7, 1869, requiring the amount, etc., to be indorsed on a chattel mortgage, be not complied with, such mortgage is void as against creditors of the mortgagor and his assignee for the benefit of creditors, who may replevy the mortgaged property from the mortgagor if he has taken possession of it under the mortgage.
2. A chattel mortgage on goods which the mortgagor has at all times the power to sell, is void against creditors or the assignee of creditors.

ERROR.

YAPLE, J.

This a petition in error prosecuted here seeking the reversal of a judgment of this court rendered in special term in favor of the defendants in error, who were defendants in the action below, and against the plaintiff in error, who was plaintiff in the original action.

The suit was a replevin of a stock of goods in the plaintiff's store in the city of Cincinnati. The verdict of the jury was for the defendants; and for $2,061 in their favor against the plaintiff for the value of the stock of goods, the property having been delivered to the plaintiff by the sheriff under the order of replevin.

On September 28, 1874, A. Ipsharding made his negotiable note to Droege, payable ninety days after date, for $2,500; and Droege indorsed it to enable the father of Ipsharding to obtain that amount of money by the negotiation of the note, which he did, Droege and A. Ipsharding being accommodation parties merely.

To secure Droege, A. Ipsharding executed to him a chattel mort-

gage upon the goods in his store. The mortgage provided in effect, that it should become absolute if Ipsharding suffered the goods to be taken for creditors. The mortgage was at once filed as required by statute; but there was no indorsement, etc., upon it of the amount due, etc., as is required to make chattel mortgages valid as against creditors, by the statute, 66 O. L., 345. And the stock mortgaged was employed in trade, being constantly sold and supplied. The day after the note came due, and after Droege had arranged with the holder for its payment, which payment he afterwards made, Ipsharding assigned all his
479 *property, including the goods in this store, to F. J. Meyer for the benefit of his creditors; and Meyer had accepted the trust, and filed the deed of assignment in the probate court before Droege took possession of the goods under his mortgage. The assignee obtained the key of the store, and left a porter in charge. Droege, in the meantime, had sued out an order of replevin, and the sheriff came and replevied the goods, the porter giving up the key of the store.

The question presented for decision is, who had title to the goods, Droege or the assignee? We are clear that the assignee had such title and that the verdict and judgment were right.

The law of May 7, 1869, not having been complied with, the mortgage was void as against creditors, and also as against an assignee for the benefit of creditors.

Hanes v. Tiffany, 25 O. S., 549; Erwin v. Shuey, 8 O. S., 509, it was also void as against creditors, because, upon property which the mortgagor had the power, at all times, to sell. This has been so often and uniformly decided in this state as to require no citation of authorities.

The judgment will be affirmed with costs.

Judges Tilden and Force concur.

J. F. Baldwin, for Plaintiff in Error.

J. H. & C. Bates, for Defendants in Error.

TAX SALES.

[Superior Court of Cincinnati, General Term, October, 1877.]

MARIA PLANT v. JOHN MURPHY ET ALS.

Tilden, Yaple and Force, JJ.

1. Where perpetual leasehold property is taxed in the name of the lessee, and sold for taxes under sec. 43 III. of the statute, 2 S. & C., 1591, the purchaser only acquires such leasehold; and if such purchaser suffer the owner of the fee to re-possess himself of the property and put an end to the lease—the tax title being defective—and take no steps to recover the money paid by him, with interest, for more than ten years after yielding up the possession and lease, the claim for such money and interest is barred by the statute of limitations.
2. The recovery for taxes paid by such purchaser of such perpetual leasehold, subsequent to the purchase, is barred in such case in six years after payment and surrender of possession to the owner of the fee.

YAPLE, J.

This case comes before us on reservation from special term, the controversy being between the plaintiff and trustees of Lane Seminary on the one side, and the defendant, A. M. Johnston on the other.

*The trustees of Lane Seminary being the owners in fee simple 480
of lot 93, in Lane Seminary's subdivision of Walnut Hills, made a perpetual lease of the lot, that is, a lease for ninety-nine years, renewable forever, the lessee to pay the taxes to John Murphy. He failed to pay the taxes, and Johnston bought at tax sale, in January, 1852, fifty-one feet in depth of the lot, and paid all the taxes on the same up to and including December, 1865, leaving unpaid the half tax for 1865, due in June, 1866, since which time he has paid no taxes; and this suit was brought on December 30, 1876. The premises were placed upon the tax duplicate in the name of the lessee, Murphy, until the tax deed was made to Johnston, when his part was taxed in his name.

In November, 1865, the trustees of Lane Seminary executed a perpetual lease, similar to the Murphy lease, to one Gale, of the entire lot. The auditor at that time made a memorandum upon the tax duplicate of such change in title, and for the next year, 1866, taxed the lot in the name of Gale. Nobody paid such on the subsequently accruing taxes, and the trustees of Lane Seminary, in January, 1867, purchased in the lot at tax sale. Afterwards, they executed a perpetual lease of the lot, similar in terms to the former leases to the plaintiff, Maria Plant, and in which they covenanted against incumbrances and for quiet enjoyment. Maria Plant has sold and conveyed a part of the lot to Mary L. Hird, and is the owner and in possession of such leasehold estate of the residue of the lot; and Lane Seminary, as her warrantor, defends for her. She and the seminary seek to have her title quieted against any claim of Johnston's, the tax sale to him being admitted invalid as was the subsequent tax sale to Lane Seminary. He claims a lien upon the lot for the amount he paid at the tax sale in January, 1852, and for all the taxes since paid by him, that is, up to December, 1865, together with interest upon such amounts. The plaintiff, Maria Plant, and the defendant, the trustees of Lane Seminary, insist that Johnston's lien is barred by the statute of limitations, he having failed to attempt its enforcement for more than ten years after his last payment of taxes, and after Lane Seminary repossessed itself of the lot. The statute of 1 S. & C., pr. 103, sec. 32, provides: "Upon the sale of any land or town lot for delinquent taxes, the lien which *the state* has thereon for taxes *then* due shall be *transferred* to the *purchaser* at such sale; and if such sale should prove to be invalid on account of any irregularity in the proceedings of any officer having any duty to perform in relation thereto, the *purchaser* at such sale shall be entitled to receive *from the proprietor* of such land or lot, the amount of taxes, interest and penalty, legally due thereon, at the time of such sale, with interest thereon *from the time of payment thereof, and the amount of taxes paid 481
thereon by the purchaser subsequent to such sale, *such land or lot shall be bound for the payment thereof.*"

And in 2 S. & C., p. 1149, section (668) III., it is provided that, "any person having a lien on real estate may pay the taxes thereon in so far as the same are a lien upon such real estate, and the amount of taxes so paid shall, from the time of payment, operate as a lien upon such real estate, in preference of other liens, and the money so paid may also be recovered by action for money paid to his use against the person or persons legally liable for the payment of such tax."

And 2 S. & C., p. 1473, section 106, enacts, "In all cases where any claimant of any lands *heretofore* sold, or which may hereafter be sold for

the non-payment of taxes, under any law of the state, his heirs, or assigns shall recover by action *or otherwise* the land so sold as aforesaid for taxes, such *claimant*, his heirs or assigns, shall be liable to refund to the purchaser, his heirs or assigns, the amount of taxes and penalties due to the estate on the land when sold, together with all other taxes paid thereon by such purchaser, his heirs or assigns, up to the time of recovery, with interest, to be recovered by action, counter-claim or otherwise, as the case may require; and the same shall be required to be paid to the person or persons entitled thereto, before such person or persons shall be evicted or turned out of possession by any claimant recovering, by action, the land so sold for taxes."

In relation to perpetual leaseholds, the statute 2 S. & C., p. 1591, section (43) III, enacts, "That where lands or lots, liable to taxation, are held upon permanent lease, and with the improvements thereon, are taxed *in the name of the lessee*, if the same are supposed to become delinquent, and are brought to sale by the county auditor for the non-payment of the tax, interest and penalty due thereon, *such sale shall be confined to the right of the lessee in the premises, and the improvements thereon*, if the same shall be sufficient to meet the tax, interest and penalty so assessed and due; provided, that nothing herein contained shall be so construed as to require such lands or lots to be differently described on the duplicate, or advertised in any separate or distinct form, or in any other manner than other lands and lots under the provisions of existing laws."

In relation to the limitation of actions, the code, section 14, provides:

"Within six years * * * 'An action upon a liability, created by statute, other than a forfeiture or penalty.'"

For forfeiture or penalty, the right of action is limited to one year. Section 18, "An action *for relief* not hereinbefore provided for, can only be brought within ten years after the cause of action shall have accrued"

482 *It is clear that Johnston's right to recover these taxes, personally, against the trustees of Lane Seminary is barred by the statute of limitations, but the law is well settled that if a party have two remedies, one of which is barred by the statute of limitations, and the other not, he may maintain an action for his rights by means of the form of remedy not so barred, if all forms of remedy are so barred, then no action is maintainable, and where an action cannot be maintained, a defense cannot be.

It does not appear that Johnston was ever in possession under his tax purchase, and his tax deed did not give to him the legal possession. This possession was first created in Ohio by the act of May 7, 1869, 66 O. L., pp. 338, 339—nearly four years after Lane Seminary had leased to Gale, and more than two years after it had purchased at tax sale. Besides, Johnston's tax title was defective, and the tax sale to the seminary was not affected by the fact that the property was taxed in the name of Gale and not of Murphy or Johnston. "No sale of any land or town lot for delinquent taxes shall be considered invalid on account of its having been charged on the duplicate in any other name than that of the rightful owner, etc., 1 S. & C., p. 104, section 33.

Lane Seminary, the owner of the fee, then took control of the lot and leased it to Gale in November, 1865, more than eleven years before this suit was brought, and before Johnston, in any way, sought to en-

force his lien upon the lot for the taxes so paid by him up to December, 1865.

Johnston's liens in this case were created alone by statute, and the right of enforcement was also given by statute. He supposed Lane Seminary to possess itself of the property, and more than eleven years thereafter to elapse before seeking his remedy to enforce his liens, which enforcement would have been equitable relief. He seems clearly to be barred of all relief by the provisions of the code, the statutes relating to such liens not prescribing how long they shall exist after the original owner gets possession of the land without satisfying them, except that for the amount paid by him at his tax purchase in January, 1852, by which he obtained the lien of the state, against whom no statute of limitations runs, and which it transferred to him as fully as it held the same. For subsequent payments of the statute creates the lien to him personally. But it is usual where lands are granted upon perpetual leases, the lessee to pay the taxes, to place them upon the tax duplicate in the name of the lessee and not in the name of the owner of the fee; and where this is done, as it was in this case, it is only the leasehold estate that is sold at a sale for delinquent taxes, 2 S. & C., 1591. Johnston, then, only purchased the leasehold estate, not the fee, and his lien was upon such leasehold only. When the semi-
*nary forfeited it, as it did by leasing to Gale, the estate upon which 483
Johnston held his lien was forfeited, and it does not appear that the Gale lease was unauthorized. Although the facts are not stated, is is fair to infer that the seminary had the right to forfeit Murphy's lease, and did so without going into court, it not being claimed that anybody paid the seminary the required rent for the lot. It would seem, then, that the state's lien ended with the destruction of the estate upon which alone it was a lien. Taking the lien of the state for the taxes for which the lot was sold in January, 1852, can not help Johnston, for that lien perished with the thing upon which only the state had such lien.

Johnston has lost the lien the state had by his own act of negligence.

By submission upon an agreed statement of facts, and the admission of the pleadings, the demurrers are waived, and we find that the plaintiff is entitled to have her title quieted as against the claims of Johnston.

Judgment accordingly.

Judges Tilden and Force concur.

REFORMATION OF DEEDS.

[Superior Court of Cincinnati, General Term, October, 1877.]

†LUCINDA F. PIATT ET AL. v. DAVID SINTON.

Tilden, Yaple and Force, JJ.

P. and wife conveyed the wife's land in fee simple in 1844, knowing there was a question whether her title was a life estate or a fee simple, and after taking advice of their attorneys. The purchaser put up valuable improvements and died. His representatives, in 1866, conveyed to S. In 1871, P. and wife bring suit to have the deed corrected from a conveyance of a fee simple to a deed conveying an estate for Mrs. P.'s life, on the ground that she held only a life estate

†The judgment in this case was affirmed by the supreme court. See opinion, 37 O. S., 353.

and was induced by misrepresentations of the original purchaser to execute the deed in the form of a conveyance of a fee simple.

Held, Notice to S. of Mrs. P.'s claim that she had owned and could convey only a life estate, was not notice of a claim that she had been induced by misrepresentation to execute a conveyance of a fee simple.

S. was a *bona fide* purchaser for value without notice, and the right of plaintiffs to correct the deed, if they ever had such right, is barred by laches.

The question whether the estate held by Mrs. P. was in fact a life estate or a fee, will not be considered in this action.

FORCE, J.

William Piatt, father of the plaintiff, L. F. P., made his will 2d of March, 1832, which contained the following provisions: "I will and bequeath to Lucinda Frances Piatt, now at the school of Mrs. Ryland, in this place, all of my property of *every
484 description, whether real, personal or mixed"—except payment of debts and certain specific legacies—"and in case the aforesaid Lucinda Frances Piatt should die without leaving any legitimate heirs of her body, then I will and bequeath all my property of every description to," etc.

After the death of William, Lucinda married Jacob Piatt, her co-plaintiff. Children were born of this marriage in 1839, 1841 and subsequent years, and are now, or some of them, still living.

On the 5th of July, 1844, the plaintiffs conveyed a lot on Fourth street, in Cincinnati, being part of the property so devised, to John C. Wright, for $3,100. The deed is an ordinary warranty deed; conveying a fee simple. A few years before this sale the Piatts had negotiated a sale of the premises, which fell through because the purchaser was advised by counsel that Mrs. Piatt took by the will only a life estate. While the Piatts were negotiating with Wright, they obtained the written opinion of counsel that the will gave Mrs Piatt a fee simple estate. Immediately after the purchase, Wright removed the cheap building that was on the premises, and put up costly improvements.

Subsequently Wright died, and his representatives, in 1866, conveyed the premises to Sinton for $68,000

Jacob Piatt at this time setting up a claim that Wright acquired only an estate for the life of Mrs. Piatt, and upon her death the fee simple would rest in her children, Sinton brought suit against said children, to quiet his title, and recovered judgment against them.

The plaintiff then instituted the present action, averring that in 1844 they intended to convey to Wright only an estate for the life of Mrs. Piatt, that Wright, by his representatives, induced them to execute a deed conveying a fee simple; that the deed in that form was executed under a mistake, and praying that the deed be corrected. Sinton answered, denying all claim on the part of the plaintiffs, and further averring that he was a *bona fide* purchaser for value without notice. Court at special term, after hearing, found that the plaintiffs had no equity and dismissed their action. Petition is now brought to reverse that judgment.

The testimony shows that Sinton, before he completed his payments, was notified that the Piatts claimed that Wright acquired only an estate for the life of Mrs. Piatt, and that her children would take the fee after her death. But this notice was of no importance. William Piatt's will was recorded, and it was notice to Sinton what estate he obtained. The will determined whether that was a fee or a life estate.

There is no testimony at all to show that Sinton was notified that the deed to
485 Wright was induced by representations on his part, *fraudulent, either actually or constructively; or that the Piatts, or either of them, at the time of the execution of the deed, were under any mistake as to its purpose or its effect. Hence, he purchased without any notice of the equitable claim set up in this action. Indeed, it does not appear that this claim was ever advanced before the filing of the present action in 1869.

Further, the cause of action, if any ever existed, accrued long before the adoption of the civil code, and is therefore subject to the rule of laches in equity. It appears from the allegations and proof, that the cause of action, if any, accrued twenty-six years before suit was brought, and accrued before the title was subsequently conveyed without notice of the claim. Fox v. Reeder, 28 O. S. p. 181, is authority that such laches is sufficient to bar the action. And Piatt v. Smith, executor, 12 O. S. 561, holds that such laches will bar even a married woman.

The record in this case shows the wisdom of the rule as to laches and statutes of limitations. For the testimony of Jacob Piatt, compared with his declarations in 1866, and with writings that were in his possession at the time of the sale to Wright, shows how memory, especially memory biased by interest, fades and changes with the lapse of years.

But further, the testimony shows that there was no representation, no mistake at the time of the sale to Wright that would sustain the present action. It appears from the testimony of Jacob Piatt himself, that he and his wife knew there was a question whether his wife owned a fee simple or only a life estate, and so knowing, executed knowingly a deed which convey a fee simple, and did so, intending to convey all the estate they had.

Counsel have argued whether Mrs. Piatt in fact took by her father's will a fee simple or only a life estate. But that question is not at all concerned in the present litigation. Plaintiffs intended to convey all they had, and did so convey. They have no interest to obtain, now in an adjudication as to how much that was. That question belongs to litigation between Mrs. Piatt's children and the terre tenant.

We think the court in special term was right in finding that the plaintiffs have no equity, and in dismissing their bill.

Judgment affirmed.

Taylor & Hollister, for Plaintiffs in Error.

J. L. Baldwin, for Defendant in Error.

---

*CORPORATION—LOANS. 486

[Superior Court of Cincinnati, General Term, October, 1877.]

ANDES INSURANCE CO. v. MCCOY ET ALS.

Tilden, Yaple and Force, JJ.

1. The charter of a corporation specifying the parties to which the corporation may loan its money, names only certain classes of corporations. It is thereby prohibited from loaning to a partnership.
2. If such a prohibited loan should be made, the corporation cannot recover in an action, either on the security taken or for money loaned.

FORCE, J.

The plaintiff brought action for the recovery of money loaned. Judgment was rendered at special term for the defendants, and it is now sought to reverse that judgment.

The plaintiff alleges in its petition that the defendant and others, in May, 1871, applied for and received a pretended certificate of incorporation, purporting to be from the secretary of state, under the assumed name of Southwestern Transportation and Wharfboat company. That there was no law authorizing the organizing a corporation for the purposes specified in said pretended certificate, and that the defendants were co-partners, and were a partnership doing business under the firm name of Southwestern Transportation and Wharfboat Co.

That the defendants, under the said name and style, being in need of funds for carrying on their business, applied to the plaintiff, a corporation in the insurance business, for a loan of $16,000, who thereupon, "at the request of the defendants, then known as the firm of the Southwestern Transportation and Wharfboat company," loaned them $16,000 upon their promise to repay the same in twelve months, with interst.

That afterwards, defendants of proceeding in *quo warranto* were ousted of their pretended corporate powers for the reason that the fran-

chise to be a corporation was not conferred upon them by the laws of Ohio.

Plaintiff therefore avers further that the money so loaned and the contract so made, was in fact and in law made with them as a co-partnership, under their firm name.

Plaintiff further avers that proceedings in a certain action, a portion of the money so loaned was recovered by sale of the partnership property, and judgment is asked for $7,998, and interest, being the remainder.

The numerous defendants, in their separate answers, set up various defenses, but all agree in setting up the defense that the alleged loan sued on was beyond the corporate power of the plaintiff.

The act under which the plaintiff was incorporated specifies in detail the investments and loans which it is allowed to make. *It is
487 not allowed to loan to a partnership. The petition avers that the defendants were a partnership, were known to be a partnership, and the dealing with them was with them as a partnership. The transaction was a loan and a promise to repay. The transaction alleged as the cause of action was, therefore, beyond the corporative power of the plaintiff; it is excluded by statute from the transaction which the plaintiff is authorized to engage in. It was a transaction not simply unauthorized, but prohibited; and was, therefore, one which cannot give the plaintiff ground for an action.

It was strenuously urged by the plaintiff in argument, that when a corporation lends or advances money in a transaction not authorized by its charter, though no action can be maintained on the security taken for the loan, yet the money can be recovered back under the form of an action for money had and received. If that were law, the restraints upon corporate authority would be of little avail. But, in fact, the cases hold otherwise.

Where a loan had been made by a bank to one of its directors, such loan being prohibited by its charter, the high court of chancery of Maryland said: "If, then, a suit had been brought by the bank against Jones, or by Jones against the bank, upon this contract, it would, in my judgment, have been competent to either of the defendants under such circumstances to deny the validity of the contract as forbidden by the charter." Albert v. Savings Bank of Balt., 1 Md. Chy., p. 413.

In the same case, when taken to the court of appeals, the court said: "It cannot be denied that a loan to a director could not be recovered, the bank having no power to make it. Such loan, and any security taken for it, would be void." 2 Md., 171.

The court of errors of New York, said: "It is said that though the notes were void, being discounted in violation of the restraining act, yet the contract of loan is valid and the money may be collected of the borrower." This has been said in two cases only: in the Utica Ins. Co. v. Scott, 11 Johns., 1, and in the suit of the same plaintiff against Kipp, 8 Cowan, 20. If these cases were critically examined, it will be seen that the right of the plaintiffs in those cases to recover was placed upon the power given them by the charter to loan money. The Hudson Ins. Co. has no such power, and therefore, the contract of loan is void as well as the security, and for the same reason, viz.: the want of capacity to make such a contract either by parol or by taking a note." Beach v. The Fulton Bank, 3 Wend., 583.

In like manner the supreme court of Connecticut held, that if a corporation make an authorized loan, and take for it an unauthorized security, no action can be maintained by a special *count on the security, 488
while the money may be recovered on the common count for money had and received; while if the loan as well as the security is unauthorized, an action cannot be maintained either by a special count, or by the money counts. Philadelphia Loan Association v. Towner, 13 Conn., 249.

Where a transaction between a corporation and another party is one which the corporation is not authorized by its charter to engage in, either party may defend against a suit brought upon it on the ground that it is void. "The circumstance that a corporation has entered into a contract, does not estop it from denying its competency to do so in an action brought against it on such contract. If such were the case in reference to the corporation, the estoppel would apply equally to the other contracting party, and thus, in effect, limitations upon the powers of corporations would be of no avail." Penn., Del. & Md. Navigation Co. v. Dandridge, 8 Gill. & Johns., 248.

As is said by the supreme court of the United States in White Water Valley Canal Co. v. Valletta, 21 How., 425: "The objection that a contract is illegal and that no judgment can therefore be rendered upon it, is not allowed from any consideration of favor to those who allege it. The courts, from public considerations, refuse their aid to enforce objections which contravene the laws or policy of the state."

Without referring, therefore, to the other issues, we find that the plaintiff does not allege a cause of action which can be enforced by the court, and judgment for defendants is affirmed.

---

*HUSBAND AND WIFE—SURETY. 500

[Madison Common Pleas, January Term, 1878.]

†HERSHIZER, ADAMS & CO. v. ROBINSON FLORENCE.

A wife can sign a note as surety for her husband without intending to charge her separate estate.

COURTRIGHT, J.

This was an action to enforce a lien which was alleged by plaintiffs had been created by Mrs. Florence upon her separate property. The plaintiffs were lumber dealers in the city of Columbus, and had sold large quantities to one Edward Edwards, a contractor and builder. Edwards had constructed a dwelling house on the Florence lands when they were owned by Mr. and Mrs. Florence as tenants in common. Afterward an amicable partition of the lands was had, and the lands upon which the dwelling stood were assigned to Mrs. Florence. Afterwards, in the year 1867, Edwards, the contractor, being *indebted to the plaintiffs in the sum 501
of $600, and Florence to Edwards in that sum, it was arranged that Edwards' indebtedness should be canceled by plaintiffs taking notes for that sum from Mr. and Mrs. Florence. The notes, one joint, the other joint and several, were signed first by Mr. Florence, and then by Mrs. Florence. Plaintiffs claimed that Mrs. F. undertook to and did charge her separate estate for the payment of this indebtedness by her contract entered into at the time the notes were executed. The defendants claimed that Mrs. Florence merely signed the notes as surety for her husband, and denied any contract on her part by which she designed

†Judgment of the district court in favor of Mrs. Florence was reversed by the supreme court. See opinion, 39 O. S., 516.

or intended to or did charge her separate estate. Heard by the court, who found in favor of the defendants and entered a judgment in their favor. Notice of appeal by plaintiffs; bond of $200.

Woodruff & Stewart and *Col. Wm. P. Reid* for Plaintiff.

Lincoln, Harrison, Olds & Marsh for Defendants.

JUDGMENT—APPEAL.

[Madison Common Pleas, January Term, 1878.]

N. P. MIX v. JOHN CREGO.

A justice's judgment of dismissal, without prejudice to a new action, if rendered on a hearing on the merits and finding for defendant, is a final judgment, from which an appeal will lie.

COURTRIGHT, J.

The case was heard upon motion to dismiss the appeal which had been perfected in this case, for the reason that the justice of the peace had not rendered a final judgment from which an appeal would lie. It appeared from the transcript that a trial was had before the justice, and a finding for the defendant, and the action dismissed without prejudice to a new action. The court held that inasmuch as the judgment of dismissal was based upon a hearing of the merits of the case, it was a final judgment from which an appeal would lie.

Motion overruled.

Harrison & Marsh for the Motion.

George Lincoln, Contra.

RAILROAD—MAYOR'S JURISDICTION

[Madison Common Pleas, January Term, 1878.]

THE P. C & ST. L. RY. CO. v. STATE OF OHIO.

Where a statute imposes a penalty and provides for its recovery in a civil action before a justice, no jurisdiction over such complaint is thereby given to the mayor of a village.

COURTRIGHT J.

Heard on petition in error to the judgment of Mayor Lewis of the village of Jefferson. The proceedings before the mayor were on complaint of George Hann to recover a penalty against the railroad company, under the statute of 1867, for not stopping a passenger train, known as No. 23, at the station of West Jefferson on the 25th of May, 1865, as advertised. The cause was tried before a jury in the mayor's court, and verdict and judgment against the company were rendered in the sum
502 of $60 and costs of suit. Error was prosecuted to this court, and *a large number of errors assigned. The principal one relied upon was that the mayor had no jurisdiction of the subject matter of the action. The statute referred to provides that any railroad company

who shall violate its provisions shall forfeit and pay for each offence not more than $100, nor less than $25, to be recovered in a civil action, on complaint of any person before any justice of the peace of the county in which such violation shall occur. The court held that the legislature, by the act referred to, had provided the tribunal which should have and entertain jurisdiction of causes of action arising under this statute, that justices of the peace alone had jurisdiction, and that no jurisdiction was vested in the mayor, and for this reason the judgment was vacated and set aside.

McCloud & O'Donnell for the Railway Company.

Smith & Lewis for Defendant in Error.

---

*PARTITION—CONSTRUCTION OF WILL. 513

[Madison Common Pleas, January Term, 1878.]

SARAH E. PETERSON v. ELIZABETH BEACH ET AL.

Where S. devised his real estate to his children during their natural lives, and in the event of the death of any of his children to whom his real estate is devised for their lives respectively, without issue, living, then and in that case their share or shares are bequeathed to the children of all his children, and that event happening before the death of the testator:

Held, That the devise means, and is confined to his grandchildren, who were in existence at the date of the death of the testator, and not to after-born grandchildren.

COURTRIGHT, J.

This proceeding is one in partition, and involves the construction of a will, under and by virtue of which the parties claim title.

The late Peter Slaughter, of this county, died testate, and that portion of his will which passes under review provides as follows:

"I devise and bequeath all my messuages, lands and tenements, wheresoever situated, which I may die seized of and which I may own at my decease * * * to all my children who are now living * * * during their natural lives, respectively, as tenants in common, and after their decease to the children of all my said children who are now living * * * and in the event that any of my children, to whom my real estate is hereby devised for their lives respectively, should die without issue, living, I will and bequeath their share or shares *of my real 514
estate to the children of all my children who are now in being * * * My will is that said real estate be divided after my decease."

During the life of the testator, his son John and his daughter Adelaide died without issue. At the death of the testator there were living eleven of his children's children, or grandchildren, and at the time of the filing of the petition herein, there were twenty-five living, fourteen of whom were born since the death of the testator. The question now presented, and the only one raised by the pleadings, is: Shall partition be ordered among the eleven grandchildren who were in existence at the date of the death of the testator, or among the twenty-five who were living at the date of the filing of the petition herein. This question, as we have before stated, is solved by a construction of the provisions of the will above set forth.

It will be observed that the testator provides for a "division" of his real estate, and says upon that subject: "My will is that said real estate be divided after my decease," without saying in so many words *when* the division shall be made. Does it mean *immediately* after his decease, *upon* his decease, or at some future time? A testator is considered to intend the objects of his bounty to be ascertained at as early a period as possible. But this subject will be discussed hereafter. Then what was meant and intended by the testator when he bequeathed the share or shares of those of his children who should die without issue, living, "to the children of all my children?"

It has been held that a devise or bequest to the children of A., or of the testator, means, *prima facie*, the children *in existence at the testator's death*, provided there are such children then in existence. Viner v. Francis, 2 Cox, 190; Mann v. Thompson Kay, 638; Adams v. Spaulding, 12 Conn., 359; Miles v. Boyden, 3 Pick., 216; Worcester v. Worcester, 101 Mass., 132; Collin v. Collin, 1 Barb., ch. 636; Downing v. Marshall, 23 N. Y., 373; Grass' Estate, 10 Penn. State, 361; Ingram v. Girard, 1 Houst., 286; Benson v. Wright, 4 Md., ch. 279; Meares v. Meares, 4 Ind. L., 196; Myers v. Myers, 2 McCord, ch. 214; Wood v. McGuire, 15 Ga., 205; Walker v. Williamson, 25 Ga., 554; Smith v. Ashhurst, 34 Ala., 210.

Again, in Scott v. Harwood, 5 Mad., 332, the testator devised his real estate to "all and every the children of A.," with a gift over in case "the said children" should die under twenty-one, it was *held* that the devise was confined to children living at the death of the testator.

It has likewise been *held* that, if there is a bequest to the children of A., begotten and to be begotten, the words "to be begotten" show only that the testator contemplated children to be born after the date of his
515 will, and before his death. See *Butler v. Lowe, 10 Sim., 325; Sprackling, 2 Rainer, 1 Dick, 344; Storrs v. Benbow, 2 Myl. & K., 46. See also Mann v. Thompson, above cited. This doctrine has been disputed. See Dafflis v. Goldschmidt, 1 Mer., 417; Mogg v. Mogg, Ib., 654, and Gooch v. Gooch, 14 B., 565, and we are not prepared to say that the weight of authority would sustain this doctrine, although it seems to be the rule generally adopted.

The general rule in regard to all bequests is, that all who are embraced in the class at the time the bequest takes effect, will be allowed to take, and consequently, as an interest devised under a will, ordinarily takes effect at the death of the testator, unless some other time be appointed for it to come into operation, it will be so regarded, and the class ascertained as of that time. And thus it often occurs that by this natural and established construction, afterborn children are excluded, and many times, no doubt, when there may be probable ground to conjecture, that they might have been intended by the testator to share in his bequest. Thus it has been held in the American courts, that where no time is fixed for the payment of a legacy to the children of A., it is due at the death of the testator, and only the children then in existence, including a child in *ventre sa mere*, can take. See Redfield on Wills, 2 vol., pp. 329-30, and cases there cited.

After a careful consideration and examination of the question presented, I can arrive at but one conclusion, viz.: that at the decease of the testator, the grandchildren *then in existence* were entitled to the shares of the childless deceased children, and that the children of each surviving

child have only the shares of their parents, respectively, upon the decease of their parents. Many authorities other than those referred to above have been cited and considered, but I regard it unnecessary to further pursue the discussion of a question upon which I have arrived at a conclusion satisfactory to my own mind.

We, therefore, find that partition should be awarded only among the grandchildren of the testator, who were in existence at the time of his decease.

The decree will be entered accordingly.

---

*TELEGRAPH COMPANY—CONTRACT—DAMAGES. 529

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

Tilden, Yaple and Force, JJ.

HORD & CO. v. W. U. T. CO.

1. A telegraph company can not, by contract, relieve itself from liability for negligence of itself, agents or servants in the transmission and delivery of telegraphic messages.
2. Damages recoverable against such a company for such negligence must be the direct and natural result of such negligence.
3. Where a message is in the form of a mere statement of an act done by the sender, the telegraph company can not be held liable by him for damages he may have sustained in consequence of such act, being in violation of his powers as agent of the person to whom the dispatch is sought to be sent, and subjected him to liability to loss against which he could have protected himself if the dispatch had been properly sent, unless the circumstances were made known to the telegraph company.
4. If to save himself from such a loss, the sender of the message would have been obliged to go into the market and make a purchase upon precisely the same terms as the sale of which he advised his principal by the dispatch, he could, in no event, hold the telegraph company liable for the loss he afterwards sustained.

YAPLE, J.

This is a motion for a new trial reserved from special term for determination here. The plaintiff sued the defendant to recover $1,000 damages and $100 expenses incurred, for the failure of the defendant to transmit a telegraphic dispatch. The verdict of the jury awarded the plaintiff 43 cents, the cost paid for the dispatch and interest on the same, and the plaintiff moved for a new trial.

The plaintiff resided and did business in Cincinnati as a broker, buying and selling pork. He was employed as such by Coffin, Holmes & Landers, of Indianapolis, to sell pork for them in the Cincinnati market. The authority was given on February 22, 1873, to sell "100,000 clear rib sides at seven cents per pound, to be delivered at any time during the month of April, at the option of the *seller*." Hord & Co. sold to J. C. Crane & Co., of Indianapolis, 100,000 pounds of clear rib sides at seven cents a pound, to be delivered during *March*, at the *buyer's* option. By an arrangement between the plaintiff and Coffin, Holmes & Landers, the former was to wire them when he had effected a transaction for them, and if they objected they *were to wire him to that effect, but if they assented they would remain silent so far as telegraphing was 530

concerned. After such sale to Crane & Co., the plaintiff sent over the line of the defendant the following dispatch:

"FEBRUARY 22, 1873.

"*Coffin, Holmes & Landers, Indianapolis, Ind.:*

"Sold 100,000 clear rib, buyer March—seven—can sell more.

(Signed) "GEO. M. HORD & Co."

This dispatch failed to reach Coffin, Holmes & Landers at any time. It was delivered to Kingan & Co., at Indianapolis, another pork dealing firm, the envelope containing it being addressed to them. The same day Geo. M. Hord & Co. wrote to Coffin, Holmes & Landers, advising them of what had been done, and of sending the dispatch. The latter wrote and mailed an answer, disaffirming what had been done by Hord & Co., it not being in pursuance of authority, which answer failed to reach Hord & Co., who remained under the impression that the sale had been satisfied. When the time came for delivery Hord & Co. learned, for the first time, that Coffin, Holmes & Co. declined to make the contract their own. Such pork had then fallen one cent on the pound, and Hord & Co. paid Crane & Co. $1,000 damages for failure to comply with their contract, and expended $100 in and about ascertaining the facts in relation to the dispatch, its misdirection and non-delivery. The names of Kingan & Co. and Coffin, Holmes & Landers have no more similarity in telegraphic sound or characters than in speaking or writing them. It was shown at the trial that the only way the change could occur by accident in transmission would be by the wires crossing touching each other, in which case different messages on such crossed wires might get mixed, and one name or word dropped and another taken instead. The plaintiff claimed that if the message had been properly transmitted and the sale disaffirmed by the principals, he could have then gone into the market and purchased the same amount of pork at the same price, deliverable at the same time, at his option, which would have secured him against any loss by reason of this sale.

The printed part of the message contained the following:

"To guard against mistakes or delays the sender of a message should order it repeated, that is, telegraph back to the originating office for comparison. For this one-half the regular rate is charged in addition. And it is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any unrepeated message
531 *whether happening by *negligence* of its servants or otherwise, beyond the amount received for sending the same."

This message was not required to be repeated.

The court charged the jury in substance, that a telegraph company, in sending a message, could not make a binding stipulation exempting itself from the fraud or culpable negligence of itself or servants or agents. The court charged that "for the fraud, bad faith, or culpable negligence of the defendant, its agent, or employes, the defendant would be liable for the full amount of damages naturally arising therefrom, and not merely for the price paid for the transmission of the message, forty cents, in this case." The court then stated to the jury that fraud or bad faith on the part of the defendant was not claimed, but only culpable negligence; and then said the burden of proving such negligence was cast by law upon the plaintiff. In reference to such proof the jury were then told: "I charge

you, that as it is admitted by the defendant that the parties dispatched to Coffin, Holmes & Landers by the plaintiff, and Kingan & Co. had no more similarity in the sounds of their names in telegraphic signals than is pronounced in ordinary language, the substitution of Kingan & Co. for Coffin, Holmes & Landers by the agents or employes of the defendant is, *prima facie*, actionable negligence. If the dispatch, as written and delivered to the defendant by the plaintiff, contained the name of Coffin, Holmes & Landers, as the persons to whom it was addressed, in plain, legible writing, and did not contain the name of Kingan & Co. at all, but you should find, on the weight of the evidence, that the misdirection in the dispatch occurred in its transmission by the wires becoming crossed by *accident*, the names of Coffin, Holmes & Landers thereby being lost and that of Kingan & Co.—being also telegraphed at the time—substituted in the body of the dispatch, then following the latter names, produced the mistake, the plaintiff can only recover the price paid for sending the dispatch, with interest."

Exception was taken by the plaintiff to the use by the court of the term "culpable negligence," instead of "ordinary negligence;" but as the court stated what specific facts would amount to "actionable negligence," and which, from the record, it is plain, the jury did find, we deem it unnecessary to consider the question whether the criticism is just or not. As there was no evidence tending to prove that the plaintiff informed the telegrapher of the circumstances under, or the purposes for, which he sent the dispatch, the court told the jury, in substance, that plaintiff, though actionable negligence on the part of the defendant was proved, could only recover the price paid for sending the dispatch, with interest. And this, we think, is the only question of law involved in the case. The subject is very fully discussed in Field *on Damages, pp. 347–364, sections 410 to 431, and in the many cases there cited; and also in a late case, Beauprie v. P. & A. Tel. Co., 21 Minn., 155. 532

Our supreme court commission has just decided that, "In a case of failure to deliver a telegraphic message, the company is only liable for such damages as naturally flow from the breach of the contract, or such as may be fairly supposed to have been within the contemplation of the parties at the time the contract was made." Nat. Bk. of Barnesville v. West. Un. Tel. Co. (1878). This is in accordance with the entire current and weight of authority.

Now, what did the defendant know, or what could the dispatch advise it about the plaintiff's arrangement with Coffin, Holmes & Landers in relation to selling pork and their agreed method of assenting to, or disaffirming sales? What of the importance, in view of such arrangement, of the narration in the dispatch of a past fact, and of what the sender could do? And what of the fact that plaintiff could and would protect himself against loss, if his sale should be disaffirmed, by buying at once in the market just the amount of what he had so sold?

We think it will be found that in all similar cases in which substantial damages have been awarded, the dispatches delivered for transmission reasonably and fairly disclosed on their face the damages that would or might result from any specific mistake, or for the failure to transmit and deliver them. This dispatch disclosed nothing of any pecuniary interest to the plaintiff, or to those to whom it was addressed.

But how was the defendant to know that if the dispatch should be transmitted and delivered, Coffin & Co. would disaffirm the sale men-

tioned as beyond the authority of the plaintiff to act for them, and that the plaintiff would thereupon at once go into the market and buy the same amount of pork that he had sold upon the same terms so as to avoid making or losing anything by the sale he had made? If the plaintiff had not done that he would have come out loser to the precise amount he did, though the dispatch had been properly transmitted and delivered. He may have thought pork would rise in price, and have risked making a gain, on finding that the obligations of the contract were thrown upon him. What he would have done would have depended upon his judgment, expectations and desire, and his voluntary action. How, then, can it be said that the ultimate loss was the natural, direct and necessary consequence of the failure to transmit and deliver the dispatch?

The motion for a new trial will be overruled and judgment rendered upon the verdict.

Judges Tilden and Force, concur.

Taft & Sons and *Thos. B. Paxton*, for Plaintiff.

Collins & Herron, for Defendant.

---

533 *MARINE INSURANCE—FORFEITURE OF POLICY.

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

†WM. H. FRY v. FRANKLIN INS. CO.

Tilden, Yaple and Force, JJ.

Insurance for one year was effected by the owner through a broker upon a steamboat, and a note for the premium given by the insured, payable in six months after date. The policy provided that if the note should not be paid at maturity, the premium should be earned in full and collectible and the policy forfeited. After the note fell due, the insurer forwarded it to the broker for collection, claiming the forfeiture of the risk. The broker, who was an officer in another insurance company, having also a risk on the boat, replied, "Continue the policy in force and we (his company) will guarantee payment of the note." To this the insurer made no reply. The broker had taken a good note as collateral security for the payment of all premiums due for insurances on the boat, which note fell due, was paid in a few days thereafter, and the broker sent the insurer a check for the amount of the premium note. The boat was then lost. The insurer accepted such payment, but claimed a forfeiture.

Held, That the policy was forfeited before the loss, and that the insured could not recover.

By the petition in error in this case, it is sought to reverse the judgment of this court in special term, rendered in favor of the defendant in error, the defendant below, and against Fry, who was plaintiff below. The action was brought by the plaintiff to recover from the defendant $3,000, with interest from February 13, 1874, upon a policy of insurance in that sum, upon the steamboat of the plaintiff, called the "Henry Probasco," which was lost on the 21st of November, 1873, while, as it was alleged, the policy was in full force.

The answer denied that the policy was in full force at the time of the loss, and alleged that the same had previously become forfeited and void for non-payment of the premium. Also that the plaintiff failed to give notice of the loss as required by the policy. The reply made an issue as to each of the defenses. At the trial, on the conclusion of the plaintiff's evidence, the court directed the jury to find a verdict for the defendant upon the first defense, and submitted to the jury, the second, upon the testimony. The jury found the one issue for the defendant as directed,

† The judgment in this case was reversed by the supreme court. See opinion, 40 O. S., 108.

and the other for the plaintiff. Both parties excepted, and have filed a petition in error. The insurance was effected through E. E. Townley, secretary of the Eureka *Insurance company, who acted as broker, and placed in other companies, and took in his own, insurance upon the boat for $30,000, in all. The risk in question was for one year, beginning on April 10, 1873. The policy, among others, contained this provision or condition: "Also, in case the note or obligation given for the premium herefor be not paid at maturity, the full amount of premium shall be considered as then earned; and this policy shall thereupon become and remain void." 534

The premium note, which was for $330, was payable six months after date, April 10, 1873. It contained this language: "And in case this note be not paid at maturity, the full amount of premium shall be considered as earned, and the said policy becomes void, while the note remains overdue and unpaid.

On October 16, 1873, the Franklin Insurance company forwarded the note to Townley, secretary, with the following instructions:

"We inclose note St. Bt. Hy. Probasco and owners, due 13th, returned for non-payment. The policy is per contract now voided. Please attend to its collection at once. All insist on the company's complying to their contracts at or before maturity."

To this Townley replied the next day, October 17: "Yours to hand inclosing note Str. H. Probasco, for collection. Have notified the parties. Continue the policy in force and we will guaranty payment of the note." By "we" was meant the Eureka company. To this letter and request, the Franklin made no reply. It also appeared that shortly before the note fell due, Fry deposited with Townley a note or notes as collateral security for the security and ultimate payment of all the premium notes for the $30,000 insurance upon the boat, of which fact the Franklin was not advised, nor did it ever assent to taking such security and extending the time for the payment of the note due it. The collaterals were good and paid promptly to Townley at maturity, and he, on November 28, 1873, sent the Franklin his check for $334.20, the principal and interest due on the premium note; and the company collected and have retained the amount of such check. The boat had been previously lost, that is, on November 21, 1873. The Franklin company replied to Townley on December 4, 1873: "Yours of the 28th ult., covering check for $334.20, in payment of note of S. B. Hy. Probasco, due October 13th, received. We place check in bank without waiving any conditions of our policy."

This was, in substance, all the evidence bearing upon the first issue. Upon it, we have to say, that it in nowise tended to *prove Townley had authority to extend the time of payment of the note, but it proved the contrary. Nor do we think the court was bound to submit to the jury whether or not the time for payment was extended by the acceptance of the guaranty proposed by the Eureka company, through Townley. The instructions given Townley when the note was sent him for collection forbid extension, and the Franklin company had the right to stand upon such instructions; and they were not bound to *refuse* to assent to the extension upon receiving the proposed guaranty. To make that effective, they must have *assented*. There was no evidence that they did so; they had a right to treat the proposal with silence and stand upon the instructions previously given to Townley. Receiving payment after the loss was no evidence of extension; for the right to collect the note after due was given even if the policy should become forfeited for non-payment at maturity. The legal difference between the condition in the policy and the provision in the note, if any there be, it is not necessary to consider, as the payment did not take place until after the loss, and there being no evidence that the time for payment was extended by the Franklin company before the loss. 535

We think the verdict and judgment below in favor of the defendant should be affirmed.

The Franklin company's cross-petition in error, founded upon the verdict and judgment on the second issue, is not well founded, and we affirm the findings against the Franklin company, upon it.

Judgment affirmed.

Lincoln, Smith & Stevens, for Plaintiff in Error.

Mathews, Ramsey & Mathews, for Defendant in Error.

564 *WILLS—MOTION FOR NEW TRIAL.

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

†WM. J. HARKER v. A. H. SMITH, EXR.

Tilden, Yaple and Force. JJ.

A provision in a will as follows: "I hereby request and desire William J. Harker, who has attended to my books and accounts, to continue to take charge and keep the accounts of my estate for my executor and trustee, and in every way he can assist in the settlement of my estate so long as his services may be necessary, and for such services I allow him a salary of fifteen hundred dollars per year, to be paid to him by my executor in monthly payments," is a direct provision for the benefit of Harker. Neither the duration of the employment, nor the amount of compensation is at the pleasure of the executor; but so long as there is in fact a necessity for such services, and Harker has not misbehaved
565 *or proved incompetent, he is entitled to the employment and the compensation. The fact is a question to be settled, when disputed, by a jury.

2. Motion for new trial should be heard and disposed of before motion for judgment *non obstante veredicto.* When a party has by motion had a verdict set aside and new trial granted, it is not error to overrule his motion for judgment, notwithstanding the verdict.

ERROR to special term.

FORCE, J.

Plaintiff filed a petition setting forth three causes of action. The first states that John Bates, deceased, left a will, of which defendant is executor, and which contains the following provision:

"Item 13th. I hereby request and desire Wm. J. Harker, who has attended to my business, keeping my books and accounts, to continue to take charge and keep the accounts of my estate for my executor and trustee, and in every way he can to assist in the settlement of my estate, so long as his services may be necessary, and for such services I allow him a salary of fifteen hundred dollars per year, to be paid to him by my executor in monthly payments."

That he entered upon such service and continued therein, until the 18th of April, 1874, when defendant took possession of the books, and excluded plaintiff from them, and has ever since prevented his performing said services, though said services have all the time been necessary to the estate, and plaintiff has been at all times ready and willing, and offering to perform the same, therefore he claims compensation at the rate fixed by the will during the time he was excluded.

Defendant answers to the first cause of action, that plaintiff became negligent, overdrew his account, the business of the estate diminished, so that the assistance of the plaintiff became of little value; that the plaintiff was notified thereof, and that his salary must be reduced to a fair price, and that thereupon the plaintiff quit. Answer was filed also to the other two causes of action, and a counter-claim was filed. Plaintiff replied, denying all the allegations of the answer and counter-claim.

At the trial, the court charged: "That the 13th item of said will is not a request to the executor to employ the plaintiff, but is an appointment of Harker as trustee, to do the service specified, and that unless the necessity for his services had ceased, which the jury were to determine from the evidence, he could recover in this action the damages by him actually sustained, unless he was discharged for good and sufficient cause;" and refused to charge the jury that although they believe the plaintiff was wrongfully discharged, he could not recover against the defendant,
566 executor as such in this action; and also refused to *charge that the defendant as executor was the sole judge of the necessity for the plaintiff's services.

The jury brought in a verdict finding separately the amounts due to the plaintiff and the amount due defendant on the counter-claim. Defendant filed at the

†The judgment in this case was reversed by the district court. See opinion 9, Rec. 488. The judgment of the district court was affirmed by the supreme court. See opinion 41. O. S., 236.

same time two motions, one for a new trial, and one for judgment in his favor on the first and second causes of action in the petition, notwithstanding the verdict. The plaintiff thereupon dismissed his third cause of action; the court granted a new trial on the second cause of action, overruled the motion for new trial as to the rest of the action; overruled the motion for judgment *non obstante*, and rendered judgment for the defendant for the balance found in his favor by the jury on the first cause of action, and the counter-claim. It is claimed there is error in the instruction given, in the refusal to give the instructions asked, and in overruling the motion for judgment *non obstante*.

The questions presented involve a construction of the will of John Bates, and a ruling as to the practice upon motion for judgment *non obstante*.

The thirteenth clause of the will does not request the executor to employ Harker and pay him, and therefore does not present the ordinary case of construction of precatory words in a will. The will, reciting that Harker had long had charge of the books, accounts and business of the testator, declares, "I request Harker to continue to take charge of, etc., as long as his services may be necessary and for such services I allow him a salary of $1,500 per year." Here is a written recognition of long and valuable service already rendered by Harker, and in connection therewith, an appointment of Harker to an office with a fixed salary. The selection of Harker as an assistant is not left with the executor, nor is the beginning of Harker's services left to the executor's discretion. Nor is the executor given any authority in connection with the amount of the salary. The whole clause is a provision made by the testator for an old and faithful employe. It is a direct bounty from the testator to the recipient. The term of service, as fixed by the testator, is as long as the service shall be necessary. Who shall determine the fact of necessity? If the executor has arbitrary power to determine the employment, he could do so as well the first day he entered upon the discharge of his office, as later. If that were so, Harker, so long as he was employed, would be enjoying the bounty of the executor, not of the testator. But the testator did not request the executor to give employment to Harker. The testator himself gave employment and salary to Harker, as a legacy, and fixed the term of employment, not so long as the executor should like, nor so long as the executor should consider necessary, but as long as the services in fact shall be necessary. *The necessity which fixed the term to Harker's employment was, therefore, not the judgment of the executor, but was a fact *in pais*, which must, therefore, be ascertained by the verdict of a jury. The court was, therefore, right in refusing to charge that the executor was sole judge of the necessity, and in charging that the jury was to determine the question of necessity. 567

Since the executor could not determine the period of Harker's employment, so long as there was actual necessity for it, and Harker had not forfeited it by inefficiency or misconduct, Harker was not, in fact, discharged from his office by the executor locking up the books and keeping Harker out of the room. This was preventing Harker from doing the work which the jury found should be done, and which Harker was ready and offering to do. If the executor had jogged his elbow or spilled the ink, that would have been quite as effectual in preventing Harker from work, and as operative in discharging him from the office and trust which the testator himself conferred. Harker was not, in fact, deprived of his office, though prevented from performing its duties; and as he was not in the fault, he was not deprived of his right to the salary given him by the testator. Hence, the court was right in refusing to charge that the plaintiff, even if wrongfully discharged, could not recover against the defendant executor as such in this action.

As we have thus held that the first article in the petition set forth a good cause of action, it follows that the court was right in overruling the defendant's motion for judgment, notwithstanding the verdict, so far as it relates to the first article.

The second article of the petition presents a different question. The second article does not set forth a good cause of action; it is bad on general demurrer. But the defendant having filed at the same time a motion for new trial and a motion for judgment *non obstante*, the motion for new trial is in regular course heard first. And as the motion for new trial was granted as to the second article, the motion for judgment *non obstante* was, of course overruled, after a new trial was ordered at the defendant's instance.

If the defendant had filed no motion for new trial, or if his motion for new trial had been overruled as the second article also, he would have been entitled to his judgment on the pleadings. So, if the verdict had been in favor of the defendant (for under the code the rule is the same for defendant and plaintiff) on the second article, and he mistrusted that error had intervened at the trial, he might take judgment on the pleadings notwithstanding the verdict in his own favor, instead of

taking judgment on the verdict. But when the party against whom a verdict is rendered, moves successfully for a new trial, he has surrendered his right to a
568 judgment on the pleadings notwithstanding *the verdict; for as soon as the new trial is ordered, the other party has a right to ask leave to amend his pleading.

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

---

593 *EVIDENCE—PARTNER AND PARTNERSHIP.

[Hamilton Common Pleas.]

GEO. W. DEHAVEN ET AL., v. W. C. COUP.

1. Extraneous evidence will be received to establish a cotemporaneous oral agreement suspending the operation or taking effect of a written agreement, provided it be not in defeasance, or in contradiction of it.
2. A co-partner may in the firm name or in his own name release a claim for damages growing out of a libelous publication against the firm injurious to its trade or business

ON motion for new trial.

JOHNSTON, J.

The plaintiff sued for $50,000 damages for the publication of an alleged libelous advertisement in the Utica (N. Y.) *Observer*, May 28, 1875, of and concerning them and their business, as The American Racing Association or Hippodrome. P. T. Barnum, S. H. Hurd, Daniel Castello and Geo. B. Bonnell were joined as defendants, but Barnum and Castello never were served with summons, and when plaintiffs rested their case a dismissal was entered without prejudice as to Hurd and Bonnell.

The trial resulted in a verdict against Coup for $40,000.

A motion for a new trial was filed assigning a number of reasons therefor:

1. That the verdict is against the law.
2. That it is against the evidence, and other reasons.

The two named for the purposes of this motion will be considered. The answer disclosed the fact that notwithstanding there may have at various times during the month of May, 1875, been libelous articles published of the plaintiffs and their hippodrome, and counter libels published of defendants and their hippodrome; that the managers of these rival enterprises about June 4, 1875, met at Albany, N. Y., and executed and delivered mutual releases, settling all damages and claims of every kind growing out of said publications. The paper is short but comprehensive, was introduced in evidence by defendant, and is as follows:

"For and in consideration of the sum of one dollar, and of the settle-
594 ment this day effected, we have released and forever *discharged P. T. Barnum, W. C. Coup, the Barnum Exposition company, and their and each of their associates, agents and employes of and from any and all claims, damage, action or cause of action, and by these presents do hereby release and forever discharge the said Barnum-Coup Exposition company and their and each of their associates, agents and employes of and from any and all claim, damage, action or cause of action whatsoever, which against them we now have, which we or our successors, heirs or legal

representatives hereafter can have by reason of any matter or thing whatsoever, from the beginning of the world to the date of these presents."

"In witness whereof we have hereunto set our hands and seals this fourth day of June, 1875.

"[SEAL.] DEHAVEN & CO."

"[SEAL.] GEO. W. DEHAVEN."

"In the presence of W. J. FOSTER."

Plaintiffs substantially admit that such a meeting was had, that an agreement was made to settle all differences, but that defendants agreed not to publish any further libels of plaintiffs or subject them to any further annoyance; that defendants violated their promise, continuing thereafter to publish the same libelous article of them and their hippodrome, whereby, they claimed that a right of action on the previous libels revived.

When the answers and reply were filed this release was supposed to have been lost. To get rid of, and again to sustain, this formidable paper when it was offered in evidence on the trial, an exceedingly able discussion, lasting for days, ensued, covering about all the law appertaining to partnerships and corporations, as to the right of a partner or agent in the firm name or in his own name to release a claim for damages growing out of a libelous publication; also as to the effect of a delivery of such a release, whether the effect thereof could be controlled thereafter by a cotemporaneous parol agreement; also the effect of one partner secretly and in fraud of the rights of his co-partners executing on behalf of the firm a release of the kind offered in evidence, together with a number of collateral questions.

The conclusion then arrived at was, that this release was a complete bar to the action unless plaintiffs were able, as claimed by them, to show that the release was in fact delivered as an escrow to take effect only upon condition that defendant should thereafter cease the publication of all further libels of plaintiffs, and that defendant did thereafter, knowingly and in bad faith, continue such publication.

*Such a delivery was dependent upon parol testimony. The release upon its face is complete and perfect, and there is no provision in it other than that it was to take effect immediately upon its delivery. The testimony was, that it was at once delivered to Coup and the counterpart to DeHaven. The law seems to be well settled that a condition limiting the operation of a release to real estate *after delivery* to the grantee or his agent will not be sanctioned by proof that there was a cotemporaneous parol agreement to that effect. The law does not seem to be so well settled respecting other releases, where delivery is not essentially a part of the execution of the instrument to give it effect. 595

In many instances the delivery of the instrument to take effect as such depends upon the intentions of the parties. 7th Ohio, 418, Lloyd v. Giddings. In 13 O. S., 235, Zanesville R. R. v. Iliff, it was *held* that the mere delivery of manual possession of the deed was not necessarily a delivery of the deed. In 11 Meeson & Welsby, 146, Bowka v. Burdekin, Park B. said: "I take it to be now settled, though the law was otherwise in ancient times, as appears by Sheppard's Touchstone, that in order to constitute the delivery of a writing as an escrow it is not necessary it should be done by express words, but you are to look at all the facts attending the execution, to all that took place at the time, and to the result of the transaction; and therefore, though it is in form an abso-

lute delivery, if it can reasonably be inferred that it was delivered not to take effect as a deed till a certain condition was performed, it will nevertheless operate as an escrow." And again in 103 English Common Law Reports, p. 368, Wallis v. Little: "The defendant pleaded that the agreement declared on was made subject to the condition that it should be null and void if Lord Sydney 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 to the defendant to prove by extraneous evidence this contemporaneous oral agreement—such oral agreement operating as a suspension of the written agreement, and not in defeasance of it," and several authorities are cited sustaining that decision. It would seem that the contract had been delivered and it concerned real estate.

In the case at bar opportunity was given plaintiffs to introduce testimony of this character, and I still think properly. The question now is, what was the character of such testimony? Did the plaintiffs establish an oral agrement made at the time of the written release, suspending the operation or taking effect thereof, and giving to plaintiffs a right of action for the original libel in the event of a publication thereof *after* the giving of the release? The libel was an advertisement appearing in some
596 *form in the several newspapers in the towns and cities at which plaintiffs gave exhibitions. Before the jury could reach the question of damages this release, perfect and complete on its face,—delivered—no charge of fraud in the procurement being made, had to be got out of the way. The whole case of the plaintiffs depended upon this. I have searched in vain for evidence to sustain the jury in their conclusion on this vital question. I am fully aware of the hesitancy with which courts interfere with the findings of a jury. Where, however, the issue of fact becomes so narrowed as here, the whole case hanging as by a single thread, and dependent upon the testimony of but a single witness, and that testimony embraced within the compass of eight or ten lines of an ordinary deposition, the danger of interfering with the promise of the jury is greatly diminished.

The only testimony relied on to sustain this oral agreement is that of W. J. Foster, an attorney of New York city, who negotiated the settlement and drew the releases between the parties, and attested the execution. He was upon the stand as a witness. He had before given his deposition. In that there was no cross-examination by plaintiffs. He made no allusion whatever to any agreement other than that contained in the release. When upon the stand on cross-examination the only testimony elicited bearing upon the vital question was in substance, that at or about the time the release was signed, Coup said: "George," addressing George DeHaven, "there may be some out-of-the-way places on your route where this publication is being made that I can not immediately have stopped. I will do the best I can, and use the telegraph wires liberally." DeHaven made no reply, and they then went down to the telegraph office and in the presence of DeHaven and witness, Foster, Coup wrote out a number of telegrams ordering the publication to be stopped, showing the dispatches to DeHaven, to which he made no objections or suggestions. This, in substance, is all the testimony of Foster on that point, or of any other person. Now it is claimed that the violation of the release and oral agreement occurred in the appearance of the libelous advertisement in a daily newspaper at Ogdenburg, N. Y.,

200 miles away, the next morning, June 5, 1875. The release was executed about five or six P. M., June 4th, at Albany. DeHaven's testimony was not taken nor was he a witness on the stand. He is one of the plaintiffs, and was the person who signed the release. His testimony might have been of great value to plaintiffs on this point. As it is, the jury had only the testimony of Foster to consider. It has been given. Can it be said that it is of that force, character and clearness that it is sufficient to sweep away a release duly executed under seal? It *lacks not only clearness and positiveness, but also conclusiveness. 597
It does not appear that the minds of Coup and DeHaven ever met at all upon a proposition to suspend the taking effect of the release for a moment.

It may be that plaintiffs will be able hereafter to strengthen this weak link in the chain of testimony. It is too weak now to bear up this verdict. I announce this conclusion with some reluctance, for the plaintiffs but for this release, undoubtedly had a good cause of action. It would seem that the course pursued against plaintiffs by defendants, Barnum and his staff (as he terms them), completely broke up the legitimate enterprise of plaintiffs, scattering to the four winds a property valued at over $100,000, and precipitating into bankruptcy all of the proprietors and other parties who had dealt with them, relying largely upon their success.

The verdict is set aside and a new trial granted.

The costs of the term first to be paid by defendant, Coup.

Jno. F. Follett and E. S. Throop, for Motion.

Logan & Randall and T. F. Shay, Contra.

---

*WILL. 641

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

†MARY F. B. ELDER v. RHODA ANN TAYLOR.

Tilden, Yaple and Force, JJ.

YAPLE, J.

This case comes before us by reservation upon the pleadings and the evidence.

The late P. N. Taylor made the following will:

"Cincinnati, September 6, 1862.

"In case of any accident with me, I give all my property and money to my wife, Rhoda Ann Taylor. P. N. TAYLOR.

"With this proviso, that my wife provide for my adopted daughter, Mary Frances Boyle Taylor, adopted in the month of February following, being in the year eighteen hundred and sixty-three. Dated this day, November 25, 1873.

"P. N. TAYLOR.
(His X mark.)

"Signed in the presence of these witnesses:
DANIEL W. MOORE,
WM. CHEESEMAN,
CAROLINE M. REED,
M. A. CHEESEMAN."

† Another decision by the same court, in this case, is found 6 Rec. 73. Judgment of the superior court was reversed by the supreme court. See opinion 39, O. S., 535.

Taylor died in a day or two after he executed the above proviso, which by its execution and witnessing made the instrument a will.

His widow, the defendant, elected in the probate court to take under the will.

Mr. Taylor left the following estate, constituting, we presume, the bulk of his
642 fortune: One note, good, $1,200.00; another *$823.77; money, $3,400.00; $1,800.00, unpaid purchase money of real estate sold by him; one lot in Cincinnati, appraised at $4,000.00; another at $6,000.00, the homestead; and a lot in Covington, Ky., appraised at $2,500.00.

The plaintiff lived with Mrs. Taylor and was provided for until her marriage, and to that time the parties have no difference.

After plaintiff's marriage, she demanded that Mrs. Taylor should make her a reasonable and adequate provision out of the estate. Mrs. Taylor thought that the will only required her to provide for the plaintiff while she was single and remained a member of the family. The plaintiff, on the contrary, claimed that the testator gave her for life a fair and reasonable provision out of his estate, to be determined by the value of such estate, her and Mrs. Taylor's circumstances in life, and, in view of the fact that Mr. and Mrs. Taylor had no child or children, and that they had adopted her, in fact, though not according to the statute, as their daughter. She demanded of Mrs. Taylor as trustee under the will. This Mrs. Taylor refused to give her, insisting, that, when she married and left the family, she was not entitled to anything under the will.

The plaintiff sued, and the defendant demurred to the petition. This court in general term held that the provision was for the life of the plaintiff; that Mrs. Taylor was a trustee and required to furnish to the plaintiff out of the estate such provision, and that, if she refused to do so on demand, the plaintiff had the right to invoke the aid of a court of equity to enforce what Mrs. Taylor as trustee under the will ought to have done. The case was then remanded to special term to take testimony, as the language of the will had to be construed by the circumstances surrounding the testator in order to arrive at the true interpretation of the will. We may say that the testimony strengthens the claim of the plaintiff. The testator, it is true, said, when he asked the proviso to be written, that he left his wife to make the provision. This, we hold, required her to make one fair and reasonable under all the circumstances, as we held that the will created a trust in favor of the plaintiff and constituted Mrs. Taylor the trustee. Upon her refusal to do anything after the plaintiff's marriage, the right of the plaintiff to invoke the aid of a court of equity to decree what the defendant ought to have done, we think, became complete.

The opinion of the court upon the demurrer, pronounced by our brother judge, Tilden, is attached to the brief of the plaintiff, and it relieves us of the necessity of again fully reasoning out the case upon principle and authority as we adopt it.

We hold that the plaintiff is entitled to a judgment in accordance with the opin-
643 ion and directions of our previous decision; *and the case will be referred to a master, to report what such reasonable provision shall be.

Judges Tilden and Force concur.

J. S. Connor, for Plaintiff.

C. K. Shunk, for Defendant.

---

681 *SALES BY COMMISSION MERCHANT.

[Hamilton District Court, April Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

†NEWHALL, GALE &. CO. v. LANGDON & SON.

Plaintiffs were the owners of one hundred barrels of flour received by railroad and stored in the depot of the railroad company, snbject to their order. They contracted to sell at an agreed price to defendants fifty of the one hundred barrels, and gave them an order upon the railroad company therefor. Plaintiffs afterward sold to two other parties twenty-five barrels each. Defendants presented their order to the railroad company, and hauled away seventeen

†The judgment in this case was reversed by the supreme court. See opinion, 39 O. S., 87,

barrels, the railroad company retaining the order and noting on its back the number of barrels delivered. The other purchasers hauled away each his twenty-five barrels, leaving thirty-three barrels, the number necessary to complete the purchase of the defendants. Before the residue was hauled away, the depot was burned and the flour destroyed. The custom of merchants, *with reference which to the parties dealt, was that, where a portion was 682
sold out of a lot of goods of the same kind at a railroad depot, the vendor gave to the vendee an order upon the railroad company, who presented the order, selected the goods and hauled them away. *Held:* That in this case, in order to complete the sale, it was necessary that the purchaser should select the flour and appropriate it to the contract, and, this not having been done, except as to the seventeen barrels, the property in the remainder did not pass to the defendants.

BURNET, J.

This case is a petition in error to reverse a judgment of the common pleas. Newhall, Gale & Co. had consigned to them by the Dayton Short Line Railroad Company one hundred barrels of flour in August, 1876, all of one brand and of one quality.

On the arrival of the flour at the depot of the railroad company they were notified of the fact, and thereupon paid the freight and gave the company a receipt, acknowledging the delivery of the flour. The railroad company then removed the flour into a location or compartment by itself, where it remained stored. On the afternoon of the 28th of August, the plaintiffs contracted to sell to the defendants at an agreed price fifty barrels, and gave them an order on the railroad company for that amount. Afterward, on the same day, they contracted to sell to one Smith twenty-five barrels of the same lot of flour, and on the morning of the 29th contracted to sell another twenty-five barrels to one Sweeny, which closed out the lot. On that afternoon the defendants sent their drayman to the depot with the order, which was delivered to the agent of the railroad company, and the drayman then proceeded to load upon his drays a portion of the one hundred barrels of flour, taking away seventeen barrels. The agent of the railroad company retained the order, and upon the loading of the seventeen barrels noted upon the back the delivery of the seventeen barrels. Subsequently, during the same afternoon, Smith and Sweeny hauled away all the flour they were entitled to under their respective orders.

The drayman did not see, nor did any of the defendants or their agents, the residue of the flour. The defendants at this time were not aware of the sale made by the plaintiffs of any of the residue of the flour, nor that any other barrels of flour had been hauled away by Smith and Sweeny. During that night the depot was burnt down, and the flour was entirely destroyed. The defendants subsequently paid to the plaintiffs the price of the seventeen barrels of flour hauled away, the money being received without prejudice to the rights of the parties as to the ownership or loss of the other thirty-three barrels

The error is predicated in this court upon the finding of the court of common pleas.

*The finding of the court of common pleas was that the flour was all of 683
the same quality and brand, and that the remaining thirty-three barrels would have filled the contract. The question now is, on whom does the loss fall, or, in other words, to whom did the flour belong at the time it was destroyed? The court below found the property in the flour remained in the plaintiffs, and that the loss would be theirs, and rendered judgment for the defendants with costs. The finding of the court also showed that the usage on which merchants dealt was this, that when articles were consigned to commission merchants (these plaintiffs being commission merchants) by rail, and reached the destined depot of the railroad company, the latter informed the commission merchants of the fact of the arrival, and that thereupon the freight was paid and a receipt given to the company acknowledging the delivery of the goods to the consignee, and that the company then put the goods shipped into a location or compartment, subject to the order of the commission merchants; and that, when sales were made of a portion of the goods (as in this case), the order was drawn by the commission merchants on the railroad company for the delivery, the purchaser to haul it away by his own agents or draymen, and that this order was delivered by the drayman of the purchaser to the railroad company's agent, who retained it and took receipts for the property as it was delivered to the purchaser. The court also found that the parties knew of this custom and dealt with reference to it.

Now, at the time of the contract to sell this flour there was not a completed sale. There remained something more to be done. It was not a sale of the entire lot of flour, but a sale of fifty barrels, to be selected from a larger quantity, and the question that is to determine the case is whose duty it was to make a selection and appropriate the particular flour to the fulfillment of this contract. When the order was given, the flour was in the possession of the railroad company, which had ceased to be a common carrier, but was bailee, nevertheless, of the plaintiffs as their warehouseman, who was, therefore, acting in his possession and control and subsequent delivery as agent of the plaintiffs.

It was claimed on behalf of the plaintiffs that by the subsequent orders given by them to Smith and Sweeny for twenty-five barrels each, which, after deducting fifty barrels sold to the defendants, would exhaust the entire lot—these subsequent orders having been presented to the railroad company and the fifty barrels hauled away. The plaintiffs had set apart for the defendants the only remaining barrels of flour, which, according to the finding of the court, were such flour as had been
684 sold *and such as would fill precisely the contract between the parties.

If the act to be done to complete the sale was to be done by the plaintiffs, this claim would be correct, for whether the plaintiffs, by their own direct act or the act of the parties to whom they had sold, had made the separation, and so determined the selection and appropriation, would make no difference in law. The parties to whom they had sold would be regarded as their agents in making the selection. But the determining act to be done was to be an act of the purchasers, and not an act of the vendors. The vendors were the owners of the lot of flour in the hands of their warehouseman. They gave an order to the vendees for a portion of that lot, the usage being incorporated into the agreement of the parties that the vendees were to haul away the the fifty barrels sold to them. The first act, therefore, for the selection and appropriation under that contract was to be the act of the defendants, the vendees. All the circumstances attending the transaction and involved in the custom of dealing accord with this rule.

The flour was kept stored by the railroad company, to be delivered in accordance with the custom. The order for the fifty barrels was presented by the defendants to the agent of the company, who kept it, but who, as the flour was loaded on the drays of the defendants, noted on the back of the order at the first delivery the number of barrels that had been selected and appropriated to the contract, the usage being that, as successive drafts should be made from the lot, successive receipts should be given for the amount thus taken. The selection was with the defendants. The rule of law, with a case stated in illustration of it, is laid down in Benjamin on Sales, section 359. That case is paralled to the case at bar, in which the plaintiffs contracted to sell to the defendants fifty barrels out of the lot of one hundred barrels which were located in a compartment of the railroad company. The defendants presented their order to the agent of the company, who recognized it and their authority to select the barrels and haul them away. They selected seventeen barrels and hauled them away, and that is noted on back of the order, and any subsequent removals from the lot would be noted in the same way, or receipts given, which would be equivalent. Having selected seventeen barrels, there was only that quantity appropriated to this contract, and these were paid for.

Judgment affirmed.

Matthews & Ramsey, for Plaintiffs in Error.

Snow & Kumler, for Defendants.

*RAILROADS—NEGLIGENCE—DAMAGES. 685

[Hamilton District Court, April Term, 1878.]

†SYLVESTER RUFFNER v. THE C., H. & D. R. R. CO.

Avery, Burnet, Cox, Johnston and Longworth, JJ.

In a Suit for Injury, the Proof of Negligence must be Affirmative.

1. In an action to recover damages to plaintiff's cattle caused by the negligent acts of the officers and servants of a railroad company the burden is upon the plaintiff to show a want of ordinary care on the part of such persons, and this want of ordinary care must be proved affirmatively.
2. When evidence has been adduced tending to make out the plaintiff's case, the sufficiency of such evidence is to be left to the jury; but when the plaintiff fails to introduce evidence tending to prove all the facts essential to show a right to recover, the court may properly, upon motion—the plaintiff having rested—arrest the case from the consideration of the jury and direct the jury to bring in a verdict for defendant. It is not a sufficient objection to such action on the part of the court, that the plaintiff had introduced testimony to prove one or more material facts when it appears that such facts *standing alone* would not make out a right to recover.

ERROR to the court of common pleas.

LONGWORTH, J.

The plaintiff brought suit against the railroad company, alleging that he was the owner of two thoroughbred cows, which, without his fault, and by negligence of the railroad company, were killed, and he asks damages. The railroad company denied generally the averments of the petition. Evidence was introduced to show that the plaintiff not having upon his own land sufficient pasture, rented pasturage from another party, who owned land on the west side of the railroad track; that in September, 1875, the dry grass along the line of the railroad caught fire, and burned the fence dividing the field from the railroad; that the cattle strayed through the open space on the railroad track, where they were killed by a passing train. It was admitted that there was no negligence upon the part of the company running the train. There was evidence tending to show the fire had occurred from sparks emitted from the engine, and the plaintiff having rested his case, on motion of the defendant, the court directed the jury to bring in a verdict for the defendant and overruled a motion for a new trial.

*Where there is evidence tending to make out a case, the weight of that evidence is to be left to the jury; but it is also well settled that where there 686
is not evidence which, if true, would tend to make out the claim, a motion to arrest the case from the jury is properly granted. The question is, did this evidence tend to make out the claim of the plaintiff? It is a well established rule in this state, that to make out a case for the recovery of damages on the ground of the negligent act of another person, the plaintiff must show that the act was directly caused by the negligence complained of and that he himself was free from contributing to the injury. Whatever may be said of the reasonableness of the rule which requires a party to prove a negative, the law is well settled.

In this case it was proved there was a fire, and, conceding that the fire was caused by a spark from the defendant's engine, does it follow that this is negligence? If it were an accident, the defendants are not liable. It must be shown affirmatively that they are guilty of negligence; in other words, that they failed to exercise the care that should be expected from ordinarily prudent persons under the circumstances. It has been held in some states in cases of this kind, that the plaintiff, after introducing testimony tending to show the fact, may rest his case; but an examination of these cases shows that in all these states there are statutory provisions as to the conditions of the charter of the railroad company, making it responsible for such injuries, or at least that they be required to prove it was an accident, and that they exercised all proper care. In Ohio it has been decided

†The judgment in this case was affirmed by the supreme court. See opinion, 34 O. S., 96.

over and over again that it must be shown affirmatively there was negligence. We do not think the mere fact that the spark caused the fire had any tendency to show affirmatively that the servants of the company were not exercising ordinary care. Again, it is a serious question whether the injury was directly caused by the spark. The law never goes beyond the first cause. It is the stern requirement of the law that the injury must be the direct and not remote result of the negligence. In this case if we suppose the fire was caused by negligence, though it burned the fence, it did not destroy the cattle. The fence being destroyed the cattle strayed on the turnpike, where they were killed, and it was admitted there was no negligence in the killing of the cattle. This seems a remote result and separated from the original accident by a long chain of causation.

Judgment affirmed.

Stimmel & Davis, for Plaintiff.

Matthews & Ramsey, Contra.

---

687 *APPEALS—ASSESSMENTS.

[Hamilton District Court, April Term, 1878.]

†THOMAS CLIFTON ET AL. v. CITY OF CINCINNATI.

Avery, Burnet, Cox, Johnston and Longworth, JJ.

1. An action for a contractor to collect an improvement assessment, certified to him in payment, asking a personal judgment and sale to pay the same, is not an appeal case.
2. The lien for the assessment for a street improvement certified to the contractor in payment made after land had been sold is prior to the lien of the purchase money mortgage.

STATEMENT.

This was a petition in error to reverse a judgment of the common pleas in an action instituted by the defendants in error to enforce an assessment for the improvement of Eighth street. The plaintiffs below asked a personal judgment against the owners of the property, Thomas Evans and Thomas Clifton, and also a sale of the real estate to pay the assessment in case the parties against whom the personal judgment was sought should fail to pay the same. Rees E. Price, who held a mortgage for the purchase money of the property, and others were also made defendants.

All the defendants made default, except Evans and Clifton, who joined issue with the plaintiffs, and denied their right to recover against them, also charging that the assessment was illegal and invalid, and denying that it was a lien upon the real estate. The case was submitted to the court, and there was a finding against Evans and Clifton, and, while the assessment was informal in some respects, it was found to be valid against the defendants for the assessment, and a personal judgment was rendered against them for the value of the work, being the amount fixed by the ordinance. A notice of appeal was given and the court was asked to fix the bond.

This the court refusing to do and to grant Evans, Clifton & Co. an appeal, they excepted, and thereupon the court allowed a second trial, of course under the statute then in force. The second trial was to a jury, who returned a special verdict against the defendants. In the meantime Rees E. Price died. An answer was filed in which it appeared he had assigned this mortgage to a Mrs. Harrison, and she also died since the suit was brought, and her executor, William Price, was made a party defendant. When the decree was entered on the special verdict the court found the assessment was the first and best lien upon the property. It is now claimed by Evans and Clifton and the executor of Mrs. Harrison that the court erred in not granting an appeal to this court, and also upon entering the second decree in finding that the mortgage security of Mrs. Harrison was postponed to the assessment, it being claimed, which is not denied, that the purchase money mortgage antedated the assessing ordinance some two years.

---

†Leave to file petition in error in this case was refused by the supreme court, as Evans v. Cincinnati, 3 B. 512. The case was again heard by the district court on motion to amend judgment. 3 B. 856.

*JOHNSTON, J.

688 As to the question whether the court erred in refusing an appeal, this court was not really called to pass upon that alleged error, inasmuch as it appeared on inspection of the record that the order refusing the appeal was made three years before the filing of the petition in error. But notwithstanding that fact, they had considered the question, and it was the opinion of the court that the case falls within the decision in 10 O. S. R., Ladd v. James, a case in which an appeal was not allowed, but the parties were granted a second trial, the decision being that where any question of fact was involved as to the right to recover a personal judgment for money, notwithstanding there might be a cause of action in favor of some of the defendants, equitable in its nature, that wherever such an issue of fact was joined that triable by jury, that settled the question in favor of the second trial, and in such case an appeal would be denied. Such is this case. The court was of opinion that the common pleas decided correctly in refusing an appeal, and that a second trial was properly allowed.

The only question is, whether the court erred in finding the purchase money mortgage of Rees E. Price, assigned to Mrs. Harrison, was subject to the lien for assessment. That brings up the question as to the nature of an assessment. The municipal authorities may levy an assessment for the improvement of a street. It is called a tax or assessment. The municipal code, statute 554, provides that under certain circumstances, where the tax or assessment against property is not paid, it is the right of the municipal authorities to place it upon the grand duplicate, and when that is done the same section provides it shall be collected as other taxes are collected.

An assessment, therefore, is in the nature of a tax. By a tax is ordinarily understood, a revenue raised by levy at a uniform rate upon the property of every citizen, for the purpose of keeping the governmental machine in motion. It is general in its operation—while an assessment is local—levied to defray the expense of a local improvement—an improvement, however, while it confers an individual benefit, is, at the same time, of public benefit. The citizen derives a benefit from the tax, in the protection he receives through the public authorities in the peaceable possession and enjoyment of his property, and in the protection of his person against violence and wrong. Both have their origin in the constitution, in that provision conferring the taxing power. The general assembly here derives its right to confer this power upon a corporation. Subject to the power of taxation and assessment for public purposes, every citizen holds his property. Such being the organic law of the state, the citizen can not by contract, can not by mortgage, or otherwise, *dispose of or encumber his property, so as to defeat this 689 paramount right of taxation. The absolute owner holding his property in this manner, his mortgagee certainly cannot occupy a more favorable position. Hence the court below very properly found that the mortgage lien was subordinate to the assessment lien.

Judgment affirmed.

J. A. Jordan, for Plaintiff in Error.

Wulsin & Worthington, Contra.

BANKS—DEPOSITS AND DEPOSITORS.

[Hamilton District Court, April Term, 1878.]

CHARLES JACOB, JR., v. FIRST NATIONAL BANK OF CINCINNATI.

Avery, Burnet, Cox, Johnston and Longworth, JJ.

Where a bank receives on deposit, as cash, sight drafts of a depositor, the implied condition is they shall be paid, and on default of payment, the right of the bank to recall the credit is superior to the right of the depositor to check against the fund.

AVERY, J.

Goettle Bros. gave their check to Jacob for $1,323, in payment for beef, and the next day the check was presented for payment through the clearing-house. When the check was drawn, Goettle Bros. had a balance to their credit of more than enough to pay the check, but this balance was made up of sight drafts which they had deposited on Charleston and New York, and which had been received as cash on deposit. When the check was presented, three of the drafts, to an amount much larger than the balance, having been protested, payment was refused.

The drafts had bills of lading attached, and it required all the balance on deposit, except $190, to make up the deficiency between the proceeds of the bills of lading and the face of the drafts. The $190 was afterwards applied to other drafts of the same series which subsequently became due.

Jacob brought suit on the check against the bank, and there was a judgment against him in the court of common pleas, to reverse which he files this petition in error.

As between the payee and drawer, a check is an absolute appropriation of the fund, and on notice to the bank binds the fund. This is because of the common understanding between the bank and its depositors, that money deposited there is for the purpose of being drawn out by check. But when sight drafts of depositors are received as cash, there is an implied condition that they shall be paid, and on default of payment, the right of the bank to recall the credit is superior to the right of the depositor to check against the fund.

690 *Nor in the event of the bank resorting to bills of lading securing the drafts, would the holder of the check have the right to maintain an action against the bank for any balance that might be left, because a check is not in its nature an assignment of what ultimately may be due as between the bank and its depositor, but is confined to a particular fund.

Where there is no such fund on which, as against the bank, the depositor would have the right to draw, there can not be any privity between the holder of the check and the bank, enabling him to maintain an action against the bank.

Judgment affirmed.

Lincoln, Smith & Stephens, for the Bank.

Forest, Cramer & Mayer, Contra.

COMMON CARRIER—DAMAGES.

[Hamilton District Court, April Term, 1878.]

†J. H. DEVEREAUX, RECEIVER, v. W. P. BUCKLEY ET AL.

Avery, Burnet, Cox, Johnston and Longworth, JJ.

Fluctuations in the New York Egg Market.

If a common carrier is chargeable with knowledge that the article carried is intended for market, and unreasonably delays its delivery, and there is a depreciation in the market value of the article at the place of consignment, between the time it ought to have been delivered and the time it was in fact delivered, such depreciation will, ordinarily, constitute the measure of damages.

Cox, J.

Petition in error to reverse a judgment of the court of common pleas rendered for the plaintiff (Buckley) in the court below. The suit was brought to recover damages for the non-delivery in the city of New York of 2,195 dozen of eggs. It was claimed by the plaintiff that the eggs, by the contract with the A. & G. W R. R. Co., were to have been delivered in New York on April 7, 1875, but that, by the negligence of the carrier in permitting them to be delayed on the road, they did not reach New York until the 14th of April. Testimony was introduced to show that on April 7th eggs were worth 32 cents per dozen, and that when they were delivered the price had fallen to 20 cents, making a difference of 12 cents per dozen, for which difference plaintiff claimed defendant was liable.

The court thought the true rule was that the railroad company, not having complied with their contract by negligence, was responsible for the value of the eggs at the time they should have been delivered by contract in New York. The jury, on the trial below, had found the value at an intermediate time. The value ran up to 35 cents on the 12th, and the jury based their calculation on that value, making their verdict for $363.02, being an amount of $72.39 greater than the plaintiff was entitled to. Upon remitting this amount the judgment would be affirmed

Durbin Ward, for Plaintiff in Error.

W. E. Jones, Contra.

---

*ELECTIONS AND ELECTORS. 694

[Ross Common Pleas, 1878]

‡FRANK J. ESKER V. JOHN A. MCCOY.

1. It is the duty of county canvassers to correct clerical errors apparent on the face of the returns made to the clerk of the court.
2. Where there is a confusion in the boundaries of two adjoining precincts, the general opinion of the neighborhood may be adopted by a voter in determining the precinct to which he belongs
3. A quarter section line gives a different description from a half section line, and the former in the description of a precinct includes different territory from the latter.
4. A person's intentions should, unless there is a mistake of fact, be construed by his acts. Voting in a precinct is the equivalent of a declaration of residence therein, and a party, with the knowledge of the facts, should not be heard to declare the contrary for the purpose of having the right to vote in a different precinct at a subsequent election.
5. The right to vote in a certain precinct requires the concurrence of two things—the *act of residing* in connection with *the intention* to do so. The latter must be free and voluntary. As a rule such is not the case of paupers in an infirmary, and, unless it is, they have no right to vote in the precinct where the infirmary is located.
6. The act of a court of record in admitting a foreign-born person to citizenship is conclusive on his right to vote, and it cannot be impeached so as to deprive him of that right by showing that the admission was, in fact, premature.
7. Residence within the meaning of the statute regulating elections, has reference to and means a fixed place of abode. This may be constructive where the absence is temporary and there is an intention to return. Where a canal boatman has a fixed place of abode in a precinct a temporary absence, however long,

†Judgment in this case was affirmed by the supreme court. See opinion 34 O. S. 16.
‡This case is cited in Dalton v. State, 43 O. S. 652, 657.

does not affect his right to vote; but without such place of abode, other than that on his boat, he acquires no right to vote in a ward by lying at the wharves of the canal therein when not engaged in boating.

8. Ordinarily the presumptions of law are in favor of the legality of a man's acts; but the right to vote cannot be presumed from the fact *of voting where the presumption from the latter fact is overthrown by countervailing circumstances.

695

9. Residence and age must both concur to make a valid voter. One does not depend on the other so as to be inferred from it.
10. Minors are as much within the reason of the law requiring registration as are adults.
11. Disfranchisement will be presumed to continue in the case of ex-convicts unless shown to have been removed by the production of a pardon from the governor.
12. A residence in the states includes a residence at some particular place therein; none is acquired in transit to such place. Until a person begins to acquire a residence at some particular place in the state, he does not begin to acquire one in the latter.
13. An offer to register will not dispense with the necessity therefor, though the hindrance arose from the wrongful act of the registering officers
14. The failure of the judges of election to require other sworn testimony as to the truth of the statements of one whose right to vote has been challenged will not affect the validity of his vote.
15. No judgment for costs can be rendered in favor of the contestant where he prevails. Such favor can only be rendered in favor of the contestee where he prevails.

MINSHALL, J.

This is a proceeding brought under the provisions of the election law, whereby Frank J. Esker contests the election of John A. McCoy to the office of county auditor, for which he and McCoy both were candidates at the last October election, claiming that he, the contestant, received a majority of all the legal votes cast for that office, and should be declared the person duly elected to the same for the present term. The returns of the county canvassers show that John A. McCoy received 3,811 votes, and that Frank J. Esker received 3,808.

The notice of contest covers nearly every conceivable ground and under it an immense volume of testimony has been taken by both sides relative to the points raised by the notice of contest, imposing on the court the laborious duty of considering and weighing it.

The ballots in several of the townships and wards have been recounted, but we find nothing in the recounts of the tickets in the several townships and wards that would authorize us to vary the returns as made by the judges of the several precincts in which recounts have been made. There are discrepancies varying the result for and against each candidate, but to no great extent; and, strange enough, what one gains in one place he loses in another. So as to the irregular tickets, whether the "Ben Esker" ticket as counted in the second ward for the contestant or not, and whether it should have been (and we are of opinion that it should) the "Frank J. Esker" ticket was not counted for him in Springfield. Nor can it be told with any certainty as to what disposition was made by the judges of *the tickets put in evidence from the fourth ward, the Benjamin Esker tickets and the two claimed to have been scratched as to the contestant. The ticket put in evidence from Concord having, as claimed, the name of Esker scratched and not counted by the judges, does not appear so now, but the judges were in a better situation to determine that fact than this court. The tickets put in from Liberty—one scratched for Esker and not counted for him, and one scratched for McCoy and not counted for

696

him—should have been counted for each. But the omission to do so does not vary the result.

But, in the matter of canvassing the returns of the judges and clerks of the different precincts, a clear error was committed by the county canvassers in the returns from Huntington township. By a clerical error the number of votes counted for McCoy, as shown by the tally sheet, was carried out 226, when it should have been 221, and this error was carried into the certificate of the judges and clerks as to the number of votes received by each candidate. We think this should be corrected *in limine*, and that each should start in the contest with the number of votes received and counted for him by the judges of election. That is to say: Esker, 3,808 votes; McCoy, 3,806 votes.

The ultimate result is to be determined by a consideration of the votes that are claimed to have been illegal and fraudulent, and that should not have been received and counted by the judges. As many of these present the same questions, they will be considered in classes.

As to those who are claimed to have voted in the wrong precinct:

1. Those who lived west of the old Portsmouth road, claimed to be the line between the east and west precincts of Scioto township, and voted in the east precinct. These all voted for Esker: Joseph P. Burns, John A. Grant, Henry Kelly, Columbus Lindsey—four.

2. Those who voted in the wrong precinct, but not from any mistake about the boundaries; voted for McCoy: James D. Shaw and Thomas J. Hammond.

3. William Scott, who, it is claimed, lives in West Springfield, and voted in East Springfield, voted for Esker.

4. Those who voted in Concord but are claimed to live in Twin; voted for McCoy: Alex. Given, James Given; for Esker: T. B. Lawhead.

Now, relative to the first class, it is shown by the act of legislature, passed March 8, 1845 (43 Laws L. & G., 293), that Scioto township was divided into two precincts, known as east and west. The act describes the line between these two precincts from Paint Creek bridge as follows: "Thence with *the old Portsmouth road to the south line of said township." 697
This is a fact fixed by law, and of which all persons are bound to take notice. It follows that, as the four persons just named as composing this class lived west of this road and voted in the east precinct for Esker, these votes must be deducted from the votes cast for him in that precinct as being illegal votes.

As to the fourth class, we think the case is different. It appears from the evidence that there has been a confusion in the boundaries on the line between Concord and Twin. The Givens and Lawhead acted in conformity to what is regarded as the better opinion as to the true line by the people of the vicinity, and, without accurate knowledge on the subject, it would be unreasonable to hold that they voted in the wrong township, because some are of the opinion that the establishment of the true line by a survey would throw these persons in Twin township, instead of Concord where they voted.

As to the case of William Scott, the proof does not show that he voted in the wrong precinct. Using the deceptive language "quarter section line" as we understand it, and he resides, without question, in the precinct where he voted; using it as meaning "the half section line," and still there is doubt as to the precinct to which he belongs. He voted

in the east precinct without objection, his vote having been refused in the west.

As to Shaw and Hammond, they stand on wholly different grounds. They voted in the wrong precints, but not from any want of certainty about the boundaries of the precincts in which they resided and should have voted. It is known that they voted in the wrong precincts; it is not known that the others did so.

Persons who voted at the October election in 1877 in certain precincts, who had voted elsewhere within the time required of them to gain a residence in the precinct where they voted, by registration or otherwise, are as follows: Those who voted for McCoy: Louis Richards, Joseph Miller—two; those who voted for Esker: Joseph Merkle, Jacob Briggs, Anthony Woodfall, Adam Hamm, William Mincer, Emanuel Jackson, John Spetnagle—seven.

In reference to all these persons we observe that it is not the policy of the law to permit a man to dispute his acts by his words, particularly when his acts are in the nature of declarations as to the state of his mind. In all these cases each was required to have resided in the precinct where he voted a certain length of time as a citizen, in order to exercise the right of franchise; but in this time each had voted elsewhere.

Now it is said that a man ought not to be prejudiced by an innocent
698 mistake. This is true as to questions of fact, but it is *not so as to questions of law. The mistake in each of these cases, if one at all, is shown to have been a mistake as to the law and not as to the fact. Every man is bound to know the law, and is presumed to act accordingly. A man might innocently, through mistake, vote in the wrong precinct, from a mistake as to the boundaries of the precinct in which he lives. Such a mistake would be one of fact and would not affect his right to vote in the proper precinct at a subsequent election. When each of the above persons voted elsewhere than in the precinct where he voted last election, the act of so voting was a declaration that he was a resident of the place where he then voted and not of the place where he exercised the right at the election in question We are clearly, then, of the opinion that all these were illegal votes for the candidates who received them.

THE PAUPER VOTE.

The following is the contested pauper vote: For McCoy: Wm. A. Johnson, Robinson Southmail, Andrew Wilson, Henry Thompson, Henry Bellows, Thomas Holland, Mathew Richards, Michæl Kerns, Michæl Tameny, James Laidlaw—ten; for Esker: Jacob Miller, John Hoffman, James Garnes—three.

To be entitled to exercise the right of franchise in a certain precinct requires the concurrence of two things—the act of residing in connection with the intention to do so. The act, as will elsewhere appear, may be constructive; the intention never. It must be a mental fact. The act of residing in a certain precinct without the present intention of making it a permanent abode, or the intention to do so without the act of residence, avails nothing upon the right to vote. The intention here referred to must be that of the person whose status as a voter is to be determined, and not that of some third person possessed of control over him. The residence of a child or of a wife may be fixed by that of the father or of the husband; but these are exceptions to the general rule on

the subject of domicile. The intention of a citizen to make a certain precinct his residence must be free and voluntary to confer on him the status of a voter in such precinct. Whether a pauper chooses or not to go to the infirmary, or to remain there after he has been sent, is not a matter of his own volition. This is determined by the official acts of the proper officers, and to their determination in the premises his will must conform, whether it coincides with his wishes or not—and in many cases it does not. So that a pauper has no volition whatever in connection with his act of residing at a county infirmary.

But it is suggested that this construction of the law will deprive this class of persons of the constitutional right to vote. *There is no right secured by the fundamental law so sacred but that 699
it may be regulated by statute. Indeed, without the vesting of such power in the legislature, the most valuable rights secured by the organic law, including the right of franchise, could not be preserved in their purity. But it is not true that this construction deprives any pauper of the right to vote in a sense different from any other restriction placed upon the exercise of the right to secure its purity. The pauper retains his residence in the township where he was settled at the time he became a township charge, if he leaves behind the elements a home, however humble, and may, if he chooses, there exercise the right.

[CCC] PERSONS IRREGULARLY NATURALIZED.

Those who voted for McCoy were Matthias Grohe, Charles Hummell, Ernest L. Lehman; for Esker, Henry Ulrich.

The irregularity in all these case consists in the permature admission of the parties to citizenship by the probate court of the county, the requisite time not having elapsed between the declaration of the intention to become a citizen and the taking out of the final papers or certificate of naturalization. The statute of the United States governs the subject. It provides that the act of admission to citizenship shall be by a court of record. Now, if the act of the court in admitting a foreigner to citizenship is not to be regarded as an adjudication, and so final in all collateral proceedings, it is difficult to perceive what the policy of the law is in requiring it to be the act of a court of record. It is in the nature of a proceeding *in rem*, and binding upon all until set aside by a proceeding for that purpose. The omission, however, of a proceeding for setting aside papers irregularly or fraudulently granted argues nothing, as it is the policy of the law in many instances to provide no means for reviewing the action of the court, as in a decree of divorce. The inconvenience which might result from setting aside admissions to citizenship might be far greater than any that could result from occasional frauds or mistakes. The law intrusts this important matter to the integrity of courts, and the trust has not been abused to any great extent. The punishment attached to false swearing and official misconduct furnishes a sufficient protection against frauds in the naturalization of persons. There is some difference of opinion on the subject, but the view here taken is more in accordance with reason and the weight of authority. Campbell v. Gordon, 6 Cranch., 176; Stark v. Ins. Co., 7 id., 420; Ritchie v. Putnam, 13 Wend., 524; Spat v. Spat, 4 Pet., 193; McCarthy v. Marsh, 5 N. Y., 273; Brigh, L. C., on Elec., 105, 106.

CANAL BOATMEN.

700 *The following are the names of those who voted at the October election for McCoy for auditor: Charles Barringer, Casper Hoffman, John Shuhamer, James Shaw, Michael Watson, Nicholas Hedrick (conceeded)—six. The following voted for Esker: Edward Lomax.

It is not claimed that either of these persons had an actual residence in the ward where they voted at the time of the election or at any previous time, other than upon boats owned or occupied by them, usually lying at the wharves of the canal in the ward, when off business, except Hoffman, Watson and Lomax. All considered this ward their home, and there returned their property for taxation.

Residence, within the meaning of the statute regarding elections, has reference to and means a fixed place of abode. This may be constructive, as in the case of persons who are absent on temporary business, intending to return when their temporary purpose has been accomplished. But, in such case, the place to which the return is to be made must be a fixed one, and in which he might have in fact resided but for the temporary absence. Neither of these, except the ones already named, ever resided in the third ward, where they voted, except as on their boats, when lying along the wharves of the canal in that ward.

The case of seamen is instanced as a parallel one, and so it may be, but no case is cited in which it was ever held that under similar circumstances a seaman ever retained his domicile, much less a right to vote. Domicile, in its general sense, and a residence for voting are not one and the same thing. The latter is regulated by statute, the former by general principles of domestic law, having regard to the descent and distribution of property and other subjects of a kindred nature.

The case of Thorndike v. City of Boston (1 Met., 245) arose from the resistance of the plaintiff to an assessment that had been made on his property by the city. The court held, under the circumstances of that case, that Thorndike had lost his domicile and was not liable to the assessment. The court, in discussing the question before it, refers to the case of seamen who are gone on long voyages without losing their domicile; but this is certainly said with reference to their possessing a domicile or home on land to which they may return. It may be but a simple hut, and yet sufficient to sustain the domicile of the voyager. But, whether this be true or not as to the general subject of domicile, we are convinced that it is so as to a voting residence. This can only be acquired and retained in connection with some settled place of local habitation by the voter. This grows out of the reason and policy of the law regulating the subjects
701 *of elections, the purity of which can only be preserved by the observance of certain restrictions requiring a definite settlement of the voter for a definite time in the precinct where he votes before exercising the right. So that all these, except Hoffman's, were illegal votes, and must be deducted from the aggregate vote of the candidate for whom they were cast respectively. Casper Hoffman, however, owned property in the third ward, and, occasionally, when not employed in his business, resided therein, and when absent in his employment on the canal, usually stored his furniture in the same. He comes within the category of seamen who have a permanent abode at the home port and retain their domicile of origin though absent for long periods, voyaging to different parts of the earth.

UNNATURALIZED.

Those claimed to be unnaturalized are Michael Tameny, Michael Kerns and James Laidlaw.

As to Laidlaw, it is admitted that he is not a citizen; but as to the other two, it is said it does not appear that they were naturalized, and that the presumption is that they were from the fact of having voted. In the absence of everything to the contrary, this is certainly true. The presumption of the law is in favor of the legality of a man's acts. But this presumption cannot prevail over facts that raise one of equal, if not stronger, force. Michael Tameny says he was naturalized at New Orleans in a few days after he landed, and Michael Kerns says he never took out but one set of papers. Now, in the case of Tameny, it is more reasonable to suppose that he is mistaken, that he has confounded some other act with that of having been naturalized, than that such a fraud on the law could have been perpetrated in a court of record. In the case of Kerns, he has fallen into and acted upon a very common error among foreign born citizens, that one set of papers is enough.

These cases differ from those where the papers are produced. In such cases there is no question about the act of the court; the papers prove themselves. But here we have to rely on secondary evidence, accompanied by facts that entirely destroy the value of the evidence and leave it in doubt whether either were ever naturalized. But both are also inmates of the infirmary, and their votes invalid on that ground, if not on this.

George Deveny and Charles McAdow voted for McCoy. It is claimed as to these that they were both minors when they came into the wards where they voted, and, therefore, not affected by the registration law. This is not sound. Residence and age must both concur to make a valid vote—one does not depend upon the other. Residence within the wards where they voted, for the requisite time, was as necessary in the case *of each, to entitle him to vote, as that each had attained to years of majority, and minors are as much within the reason of the law requiring registration as are adults. 702

Lewis Richards voted for McCoy, and Addison Richards voted for Esker. These two stand much on the same ground. The latter voted for Esker and the former for McCoy. Both, we think, should be counted out. We think Lewis should for the reason already given—that he voted in the fourth ward at the April election, 1877, under the same circumstances as to residence, when at the fall election he voted in the second ward.

Frank McGee and Robert P. Safford voted for McCoy. Willis May voted for Esker.

I have no doubt that, under the circumstances, Safford had a right to vote where he did. This was his home—his absence at West Point must be regarded as having been for a temporary purpose, the acquisition of a military education. McGee and May were both here as students of law, maintained by their fathers. Both should have voted at their homes. May did so; but McGee did not, and his vote should not be counted.

John L. Johnson voted in West Scioto township, his family living at the time in the first ward. He has lived for a time at the same place with his family, and while doing so voted in the first ward. There has been no separation between himself and wife. His case is governed by the eighth clause of the first section of the act of May 7, 1877.

Suffrines Clifton and Reuben F. Curry both voted for Esker, and the proof shows that they are both ex-convicts of the Ohio penitentiary. It is not denied that they were in the penitentiary under the sentence of a court upon conviction of crime had in the case of each of them; but it is claimed that it is not shown but that they had been pardoned by the governor of the state and thus returned to citizenship. But, we think, the disqualification will be presumed to continue until removed by the production of a pardon from the governor of the state, and that their vote must be deducted from the aggregate of vote for Esker as returned by the county canvassers.

James Smack voted for McCoy. He had no residence in the state prior to the time he settled in Twin township, on the 15th of October, 1876. It is claimed, however, that his residence in the state should be dated from the time he crossed the line, on the 8th of that month, as he came into the state with the intention of making it his residence. But a party can acquire no residence in a place while in a transit thereto, and residence in the state includes a residence at some particular place therein. Until a person coming into the state begins to acquire a residence in some township or election precinct of the state, he does not begin to acquire a residence in the latter.

703 *John Wagner voted for McCoy. It is admitted that he should have registered to entitle him to vote; but it is claimed that he was prevented by the refusal of the registering officers to permit him to do so, and that his offer to register is equivalent to registration. This would be contrary to the policy of the registration law. The judges of election have no power reposed in them to hear and determine whether a voter has registered other than by inspection of the certificate of registration, nor to hear and determine whether a voter has been wrongfully prevented from registering. The remedy of the voter in such case is against the registering officers.

The failure of the judges to require the sworn testimony of an elector of the proper township or ward, and known to the judges, as to the truth of the statements of a person whose right to vote has been challenged, does not affect the validity of the vote of such person; and such vote should be received and counted unless invalid for other reasons.

The court then took up the cases *seriatim*, and decided them upon their merits.

RECAPITULATION.

Aggregate vote for McCoy as returned by canvassers		3,811
Deduct clerical error	5	
Deduct illegal votes	52	57
		3,754
Aggregate votefor Esker as returned by canvassers		3,808
Deduct illegal votes		38
Legal vote for Esker		3,770
Legal vote for McCoy		3,754
Esker's majority		16

We then find that at the last October election, to wit: the election held October, 1877, for state and county officers, the contestant, Frank J. Es-

ker, received a majority of all the legal votes cast at that election for the office of county auditor, and is declared and adjudged by the court here to have been duly elected to that office for the present term, and is entitled to be commissioned and qualified and to act as such for and during the present term thereof.

COSTS.

The only statute there is upon the subject was passed February 24, 1868 (S. & S., 344-5). It reads as follows:

"That in every case in which the election of any person declared duly elected * * county auditor * * * is contested,* * * * upon the hearing and determination of said contest against the party 704 or parties contesting said election, said court shall render judgment against the party so failing in said contest and in favor of the party so declared duly elected, or all costs incurred by him in said contest, including the costs of all depositions taken in his behalf."

The language here used is by no means as definite as it should have been to express the intention of the law makers, but with all, we think the intention is to give costs merely to the contestee when he prevails in the contest, leaving the law as it was before its adoption, in the cases where the contestant prevails. Before this act was adopted the statutes contained no provision for a judgment for costs in favor of either party. (8 Ohio R., 345.)

The language in the statute—"against the party so failing in said contest," refers to the language, "the party contesting said election;" and the language, "in favor of said party so declared duly elected," refers only to the person that had been declared duly elected by the canvassers and held the certificate of election.

So that no judgment for costs will be rendered in the case; or, in other words, each party must pay his own costs.

Exceptions to the findings and judgment will be noted for either party, if desired; and time given in which to prepare a bill of exceptions for the signature and seal of the clerk.

---

* BUILDING ASSOCIATIONS. 755

[Hamilton District Court, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

N. C. BUILDING ASSN. v. HENDERSON.

Where by the rules of a building association it was provided that a member might withdraw and receive back his dues, one member having taken a number of shares in the names of others, but really for himself, may exercise the privilege of withdrawing on their behalf, and upon the refusal of the association to refund an action as for money had and received will lie.

AVERY, J.

The defendant in error brought suit in the common pleas, claiming the association was indebted to him for money had and received for his use. The court of common pleas rendered judgment in his favor.

He had subscribed in the association, in his own name and in the name of five others, for thirty shares in all, which shares were under his control. Whether permitting him so to subscribe was an act *ultra vires*,
756 so far as the association is concerned, *is not made a question in the case, and will not be passed upon.

The only question made is as to his right to the action. By the rules of the association any member, after the expiration of one year, might withdraw, and receive back all dues he had paid with interest from the beginning of the second year. Henderson chose to exercise this privilege of withdrawing on his own part and on behalf of those in whose names he had subscribed the other shares. His vouchers from such persons were produced to the secretary of the association, which the association refused to recognize. The only objection was that by the articles of the association it was required that each member, on transferring his shares to another, should pay one dollar on each share; that these shares had not been so transferred by him, and that his right under the rules extended only to the shares subscribed in his own name.

The manifest error in this claim was that, though the subscriptions were in the names of others, they were subscriptions by Henderson himself, and he was entitled to control them as if they were his own. Having exercised the privilege of withdrawal both for himself and the others, nothing remained but to furnish the association with the proper vouchers, which was done by furnishing the orders from the parties. On the production of these it became the duty of the association to pay him the money, and, on their refusal, the action was properly brought.

Judgment affirmed.

Dolle, for Plaintiff in Error.

Carr & Carnahan, Contra.

CORPORATIONS—SUBSCRIPTIONS—CREDITOR'S BILL.

[Hamilton District Court, 1878.]

†MARVIN PORTER v. JAMES H. LAWS.

Liability of Stockholders to Creditors of a Corporation.

A creditor's bill by a judgment creditor of a corporation can be sustained against a stockholder only where there are installments due from him upon the stock, and if the stock has been transferred *bona fide* before the bill is filed, the suit must fail except as to what was due at the time of transfer.

AVERY, J.

This case comes up by appeal from the common pleas. The plaintiff, a judgment creditor of the Big Sandy Valley Railroad Company, files a petition against the defendant to recover intallments of a stock subscription. It is in its nature a creditor's bill.

757 *The defendant subscribed to the stock of the railroad company to the extent of $40,000, and paid, up to the time that he ceased to be the owner of the stock by transfer twenty percent. The judgment on which the petition is filed was rendered in 1875. The petition was filed

†This case was dismissed by the supreme court for want of preparation.

in 1876. Defendant was a stockholder at the time the cause of action accrued on which the judgment was obtained, but prior to the judgment had transferred his stock by sale.

Against the sale there is no imputation that it was not *bona fide.* The purchasers were reputed to be solvent, and the single question is whether a stockholder who has ceased to be the owner of stock can be made liable to a judgment creditor on a creditor's bill, subsequently filed, for installments of subscription which had not been called for by the company at the time of his transfer.

This is a corporation under the laws of Kentucky, in which state it does not appear any statutory liability exists. The liability of a stockholder to a corporation at common law depends upon the terms of his subscription, and he is liable only for the amount of assessments that may be made by the corporation on his stock. It is true that, if, while he is owner of the stock, the corporation becomes insolvent, he may be compelled, as toward the creditor, to comply with his obligation to the corporation, notwithstanding he may have subsequently transferred his stock. But, as a general rule, a stockholder is liable to a creditor who files a subsequent bill, for such installments only upon his stock as were due at the time of the transfer, in the absence of anything to show that the transfer was *mala fide.*

The application of that principle to the facts of this case determines it. The stock was transferred on the books of the company, and by that act the transferee was accepted in the place of the original subscriber. The transfer constituted a change in the ownership, and created new liabilities. The original subscriber became discharged except as to calls made up to that time, and the transferee became liable for future calls.

The plaintiff in this case can enforce as against the defendant only such liabilities as existed between him and the corporation at the time of filing the bill. It is not an action against the defendant as a stockholder to enforce statutory liabilities, which are created for the benefit of the creditors under such laws as we have in this state, but is simply an action against him as a debtor of the corporation in an attempt by a creditor to collect a judgment against the corporation.

Judgment for defendant and petition dismissed.

E. S. Throop, for Plaintiff.

Thompson & Maxwell, for Defendant.

---

* APPEALS. 758

[Hamilton District Court, 1878.]

JOSEPH MARKS v. PHILLIP GOLDMEYER.

Where in an action upon a note and mortgage judgment is asked upon the note, but there is no issue joined, and judgment is taken by default for sale, of the property merely, the case is one for appeal and not second trial, and the demand for a money judgment is to be regarded as waived.

AVERY, J.

This action was brought in the court of common pleas upon a note and mortgage, and comes into this court by appeal. The petition prayed for a personal judgment as well as for a sale under the mortgage, and,

the defendant being in default, an order for sale was taken without personal judgment.

Where in an action upon a note and mortgage judgment is asked upon the note and issue is joined, the case is one for second trial and not for appeal. Ladd v. James, 10 O. S., 437. And this is so although no personal judgment is finally entered, but only a judgment for sale of the mortgaged premises. Keller v. Wenzell, 23 O. S., 579.

Where, however, no issue is joined upon the note the case is different, and, in such case judgment having been taken simply for sale of the property, the demand for a personal judgment may be regarded as waived.

An order may be taken accordingly for a sale of the property, but no personal judgment.

CONSTRUCTION OF LIEN LAWS.

[Hamilton District Court, 1878.]

[†RUTHERFORD & CO. v. C. & P. RY. CO.

The act of May 4, 1877, "for the better security of head contractors, sub-contractors and material men," does not create a lien upon a railroad in favor of the contractor who builds the road.

AVERY, J.

Rutherford & Co., the plaintiffs in error, built twenty-eight miles of the road of the Cincinnati and Portsmouth Railroad, from Columbia, in this county, to Bethel, in Clermont county, and in December last, caused their account to be recorded in the counties of Hamilton and Clermont under the Mechanics' Lien Law, and afterwards filed a petition in the court of common pleas to enforce their lien. A demurrer was sustained to the petition and judgment rendered for the defendant, which this petition seeks to reverse.

The act at that time, and still in force, provides in the first section that any person performing labor on "any house, mill, *manu-
759 factory, or other building, appurtenance, fixture, bridge or other structure." shall have a lien thereon, and "upon the lot on which the same shall stand." The single question is, whether these words include a railroad.

By another section of the same law, any person performing labor, or furnishing materials for constructing a street, turnpike or road, by virtue of a contract between him and the owner of the lands abutting thereon, shall have a lien on the said lands. But the contract in question is with the owners of the railroad, and the lien that is sought is against the road.

By the act of March 30, 1875, repealed by the present act, it was provided that any sub-contractor doing work toward the construction of a railroad under a contract between the builder and the company or corporation, might file an attested account. But the present case is a case of original contractors seeking, not to charge money in the hands of the company, but to obtain a lien on the road itself.

The question goes back, therefore, to the first section of the present law. The word "structure" contained in that section, is large enough to include anything that may be constructed, and, therefore, would include a railroad, but the connection in which the word is used limits the sense. The lien given is for erecting, altering or repairing, and while "altering or repairing" might apply, it would be an odd expression to speak of *erecting* a railroad. The lien is upon the structure, and the lot of land on which the same shall stand—a somewhat unusual expression if "structure" is intended to mean railroad—for while a railroad might be spoken of as constructed on land, it would be an unusual expression to speak of it as *standing on land.* Turning to the other words, if "structure" would include a railroad, because railroads are constructed, the word "building" would likewise in-

†The judgment in this case was affirmed by the supreme court, see opinion 35 O. S. 559.

clude a railroad, because railroads are built. The word "building" however, is restrained by the connection "house or other building," and for the same reason, the word "structure" is restrained by the connection "bridge or other structure."

The Act of March 30, 1875, providing for work by sub-contractors in building a railroad speaks of railroads, and of contracts with the company or corporation. The present act upon the same subject refers only to structures as described elsewhere in the act, and drops all reference to companies or corporations. From this it is to be inferred that it was intended to exclude sub-contractors from filing attested accounts, rather than that it was intended, by reference to the word "structure," to enlarge such word in other parts of the act, so as to give an original contractor a lien upon a railroad.

Mechanics' lien laws may be liberally construed to save the *lien from being lost, but not to bring the lien into existence. The moving cause for 760
creating a lien on land is that the labor of the mechanic has improved the land, a reason which would have little application to land occupied by the road-bed of a railroad, which, as in this case, was a strip from twenty to one hundred feet wide, begining at Cincinnati and ending at Portsmouth. In the absence of any express intention to include a railroad, there is no reason why that intention should be inferred. The creation of a lien is in derogation of a common right, and while courts will be liberal in construing a law under which a lien is conferred, so that it shall not be lost by the failure of an illiterate man to perfect his accounts, the question whether a lien is conferred is to be determined on the same principles of construction which govern all statutes.

Judgment affirmed.

Sayler & Sayler, for Plaintiff in Error.

Mallon & Coffey and *Wulsin & Worthington*, Contra.

BILLS AND NOTES—PAYMENTS.

[Hamilton District Court, 1878.]

† JOHN F. MCFARLAND v. ELISHA L. NORTON.

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, and his right will not be affected by the fact of the paper having come to him from the person who had assumed payment, provided he had no notice of the fact, but honestly supposed he was taking title from some one else.

AVERY, J.

The defendant in error recovered a judgment and order of sale against the plaintiff in error in the court of common pleas upon a note and mortgage he had given to one Sargent, and this is a proceeding to reverse the judgment.

Messrs. A. & G. W. Ross, by agreement with plaintiff in error, had assumed to pay the note and mortgage, the time for payment of which had been extended by Sargent, and he being unwilling to give a further extension, they applied to the brother of defendant in error, who was assistant cashier of the Lafayette Bank, to purchase the paper from Sargent and carry it for them. He agreed to make the purchase for his brother if it was all right, and the Messrs. Ross sent their attorney to him to satisfy him on the point. The note and mortgagea had not been made to Sargent directly, but to a third person who had endorsed *the note and put his name upon the mortgage in blank, and, when the brother of defendant in error was satisfied, the attorney 761

† Leave to file petition in error in this case was refused by the supreme court, no report, 3 B. 462.

for Messrs. Ross brought to him the note with Sargent's indorsement without recourse, and the mortgage, with an assignment direct filled out over the blank signature, which were received and the money placed to the credit of Messrs. Ross in their deposit account with the Lafayette bank.

The books of the bank now show that three days before this, the Messrs. Ross had drawn their check to the order of their attorney and he had indorsed it to Sargent, taking up the note and mortgage which he held until delivered to the brother of defendant in error. The claim is that this was payment and satisfaction by the Messrs. Ross three days before any title by the defendant in error to the note and mortgage could have been acquired.

Whether it was meant to be payment was a question for the court which heard the case upon the evidence, and the finding that it was not is not against the weight of the evidence. The Messrs. Ross had assumed to pay the note and mortgage, but the object of their negotiation with defendant in error was not to discharge that obligation. Upon the contrary, it was that the loan should be carried, not paid off. In their hands no recovery could have been had upon the note and mortgage, but this was because of the right of the mortgagor to have recourse back against them. It was not because of anything in the note and mortgage, or between the parties, but because of a collateral agreement.

The defendant in error had notice of this agreement, that is, he knew that upon payment by the maker of the note and mortgage, such maker would have recourse over against the Messrs. Ross, but he did not know that the title had passed first from Sargent to the Messrs. Ross by their attorney, and afterward to him from them. His understanding was, he was purchasing from Sargent, and he was applied to by the Messrs. Ross for that sole purpose.

The paper, when he took it, was past due, which was a circumstance to put him upon inquiry, but inquiry would have led only to the fact that the maker upon payment would have recourse over against the Messrs. Ross. This he already knew. It was not an act affecting the parties to the paper, as among themselves. His title was not derived through the Messrs. Ross as parties to the paper; they were not parties to the paper The knowledge that they had assumed payment by agreement with the maker left his right to recover against the maker unaffected unless he had notice of the title coming to him from them. Without such notice, there was nothing affecting his right against the maker inasmuch as the
762 liability upon the paper remained *intact, notwithstanding that the maker, upon payment, would have recourse over against the Messrs. Ross.

Judgment affirmed.

J. B. Foraker, for Plaintiff in Error.

Thomas Heath, for Defendant in Error.

STREET ASSESSMENTS.

[Hamilton District Court, 1878.]

CITY OF CINCINNATI v. J. G. MONTFORT ET AL.

Improvement of a Street in a Territory Annexed to the City.

When property abutting upon a street has been assessed to defray the expense of improving the latter under the ordinances of a corporation, and this corporation, in the manner provided by law, is annexed to another corporation, said property cannot, for an improvement made necessary by a change of said grade, be again assessed for the expense thereof, unless a majority of the owners on said street have consented to such change and improvement.

STATEMENT.

APPEAL.

The action was instituted by McErland in the name of the city to enforce a lien for an assessment against the property of the defendant abutting on Chestnut street, Walnut Hills. The claim of the plaintiff is that he became a successful bidder to do the work on the street, performed his contract, and on completion of the work received an assessment against the property holders, who, having refused payment, the suit was brought, and he asks for a judgment and, in case the defendants should refuse to pay, for an order of sale. The defendants answer that, while it was true the work was done, their property is not bound for any portion of the assessments, for the reason that, prior to the establishment of this grade, the Walnut Hills, Mt. Auburn and Clintonville district, within which their property was situated, established the grade of the street; that it was improved to that grade and the expense assessed on the abutting property, and that the improvement now in question was on a different grade than that established by the road district. It is claimed by the contractor that the assessment now sought to be recovered is the first improvement and assessment made on the street by the city, and that it was nothing more than what became *necessary on account of the wearing out of the metal on the old grade.

JOHNSTON, J. 763

It appears from the fair weight of the testimony that the property of all the defendants was situated within the corporation heretofore known as the Mt. Auburn, Walnut Hills and Clintonville district, which, as such, had full authority to establish grades, improve streets, and levy the expense on abutting owners in the same manner as the city has a right to do; that Chestnut street was improved by the road district in 1868, and that, the defendants paid the assessment for that improvement. It further appears that in 1870 this territory became annexed to the city, and that; upon the terms of annexation becoming complete, the law provides that the people in the territory annexed shall be entitled to enjoy all the rights and privileges belonging to the people of the corporation to which annexation has been made.

Now by the compact entered into between the two corporations at the time of the annexation the provision of the municipal code are substantially made part of that compact, and it provides that all established grades shall be respected, and not altered unless no consent of property owners, or on payment of damages: that is to say, that where property is once improved to an established grade the property owners are not liable to be assessed again for any improvement on that grade, unless it be for their proportion of repairing the same. Where there is a change of grade made and an improvement made thereto, the property owners can not be assessed therefor, unless a majority consents to such change of grade and improvement. The testimony discloses

that, after the annexation, the city established a new and different grade for Chestnut street, and then proceeded to have the street improved. It failed to disclose that the defendants or their grantors petitioned or assented to the change of grade made in 1874, under which this improvement was made : but it does disclose the fact that shortly after the annexation the Montgomery turnpike, into which this street leads, was changed by cutting it down eleven feet, the defendants bringing to their assistance a popular and useful art, and were enabled on the trial to show the condition of their property at three various stages: first, its condition before the Montgomery pike was cut down : next, its condition thereafter; and, lastly, its condition as now improved.

The court was of opinion that the improvement in question was not a repair, as claimed by the city or its contractor, but was an improvement made necessary on account of the change of the grade of the street, and, in order to hold the property *holders liable, it was incumbent on the 764 city to show that the majority had assented to the change, as section 560 of the code in such cases provides. The court were of opinion on the whole case that the assessment was not a valid assessment against the defendants, but should be paid out of the general fund.

Judgment accordingly.

Paxton & Warrington, for Plaintiff.

Sage & Hinkle, for Defendants.

FACTORS.

[Hamilton District Court, 1878.]

THE INDIANAPOLIS ROLLING MILL CO. v. MATTHEW ADDY & CO.

Interesting to Commisson Merchants and their Principals.

1. A firm of commisson merchants, who in selling for their consignor take to themselves from the purchaser a separate note for the amount of their commission and balance of a former account of sales, the note being made payable to their order, and thereafter have the same discounted and the proceeds placed to their credit—all without notice to their consignor, can not, on the insolvency of the msker thereof, turn said note over to their consignor and sue him for the commissions, etc., represented by the note.
2. Such a transaction amounts to payment as between consignor and consignee.
3. A custom, that the consignee is at liberty to retain the note and look to the consignor for the charges, will not be permitted to be proven as the same would be in contravention of a well settled rule of law.

STATEMENT.

This case is a procedure to reverse a judgment of the common pleas.

The plaintiff in error, in the spring of 1875, was engaged in the iron business in Indianapolis, and the defendants, commission merchants in Cincinnati, were dealing in that article of merchandise. The Rolling Mill compony had at that time in the possession of the defendants in error seventy-six tons of pig ir n, for the purpose of selling as commisson merchants. There had been previous dealings between the parties, and a small balance was due by the Rolling Mill company on previous transactions. According to instructions the seventy-six tons of iron were sold in March, 1875, to the Anchor Iron Works, the proceeds amounting to $1,600 The commission was to be two per cent., and the storage and interest, and these, with a balance due by the Rolling Mill company, amounting in all to $290, being.

*deducted from the gross amount of the sale, left a balance of $1,403. The sale was on the usual time, four months, and Matthew Addy & Co. received from the 765
purchasers of the iron two notes, taking to themselves directly a note for the amount of their charges and past indebtedness, while the net proceeds of the sale were put in the shape of a four months' note, payable to the order of the plaintiffs in error, to whom the note was sent by Matthew Addy & Co., who retained the note payable to their own order for their commissions and past charges, placed the note in bank and obtained money on it, which was mingled with their own account. The notes fell due on the 18th of July, and a day or two prior the Anchor Iron Works failed. In about a month afterward the defendants in error sent to the Rolling Mill company this note of $290 covering their commissions and past charges, and stating that, inasmuch as it was not paid, and the Anchor Iron Works had failed, they would like the Rolling Mill company to pay their account for charges. The plaintiffs in error replied, stateing that the acceptance of the note by Matthew Addy & Co. they regarded as a discharge of their claim, and further remarked that the claim was unreasonable and unwarranted. Matthew Addy & Co. then instituted a suit against the Indianapolis Rolling Mill Company on the account for charges and past indebtedness and obtained an attachment and garnishee process. The defendants answered, pleading payment. The case was submitted, and upon the trial testimony as to the usage in reference to charges where the purchaser of merchandise had failed to pay the note representing the charges, was allowed to be given and exceptions were taken. Judgment was rendered in that suit in favor of Matthew Addy & Co. for the amount of their account for passed indebtedness and their commissions.

JOHNSTON, J.

This court was of the opinion that the common pleas court erred in permitting a custom of this natuie to be proven. On the facts stated they were of opinion that, by receiving this note of $290, including not only commission on the sale of the iron, but incorporating into it a past indebtedness and another transaction, and taking into consideration that the note was made payable to the order of Matthew Addy & Co., and without advising with the plaintiffs in error, as a matter of law it was a payment of those charges, elected to be taken in the way that Matthew Addy & Co. had themselves chosen, and it was not proper, on the note not being paid, to go back on the owner of the property for the charges. A custom will not be permitted to be proven where it is in contravention of a well-settled principle or rule of law. Independant of that view of the case there was another consideration upon which this custom ought not to have been proven. While in these tranactions * the acts of 766
Matthew Addy & Co. were ratified by their principal, yet taking the note to their own order without consultation with their principal amounts in law to a conversion of the property, and to show a custom to legalize such a transaction would be in contravention of a well-established principal of law, if not a positive statute.

As to whether the custom was established the evidence was conflicting. Men eminent in the iron market have testified both ways. Some testify it is the custom on sales of iron by a commission merchant to take the charges out of the proceeds of sale, the note being made payable to the commission merchant; whereas others testify they never knew of such a custom, and the president of the rolling mill in Indianapolis testifies that he never heard of such a custom. The majority of the court were of opinion on this last ground that there was not sufficient evidence to establish the custom claimed. On the whole case the court was of opinion that error intervened to the prejudice of the plaintiff in error.

Judgment reversed, and the case remanded for a new trial.

Houdly, Johnson & Colston, for Plaintiffs in Error.

Taft & Loyd, Contra.

CHATTEL MORTGAGE.

[Hamilton District Court, 1878.]

MICHALL WELTE ET. AL v. JOSEPH FALLER ET AL.

1. A mortgage of chattle's with actual notice of the non-payment of a prior mortgage not refiled within the year, takes subject thereto, and so of a purchaser, and a mere creditor.
2. A judgment creditor, by law, occupies a different position, and his levy is good as against such morgage, not refiled within the year.

STATEMENT.

ON APPEAL.

Welte & Sons were manufacturers of and dealers in a musical instrument known as the "Orchestrion," manufactured in Europe, they having a branch house in New York. A sale was made of one of the instruments to Faller & Glassmaker, who were the lessees of Germania Hall, on Vine street in this city. A chattel mortgage for $4,000 on the instrument was given to Welte & Sons. It was an instrument apparently of
767 *great capacity, having 93 keys, twelve stops, 1 base drum, 1 electric drum, cymbals, triangle and 9 cylinders; and perhaps there was a peculiar fitness in deciding the case to-day (Tuesday), the opening of the festival.

A mortgage was filed for record in this county, and the evidence of indebtedness consisted of twenty-five notes, none of which had been paid. After the year expired Welte & Sons having failed to refile the chattel mortgage, Windisch, Muhlhauser & Co., the lessors of Faller & Glassmaker, to whom they had also sold beer, and against whom they had a claim of $1,000, procured an attorney to examine the records, and finding that the mortgage of Welte & Sons had not been refiled within the year as provided by the statute, they obtained a chattel mortgage from Glassmaker, survivor of the firm of Faller & Glassmaker, and filed that mortgage. Thereafter, Glassmaker succeeded indifferently in business, vacated Germania Hall, and surrendered everything in the hall, including the instrument in question, to Windisch, Muhlhauser & Co., they paying him a small sum of money. The plaintiffs instituted this action against Faller & Glassmaker, and Windisch, Muhlhauser & Co., claiming that, while they did not file the mortgage within the year, the mortgage of W., M. & Co. was taken with the full knowledge of the fact that plaintiff's mortgage had not been paid, and asking a foreclosure, the appointment of a receiver, and that the property should be sold and the process brought into court. It appears the instrument was sold, and the fund is now held by the receiver; that at the time W., M. & Co. took their chattel mortgage on the instrument, and especially when they sought to take possession of it on the surrender of the lease, the fair weight of the evidence is that they had actual notice of the fact that Welte & Sons' chattel mortgage had not been paid.

JOHNSTON, J.

It has been decided by the supreme court (7 O. S., 14 O. S. and 16 O. S.), that although a prior mortgagee of chattel property may fail to refile within the year, another mortgagee, taking a mortgage on the same property, with actual notice of the fact that the prior mortgage was not paid, though not refiled within the year, takes subject to the first mortgage. In other words, he is not a mortgagee in good faith, having actual notice of the first mortgage being unpaid, though not refiled, and when seeking to thus regain priority, he is chargeable with *mala fides*.

It was claimed by W., M. & Co. that, on the surrender of the lease and of the chattels to them by Glassmaker, they were placed in a more favorable position. The evidence as to what disposition was, in fact, made by Glassmaker of the orchestrion is not clear, and did not satisfy
768 the court that there was any delivery *of the instrument to W., M. & Co. There was no evidence tending to show, that, at the time it

was taken by them, they took it as judgment creditors of Glassmaker by levy. In fact, their answer says they took possession of it as security for the indebtedness of Glassmaker to them. If they had levied on it as judgment creditors, they would have occupied a very different position. A judgment creditor by levy would prevail against a prior mortgagee who has failed to refile within the year. A mere creditor can occupy no better position than a subsequent mortgagee or purchaser, who, in order to take priority, must be a mortgagee or purchaser in good faith—that is, one who is without actual notice of the prior unpaid mortgage. Hence, the alleged possession taken on the surrender of the lease not being by virtue of levy, but by arrangement between Glassmaker and W., M. & Co. to hold the instrument as security for the debt, and having actual knowledge of the unpaid mortgage of plaintiffs, they occupied no better position than would a mortgagee or purchaser with actual notice. Under the decisions of the supreme court referred to, the equity of the case is with Welte & Sons, and a judgment would be rendered in their favor for the unpaid notes, to be first paid out of the proceeds of the instrument, and the balance, if any, to W., M. & Co.

Stallo & Kittredge, for Plaintiffs.

W. M. Ramsey and *T. R. Hildebrandt*, Contra.